CHAPTER VIII

STATE JUDICIARY

SYNOPSIS

A. INTRODUCTORY

The primary duty of the Judiciary is to uphold the Constitution and the Laws without fear or favour, without being biased by political ideology or economic theory.[1]

The State Judiciary consists of a High Court and a system of subordinate courts. The High Court is at the apex of the State judicial system. The High Courts come below the Supreme Court in India's judicial hierarchy.[2] The institution of the High Courts is fairly old as it dates back to 1862 when under the Indian High Courts Act, 1861, High Courts were established at Calcutta, Bombay and Madras.[3] In course of time, other High Courts also came to be established.[4] The Constitution builds the structure of the High Courts, on the pre-existing foundations.[5]

At present, each State in India has a High Court [Art. 214]. Parliament may, however, establish by law a common High Court for two or more States [Art 231(1)]. The Gauhati High Court is the common High Court of seven States of North East India, namely-Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram[6] and Arunachal Pradesh[7]. Bombay High Court has jurisdiction over the State of Goa and the Union Territory of Daman, Diu, Dadra & Nagar Haveli[8]. Similarly Calcutta High Court is the High Court for the Union Territory of the Andaman & Nicobar Islands[9]. The States of Punjab & Haryana have a common High Court which is also the High Court for the Union Territory of Chandigarh[10]. Besides these four, there are at present 17 other High Courts.

The High Courts play a very significant role in the scheme of administration of justice. The enormity of the task assigned to the High Courts can be appreciated by having a look at the wide and varied jurisdiction assigned to these courts.

The High Courts enjoy civil as well as criminal, ordinary as well as extraordinary, and general as well as special jurisdiction. The High Courts enjoy an original jurisdiction in respect of testamentary, matrimonial, company and guardianship matters. Original jurisdiction is conferred on the High Courts under several statutes. The High Courts enjoy extraordinary jurisdiction under Arts. 226 to issue various writs. Several statutes confer an advisory jurisdiction on the High Courts. Each High Court has supervisory powers over the subordinate courts under it. Each High Court, being a Court of record enjoys the power to punish for its contempt as well as of its Subordinate Courts.

Considering the question whether a High Court should sit as a whole at one place or in Benches at different places, the Law Commission expressed its firm opinion as early as 1957 that "in order to maintain the highest standards of ad-

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1. *People's Union for Civil Liberties (PUCL) v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.
2. For Supreme Court, see, *supra*, Ch. IV.
3. JAIN, OUTLINES OF INDIAN LEGAL HISTORY, 262-289.
4. *Ibid*.
5. *Ibid*.
6. State of Mizoram Act, 1986.
7. State of Arunachal Pradesh Act, 1986.
8. Goa, Daman & Re-organization Act, 1987.
9. Calcutta High Court (Extension of Jurisdiction) Act, 1953.
10. See Art. 230 (*infra*).

ministration of justice and to preserve the character and quality of the work at present being done by the High Courts, it is essential that the High Court should function as a whole and only at one place in the State."[11]

However, several High Courts have Benches apart from the principal one, with separate territorial jurisdictions.[12]

The Chief Justice is the administrative authority of the High Court. He plays or ought to play a very important role in the consultative process relating to appointment of Judges of the High Court. He has absolute prerogative to constitute a Bench is of the Chief Justice of the High Court and a request to the Chief Justice of the High Court to constitute a Bench to dispose of certain matters did not amount to a direction did not in any way express any lack of confidence in the Chief Justice nor take away his prerogative to constitute the Bench.[13]

B. COMPOSITION OF THE HIGH COURT

(a) STRENGTH OF A HIGH COURT

A High Court consists of the Chief Justice and such other Judges as the President may appoint from time to time [Art. 216]. In this way, the number of Judges in a High Court is flexible and it can be settled by the Central Executive from time to time keeping in view the amount of work before a High Court.

