Indian Ex Servicemen Movement (An All ... vs Union Of India Department Of ... on 16 March, 2022

Author: D.Y. Chandrachud

Bench: Vikram Nath, Surya Kant, Dhananjaya Y Chandrachud

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. 419 of 2016

Indian Ex Servicemen Movement & Ors. … Petitioners

Versus

Union of India & Ors. … Respondents

JUDGMENT Dr Dhananjaya Y Chandrachud, J This judgment has been divided into the following sections to facilitate analysis:

PART A A. Factual Background 1 The petition under Article 32 of the Constitution addresses a challenge to the manner in which the “One Rank One Pension”1 policy for ex-servicemen of defence forces has been implemented by the first respondent2 through a letter dated 7 November 2015 issued to the Chiefs of three defence forces. The letter defines OROP as the payment of uniform pension to armed services personnel retiring in the same rank with the same length of service, irrespective of the date of retirement. OROP, in terms of the letter, aims to bridge the gap between

the rate of pension of current and past pensioners at periodic intervals. The petitioners contend that in the course of implementation, the principle of OROP has been replaced by 'one rank multiple pensions' for persons with the same length of service. The petitioners contend that the initial definition of OROP was altered by the first respondent and, instead of an automatic revision of the rates of pension, the revision now would take place at periodic intervals. The petitioners submit that the deviation from the principle of automatic revision of rates of pension, where any future enhancement to the rates of pension are automatically passed on to the past pensioners, is arbitrary and unconstitutional under Articles 14 and 21 of the Constitution.

2 The salient facts giving rise to the proceedings need to be stated. The demand for OROP by ex-servicemen of the defence forces was initially examined by Parliament in 2010-11. On 19 December 2011, the Rajya Sabha Committee on Petitions3 presented its 142nd Report on the Petition Praying for Grant of "OROP" Also referred as the "Union Government" "Koshyari Committee" PART A OROP to Armed Forces Personnel4. The Committee recommended the implementation of OROP. The Committee defined OROP as a uniform pension to be paid to armed forces personnel retiring in the same rank with the same length of service, irrespective of their date of retirement, where any future enhancements in the rates of pension were to be automatically passed on to the past pensioners. The Committee noted that OROP was being implemented till 1973 when the Third Central Pay Commission took a decision to revoke it. The relevant observations/recommendations of the Koshyari Committee are extracted below:

"11.The Committee takes note of the fact that a sum of Rs 1300 crores is the total financial liability for the year 2011-12 in case OROP is implemented fully for all the defence personnel in the country across the board. The Committee is informed that out of this, 1065 crores would go to retirees belonging Post Below Officer Ranks (PBOR) while the Commissioned Officers would be getting the remaining i.e. 235 crores. The Committee feels that 1300 crores is not a very big amount for a country of our size and economy for meeting the long pending demand of the armed forces of the country. The Committee understands that this · 1300 crores is the expenditure for one year which might increase at the rate of 10 percent annually. Even if it is so, the Committee does not consider this amount to be high, keeping in view the objective for which it would be spent. Needless for the Committee to point out here that our defence personnel were getting their pension and family pension on an entirely different criteria before the Third Central Pay Commission came into force. Till the recommendations of the Third Central Pay Commission were implemented for the defence personnel of the country, they were satisfied and happy with dispensation meant for their pension/family pension.

....

11.4 ...the Committee feels that the decision of the Government to bring our defence personnel on the pattern of the civilians with regard to their pay, pension, etc. (from Third Central Pay Commission onwards) is not a considered decision which has caused hardship to the defence personnel and has given birth to their demand for OROP. The Committee understands that before the Third Central Pay Commission, the defence personnel were getting their pay/ pension on the basis of a separate criteria unconnected with "Koshyari Committee Report" PART A the criteria devised for the civilian work force. That criteria acknowledged and covered the concept of OROP which has been given up after the Third Central Pay Commission. 11.5 The Committee is not convinced with the hurdles projected by the Ministry of Defence (D/o Ex-Servicemen Welfare) in implementing of OROP for defence personnel. They have categorized the hurdles into administrative, legal and financial. The financial aspect has already been dealt with by the Committee. So far as the administrative angle is concerned, the Committee is given to understand that all the existing pensioners/ family pensioners are still drawing their pension/family pension based upon the lawfully determined pension/family pension. In that case, revision of their pension/family pension, prospectively, as a one time measure should not pose any administrative hurdle. So far as the legal aspect is concerned, the Committee is not convinced by the argument put forth against the implementation of OROP because the pension/family pension is based upon the service rendered by personnel while in service and comparison of services rendered during two sets of periods does not seem to be of much relevance. If seen from a strict angle, in each set of periods, the army officer performed the duties attached to his post and it may not be proper to infer that the officers who served at a later period performed more compared to the officers of earlier period. On the contrary, facts tilt towards treating past pensioners/family pensioners at par with the more recent ones." 3 On 17 February 2014, the Finance Minister announced in his Budget Speech that the Union Government had in principle accepted OROP and it would be implemented prospectively from financial year 2014-15. The Finance Minister stated that an amount of Rs 500 crores has been transferred to the Defence Pension Account to meet the budgetary expense. On 26 February 2014, the Defence Minister chaired a meeting to discuss the implementation of OROP. The Defence Secretary, the Secretary to the Department of Ex-Servicemen Welfare, the Controller General of Defence Accounts5, the three Vice Chiefs of Staff, and senior officers of the Service Headquarters along with the concerned Joint Secretaries attended the meeting. The minutes of the meeting refer to OROP as a uniform pension to be paid to armed forces personnel that are retiring in the "CGDA" PART A same rank with the same length of service, irrespective of the date of retirement, where any future enhancements in the rates of pension are to be automatically passed on to the past pensioners. The fourth respondent, CGDA, was directed to take necessary steps to give effect to the decision of implementing OROP in consultation with the three defence forces, and the first and second respondents. 4 By its letter dated 26 February 2014 the first respondent directed CGDA to work out the modalities of executing OROP. However, OROP was not implemented at the time. On 10 July 2014 in his Budget Speech for the year 2014-2015, the Finance Minister reaffirmed the Union Government's commitment to implement OROP and a further sum of Rs 1000 crores was set apart to meet the requirement. In a written reply to a Member of Parliament on 2 December 2014, the Minister of State for Defence stated that OROP implies that a uniform pension is paid to retired servicemen having the same rank with the same length of service, irrespective of the date of retirement, with any future enhancement in the rates being passed on to the past pensioners automatically. 5 The above sequence of events has been emphasised by the petitioners to highlight

that OROP always entailed an automatic revision of the rates of pension to bridge the gap in the pension being received by past and current pensioners. However, according to the petitioners, a letter dated 7 November 2015 of the Joint Secretary of the first respondent to the Chiefs of three defence forces introduced a revised definition of OROP, where the revision between the past and current rates of pension was to take place at periodic intervals. Besides stating that OROP would take effect from 1 July 2014, the letter also highlighted the salient features of OROP:

> PART A "3. Salient features of the OROP are as follows:
>
> i. To begin with, pension of the past pensioners would be re- fixed on the basis of pension of retirees of calendar year 2013 and the benefit will be effective with effect from 1.7.2014. ii. Pension will be re-fixed for all pensioners on the basis of the average of minimum and maximum pension of personnel retired in 2013 in the same rank and with the same length of service.
>
> iii. Pension for these drawing above the average shall be protected.
>
> iv. Arrears will be paid in four equal half yearly instalments. However, all the family pensioners including those in receipts of Special/Liberalized family pension and Gallantry award winner shall be paid arrears in one instalment. v. In future, the pension would be re-fixed every 5 years."

6 The above definition of OROP was also adopted by the first respondent while implementing OROP by its notification dated 14 November 2015. The rates of pension were now to be revised every five years. The notification also constituted a Committee headed by Justice L. Narasimha Reddy to examine and make recommendations on the terms of reference received by the Union Government on measures to remove anomalies that may arise in the implementation of the letter dated 7 November 2015. 7 By its letter dated 25 January 2016 to the Defence Minister the first petitioner objected to the revision of the definition of OROP highlighting that the deviation from the automatic revision of rates of pension to a revision at periodic intervals changed the accepted meaning of OROP. It was submitted that the revised definition would deprive the past pensioners of equal monetary benefits, which militated against the principle of OROP. The letter urged that the Committee headed by Justice L. Narasimha Reddy would be 'inapt' in making recommendations on the issue of OROP since the terms of reference took into PART A account the revised definition of OROP. The letter urged the Defence Minister to revert to the original definition of OROP where the pension of past pensioners would be automatically revised pursuant to any future enhancements. The first petitioner also wrote to Justice L. Narasimha Reddy on 25 March 2016 highlighting the anomalies that will result from the implementation of the revised definition of OROP.

8 Meanwhile, the first respondent issued a letter to the Chiefs of the three defence forces on 3 February 2016 regarding the implementation of OROP. On 29 October 2016, the first respondent issued a letter to the Chiefs of the three defence forces revising the pension of pre-2016 defence forces' pensioners and family pensioners. The existing pension was to be revised upwards by implementing the basic pension drawn on 31 December 2015 by a multiplication factor of 2.57. The

petitioners have highlighted that owing to the periodic revision of the pension rate according to the revised definition, the pension of many ex- servicemen would not be updated to the 31 December 2015 level. 9 A post-facto approval of the Union Cabinet for implementation of OROP was received on 6 April 2016 and was conveyed by the Cabinet Secretariat on 7 April 2016. The proposal, which was approved by the Union Cabinet is as follows:

> "9.1. Ex-post facto approval of the Cabinet is solicited for implementation of One Rank One Pension as under.
>
> 9.1.1 The benefit will be given with effect 1st July, 2014.
>
> 9.1.2 Pension will be re-fixed for pre 01.07.2014 pensioners retiring in the same rank and with the same length of service as the average minimum and maximum pension drawn by the retirees in the year 2013. Those drawing pensions above the average will be protected.
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> 9.1.3 The benefit would also be extended to family pensioners including war widows and disabled pensioners.

PART A 9.1.4 Personnel who opt to get discharged henceforth on their own request under Rule 13(3)1(i)(b), Rules 13(3)1(iv) or Rule 16B of the Army Rule 1954 or equivalent Navy or Air Force Rules will not be entitled to the benefits of OROP. It will be effective prospectively.

9.1.5. Arrears will be paid in four half-yearly instalments. However, all the family pensioners including those in receipt of Special/Liberalized family pension and Gallantry award winners shall be paid arrears in one instalment.