Representation of People Act cannot be taken away by the Rules framed by the High Court in exercise of the power conferred by Article 225 such power relates to procedural matters and cannot make nor curtail any substantive law.[14]

The question of justiciability of the adequacy of the Judge-strength in a High Court has been considered by the Supreme Court in *Supreme Court Advocates-on-Record Association v. Union of India*[15]. The Court has emphasized that it is necessary to make a periodical review of the Judge strength of every High Court with reference to the felt need for disposal of cases, taking into account the backlog of cases and the expected future filing. This is essential to ensure speedy justice. Art. 216 casts a duty on the Central Executive to periodically assess the Judge strength of each High Court. Art. 216 is to be interpreted not in isolation, but as a part of the entire constitutional scheme, conforming to the constitutional purpose and its ethos.

Accordingly, the Court has ruled that fixation of Judge strength in a High Court is a justiciable matter. If it is shown that the existing strength is inadequate to provide speedy justice to the people, in spite of the optimum efficiency of the existing strength, "a direction can be issued to assess the felt need and fix the strength of Judges commensurate with the need to fulfil the State obligation of providing speedy justice." In making the review of the Judge strength in a High Court, the President must attach great weight to the opinion of the Chief Justice

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11. Law Commission of India, *Fourth Report*, (1956).
12. Allahabad High Court-1; Bombay High Court-3; Calcutta High Court-1; Gauhati High Court-6; Madras High Court-1; Madhya Pradesh High Court-2; Rajasthan High Court-2.
13. *Rajiv Ranjan Singh v. Union of India* (2005) 11 SCC 312 : (2005) 5 Scale 297.
14. *Raj Kumar Yadav v. Samir Kumar Mahaseth* (2005) 3 SCC 601 : (2005) 11 JT 177.
15. AIR 1994 SC 268 : (1993) 4 SCC 441, see, *infra*, (d).

of the High Court and the Chief Justice of India, and "if the Chief Justice of India so recommends, the exercise must be performed with due despatch".[16]

To reach this conclusion, the Court invoked Art. 21, according to which speedy justice is now a constitutional requirement.[17] On this point, the Court overruled the view expressed by it earlier in *S.P. Gupta v. Union of India*,[18] that the question of the strength of Judges in a High Court was not justiciable. It is not for the Court to fix the number of judges itself; it can ask for a review to be undertaken of the judge strength. Thereafter, on the question of fixation of the strength of the Judges of a High Court, the Supreme Court had observed in *Subhesh Sharma v. Union of India*[19]: "For the availability of an appropriate atmosphere where a Judge would be free to act according to his conscience it is necessary, therefore, that he should not be overburdened with pressure of work which he finds it physically impossible to undertake. This necessarily suggests that the Judge strength should be adequate to the current requirement and must remain under constant review in order that commensurate Judge strength may be provided."

The significance of the Supreme Court ruling in the *Advocates-on-Record* case can be appreciated in the context of the embarrassing situation that every High Court is faced with the load of pending cases. In its report in 1988, the Law Commission estimated that nearly 14 lac cases were pending in the various High Courts.[20] As on 31st March, 2007 there were 3678043 cases pending in the High Courts.[21] One of reasons for this situation is inadequate judicial strength in the High Courts.

(b) APPOINTMENT OF JUDGES

The High Court Judges are appointed by the President after consulting the Chief Justice of India, the Governor of the State concerned[22] and, in case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court to which the appointment is to be made [Art. 217(1)].

As mentioned above, the constitutional provision [Art. 217(1)] says that the President appoints these Judges after consulting the Chief Justice of India, the State Governor and the Chief Justice of the High Court concerned. The Central Executive and the State Executive provide the political input in the process of selection of the Judges.

Since the inauguration of the Constitution, the question has been considered by some authorities: how to ensure that the Judges are selected on non-political considerations? It is thought that it is necessary for securing the independence and objectivity of the Judiciary that Judges be selected on merit and not on political considerations. Such an objective can be achieved only if the role of the po-

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16. *Ibid*, at 441.
17. See, *infra*, Ch. XXVI, for discussion on Art. 21.
18. AIR 1982 SC 149 : 1981 Supp SCC 87; see, *infra*, (c).
19. AIR 1991 SC 631, 636 : 1981 Supp (1) SCC 574.
20. *LAW COMM. OF INDIA, ONE HUNDRED TWENTY FOURTH REPORT ON THE HIGH COURT ARREARS—A FRESH LOOK*, 2 (1988).
21. Court News : published by Supreme Court of India: [April-June 2007]: Vol. II; Issue No: 2; p. 7.
22. In case of a common High Court for two or more States, the Governors of all the States concerned are consulted; Art. 231(2).

litical elements is reduced in the process of selection of the Judges of the High Courts.