9.1.6 In future, the pension would be re-fixed every 5 years. 9.1.7. Constitution of Judicial Committee headed by Justice L Narasimha Reddy, Retd. Chief Justice of Patna High Court on 14.12.2015 which will give its report in six months on references made by the Government of India." 10 Aggrieved by what the petitioners contend is a revision in the definition of OROP, the petition under Article 32 was instituted before this Court on 9 June 2016. On 1 May 2019, this Court took note of the anomalies which were highlighted on behalf of the petitioners:

> "Fixation of pension as per calendar year 2013 instead of FY 2014: Fixation of pension as per calendar year 2013 would result in past retirees (pre 2014) getting less pension of one increment than the soldier retiring after 2014.
>
> Fixation of pension as mean of Min and Max pension: Fixing pension as mean of Min and Max pension of 2013 would result different pensions for the same ranks and same length of service and the past retiree would get 1.5 increment lesser on account of such fixation.

For example, if 8(i) and (ii) are implemented, two soldiers who have served for same length of years, holding the same rank will draw different pension. A Sepoy (Group Y) who retired prior to 31 Dec 2013 will get Rs.6665 p.m. and another Sepoy (Group Y) who retired on and after 1 Jan 2014 would get Rs 7605 p.m. Further, on account of such implementation, a higher rank Naik soldier who retired before 31 Dec 2013 would draw a lesser pension of rs.7170 p.m., than a junior rank Sepoy who retired after 1 Jan 2014 as his pension would be Rs.7605. This fact is illustrated by a tabular chart which is enclosed. (See Pg.1, CC).

Therefore, implementation of this new definition of OROP defeats the very principle of OPOP by creating a class within a class of the same officers, which in practice tantamounts to one rank different pensions. This is also contrary to the judgment by this Hon'ble Court in Union of India v SPS Vains, {2008) 9 SCC 125.

PART A Another fallacy in the new definition of OROP which detracts from the principle of OROP is:

(iii) Pension Equalization every five years It is submitted that Pension equalization every five years would result in the grave disadvantage to the past retirees."

This Court directed the first respondent to scrutinise the grievances raised by the petitioners. Pursuant to the order, the first respondent filed an affidavit on 5 December 2019 submitting that after extensive consultations with experts and ex-servicemen, the Union Government decided that it is practical and feasible to revise the pension under OROP every five years. The average of the minimum and maximum pension in calendar year 2013 was decided to be taken as the revised pension of all pensioners retiring in the same rank and with the same length of service. At the same time, the first respondent chose to protect the pensioners who were drawing pension above the average. Thus, it was submitted, that the implementation of OROP has benefitted the past pensioners, though the amount of financial benefit varies. It was urged on behalf of the first respondent that revising the rate of pension every year would cause administrative difficulty and is impracticable to implement. 11 Since the grievance of the petitioners remained unaddressed, it falls on this Court to adjudicate upon whether the revision of the definition of OROP and its implementation in the present form, is arbitrary and violative of Articles 14 and 21 of the Constitution. Before we analyse the rival contentions, we advert to the submissions of the counsel.

PART

B. Submissions of Counsel

12 Mr Huzefa Ahmadi, Senior Counsel, appeared for the petitioners. The

following submissions have been made on behalf of the petitioners during the course of the proceedings:

> (i) The letter issued by the Joint Secretary of the first respondent to the Chief of Air Staff on 7 November 2015 arbitrarily alters the definition of OROP6 by bridging the gap between the rates of pension of the current and the past pensioners at 'periodic intervals' and not 'automatically'. This definition is contrary to the definition arrived at in the meeting held on 26 February 2014 and the subsequent executive order issued on the same day;
>
> (ii) The implementation of the scheme with the new definition would lead to a situation where the pension drawn by an ex-serviceman who retired on an earlier date would be less than the pension drawn by an ex-serviceman who retired in 2014, until such time that a 'periodic' review is conducted to correct the anomaly;
>
> (iii) The new definition creates a class within a class where ex-

servicemen who retired with the same rank and same length of service would receive different pensions. In Union of India v. SPS Vains7, this Court has held that the creation of a class within a class is unconstitutional;

(iv) Even if the differential pay is rectified by a periodic review, it would cause injustice;

"new definition" (2008) 9 SCC 125 PART B

(v) The effective date of implementation of OROP was already fixed as 1 April 2014 and this date has been arbitrary re-fixed to 1 July 2014 by the letter issued by the first respondent on 7 November 2015;

(vi) According to the letter dated 7 November 2015, the pension of the personnel retiring on or after 1 April 2014 will be fixed based on the last pay drawn on retirement. However, the pension of soldiers who retired earlier than 2013 would be fixed on the basis of the pension of the retirees of the calendar year 2013. This would lead to a situation of one rank different pension;

		Rank: Sepoy (Group Y)	
	I	II	III
Length of Service	Pension of sepoys who retired between 1965-2013 (as per Notification dated 3 February 2016 which applies to this category with effect from	Pension of sepoys who retired in 2014 (as per Pension Payment Order of 2014 which applies to this category)	Difference betwe and II multiplie 2.57 as per repo the Seventh Pay Commission

	1.07.2014		
15 years	Rs. 6665 (as on 01/07/2013)	Rs. 7605	Rs. 940 x 2.5= R 2415

Figure 1

(vii) The pension of the past pensioners is further lowered by the re-

fixation of pension based on the average of the minimum and maximum pension of personnel retiring in the calendar year 2013, as compared to personnel retiring on or after 1 April 2014. In some cases, a past pensioner who retired before 2014 receives pension lower than personnel of a lower rank retiring on or after 2014. For instance, if the new definition is followed then a Sepoy who retired prior to 31 December 2013 will get a pension of Rs. 6665 per month while another Sepoy who retired on or after 1 January 2014 would PART B get a pension of 7605 per month. Extracted below is a chart depicting the anomaly:

Rank: Naik (Group Y) I II III Length of Service Pension of Naiks who Pension of Naiks who Difference between I retired between 1965- retired in 2014 and II multiplied by 7 2013 (as per Pension CPC multiplication (as per notification Payment Order of factor of 2.57 dated 03.02.2016 2014 which applies to which applies to this this category) (Page category w.e.f. 6) 01.07.2014 leaving a hiatus of one year) (Page 4) 20 years Rs. 7170 (as on Rs. 8295 Rs. 1125 x 2.57= Rs.

	01/07/2013)		2891

Figure 2

	Rank: Group Captain		
	I	II	III
Length of service	Pension of ones who retired between 1965-2013 (as per notification dated 03.02.2016 which applies to this category w.e.f. 01.07.2014 leaving a hiatus of one year) (Page 8)	Pension of ones who retired in 2014 (as per Pension Payment Order of 2014 which applies to this category) (Page 6)	Difference between and II multiplied b CPC multiplication factor of 2.57
32 years	Rs. 36130	Rs. 37110	Rs. 980 x 2.57= Rs.
			This has been given Govt whereas as per CPC, their pension be fixed with a multiplication fact

2.67 given in the t
below

Figure 3

PART B

(viii) The difference in the pension as provided in the chart is not due to the Modified Assured Career Progression8. Even according to the new definition, all personnel with the same rank and same length of service must receive the same pension;

(ix) The notification issued on 14 December 2015 adheres to the arbitrary definition of OROP as provided by the letter issued on 7 November 2015. The terms of reference of the Committee appointed under the notification are also restricted to the arbitrary new definition of OROP. The letter issued by the first respondent to the Chief of Army Staff, the Chief of Naval Staff, and the Chief of Air Staff on 3 February 2016 also defined OROP in new and arbitrary terms;

(x) As noted by the Koshyari Committee, after the Sixth Central Pay Commission, officers from the grade of Lt. Colonel and above fall within one pay band of Rs 37400 to Rs 67000. Therefore, defence retirees before 2014 would get pension with reference to the minimum of the pay bracket, irrespective of the fact that they held higher posts such as Major General and Lt. General;

(xi) All Havildars were granted the honorary rank of Naib Subedar. They must thus be given the pension of Naib Subedar;

(xii) All personnel who retired as Major after thirteen years of service as Commissioned Officers should be given the pension of Lt. Colonel "MACP" PART B since Commissioned Officers now automatically become Lt. Colonels after thirteen years of service;

(xiii) All veterans who retired before 2004 as Lt. Colonel should be given the pension of Colonel since all Commissioned Officers now automatically retire as Colonel;

(xiv) While the Government defines OROP as a "uniform pension to be paid to the defence personnel retiring in the same rank, with the same length of service regardless of the date of retirement", it creates a class within a class based on the date of retirement;

(xv) The decision to define OROP in narrow terms is an executive act which can be judicially reviewed and is not a policy decision; (xvi) According to the letter of the Union Government dated 7 November 2015, the pension of past pensioners would be fixed one and a half year behind even if equalization is done once in five years; (xvii) Under the Seventh Pay Commission, the basic pension of all pensioners is to be arrived at by multiplying basic pension as on 31 December 2015 by a factor of 2.57. Since the basic pension of those who retired before 31 December 2013-14 has not been

updated to 31 December 2015 (that is Rs. 7605 per month) but has only been fixed based on the mean of the 2013 pension, that is Rs. 6665 per month, a past pensioner will get Rs. 2415 less than an officer with the same rank and same length of service but who retired later;

PART B (xviii) The Union Government has stated that after the Seventh Pay Commission, the basic pension of personnel in the Colonel and Brigadier ranks will be arrived at by increasing the multiplication factor from 2.57 to 2.67. However, this increase has been denied to the past pensioners on the ground that the benefit will only be given in 2019 after the periodic equalization as per the new definition; (xix) The ex-servicemen received the benefit of OROP till the Third Central Pay Commission. Subsequently, it was recommended that the pension of ex-servicemen be reduced and to compensate them for such reduction, they were to be absorbed in paramilitary forces, police forces or public sector organisations. However, though the pension was reduced, the recommendation relating to their absorption was not implemented. The army personnel then demanded that OROP must be implemented;

(xx) The reliance placed by the respondents on DS Nakara v. Union of India9 is incorrect since it only deals with the general law applicable to civil servants. The decision in SPS Vains (supra) deals with the special law applicable to ex-servicemen of the defence forces; (xxi) The one man Committee headed by Justice L Narasimha Reddy submitted its report to the Union Government on 26 December 2016. Even after two years, the Government is still 'studying' the report and has not yet released the report;

1983 AIR 130 PART B (xxii) If the respondents can calculate the enhancement of pension for every five years, there is no reason that it cannot be done every year;

(xxiii) The rule of reduction in the pension if the service of the armed personnel is less than twenty six years was introduced in 1973. If a soldier has served for less than twenty six years then his pension would be reduced pro rata of X (number of years served) % 26. The Government has not updated the basic pay of soldiers and did not bring it at par with the 31 December 2015 pay before multiplying it with the factor of 2.57. At the same time, the pension was altered from being rank based to 50 percent of the last drawn pay. This resulted in double loss to ex-servicemen. This Court has also struck down the rule of reducing pension if an employee has served less than twenty six years;

(xxiv) While the respondents have submitted that an amount of Rs 10,795 crores has been paid as arrears for OROP in two years, it only amounts to an average increase of Rs 2131 per month per soldier. The Union Government is spending a higher amount of funds for Central Government employees and pensioners;

(xxv) The Union Government has spent Rs 32,385 crores for OROP in six years which is less than its spending of Rs 27,800 crores per year for the scheme of Non-Functional Upgradation. The Union Government consistently has been spending less on the armed forces. For instance, the "High Altitude Siachen Allowance" for Army PART B personnel is Rs 31,500, while it is Rs 50,000 to 70,000 for all Central Cadre for serving in 'hard areas' like Shillong; (xxvi) MACP Scheme should be

given to all past retirees to comply with the judgment of this Court in SPS Vains (supra). Even if MACP has been given to the 2013 retirees, the comparison made in the chart still holds correct;

(xxvii) While the Union Government states that the benefit of OROP is to be given to 'past retirees', it has created a confusion by stating that the scheme must be given prospective effect; and (xxviii) The MACP Scheme came into effect from 1 January 2016.