The matter was considered by the Law Commission as early as 1958. In its XIV Report,[23] the Commission opined that the High Court Judges were not always appointed on merit because of the influence of the State Executive. Accordingly, the Commission suggested that the Chief Justice of the High Court should have a bigger role to play in the matter of appointment of the Judges; that it should be only on his recommendation that a Judge be appointed, and also that concurrence, and not only consultation, of the Chief Justice of India be needed for this purpose.[24]

The Government of India did not accept this recommendation. On the other hand, it stated that, as a matter of course, the High Court Judges had been appointed with the concurrence of the Chief Justice of India.[25]

Again, the Study Team of the Administrative Reforms Commission on Centre-State Relationship endorsed the Law Commission's view that influence of the State Executive be reduced in appointing the High Court Judges. The Team suggested that the State Executive should have the right only of making comments on the names proposed by the High Court's Chief Justice but not to propose a nominee of its own. The Team hoped that this would reduce political influence exerted at the State level in appointing High Court Judges and improve professional competence.[26]

However, the A.R. Commission did not endorse the suggestion made by its Study Team. The Commission took the view that the proposal would drastically reduce the role of the State Governments in the selection of the High Court Judges. In its view, the existing procedure balanced the right of the Centre and of the States. It harmonized "the initiative and autonomy of the State, on the one hand, and safeguards against the question of undue influence by the State, on the other".[27]

(c) *S.P. GUPTA V. INDIA*

In 1982, the matter regarding appointment of the High Court Judges as well as of the Supreme Court Judges came before the Supreme Court by way of public interest litigation[28] in the famous case of *S.P. Gupta v. Union of India.*[29]

Several writ petitions were filed in the various High Courts under Art. 226 by several lawyers practising in the various High Courts.[30] All these petitions were transferred to the Supreme Court for disposal. The main question considered by the Court was: of the several functionaries participating in the process of appointment of a High Court Judge whose opinion amongst the various participants should have primacy in the process of selection?

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23. *Supra.*
24. *XIV Report*, 71-75.
25. *Rajya Sabha*, Nov. 24, 1959.
26. *Report*, I, 181-88 (1967).
27. *Report on Centre-State Relationship*, 40.
28. For Public Interest Litigation, see, *infra*, this Chapter Sec. D(k) and Ch. XXXIII, Sec. B.
29. AIR 1982 SC 149.
30. For discussion on Art. 226, see, *infra*, Sec. D.

The majority[31] took the view, in substance, that the opinions of the Chief Justice of India and the Chief Justice of the High Court were merely consultative and that "the power of appointment resides solely and exclusively in the Central Government" and that the Central Government could override the opinions given by the constitutional functionaries (*viz.*, the Chief Justice of India and the Chief Justice of the concerned High Court). This meant that the view of the Chief Justice of India did not have primacy in the matter of appointment of the High Court Judges; that the primacy lay with the Central Government which could decide after consulting the various constitutional functionaries and that the Central Government was not bound to act in accordance with the opinions of all the constitutional functionaries consulted, even if their opinions be identical.

The majority in *Gupta* thus gave a literal meaning to the word 'consultation' in Arts. 124(2)[32] and 217(1) in relation to all consultees and final decision in the matter was left in the hands of the Central Executive.[33] The majority thus took an extremely literal and positivistic view of Art 217(1). In reality, this view made consultation with the Chief Justices inconsequential in the matter of appointment of High Court Judges.

However, even after *Gupta,* the Central Government always maintained that it had, as a matter of policy, not appointed any Judge without the name being cleared by the Chief Justice of India.