Therefore, the figure of Rs. 6665 referring to the pension receivable by a Sepoy should include the benefits of the MACP scheme. 13 We have heard Mr Venkataramanan, the learned Additional Solicitor General of India, for the respondents. The respondents have made the following submissions during the course of the proceedings:

> (i) The budget for pension has been increased after the implementation of OROP with effect from 1 July 2014. The disbursement of arrears with respect to OROP is approximately Rs 10795.04 crores. The yearly recurring expenditure on account of OROP is Rs 7123.38 crores. For the six years from 1 July 2014, the total recurring expenditure is approximately Rs 42740.28 crores;
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> (ii) OROP seeks to bridge the gap by taking the maximum and minimum pension within the rank of pensioners holding the same rank and same length of service to determine the average. Those PART B who are below the average pension are brought to the average and those who are drawing a higher pension are protected;
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> (iii) The OROP scheme has been implemented prospectively with effect from 1 July 2014. The benefits arising out of the scheme are to be paid after 1 July 2014 to those who retired prior to 1 July 2014;
>
> (iv) The OROP scheme envisages revision of pension once in five years, unlike civilian pension schemes which are revised once in ten years. The plea of the petitioners to provide 'automatic' adjustment cannot be acceded to as it is impossible to implement it;
>
> (v) It is a settled principle of law that minutes, statements and inter-

ministerial discussions with the Ministry and within the Ministry do not have the force of law. Therefore the reference made by the petitioners to the minutes of the meeting to argue that the definition of OROP has been altered is unsustainable;

(vi) The scheme/policy can be challenged on the grounds of arbitrariness but a demand to substitute the policy cannot be made;

(vii) The disparity alleged by the petitioners in the pensions of the defence personnel with the same rank and same length of service has been wrongly depicted on account of the OROP scheme. An artificial disparity has been shown by equating different classes of pensioners;

(viii) In Figure 1 of the chart produced by the petitioners, they have compared the pension payable to a Sepoy with 15 years of service under the OROP Scheme and the pension of a Sepoy who retired PART B before 2014 (before the application of OROP) after fifteen years of service who is drawing pay in the rank of Naik due to the MACP Scheme introduced pursuant to Circular No. 555 dated 4 February 2016;

(ix) The pension figure of Rs 6,665 is arrived at by taking the average pension of the maximum and minimum pension of 2013. However, the figure of Rs 7,605 is calculated on the basis of 50 percent of the last pay drawn before retirement;

(x) Under the MACP Scheme, a Sepoy who was originally getting Rs 2000 as grade pay would after eight years of service receive a next grade pay of Rs 2400. The grade pay of Rs 2400 corresponds to the grade pay of Naik. Similarly after sixteen years of service, he would receive the higher grade pay of Rs. 2800, which corresponds to the grade pay of Havildar;

(xi) Similarly, the disparity shown in Figure 2 by the petitioners is due to the implementation of the MACP Scheme rather than OROP. Figure 3 which pertains to the rank of Group Captain quotes the pension amount of Group Captain Daniel Victor who retired on 28 February 2015. The OROP scheme is not applicable to Group Captain Victor;

(xii) The comparison drawn by the petitioners is a comparison between non-comparables. The pension calculated based on the average pension in 2013 cannot be compared with the actual pension received based on the pension rules;

PART B

(xiii) The MACP regime warranted a service of 6, 16 and 24 years of service by the Sepoy for grouping with the rank of Naik, Havildar and Naib Subedar. On the other hand, under the earlier Assured Career Progression10 regime, the required service is of 10, 20 and 30 years;

(xiv) For computation of OROP, the Union Government has taken MACP as the base and has applied it across the board to all retirees having the same length of service. OROP is not calculated based on MACP and ACP regime. No such differentiation is made;

(xv) An executive decision of the Union Government on the OROP can only be challenged on legal principles. However, the petitioners are seeking the most beneficial interpretation of OROP to be implemented. It cannot be contended that the most beneficial interpretation of OROP is the only ‘true’ interpretation and that it must be implemented as a right;

(xvi) In SPS Vain (supra), this Court held that pre and post 1996 retired Major Generals must be treated at par to remove an anomaly in the pension of pre-1996 retired Major generals. The principle in that case was about the removal of anomaly between the ranks of Major General and Brigadier which had arisen due to the implementation of the fifth and the sixth Central Pay Commission; (xvii) In Indian Ex-Services League v. Union of India11, this Court has held that unless

the claim of OROP can be treated to be flowing "ACP" AIR 1991 SC 1182 PART B from the reliefs provided in Nakara (supra), the reliefs claimed cannot be granted. It was also observed that the decision in Nakara (supra) cannot be enlarged to cover within it all the claims made by the pension retirees since the purpose of computation of the pension is different. The decisions in KL Rathee v. Union of India12 and Suchet Singh Yadav v. Union of India13 support this submission;

(xviii) The Committee headed by Justice L Narasimha Reddy submitted its report to the Union Government. The Internal Committee is examining the feasibility of the recommendations; (xix) The recommendations of the Koshyari Committee were not accepted by the Union Government and are thus not binding upon it. The recommendations of the Committee cannot be termed as the decision of the Union Government;

(xx) Since the Sixth Pay Commission, the length of service is no longer a criterion for calculating pension. The pension is now determined by 50 percent of the last pay drawn. However, due to demands, OROP rates have been prepared based on the average pension of retirees in 2013;

(xxi) It is not feasible to undertake an automatic revision. Though the government has accepted the principle of uniformity, it is not unreasonable to define periodicity for ensuring uniformity; SLJ 1997 (30 207) (2019) 11 SCC 520 PART B (xxii) The argument that OROP should be approved with effect from 1 April 2014 because it was announced in the Budget of 2014 is erroneous. The scheme was proposed by the Ministry of Defence through the letters dated 7 November 2015 and 3 February 2016; (xxiii) The pension of OROP beneficiaries who retired before 1 July 2014 was revised by the multiplication factor of 2.57 according to the recommendations of the Seventh Central Pay Commission. However, those who retired after 1 January 2016 received the benefit of only revision in emoluments in terms of the recommendations of the Seventh Central Pay Commission; (xxiv) The statement made by the Finance Minister on 17 February 2014 was not based on the decision of the Union Cabinet. The Cabinet Secretariat conveyed the approval of the Prime Minister to the OROP scheme on 7 November 2015. The Ministry of Defence communicated this policy by a notification dated 7 November 2015. A post facto approval was conveyed by the Union Cabinet on 6 April 2016;

(xxv) One of the qualifying conditions for the OROP scheme is that the personnel must have the 'same length of service'. One who had not put in the same length of service is not eligible for an MACP. The total financial outflow that is likely to be incurred by the Union Government for non-MACP to be linked with MACP personnel would be in the range of Rs 42,776.38 crores; and PART C (xxvi) The expression 'automatically' used in the Koshyari Committee report, the minutes of the meeting held on 26 February 2014 and the executive order dated 26 February 2014 defining the OROP scheme follow the expression 'in the rates of pension to be automatically passed on to the past pensioners'. It must, thus, be read as meaning that the rates of pension will be passed to the past pensioners without any difficulties. The phrase 'automatically' does not mean the time period.

C. Analysis

14 Though, a significant number of factual and detailed issues were raised in

the course of the pleadings. Mr Huzefa Ahmadi, learned Senior Counsel appearing on behalf of the petitioners brought focus upon and urged the following specific submissions during the course of the hearing:

(i) The Union government took an executive decision to implement OROP as understood by the Koshyari Committee. This is evidenced by:

a. The statement of the Minister of Finance in the Lok Sabha on 17 February 2014;

b. The decision taken on 26 February 2014 in the meeting convened by the Union Minister for Defence;

c. The letter dated 26 February 2014 of the Union government to the CGDA;

d. The Budget speech of the Minister of Finance on 10 July 2014; and PART C e. The reply of 2 December 2014 of the Minister of State for Finance to Member of Parliament.

(ii) The essential elements underlying the concept of OROP are:

a. Those retiring from the same rank with the same length of service must receive the same pension irrespective of the date of retirement;

b. Future enhancements of pension must be automatically passed on to past pensioners; and c. Bridging of the gap between the rate of pension of present and past pensioners.

(iii) In substitution of the above principle underlying OROP, the communication dated 7 November 2015 of the Ministry of Defence modified the executive decision by stipulating that:

i. The pension of past pensioners would be refixed on the basis of the pension of the retirees of calendar year 2013, with the benefit being effective from 1 July 2014;

ii. Pension is to be revisited for all pensioners on the basis of the average of the minimum and maximum pension of persons who retired in 2013 in the same rank and with the same length of service;

iii. In the future pension would be revisited every five years and not automatically; and PART C iv. Hence, the actual decision which was taken on 7 November 2015 deviates from the principle of equality which OROP adopts.

15 The submissions which have been urged by the pensioners are sought to be buttressed by referring to the charts set out in the earlier part of this judgment and

> marked as figures 1, 2 and 3 by which an attempt has been made to show the disparity in the pension payable to persons of the same rank with the same length of service, based on the date of retirement.

C. 1 Concept and genesis of OROP 16 The adoption of OROP as a guiding statement of policy on 7 November 2015 was preceded by discussions both within and outside Parliament. The Koshyari Committee submitted its report on 10 December 2011. The Committee formulated an understanding of the concept of OROP. According to the report of the Committee, OROP implies that a "uniform pension be paid to the armed forces personnel retiring in the same rank with the same length of service irrespective of their date of retirement and any future enhancements in the rate of pension to be automatically passed on to the past pensioners". The concept, according to the report implied "bridging the gap between the rate of pension of the current pensioners and the past pensioners". This understanding of the concept of OROP in the Koshyari Committee Report was based on the norm that hierarchy in the armed forces comprises of two elements namely rank and length of service. Ranks are conferred by the President and signify command, control and responsibility. Ranks are allowed to be retained even after retirement. Hence OROP, according to the Koshyari Committee postulates that two PART C personnel from the armed forces in the same rank and with the equal length of service should get the same pension irrespective of their dates of retirement and any future enhancement in the rates of pension must be automatically passed on to past pensioners. While proposing the adoption of OROP in principle, the Koshyari Committee highlighted that:

> (i) OROP was in vogue till 1973 when the Third Central Pay Commission decided otherwise;
>
> (ii) Unlike civilian employees who retire by age, armed forces personnel retire by rank; and
>
> (iii) The conditions of service of personnel from the armed forces are harsher than those of civilian employees and armed forces personnel cannot be equated with civilian employees of the government.

17 Now it needs to be understood that the Koshyari Committee Report is a report submitted to the Rajya Sabha by the Committee on Petitions. The report cannot be enforced as a statement of government policy. In Kalpana Mehta v. Union of India14, a Constitution Bench of this Court dealt, on the reference under Article 145(3), with two issues namely:

> "9…73.1. (i) Whether in a litigation filed before this Court either under Article 32 or Article 136 of the Constitution of India, the Court can refer to and place reliance upon the report of the Parliamentary Standing Committee?
>
> 73.2. (ii) Whether such a report can be looked at for the purpose of reference and, if so, can there be restrictions for the purpose of reference regard being had to the concept of parliamentary privilege and the delicate balance between the (2018) 7 SCC 1 PART C constitutional institutions that Articles 105, 121 and 122 of the Constitution

conceive?" Chief Justice Dipak Misra (speaking for himself and Justice AM Khanwilkar) held thus:

"Q. Conclusions 159.1. Parliamentary Standing Committee report can be taken aid of for the purpose of interpretation of a statutory provision wherever it is so necessary and also it can be taken note of as existence of a historical fact.

159.3. In a litigation filed either under Article 32 or Article 136 of the Constitution of India, this Court can take on record the report of the Parliamentary Standing Committee. However, the report cannot be impugned or challenged in a court of law.

159.4. Where the fact is contentious, the petitioner can always collect the facts from many a source and produce such facts by way of affidavits, and the court can render its verdict by way of independent adjudication. 159.5. The Parliamentary Standing Committee report being in the public domain can invite fair comments and criticism from the citizens as in such a situation, the citizens do not really comment upon any Member of Parliament to invite the hazard of violation of parliamentary privilege."

18 One of us (DY Chandrachud, J) speaking for himself and Justice Dr AK Sikri held that a report of a Parliamentary Committee may have a bearing upon diverse perspectives some of which were formulated thus:

"259.1. The report of a Parliamentary Committee may contain a statement of position by Government on matters of policy; 259.2. The report may allude to statements made by persons who have deposed before the Committee;

259.3. The report may contain inferences of fact including on the performance of Government in implementing policies and legislation;

259.4. The report may contain findings of misdemeanour implicating a breach of duty by public officials or private individuals or an evasion of law; or 259.5. The report may shed light on the purpose of a law, the social problem which the legislature had in view and the manner in which it was sought to be remedied." PART C The judgment elaborates that:

"264. Committees of Parliament attached to ministries/departments of the Government perform the function of holding the Government accountable to implement its policies and its duties under legislation. The performance of governmental agencies may form the subject-matter of such a report. In other cases, the deficiencies of the legislative framework in remedying social wrongs may be the subject of an evaluation by a Parliamentary Committee. The work of a Parliamentary Committee may traverse the area of social welfare either in terms of the extent to which existing legislation is being effectively implemented or in highlighting the lacunae in its framework. There is no reason in principle why the wide jurisdiction of

> the High Courts under Article 226 or of this Court under Article 32 should be exercised in a manner oblivious to the enormous work which is carried out by Parliamentary Committees in the field. The work of the committee is to secure alacrity on the part of the Government in alleviating deprivations of social justice and in securing efficient and accountable governance. When courts enter upon issues of public interest and adjudicate upon them, they do not discharge a function which is adversarial. The constitutional function of adjudication in matters of public interest is in step with the role of Parliamentary Committees which is to secure accountability, transparency and responsiveness in the Government. In such areas, the doctrine of separation does not militate against the court relying upon the report of a Parliamentary Committee. The court does not adjudge the validity of the report nor for that matter does it embark upon a scrutiny into its correctness.

There is a functional complementarity between the purpose of the investigation by the Parliamentary Committee and the adjudication by the court. To deprive the court of the valuable insight of a Parliamentary Committee would amount to excluding an important source of information from the purview of the court. To do so on the supposed hypothesis that it would amount to a breach of parliamentary privilege would be to miss the wood for the trees. Once the report of the Parliamentary Committee has been published it lies in the public domain. Once Parliament has placed it in the public domain, there is an irony about the executive relying on parliamentary privilege. There is no reason or justification to exclude it from the purview of the material to which the court seeks recourse to understand the problem with which it is required to deal. The court must look at the report with a robust common sense, conscious of the fact that it is not called upon to determine the validity of the report which constitutes advice tendered to Parliament. The extent to which the court would rely upon a report must necessarily PART C vary from case to case and no absolute rule can be laid down in that regard." 19 In a concurring judgment, Justice Ashok Bhushan observed:

> "449.7. Both the parties have not disputed that parliamentary reports can be used for the purposes of legislative history of a statute as well as for considering the statement made by a minister. When there is no breach of privilege in considering the parliamentary materials and reports of the Committee by the Court for the above two purposes, we fail to see any valid reason for not accepting the submission of the petitioner that courts are not debarred from accepting the parliamentary materials and reports, on record, before it, provided the court does not proceed to permit the parties to question and impeach the reports."

20 The Koshyari Committee Report can be relied upon to indicate the background of the adoption of OROP. The report furnishes the historical background, the reason for the demand, and the view of the Parliamentary Committee which proposed the adoption of OROP for personnel belonging to the armed forces. Beyond this, the Koshyari Committee Report cannot be construed as embodying a statement of governmental policy. Governmental policy formulated in terms of Article 73 by the Union or Article 162 by the State has to be authoritatively gauged from the policy documents of the government, which in present case is the communication dated 7 November 2015. Prior to it , on 17

February 2014, a statement was made by the Union Minister of Finance in the Lok Sabha while presenting the interim budget for 2014-15 stating that the government had accepted the principle of OROP for the defence forces and that the decision would be implemented from financial year 2014-15. The statement of the Union Minister of Finance reflects an in-principle decision to adopt OROP for all personnel belonging to the armed forces. Evidently, the modalities of PART C implementing OROP were yet to be chalked out and were adopted later. On 26 February 2014, a meeting was held by the Minister of Defence to discuss the modalities for implementing the decision to adopt OROP. Paragraph 3 of the minutes of the meeting elaborate that OROP implies that:

> (i) Uniform pension be paid to armed forces personnel retiring in the same rank with the same length of service irrespective of the date of retirement;
>
> (ii) Any future enhancement in the rates of pension should be passed on to past pensioners;
>
> (iii) The gap between the rates of pension of current and past pensioners should be bridged; and
>
> (iv) Future enhancements in the rates of pension should be automatically based on to the past pensioners at that stage.

21 The CGDA was directed to initiate steps in consultation with the Finance and Ex-servicemen Welfare departments of the Ministry of Defence to give effect to the decision. The meeting which was held on 26 February 2014 was part of the decision-making process of the Union Government for determining the modalities for implementing OROP. On 26 February 2014, a communication was addressed by the Department of Ex-Servicemen Welfare to CGDA noting that at the meeting chaired by the Minister of Defence, it had been decided to implement OROP for all ranks of the defence forces prospectively from the financial year of 2014-15. Para 2 of the communication reads as follows:

> "Accordingly, CGDA may work out the modalities in consultation with Service Hqrs, (who in turn may PART C appropriately consult ex-servicemen), Department ESW and MoD (Fin) and take necessary to implement the same."

22 On 10 July 2014, the Minister of Finance in the course of his speech while presenting the annual budget stated that the Union Government had adopted the policy of OROP to address pension disparity and a further sum of Rs 1,000 crores was set aside to meet the requirement of the year. On 2 December 2014, information on OROP was furnished by the Minister of State for Defence in a reply to a Member of the Rajya Sabha.

23 The adoption in principle of OROP followed by the discussion on the modalities for implementing it eventually led to the communication dated 7 November 2015 of the Ministry of Defence to the Chiefs of Army Staff, Air Force Staff and Naval staff. The communication indicates that :

"2. It has now been decided to implement "One Rank One Pension" (OROP) for the Ex-Servicemen with effect from 1.07.2014. OROP implies that uniform pension be paid to the Defence Forces Personnel retiring in the same rank with the same length of service, regardless of their date of retirement, which, implies bridging the gap between the rates of pension of current and past pensioners at periodic intervals. [sic]" Paragraph 3 of the communication adverts to the salient features:

"3. Salient features of the OROP as follows: i. To begin with, pension of the past pensioner would be re- fixed on the basis of pension of retirees of calendar year 2013 and the benefit will be effective with effect from 1.7.2014. ii. Pension will be re-fixed for all pensioners on the basis of the average of minimum and maximum pension of personnel retired in 2013 in the same rank with the same length of service.

iii. Pension for those drawing above the average shall be protected.

iv. Arrears will be paid in four equal half yearly instalments. However, all the family pensioners including those in receipt PART C of Special/Liberalized family pension and Gallantry award winners shall be paid arrears in one instalment. v. In future, the pension would be re-fixed every 5 years. " The communication also indicated that personnel who opt to get discharged henceforth would not be entitled to the benefit of OROP. Moreover, the Union Government had decided to appoint a committee to look into the anomaly in the implementation of OROP and its report was to be submitted within six months. The features of the policy communication of 7 November 2015 need to be noticed. First, it contains the decision of the Indian government to implement OROP for ex-servicemen. Second, it specifies the date with effect from which the decision would be implemented, namely, 1 July 2014. Third, it embodies the understanding that OROP implies the payment of uniform pension to defence personnel retiring in the same rank with the same length of service regardless of the date of retirement. Fourth, it emphasises the need to bridge the gap between the rates of pension of current and past pensioners at "periodic intervals".