The majority ruling in *Gupta* to the effect that in the consultative process leading to the appointment of a High Court Judge, the view expressed by the Chief Justice of India would have as much significance as the opinion of the State Governor, or the Chief Justice of the High Court concerned, came to be criticised in course of time by a Bench of the Supreme Court in *Subhesh Sharma*.[34] The Bench emphasized that an independent, non-political judiciary was crucial to sustain the democratic political system adopted in India. The Bench now expressed the view that consistent with the constitutional purpose and process, "it became imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to the Supreme Court and the High Courts of the States".[35]

The Bench in *Subhash* also criticised the developing practice of a State sending up names for appointment to the High Court direct to the Central Govern-

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31. BHAGWATI, FAZAL ALI, DESAI AND VENKATARAMIAH, JJ. The Bench consisted of five Judges.

32. See, Ch. IV, Sec. B(b), *supra,* for this Article of the Constitution.

33. After referring to Arts. 124(2) and 217(1), BHAGWATI, J., observed as follows (AIR 1982 SC at 200):
"... It is clear on a plain reading of these two Articles that the Chief Justice of India, the Chief Justice of the High Court and such other Judges of the High Courts and of the Supreme Court as the Central Government may deem it necessary to consult are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government... It would therefore be open to the Central Government to override the opinion given by constitutional functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court ... Even if the opinion given by all the Constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion". For 'consultation' and 'consult' and cases relating thereto see also *N. Kannadasan v. Ajoy Khose,* (2009) 7 SCC 1, 42, exhaustively considered.

34. *Subhesh Sharma v. Union of India,* AIR 1991 SC 631 : 1991 Supp (1) SCC 574.

35. AIR 1991 SC, at 641.

ment instead of sending the same to the Chief Justice of the High Court concerned. According to the Bench of the Court: "This is a distortion of the constitutional scheme which is wholly impermissible".[36] The Bench opined that primacy be given to the views of the Chief Justice of India in the matter of selection of the High Court Judges. This would improve the quality of selection. In India, judicial review is "a part of the basic constitutional structure"[37] and "one of the basic features of the essential Indian Constitutional policy". Therefore, "to contemplate a power for the Executive to appoint a person despite of his being disapproved or not recommended by the Chief Justice of the State and the Chief Justice of India would be wholly inappropriate and would constitute an arbitrary exercise of the power". The Bench observed:

> "In India, however, the judicial institutions, by tradition, have an avowed apolitical commitment and the assurance of a non-political complexion of the judiciary cannot be divorced from the process of appointments. Constitutional phraseology of "consultation" has to be understood and explained consistent with and to promote this constitutional spirit... The appointment is rather the result of collective constitutional process. It is a participatory constitutional function. It is, perhaps, inappropriate to refer to any 'power' or 'right' to appoint Judges. It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories..."[38]

The Bench, therefore, suggested reconsideration by a larger Bench of this aspect of the process of appointment of Judges.

(d) *SUPREME COURT ADVOCATES-ON-RECORD ASSOCIATION V. INDIA*

As a consequence of the observations of the Bench in *Subhesh*, a Bench of 9 Judges was constituted to reconsider the matter.

In *Supreme Court Advocates-on-Record Association v. Union of India*,[39] in a majority opinion delivered by VERMA, J., the Court has sought to interpret the constitutional provisions concerning the High Courts so as to strengthen the "foundational features and the basic structure of the Constitution."

The majority now gave up literal interpretation and adopted a wider meaning of the constitutional provisions concerning the judiciary. The word 'consultation' in Art. 217(1) was given a broad meaning. The majority now insisted that the main concern of the constitution is the selection of the most suitable person for the superior judiciary. Thus, the majority view expressed in *S.P. Gupta*—(i) that the last word in appointment of High Court Judges rests with the government; and (ii) that the Chief Justice of India has no place of primacy in selection of High Court Judges were now overruled.

Accordingly, the Court has ruled that "in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight as he is best suited to know the worth of the appointee; the selection should be made as a result of a participatory consultative process in which the Executive has the power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive

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36. *Ibid*, at 642.
37. See, *infra*, Ch. XLI, for discussion on the Doctrine of Basic Features of the Constitution.
38. AIR 1991 SC, at 645.
39. AIR 1994 SC, 268 : 1993 (4) SCC 441.

element in the appointment process is reduced to the minimum and any political influence is eliminated."[40]

The Court has emphasized that the primary aim must be to reach an agreed decision taking into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India. "No question of primacy would arise when the decision is reached in this manner, by consensus, without any difference of opinion". However, if conflicting opinions do emerge at the end of the process, then the primacy must lie in the final opinion of the Chief Justice of India, "unless for very good reasons known to the Executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable".

The Court has further emphasized that the primacy of the opinion of the Chief Justice of India in this context means, in effect, "primacy of the opinion of Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion".[41] The Chief Justice of India is expected "to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court". The majority of the Judges has emphasized that this process would achieve the constitutional purpose of selecting the best available for composition of the Supreme Court and the High Courts which is so essential to ensure the independence of the judiciary, and, thereby, to preserve democracy.[42]

The majority judgment has laid down detailed procedural norms to be followed while appointing the Supreme Court and High Court Judges.

The law laid down by the Supreme Court in the *Supreme Court Advocates-on-Record* case has one great advantage, *viz.*, to minimise political influence in the appointment of High Court Judges as the Central Government could no longer appoint a Judge bypassing the Chief Justice of India. The majority has also expressed the opinion that initiation of the proposal for appointment of a High Court Judge must be by the Chief Justice of the concerned High Court.

The ruling of the Supreme Court in the *Supreme Court Advocates* case regarding appointment of the High Court Judges has been elaborated and articulated further by another 9 Judge Bench in *In Re : Presidential Reference.*[43]

The Court has now clarified that although the opinion of the Chief Justice of India has "primacy" in the matter of appointment of a High Court Judge, it is not solely the opinion of the Chief Justice of India alone but it is "reflective of the opinion of the judiciary which means that it must necessarily have the element of plurality in its formation". Therefore, the Chief Justice of India should form his opinion in regard to a person to be recommended for appointment as a High Court Judge in consultation with his two senior-most puisne Judges. They would in making their decision take into account the opinion of the Chief Justice of the High Court, which "would be entitled to greatest weight", the views of other High Court judges who may have been consulted and the views of the Supreme

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40. AIR 1994 SC, at 430.
41. *Ibid.*, at 431.
42. *Ibid.*, at 425.
43. AIR 1999 SC 1, 19-22; see, *supra*, Ch. IV, Sec. F(j).

Court Judges "who are conversant with the affairs of the concerned High Court." All these views should be expressed in writing and conveyed to the Government of India along with the recommendation.

The Court has emphasized that the plurality of Judges in the formation of the opinion of the Chief Justice of India is an in-built check against the likelihood of arbitrariness or bias. In view of this safeguard, Judicial review of the appointment of a High Court Judge is available only on the following grounds:

(i) if, in making the decision as regards the appointment of a High Court Judge, the views of the Chief Justice and the senior Judges of the High Court concerned, and of the Supreme Court Judges having knowledge of that High Court, have not been sought or considered by the Chief Justice of India and his two senior-most colleagues;

(ii) if the appointee lacks eligibility for appointment as a High Court Judge.

But the opinion of the Chief Justice touching the *merit* of the decision is not justiciable—only the decision making process is subject to review.[44]

(e) QUALIFICATIONS FOR A HIGH COURT JUDGE

A person to be appointed as a High Court Judge should be a citizen of India; he must have held a judicial office in India, or been an advocate of a High Court, for at least ten years [Art. 217(2)].[45] Unlike the Supreme Court, the Constitution makes no provision for appointment of a jurist as a High Court Judge.

Legal History was made in India when in *Kumar Padma Prasad v. Union of India*,[46] for the first time, the Supreme Court quashed the appointment of Shri K.N. Srivastava, Secretary (Law and Justice), Mizoram Government, as a High Court Judge on the ground that he was not qualified to be appointed as such.