24 A considerable amount of debate has taken place in these proceedings on whether the expression "at periodic intervals" was in breach of the original understanding that enhancements in the rates of pension would be automatically passed on. While dealing with the submission, it is important to note at the outset that right from the Koshyari Committee Report, it was envisaged that "any future enhancement in the rates of pension is to be automatically passed on to the past pensioners". The statement made by the Union Minister of Finance in the Lok Sabha on 17 February 2014 propounded in principle the decision to implement OROP. At the meeting chaired by the Defence Minister on 26 February 2014, it PART C was again envisaged that "any future enhancement in the rates of pension to be automatically passed on to the past pensioners". The reply furnished in writing by the Minister of State for Defence to a Member of the Rajya Sabha also similarly indicates that "future enhancement in the rate of pension to be automatically passed on to the past pensioners". The legislative and other material prior to 7 November 2015 proposed that future enhancements in the rates of pension would be automatically passed on. The expression

"automatically" was clearly not linked to a time period for the revision of pensions. None of the documents on the record prior to the communication dated 7 November 2015 suggests that the process of revising pensions was to be continued on an ongoing basis as opposed to revision at periodic intervals. 25 The fallacy in the submission of the petitioners is in the argument that the policy communication dated 7 November 2015 is contrary to the original decision which was taken by the Union Government to implement OROP. Implicit in the submission of the petitioners is the premise that the original decision was based on the Koshyari Committee Report followed by the statement on the floor of the House by the Minister of Finance (17 February 2014 and 10 July 2014) and the minutes of the meeting convened by the Defence Minister (26 February 2014). Our analysis of the underlying document indicates that while a decision to implement OROP was taken in principle, the modalities for implementation were yet to be chalked out. Thus, there was no conscious policy decision on the part of the Union Government on the modalities for implementing OROP until the communication dated 7 November 2015 came into being. The communication of 7 November 2015 cannot be invalidated on the ground that it infringed the PART C 'original understanding' of OROP. A hierarchy in law exists between statutes and rules – a statutory provision will have precedence over delegated legislation if the latter conflicts with the former. Similarly, executive instructions cannot override a statute or rules made in pursuance of a statute. But in the present case the entire canvas is governed by a policy. The terms for implementing the policy were specified on 7 November 2015. Hence, that element of the policy cannot be challenged on the notion that there is an inflexible notion of OROP couched in an original understanding. OROP is itself a matter of policy and it was open to the makers of the policy to determine the terms of implementation. The policy is of course subject to judicial review on constitutional parameters, which is a distinct issue.

26 While the petitioners have not adverted to the doctrine of legitimate expectations, they have implicitly relied on this principle. The doctrine of legitimate expectations can be invoked if a representation made by a public body leads an individual to believe that they would be a recipient of a substantive benefit. A part of the petitioners' grievance stems from the belief that an assurance made by State functionaries, the Ministers of the Union Government, did not translate into a conscious policy decision, which is embodied in the communication dated 7 November 2015. We have stated above that the expression "automatically" was clearly not linked to a time period for the revision of pensions. But if it is to be assumed that the expression "automatically" meant that the revision in the rates of pension would take place on an ongoing basis rather than at periodic intervals, the question arises whether the doctrine of legitimate expectations can be invoked in the present case. In the State of PART C Jharkhand v. Brahmputra Metallics Ltd., Ranchi15, a two-judge Bench of this Court, of which one of us (DY Chandrachud, J) was a part, clarified the doctrinal difference between the concepts of promissory estoppel and legitimate expectations. The Bench observed that the doctrine of legitimate expectations, a public law concept, is premised on the principles of fairness and non-arbitrariness in state action. The doctrine of legitimate expectations emerges as a facet of Article 14 of the Constitution. On the other hand, promissory estoppel, being a private law concept, can be invoked if the State has entered into a private contract with another entity but is inapplicable where a representation has been made by the State in the discharge of its public functions. The doctrine of legitimate expectations is applicable in the latter situation. Noting that in India, the two doctrines have been conflated, this Court went on to analyse if the change in

an existing government policy violates the legitimate expectations of those who were previously covered by such policy. However, in the present case, there was no concrete government policy in existence prior to 7 November 2015. There existed only certain assurances that were made by the Ministers, or which could be deduced from the minutes of a meeting that was chaired by the Minister of Defence. These assurances were also to the effect that OROP has been accepted in principle. The implementation was yet to be worked out. In State of Arunachal Pradesh v. Nezone Law House16, a two-judge Bench of this Court held that when the views of various departments/Ministries are involved, an oral promise by a Minister does not bind the government. In that case, a law publisher had contended that the then Law Minister had assured the publisher that certain 2020 SCC OnLine SC 968 (2008) 5 SCC 609 PART C books will be purchased from it. The document that was relied upon by the publisher was a departmental note which indicated that the decision regarding the purchase was subject to the concurrence of other departments and Ministries. This Court observed:

> "8. As noted above the factual scenario is interesting. The document relied upon by the respondent and the High Court refers to some oral expression of desire by the then Law Minister. When the views of several departments were involved the question of any oral view being expressed by a Minister is really not relevant. Further, the document relied upon was nothing but a departmental note which itself clearly indicated that the views of various departments/Ministries were to be taken and their concurrence was to be obtained. Apart from that, undisputedly there was some factual dispute as to whether the intended purchase was of volumes or of sets. There is conceptual difference between the two. The books were not even printed at the relevant point of time. The High Court has noticed only one volume had been printed. Further the need for the purchase of the books for the judicial officers was to be assessed in consultation with the High Court. The Law Minister could not have, without taking the view of the High Court, placed orders. In any event the dispute as to the volumes or the sets and the interpolation in the documents were of considerable relevance. Unfortunately the High Court has lightly brushed aside this aspect. The doctrines of promissory estoppel and legitimate expectation were not applicable to the facts of the case." (emphasis supplied)

27 In the present case, discussions took place within the Government and even as of 26 February 2014, the meeting chaired by the Minister of Defence set out broad parameters of the decision, while leaving it to the CGDA to ensure necessary steps in consultation with the three services and the Finance and ESW wings of MOD "to give effect to this decision". The meeting envisaged that family pensioners and disabled pensioners would be included and that ex-servicemen may also be properly consulted as required by the service. All this is clearly PART C suggestive of the fact that in the evolving decisions which were taking place within the Government, a formulation of the precise modalities which were to be adopted was yet to take place. This eventually took place on 7 November 2015. The communication dated 7 November 2015 cannot, therefore, be assailed on the ground that it is contrary to the original intent of the policy formulated by the Union Government. The policy of the Union Government is what is embodied in the communication dated 7 November 2015. The statements made on the Floor of the House and minutes of ministerial committees are

pointers to the fact that the Union Government had in principle decided to implement OROP but the precise framework of its implementation was a matter of evolving discussion within Government. The formulation of modalities which took place in the communication dated 7 November 2015 represents the policy choices adopted by the Government.

28 While the communication dated 7 November 2015 is undoubtedly open to be scrutinised on constitutional parameters, there is no substance in the plea that the decision which was taken on 7 November 2015 is somehow contrary to an original policy decision of the Union Government. The policy and its modalities for implementation are those which have been embodied in the communication dated 7 November 2015.

C. 2. Plea of Discrimination 29 The submission of the petitioners on the violation of Article 14 is premised essentially on three aspects:

> PART C
>
> (i) Fixation of the pension as of calendar year 2013 would result in pre 2014 retirees getting less pension of one increment than a soldier retiring after 2014;
>
> (ii) Fixing the pension based on the mean of minimum and maximum pension of 2013 would result in different pensions for the same ranks and same length of service depending on whether the personnel retired before or after 31 December 2013. In effect, a higher ranked soldier would receive lesser pension on comparison to a lower ranked soldier; and
>
> (iii) As a result of the process of equalisation every five years, persons who have retired prior in point of time would be placed at a disadvantage as their unequalised pension would be multiplied by a factor of 2.57 while those who have retired after 1 January 2014 would get the benefit of higher pension which would be multiplied by 2.57.

30 In the course of its comprehensive affidavit, the Union Government attempted to explain the disparity in the pension payable to a Sepoy with 15 years of qualifying service under OROP and the actual pension of a Sepoy with 15 years of qualifying service who retired in 2014 before the application of OROP. The following explanation was offered to the three tabular charts appended as fixtures 1, 2 and 3 above:

> "A. Tabular Chart 1:
>
> (a) In this table, the comparison made by the Petitioner is between pension payable to a Sepoy with 15 years of qualifying service under OROP and the actual pension of a PART C Sepoy who retired in 2014 (before application of OROP) after 15 years qualifying service who is drawing pension in the rank of Naik, due to operation of the Modified Assured Career Progression Scheme [hereinafter referred to as 'MACP

Scheme']

(b) The figure of Rs. 6,666 is derived from the Table at Pg. 3 of the Note. The figure of Rs. 6665 denotes the weighted average pension of the minimum and maximum pension of 2013 of Sepoys who retired in 2013 with 15 years of qualifying service.

(c) The figure of Rs. 7,605 is derived from the Pension Payment Order annexed at Pg. 5 of the Note. Pension is calculated on the basis of 50% of the last pay drawn before retirement. This can be arrived at by the following:-

S.No.	Particulars	Amount
1.	Last Pay	10,510
2.	Grade Pay	2,400
3.	MSP	2,000
	Allowance	
5.	TOTAL	15,210
6.	Pension (50% of last pay)	7,605

*figures from Pg. 5 of the Note

(d) The difference in pension between the two pensions in Tabular Chart 1 is due to the applicability of the MACP Scheme (implemented based on the recommendations of the6th Central Pay Commission). Under the MACP Scheme, a defence personnel who has not been promoted for 8/16/24 years of regular service, would be eligible for grant of next higher grade pay after completion of 8/16/14 years of regular service. In other words, a Sepoy who was originally getting Rs 2,000 as grade pay would after 8 years of service (without promotion) be granted the next higher grade pay of Rs. 2,400. The grade pay of Rs. 2,400 ordinarily corresponds to the grade pay of Naik.

PART C

(e) Similarly, after 16 years of service (without promotion), such Sepoy would get the next higher grade pay of Rs. 2,800. The grade pay of Rs 2,800 ordinarily corresponds to the grade pay of Havildar.

(f) As a logical corollary, the pay (and consequently pension) of different Sepoys would differ/vary depending on whether benefit of the MACP Scheme has been granted to such Sepoy or not.

(g) The applicability of the MACP Scheme on the pension of a retired defense personnel has been dealt by the Circular No. 555 dated 04.02.2016, wherein at Para 11(C), it has been stated:-

> "...11. The provisions of this circular shall be applicable to all Pre-01.07.2014 pensioners /family pensioners and their pension/family pension shall be stepped up with reference to rank, group and qualifying service in which they were pensioned.
>
> Note:
>
> a)...
>
> b)...
>
> c) A JCOs/ORs pensioner, who has retired with a particular rank and granted ACP-I will be eligible for revision of pension of a next higher rank; if ACP-II has been granted, he will be eligible for revision of pension of next higher rank of ACP-I;

and if ACP-III has been granted, he will be eligible for revision of pension of next higher rank of ACP-II w.e.f. 01.07.2014. For example- a Sepoy granted ACP-I will be eligible for revision of pension of Naik rank, Sepoy granted ACP-II will be eligible for revision of pension of Havildar rank and sepoy granted ACP-III will be eligible for revision of pension of Naib Subedar rank [...]" Therefore, the example of two Sepoys drawing different pension amount is due to operation of MACP and is not due to operation of the OROP Scheme.