The appointment of Shri Srivastava as a High Court Judge was challenged through a writ petition moved in the Gauhati High Court by a practising advocate and the High Court granted a stay on the warrant of appointment. Shri Srivastava then moved the Supreme Court against the High Court order and moved a transfer petition of the writ petition from the High Court to the Supreme Court.

Referring to Art. 217(2)(a), the Court pointed out that the question was whether Shri Srivastava had held a judicial office for 10 years. The term 'judicial office' has not been defined in the Constitution but, according to the Court, holder of 'judicial office' under Art. 217(2)(a) means a person who exercises only judicial functions, determines causes *inter partes* and renders decisions in a judicial capacity. He must belong to the judicial service which as a class is free from executive control and is disciplined to hold the dignity, integrity and independence of judiciary.

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44. *N. Kannadasan v. Ajoy Khose*, (2009) 7 SCC 1, 51.

45. To compute the period of ten years, the periods for which a person has held a judicial office, been an advocate of a High Court, been a member of a tribunal or held any post under the Centre or State requiring special knowledge of law have to be counted: Expl. (a) and (aa) to Art. 217(2).

46. AIR 1992 SC 1213 : (1992) 2 SCC 428.

In view of the Court, the expression 'judicial office' "means an office which is a part of judicial service as defined under Art 236(b) of the Constitution".[47] The Supreme Court ruled that Shri Srivastava was not qualified to be appointed as a High Court Judge as he had held no judicial office in a judicial service. The Court ruled that the office of Legal Remembrancer-*cum*-Secretary (Law and Judicial) of the State Government held by him was a non-judicial office under the control of the Executive. All the other offices held by him were neither judicial nor part of any judicial service. He also did not complete a period of ten years as a member of the State Judicial Service.

The Court made it clear that ordinarily the domain in such matters lay wholly with the constitutional authorities but in exceptional circumstances like the present, where the incumbent did not fulfil the qualification prescribed for the office, it became the Court's duty to see that no ineligible or unqualified person was appointed to a high constitutional and august office of a High Court Judge.

(f) THE CHIEF JUSTICE

The administration of the High Court including the power to constitute Benches and the allocation of cases to puisne judges is with the Chief Justice[48]. The requirement under a statute of consultation with the Chief Justice before appointment of either a sitting or retired judge as a member of a Tribunal under that statute, cannot be equated with Art. 217 of the Constitution and does not require the Chief Justice to consult senior colleagues before making a recommendation.[49]

(g) ACTING CHIEF JUSTICE

The President may appoint one of the Judges of the High Court as its acting Chief Justice in case the office falls vacant, or the Chief Justice is unable to perform his duties by reason of absence or otherwise [Art. 223].

The Acting Chief Justice has all the powers of the Chief Justice "without any limitation or rider", although it is a rule of prudence not to take any major decisions which could await the decision of the would Chief Justice.[50]

(h) ADDITIONAL JUDGES

The President may appoint duly qualified persons as additional Judges of a High Court, for a period not exceeding two years, when it appears to him that because of temporary increase in business or arrears of work therein, the number of Judges of that Court should be increased [Art. 224(1)].[51]

(i) ACTING JUDGE

A duly qualified person may also be appointed as an acting Judge of a High Court when any of its Judges, other than the Chief Justice, is unable to perform his duties due to absence or otherwise, or when a permanent Judge of the High

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47. See, *infra*, Sec. G.
48. *Rajiv Ranjan Singh 'Lalan' (V) v. Union of India*, (2005) 11 SCC 312 : (2005) 5 SCALE 297.
49. *Ashok Tanwar v. State of Himachal Pradesh*, (2005) 2 SCC 104 : (2005) 4 JT 528 : AIR 2005 SC 614.
50. *Ashok Tanwar v. State of Himachal Pradesh*, (2005) 2 SCC 104 : AIR 2005 SC 614.
51. See, *infra*, this Chapter, Sec. B(o), for further discussion on this point.

Court is appointed as its acting Chief Justice. An acting Judge holds office until the permanent Judge resumes his duties [Art. 224(2)].