(h) It is also important to point out that the MACP Scheme is only one such factor which influences the pay drawn by a Sepoy. The other factors include promotion, disciplinary proceedings etc. PART C B. Tabular Chart 2:

> (a) In this Chart, the pension of a Naik has been compared with a person drawing pension of Havildar by virtue of the MACP Scheme.
>
> (b) The figure of Rs. 7,170 is derived from the Table at Pg. 4 of the Note. The figure of Rs. 7,170 denotes the weighted average pension of the minimum and maximum pension of 2013.
>
> (c) The figure of Rs. 8,295 is derived from the pension payment order annexed at Pg. 6 of the Note Pension is calculated on the basis of 50% of the last pay drawn before retirement. This can be arrived at by the following:-

S.No.	Particulars	Amount
1.	Last Pay	11,490

2.	Grade Pay	2,800
3.	MSP	2,000
	Allowance	
5.	TOTAL	16,590
6.	Pension(50% of last pay)	8,295

(d) Now, due to the operation of the MACP Scheme, the Naik (grade pay of Rs. 2,400) is actually drawing the next higher grade pay of Rs.2,800, which corresponds to the grade pay of Havildar. This is the same principle, which was the basis for difference in pension in Tabular Chart 1.

C. Tabular Chart III

(a) The Tabular Chart III pertains to the rank of Group Captain. As per Column II of this Chart, the example quoted is that of a 2014 retiree. However, the pension amount quoted is of Group Captain Daniel Victor, who retired on 28.02.2015. It is important to state that the OROP Scheme was not applicable to Group Captain Daniel Victor.

(e) Therefore, the Petitioner has misled this Hon'ble Court by relying on the pension of a recent retiree who has not been covered under the OROP Scheme. The PPO Number of Group Captain Daniel Victor is 08/14/1/114/2015 PART C

18. It is further submitted that the flaw in pointing out the alleged disparities by referring to the Tables at Pg. 1 of the Note are due to the following reasons, interalia:-

(i) The comparison as mentioned in the Table is a comparison between non-comparables. The weighted average pension of the minimum and maximum pension of 2013 can never be compared with the actual amount being received by a defence personnel as pension fixed under the rules applicable for retiring pension in the normal course.

(ii) The weighted average pension signifies the lowest/minimum amount that a defence personnel retiring upto 2013 is entitled to get as OROP pension. Whereas, the actual pension of the retired defense personnel in 2014 (without effect of OROP) is based on pay last drawn. This amount of actual pension may be higher (due to various factors), but cannot be lower than the weighted average pension, as in that case, pension would be raised (protected) to the level of the weighted average pension

(OROP)

(iii) In other words, the pension amount of Rs. 6,665 is the minimum prescribed benchmark amount that any Sepoy (with 15 years qualifying service) would get under OROP as per Table No. 7 at Page 3 of the Note. Therefore, no Sepoy with the same pay and same length of service will get an amount less than Rs. 6,665 under OROP. The minimum prescribed benchmark is fixed to ensure that all defense personnel retiring pre-2013 are pulled up to receive at least the minimum prescribed pension. The benchmarking to the average of the minimum and maximum ensures upliftment of those receiving below the benchmark rate, whereas, protection of those who are receiving a higher pension than the benchmark rate.

(iv) The Petitioner's interpretation is an attempt to equalize the pension of every defense personnel with the highest pension drawn by a defense personnel in the same rank with the same length of service. Such an interpretation is completely arbitrary definition of how OROP should be implemented." 31 During the course of the hearing, the Union Government placed on record a further affidavit. The affidavit places on record the status of the grant of MACP benefits to defence personnel across the three services. The sample data for 2013 which was the base year for the calculation has been placed on the record and is reproduced below: -

PART C "....(v) Likewise, a Sepoy who gets promoted at the first instance as Naik in its natural course but does not get promoted for the subsequent ranks (which may happen due to non-availability of vacancies or stagnation) would be entitled to the MACP upgradations of those ranks.

(vi) It is also respectfully submitted that the threshold condition to qualify for MACP is the completion of the required length of service. Consequently, one who completed the required length of service would qualify for MACP automatically unless otherwise barred due to disciplinary proceedings or performance.

(vii) It is also respectfully submitted that the threshold condition to qualify for MACP is the completion of the required length of service. Consequently, one who completes the required length of service would qualify for MACP automatically unless otherwise barred due to disciplinary proceedings or performance.

(viii) It is therefore self-evident that a Sepoy who does not complete the required length of service of 8 years and one who completed it, cannot be benchmarked together under any circumstances.

(ix) A Sepoy of 3 years and a Sepoy who had crossed 8 years qualifying for MACP is not equated even for OROP purpose since they do not qualify the criteria of "same length of service." (emphasis supplied) While explaining the difference in pensions of the two Sepoys, the Union Government stated that this was due to the applicability of the MACP scheme. In the subsequent affidavit, some of the issues which remained to

be explained in the comprehensive affidavit have been attempted to be clarified.

C.2.1 ACP-MACP 32 In 2013, the ACP regime was put into place. In terms of the scheme, a Sepoy upon completion of ten years of service would be upgraded to a Naik for the purpose of pay, pension and other special benefits. After completion of 20 years' service, there would be a further upgradation to the pay of a Havildar and after 30 years' service, as a Naib Subedar. Though the scheme was PART C implemented from 2014, the benefit was extended retrospectively by applying the norms of 10:20:30 years of service respectively. Hence, a Sepoy in 2013 with thirty years of service was grouped with a Naib Subedar for pay, pension and other financial benefits. The ACP scheme thus covered defence personnel tracing back in time to 1973.

33 On 11 October 2008, by Army instruction No 1/S/2008, the MACP Scheme was implemented. In terms of the scheme, the earlier time line of 10:20:30 years of service for upgradation was modified to 8:16:24 years for conferment of benefits in terms of pay, pension and other financial benefits. In view of the decision of this Court in Union of India v. Balbir Singh Turn17, the MACP scheme was made operational with effect from 1 January 2006. Though the MACP scheme was made operational from 1 January 2006, it had retrospective effect as a result of which any person who was in service and qualified with the threshold requirement of 8:16:24 years of service came to be grouped with the corresponding rank upgradations for the purpose of pay, pension and other benefits. In the above backdrop, the Union Government has stated before this Court on affidavit that for the purpose of computing the OROP benefit, it has taken MACP as the base and applied it across the board for all retirees having the same length of service. In other words, OROP was not calculated in two parts comprising of the ACP regime and MACP regime. In this context, reliance has been placed on Note VI appended to the table for working out OROP calculations. Note VI reads as follows: -

> (2018) 11 SCC 99 PART C "Pension of JCO/ORS granted upgradation under ACP/MACP scheme shall be revised with reference to the rank for which ACP/MACP was granted."

34 On the above premises, it has been submitted that no disparity on the ground of MACP/ACP has been introduced and the core value of uniform pension for a person retiring in the same rank with the same length of service is maintained without disparity.

C.2.2 Financial Implications 35 The Union Government has stated on affidavit that at the time when OROP was implemented, the annual financial implication was in the amount of Rs 7,123.38 crores. The actual arrears which had to be paid for the period of 1 July 2014 to 31 December 2015 stood in the amount of Rs 10,392.35 crores. The table on the status of the grant of MACP benefits to defence personnel (2013) indicates that 96.4% Sepoys, 72.3% Naiks, 48.9% Havildars and 90.9% Art III-I (Navy only) represent the percentage of retirees getting MACP benefits. This indicates that MACP benefit forms a significant portion of the retiring personnel in the above four ranks, the last one being relevant only for the Navy. The MACP factor is not of much impact in the case of Naib Subedar, Subedar and Subedar Major, among whom 1.6%, 2.2% and 0.2% of all retiring personnel are receiving MACP benefits. This is because they would have reached those ranks by regular promotion. When a Sepoy with eight years of service is upgraded as a Naik and thereafter as a

Havildar and Naib Subedar after sixteen and twenty-four years of service, other financial benefits attached to the higher ranks accrue automatically to an MACP beneficiary. However, if a Sepoy is promoted to the rank of Naik in the natural course before eight years of service, such a person does not qualify PART C for MACP and the same principle applies to the further upgradation. Where a Sepoy is promoted as a Naik in the usual course, but does not get promoted thereafter to subsequent ranks for non-availability of vacancies, such a Sepoy would be entitled to MACP upgradation only for those ranks. The threshold requirement for the grant of MACP is completion of a specified length of service. A Sepoy who does not complete the required length of service cannot hence be benchmarked with someone who completes the stipulated length of service for the grant of MACP benefits. In other words, a Sepoy with three years of service and a Sepoy who has acquired eight years of service thereby qualifying for MACP are not equated even after OROP purposes since they did not both have the same length of service from the past rank of Naib Subedar. According to the Union Government, if non MACP personnel are grouped with MACP personnel for the payment of OROP, the total financial outflow from 2014 would be in the range of Rs 42,776.38 crores. If non MACP persons were required to be matched with MACP, the financial implication for the period from 1 July 2014 to 31 December 2015 would stand at Rs 13,731.03 crores. If such a benefit is given, the financial implication for 2021 under the Seventh Pay Commission would require a conversion factor of 2.57 besides which 31% DR would be payable. As noted earlier, it has been stated that when OROP is implemented, the annual financial implication was in the amount of Rs 7,123.38 crores. If non MACP personnel had to be matched with MACP personnel, this figure would stand increased to Rs 9,411.71 crores. Based on this, the following tabulation has been submitted by the Union Government on affidavit indicating a total outflow if non MACP were to be matched with MACP:

> PART C Difference of 9,411.71-7123.38 Crores 2288.33 Crores financial implication per annum Further arrears from 2288.33 Cr x 1.5 years 3432.49 Crores 1.07.2014 to 31.12.2015 Conversion in 7th CPC 2288.33 Cr x. 2.57 times 5881.00 Crores Further arrears from 5881.00 Cr x 6 years 35,286 Crores 01.01.2016 DR arrears from 5881 Cr/12 x 8.28 4057.89 Crores 01.01.2016 to 31.12.2021 Total Additional arrears 3432.49+35286.00+4057.89 42,776.38 Crores C.2. 3 Average to Maximum 36 The Court has been apprised of the fact that the CGDA working committee considered four options for OROP in the year 2013. Of the four options, the fourth option was on the basis of the maximum pension of current retirees, which was proposed by the services. The Committee noted that the financial implication of the fourth option (maximum pension of current retirees) was Rs 14,898.34 crores per annum and the total arrears which would be payable on PART C this basis would have been in the amount of Rs 1,45,339.34 crores, as is tabulated below:
>
> Difference of financial 14898.34 Cr -7123.38 7774.96 Cr implication per annum: Cr Further arrears from 7774.96 Cr x 1.5. years 11662.44 Cr 01.07.2014 to 31.12.2015 Conversion in 7th CPC: 7774.96 Cr x 2.57 times 19981.60 Cr Further arrears from 19981.60 Cr x 6 years 119889.60 Cr 01.01.2016 to 31.12.2021 DR arrears from 19981.60 Cr/12x8.28 13787.30 Cr 01.01.2016 to 31.12.2021 Thus total additional 11662.44 Cr+119889.60 INR 145339.34 Cr arrears Cr+ 13787.30 C.2.4 Periodic revision every five years 37 The central limb of the submission of the petitioners is

that a revision of OROP should be automatic. The Union government has submitted that besides lacking any prior precedent, in terms of the practice governing pay scales, pensions and other financial emoluments of government servants, automatic revision would be impossible to implement. Quite apart from the above PART C consideration, it is evident that the three documents which have been relied upon by the petitioners namely (i) the Koshyari Committee Report; (ii) the minutes of the meeting chaired by the Defence Minister on 26 February 2014; and (iii) the communication dated 26 February 2014 to CGDA underscore that "any future enhancement in the rates of pension to be automatically passed on to the past pensioners". The expression "to be automatically passed on" immediately follows upon the words "any future enhancement in the rates of pension". When read together contextually, it signifies that the rates of pension would be passed on to past pensioners without any administrative impediments. The expression 'automatically passed on' cannot be construed as a commitment with reference to any period of time for the computation of benefits. The manner in which and the period over which revisions should take place of pensions, salaries and other financial benefits is a pure question of policy. The decision of the Central Government to revise the pension every five years cannot be held to violate the precepts underlying Article 14.