(j) APPOINTMENT OF RETIRED JUDGES

The Chief Justice of a High Court may, with the previous consent of the President, request a retired High Court Judge to sit and act as a Judge of the High Court. While so sitting and acting, he is entitled to such allowance as the President may by order determine. He has all jurisdiction, powers and privileges of a High Court Judge, but is not regarded as a Judge of the High Court for any other purpose [Art. 224A]. He is, thus, a Judge of the High Court for purposes of jurisdiction, powers and privileges but not for any other purpose. He can, therefore, hear an election petition.[52] Since an *ad hoc* judge is not otherwise deemed to be a judge of the High Court, the period of service as an *ad-hoc* judge cannot be included for the purposes of determining pensionary benefits.[53]

(k) OATH BY JUDGES

Before entering upon his office, a person appointed as a High Court Judge is to make and subscribe an oath or affirmation in the prescribed form before the Governor of the State, or his nominee for the purpose [Art. 219].

(l) SALARIES OF JUDGES

The salaries payable to a High Court Judge are determined by Parliament by law and, unil provision is made for the purpose, such salaries as are specified in the Second Schedule to the Constitution [Art. 221(1)]. Further, Parliament is empowered to determine by law such matters as allowances payable to a High Court Judge and his rights in respect of leave of absence and pension.

Parliament may regulate these matters from time to time [Art. 221(2)][54] but never to the disadvantage of a Judge after his appointment.[55] Thus, it has been held that the rights of a Chief Justice of a High Court to receive pension and other benefits, can not be altered to his disadvantage, after his appointment.[56]

(m) PRACTICE AFTER RETIREMENT

A person who has held office as a permanent Judge of a High Court is debarred from acting and pleading in any Court or before any authority in India except the Supreme Court and other High Courts [Art. 220].

The Law Commission adversely commented on the practice of the High Court Judges setting up practice after their retirement, as it greatly detracted from the dignity of the High Courts and the administration of Justice generally. The Commission, therefore, suggested that the retirement age of the High Court Judges be extended from 60 to 65 years and a total ban imposed on a retired High

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52. *Krishan Gopal v. Prakash Chandra,* AIR 1974 SC 209 : 1974 (1) SCC 128.

53. *Justice P. Venugopal v. Union of India,* (2003) 7 SCC 726, at pp. 734-735 : AIR 2003 SC 3887, the Bench doubted the correctness of the Court's earlier decision in *Union of India v. Pratibha Bonnerjea,* (1995) 6 SCC 765 : AIR 1996 SC 693.

54. Proviso to Art. 221(2).

55. Necessary provisions in this regard have been made by the High Court Judges (Salaries and Conditions of Service) Act, 1954. The Act has been recently amended by the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Act, 1998.

56. *Justice S.S. Sandhawalia v. Union of India,* AIR 1990 P&H 198.

Court Judge resuming practice in any Court.[57] The Commission's recommendation was partially accepted; the age of retirement of a High Court Judge was raised from 60 to 62, but ban on his practice after retirement was not imposed.

(n) FILLING UP VACANCIES

Usually, there is long delay in filling the posts of High Court Judges. This causes delay in the administration of justice. The High Court Judges are overworked and vacancies among them make matters worse.

In *Subhesh Sharma v. Union of India*,[58] the Supreme Court has taken into consideration a matter of great public significance, *viz*., the question of delay in filling up the vacancies in the sanctioned posts of the Judges in the Supreme Court and the High Courts, and fixing the strength of the Judges in each High Court.

The strength of the Judges in the Supreme Court is fixed by law by Parliament.[59] In case of the High Courts, the power lies in the President to fix the judicial strength for each High Court. It is common experience, that a number of these posts remain vacant for long. The Supreme Court has now emphasized that for Rule of Law to prevail, judicial independence is of "prime necessity". To make available to a Judge a proper atmosphere in which he may be free to act according to his conscience, it is necessary to ensure that the Judge is not overburdened with pressure of work. "This necessity suggests that the Judge strength should be adequate to the current requirement and must remain under constant review in order that commensurate judicial strength may be provided.[60] This point has been emphasized upon from time to time by various bodies.[61]