38 The policy choices which have been made by the Union Government must also be understood in the context that the estimated budget allocation for defence pensions is Rs 1,33,825 crores representing 28.39 per cent of the total defence budget estimate of Rs 4,71,378 crores for 2020-2021. This does not include budget on salaries which is of the order of 34.89 per cent of the total defence budget estimates for 2020-2021. Salaries and pensions thus account for nearly 63 per cent of the total defence budget estimates for 2020-2021. In making policy choices, the Union Government is entitled to take into account priorities towards PART C modernization of the armed forces and to modulate the grant of financial benefits so as to sub-serve and balance distinct priorities. 39 In the decision of this Court in Nakara (supra), the Constitution Bench was deciding on the issue of whether the date of retirement would be a relevant consideration for determining the application of a revised formula for the computation of pension. The liberalised pension scheme was made applicable prospectively to those employees who retired on or after March 31, 1979 in the case of government servants covered by the 1972 Rules and in respect of defence personnel, those who became non-effective on or after April 1, 1979.

Consequently, those who retired prior to the date were not entitled to the benefits of the liberalised pension scheme. It was held that payment of pension constitutes a compensation for the service rendered in the past and as a measure of social welfare for providing socio-economic justice to those who have rendered service to the State. The Court noted that earlier, the measure of pension was related to the average emoluments during a period of thirty-six months prior to retirement. By a liberalized scheme, the period was reduced to an average of ten months preceding the date of retirement coupled with the above aspects. A slab system for computation was introduced and the ceiling was raised. This Court held that there was no justification for arbitrarily selecting the criteria

for eligibility for the grant of benefits under the scheme based on the date of retirement. Hence, this Court held that all pensioners formed a homogeneous class and where an existing scheme of pension was liberalized, a distinction could not be made on the basis of a specified cut-off date. At the same time, it must also be noted that the decision in Nakara (supra) noted that "the financial PART C implication in such matters has some relevance." This Court struck down the portion of the Memoranda by which the benefit of the liberalised pension scheme was only confined to persons retiring on or after the specified date which resulted in the benefit being extended to all retirees, irrespective of the date of retirement. It was observed as follows:

> "63. The financial implication in such matters has some relevance. However in this connection, we want to steer clear of a misconception. There is no pension fund as it is found either in contributory pension schemes administered in foreign countries or as in insurance-linked pensions. Non- contributory pensions under 1972 Rules is a State obligation. It is an item of expenditure voted year to year depending upon the number of pensioners and the estimated expenditure. Now when the liberalised pension scheme was introduced, we would justifiably assume that the government servants would retire from the next day of the coming into operation of the scheme and the burden will have to be computed as imposed by the liberalised scheme. Further Government has been granting since nearly a decade temporary increases from time to time to pensioners. Therefore, the difference will be marginal. Further, let it not be forgotten that the old pensioners are on the way out and their number is fast decreasing. While examining the financial implication, this Court is only concerned with the additional liability that may be imposed by bringing in pensioners who retired prior to April 1, 1979 within the fold of liberalised pension scheme but effective subsequent to the specified date. That it is a dwindling number is indisputable. And again the large bulk comprises pensioners from lower echelons of service such as Peons, L.D.C., U.D.C., Assistant etc. In a chart submitted to us, the Union of India has worked out the pension to the pensioners who have retired prior to the specified date and the comparative advantage, if they are brought within the purview of the liberalised pension scheme. The difference up to the level of Assistant or even Section Officer is marginal keeping in view that the old pensioners are getting temporary increases. Amongst the higher officers, there will be some difference because the ceiling is raised and that would introduce the difference. It is however necessary to refer to one figure relied upon by respondents. It was said that if pensioners who retired prior to March 31, 1979 are brought within the purview of the liberalised pension scheme, Rs 233 crores would be required for fresh commutation. The apparent fallacy in the submission is that if the benefit of commutation is already availed of, it cannot and need not be reopened. And availability of other benefits is hardly a relevant factor because pension is admissible to all retirees. The figures submitted are thus neither frightening nor the liability is supposed to be staggering which would deflect PART C us from going to the logical and of constitutional mandate. Even according to the most liberal estimate, the average yearly increase is worked out to be Rs 51 crores but that assumes that every pensioner has survived till date and will continue to survive. Therefore, we are satisfied that the increase liability

consequent upon this judgment is not too high to be unbearable or such as would have detracted the Government from covering the old pensioners under the Scheme." (emphasis supplied) 40 As opposed to the factual matrix in Nakara (supra), where the liberalised pension scheme was not made applicable to employees who had retired prior to the cut-off date, in this case the OROP principle is applicable to all retired army personnel, irrespective of the date of retirement. The cut-off date is only prescribed for determining the base salary used for computing the pension. While for those who retired on or after 2014, the last drawn salary is used for computing the pension; for those who retired prior to 2014, the average of the salary drawn in 2013 is used. This policy only seeks to protect those who retired before 2014 since the last drawn salary of the prior retirees might be too low and incomparable to the pay of the 2014 retirees. Moreover, if the maximum salary drawn is to be used as the base value instead of taking the average salary, an additional outlay of Rs 1,45,339.34 crores would be incurred. The executive is therefore, well within its limits to prescribe a policy keeping in view the financial implications.

41 In Krishena Kumar (supra), a Constitution Bench of this Court decided on the issue of whether the prescription of a cut-off date for the eligibility to a pension scheme was arbitrary and violative of Article 14. Before 1957, the only scheme for retirement benefits in the Railways was the Provident Fund Scheme.

This scheme was replaced in 1957 by the Pension Scheme. All the employees PART C who served in the Railways on or after 1 April 1957 were automatically covered by the Pension Scheme. Those who were in service before 1 April 1957 were given the option to switch over to the Pensionary Benefits. It was the contention of the appellants that till 1 April 1957, there was no difference between the benefits receivable under the provident fund scheme and the pension scheme. However, it was contended that between 1957 and 1987, the pensionary benefits were increased by various methods while the benefits under the provident fund scheme were not enhanced. Dismissing the petitions, this Court held that neither the prescription of a cut-off date nor the creation of two classes of retirees (pensioners and provident fund holders) was contrary to the decision of the Constitution Bench in Nakara (supra). It was observed thus:

"32. In Nakara [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 :

(1983) 2 SCR 165] it was never held that both the pension retirees and the PF retirees formed a homogeneous class and that any further classification among them would be violative of Article 14. On the other hand the court clearly observed that it was not dealing with the problem of a "fund".

The Railway Contributory Provident Fund is by definition a fund. Besides, the government's obligation towards an employee under CPF Scheme to give the matching contribution begins as soon as his account is opened and ends with his retirement when his rights qua the government in respect of the Provident Fund is finally crystallized and thereafter no statutory obligation continues. Whether there still remained a moral obligation is a different matter. On the other hand under the

Pension Scheme the government's obligation does not begin until the employee retires when only it begins and it continues till the death of the employee. Thus, on the retirement of an employee government's legal obligation under the Provident Fund account ends while under the Pension Scheme it begins. The rules governing the Provident Fund and its contribution are entirely different from the rules governing pension. It would not, therefore, be reasonable to argue that what is applicable to the pension retirees must also equally be applicable to PF retirees. This being the legal position the rights of each individual PF retiree finally crystallized on his retirement PART C whereafter no continuing obligation remained while, on the other hand, as regard Pension retirees, the obligation continued till their death. The continuing obligation of the State in respect of pension retirees is adversely affected by fall in rupee value and rising prices which, considering the corpus already received by the PF retirees they would not be so adversely affected ipso facto. It cannot, therefore, be said that it was the ratio decidendi in Nakara [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] that the State's obligation towards its PF retirees must be the same as that towards the pension retirees. An imaginary definition of obligation to include all the government retirees in a class was not decided and could not form the basis for any classification for the purpose of this case. Nakara [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 :

(1983) 2 SCR 165] cannot, therefore, be an authority for this case.

34. The next argument of the petitioners is that the option given to the PF employees to switch over to the pension scheme with effect from a specified cut-off date is bad as violative of Article 14 of the Constitution for the same reasons for which in Nakara [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] the notification were read down. We have extracted the 12th option letter. This argument is fallacious in view of the fact that while in case of pension retirees who are alive the government has a continuing obligation and if one is affected by dearness the others may also be similarly affected. In case of PF retirees each one's rights having finally crystallized on the date of retirement and receipt of PF benefits and there being no continuing obligation thereafter they could not be treated at par with the living pensioners. How the corpus after retirement of a PF retiree was affected or benefitted by prices and interest rise was not kept any tack of by the Railways. It appears in each of the cases of option the specified date bore a definite nexus to the objects sought to be achieved by giving of the option. Option once exercised was told to have been final. Options were exercisable vice versa." (emphasis supplied) 42 In Indian Ex-Services League (supra), it was contended that in view of the decision in Nakara (supra), all retirees who held the same rank irrespective of the date of retirement must receive the same amount of pension. This Court observed that there was nothing in Nakara (supra) that backed the claim of the PART C appellants that the same pension must be given to all retirees of the same rank. The Court observed that it was held in Nakara (supra) that only the same formula for calculation of pension was to be used and nowhere was the emoluments of the retirees revised. The ratio decidendi in Nakara (supra) was explained in the following words:

"12. The liberalised pension scheme in the context of which the decision was rendered in Nakara [(1983) 1 SCC 305 :

> 1983 SCC (L&S) 145 : (1983) 2 SCR 165] provided for computation of pension according to a more liberal formula under which "average emoluments" were determined with reference to the last ten months' salary instead of 36 months' salary provided earlier yielding a higher average, coupled with a slab system and raising the ceiling limit for pension. This Court held that where the mode of computation of pension is liberalised from a specified date, its benefit must be given not merely to retirees subsequent to that date but also to earlier existing retirees irrespective of their date of retirement even though the earlier retirees would not be entitled to any arrears prior to the specified date on the basis of the revised computation made according to the liberalised formula. For the purpose of such a scheme all existing retirees irrespective of the date of their retirement, were held to constitute one class, any further division within that class being impermissible. According to that decision, the pension of all earlier retirees was to be recomputed as on the specified date in accordance with the liberalised formula of computation on the basis of the average emoluments of each retiree payable on his date of retirement. For this purpose there was no revision of the emoluments of the earlier retirees under the scheme. It was clearly stated that 'if the pensioners form a class, their computation cannot be by different formula affording unequal treatment solely on the ground that some retired earlier and some retired later'. This according to us is the decision in Nakara [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] and no more." (emphasis supplied) It was observed that the effect of the judgment in Nakara (supra) was that the same computation according to the liberalised formula must be applicable to pre and post 1 April 1979 retirees and that the decision cannot be construed to mean that the same amount of pension must be receivable. PART C

43 In KL Rathee v. Union of India18, the decision in Nakara (supra) was explained in the following terms :

> "6. Nakara case dealt with the manner of calculation of pension on the basis of average emoluments of a retired government employee. Prior to the liberalisation of the formula for computation of pension made by the memorandum dated 25-5-1979, average emoluments of the last thirty months of service of the employee provided that basis for calculation of pension. The 1970 service of the employee provided that average emoluments must be calculated on the basis of the emoluments received by a government servant during the last ten months of the service. That apart, a new slab system for computation of pension was introduced and the ceiling on pension was raised [...].
>
> 7. It is to be seen that the judgment did not strike down the definition of "emoluments". It merely held that if pension was to be calculated on the basis of the last ten months' emoluments of a government servant, after 1-4-1979, there is no reason why those who retired before 1-4-1979 should get pension calculated on the basis of average of last thirty-six months' emoluments. In other words, the rule of computation must be the same. The Court did not hold that those who have retired

> before 1-4-1979 must be treated as having the same emoluments as those who retired on or after 1-4-1979 for the purpose of calculation of pension. Therefore, on the strength of Nakara case, the petitioner is not entitled to ask for computation of pension with reference to emoluments which he never got."

44 In Col. B.J Akkara (Retd.) v. Government of India19, this Court summarised the principles relating to pension. Justice RV Raveendran writing for a two-Judge bench observed:

> "20. The principles relating to pension relevant to the issue are well settled. They are:
>
> (a) In regard to pensioners forming a class, computation of pension cannot be by different formula thereby applying an unequal treatment solely on the ground that some retired earlier and some retired later. If the retiree is eligible for pension at the time of his retirement and the relevant pension scheme is subsequently amended, he would become eligible to get enhanced pension as per the new formula of computation of pension from the date when the amendment takes effect. In such a situation, the additional benefit under 1991 2 SCC 104 (2006) 11 SCC 709 PART C the amendment, made available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred.
>
> (b) But all retirees retiring with a particular rank do not form a single class for all purposes. Where the reckonable emoluments as on the date of retirement (for the purpose of computation of pension) are different in respect of two groups of pensioners, who retired with the same rank, the group getting lesser pension cannot contend that their pension should be identical with or equal to the pension received by the group whose reckonable emolument was higher. In other words, pensioners who retire with the same rank need not be given identical pension, where their average reckonable emoluments at the time of their retirement were different, in view of the difference in pay, or in view of different pay scales being in force.

[...] One set cannot claim the benefit extended to the other set on the ground that they are similarly situated. Though they retired with the same rank, they are not of the "same class" or "homogeneous group". The employer can validly fix a cut-off date for introducing any new pension/retirement scheme or for discontinuance of any existing scheme. What is discriminatory is introduction of a benefit retrospectively (or prospectively) fixing a cut-off date arbitrarily thereby dividing a single homogeneous class of pensioners into two groups and subjecting them to different treatment." (emphasis supplied) 45 The decision in SPS Vains (supra) has been relied upon by the petitioners. The issue in that case was whether the officers of the rank of Major General, who had retired prior to 1 January 1996, could be given the benefit of the provisions of the revised pay scale, though according to the policy only those who retired after the said cut-off date would be entitled to such benefit. The rank of Brigadier is a feeder post for the promotional rank of Major General. A Major General always drew a higher pension than the pension payable to the officers holding the rank of a Brigadier, as on the basis of the recommendation of the Fourth Pay Commission, the pension was

calculated on the basis of the salary drawn during the last ten months prior to retirement. An anomaly arose with the acceptance of the recommendation of the Fifth Pay Commission which created a situation in PART C which a Brigadier began drawing more pension and family pension than the Major General. The Government increased the pension of Major Generals who had retired prior to 1996 so that they do not receive lesser pension than the officers of the rank of Brigadier. The disparity which was noted in that case is evident from the following extract of the judgment:

> "23. From the submissions made, the dispute appears to be confined only to the question whether officers of the rank of Major General in the army and of equivalent rank in the two other wings of the Defence forces, who had retired prior to 1.1.1996 have been validly excluded from the benefit of the revision of pay scales in keeping with the recommendations of the fifth Central Pay Commission by virtue of the Special Army Instruction 2/S/1998." This Court held that such a disparity in the pension payable to two groups of officers occupying the same rank of Major General based on those retiring before or after 1 January 1996 violated Article 14. It was in this backdrop that this Court directed that the pay of all pensioners in the rank of Major General and its equivalent rank in the other two wings of the Defence services should be notionally fixed at the rate given to the similar officers of the same rank after the revision of pay scales with effect from 1 January 1996, and thereafter to compute the pensionary benefits with prospective effect from the date of the writ petition.
>
> The decision in SPS Vains (supra) thus involved a completely different factual situation. The rank of Brigadier was a feeder post for the rank of Major General.
>
> An anomaly had arisen as a result of which the pay and pension of Brigadier were higher than of the Major Generals. By increasing the pension of Major General, distinction was made between those who had retired before and after 1 January 1996. This was held to be violative of Article 14.
>
> PART C

46 The canvass which is sought to be traversed in these proceedings under Article 32 of the Constitution trenches upon a domain which is reserved for executive policy. We must remember that adjudication cannot serve as a substitute for policy. Lon Fuller described public policy issues that come up in adjudication as "polycentric problems", that is, they raise questions that have a "multiplicity of variable and interlocking factors, decisions on each one of which presupposes a decision on all others". Such matters, according to Fuller, are more suitably addressed by elected representatives since they involve negotiations, trade-offs and a consensus-driven decision-making process. Fuller argues that adjudication is more appropriate for questions that result in "either-or" answers.20 Most questions of policy involve complex considerations of not only technical and economic factors but also require balancing competing interests for which democratic reconciliation rather than adjudication is the best remedy. Further, an increased reliance on judges to solve matters of pure policy diminishes the role of other political organs in resolving contested issues of

social and political policy, which require a democratic dialogue. This is not to say that this Court will shy away from setting aside policies that impinge on constitutional rights. Rather it is to provide a clear-eyed role of the function that a court serves in a democracy. The OROP policy may only be challenged on the ground that it is manifestly arbitrary or capricious. In this regard, we now evaluate the policy which has been adopted by the Union Government.

Fuller, L. L., & Winston, K. I. (1978). The Forms and Limits of Adjudication. Harvard Law Review, 92(2), 353–

409. PART C 47 The policy of OROP adopted by the Union Government stipulates thus:

> (i) The benefits will be effective from 1 July 2014;
>
> (ii) Pensions of past pensioners would be refixed on the basis of the pension of retirees of calendar year 2013;
>
> (iii) Pension for all pensioners would be protected; and
>
> (iv) In future, the pension would be refixed after every five years.

48 The principles governing pensions and cut-off dates can be summarised as follows:

> (i) All pensioners who hold the same rank may not for all purposes form a homogenous class. For example, amongst Sepoys differences do exist in view of the MACP and ACP schemes. Certain Sepoys receive the pay of the higher ranked personnel;
>
> (ii) The benefit of a new element in a pensionary scheme can be prospectively applied. However, the scheme cannot bifurcate a homogenous group based on a cut-off date;
>
> (iii) The judgment of the Constitution Bench in Nakara (supra) cannot be interpreted to read the one rank one pension rule into it. It was only held that the same principle of computation of pensions must be applied uniformly to a homogenous class; and
>
> (iv) It is not a legal mandate that pensioners who held the same rank must be given the same amount of pension. The varying benefits that may be applicable to certain personnel which would also impact the pension payable need not be equalised with the rest of the personnel.

PART C 49 Applying the above principles to the facts of the case, we find no constitutional infirmity in the OROP principle as defined by the communication dated 7 November 2015 for the following reasons:

(i) The definition of OROP is uniformly applicable to all the pensioners irrespective of the date of retirement. It is not the case of the petitioners that the pension is reviewed 'automatically' to a class of the pensioners and 'periodically' to another class of the pensioners;

(ii) The cut-off date is used only for the purpose of determining the base salary for the calculation of pension. While for those who retired after 2014, the last drawn salary is used to calculate pension, for those who retired prior to 2013, the average salary drawn in 2013 is used. Since the uniform application of the last drawn salary for the purpose of calculating pension would put the prior retirees at a disadvantage, the Union Government has taken a policy decision to enhance the base salary for the calculation of pension. Undoubtedly, the Union Government had a range of policy choices including taking the minimum, the maximum or the mean or average. The Union government decided to adopt the average. Persons below the average were brought up to the average mark while those drawing above the average were protected. Such a decision lies within the ambit of policy choices;

PART C

(iii) While no legal or constitutional mandate of OROP can be read into the decisions in Nakara (supra) and SPS Vains (supra), varying pension payable to officers of the same rank retiring before and after 1 July 2014 either due to MACP or the different base salary used for the calculation of pension cannot be held arbitrary; and

(iv) Since the OROP definition is not arbitrary, it is not necessary for us to undertake the exercise of determining if the financial implications of the scheme is negligible or enormous.

50 In terms of the communication dated 7 November 2015, the benefit of OROP was to be effected from 1 July 2014. Para 3 (v) of the communication states that "in future, the pension would be re-fixed every five years". Such an exercise has remained to be carried out after the expiry of five years possibly because of the pendency of the present proceedings. 51 We accordingly order and direct that in terms of the communication dated 7 November 2015, a re-fixation exercise shall be carried out from 1 July 2019, upon the expiry of five years. Arrears payable to all eligible pensioners of the armed forces shall be computed and paid over accordingly within a period of three months.

PART C 52 The petition is disposed of in the above terms.

53 Pending application(s), if any, shall stand disposed of.

……J. [Dr Dhananjaya Y Chandrachud] .....J. [Surya Kant] .....J. [Vikram Nath] New Delhi;

March 16, 2022