The Supreme Court has pointed out that keeping the load of work in view which comes before the High Courts, the judicial strength in no High Court is adequate. The Court has, therefore, suggested to the Government of India, that the matter should be reviewed from time to time and steps be taken for determining the sanctioned strength in a pragmatic manner on the basis of the existing need. The Court has observed in this connection:

> "If there be no correlation between the need and the sanctioned strength and the provisions of Judge-manpower is totally inadequate, the necessary consequence has to be backlog and sluggish enforcement of the Rule of Law."[62]

Another matter raised by the Court is the delay in filling vacancies of Judges. The Court has emphasized upon quick action to fill up the posts. The Court has observed in this connection:[63]

> "Backlog in the courts, has become a national problem. The adjudicatory process is being blamed for not equalling itself to the challenge of the times. There is a general complaint that the judicial system is on the verge of collapse. It is, therefore, the obligation of the constitutional process to keep the system appropriately manned. We have found no justification for the sluggish move in such an important matter".

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57. XIV *REPORT*, 88.
58. AIR 1991 SC 631 : 1991 Supp (1) SCC 574; *supra*, footnote 34.
59. See, Ch. IV, *supra*, Sec. B(a).
60. AIR 1991 SC, at 636.
61. LAW COMMISSION, *XIV REPORT*.
62. Also see, in this connection, *Supreme Court Advocates-on-Record Association v. Union of India*, *supra*, Sec. B(d).
63. AIR 1991 SC, at 641.

(o) TRANSFER OF JUDGES

The question of transfer of a Judge from one High Court to another has raised controversies from time to time. During the emergency of 1975,[64] 16 High Court Judges were transferred from one High Court to another. It was widely believed that the Government did so as a punitive measure to punish those Judges who had dared to give judgments against it.[65]

Article 222(1) empowers the President to transfer a Judge from one High Court to another after consulting the Chief Justice of India. Under Art. 222(2), the transferred Judge is entitled to receive, in addition to his salary, such compensatory allowance as may be determined by Parliament by law, and until so determined, as the President may fix by order.

As the phraseology of Art. 222(1) stands, neither the consent of the Judge is necessary to his transfer nor is the opinion of the Chief Justice binding on the Government.

A Judge of the Gujarat High Court was transferred to the Andhra Pradesh High Court without his consent. He challenged his transfer through a writ petition in the High Court and the matter came ultimately before the Supreme Court in *India v. Sankalchand Himatlal Sheth*.[66]

The Supreme Court realised that while the Constitution promoted the democratic value of independence of the Judiciary, the Executive could use the power of transfer of High Court Judges to undermine judicial independence. But, as regards the interpretation of Art. 222, the Court divided 3:2. The minority took the view that to preserve judicial integrity and independence, the word 'transfer' in Art. 222 should be interpreted to mean only 'consensual transfer', *i.e.*, transfer of the Judge with his consent and not otherwise because transfer constitutes a stigma on the Judge and is very inconvenient to him. On the other hand, the majority took a more literal view of Art. 222 and held that Art. 222 does not require consent of a Judge to his transfer from one to another High Court.

As a safeguard against misuse of power by the Executive, the majority ruled that 'consultation' with the Chief Justice as envisaged by Art. 222 has to be 'full and effective consultation' and not a mere formality. The opinion given by the Chief Justice would be entitled to the greatest weight and any departure from it would have to be justified by the Government on strong and cogent grounds.

The majority also emphasized that the proposal to transfer a judge/Chief Justice should be initiated only by the Chief Justice of India and that transfer could be resorted to only as an exceptional measure and only in public interest. Transfer made thus ought not to be considered as punitive. Transfer of a Judge from

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64. For discussion on the emergency provisions in the Constitution, see, *infra*, Ch. XIII.

65. The Government sought to justify these transfers on the plea of national integration and removal of narrow parochial tendencies, but this defence was found by the Supreme Court as not true. CHANDRACHUD, J., observed in *Sankalchand*, "..... the record of this case does not bear out the claim that any one of the 16 High Court Judges was transferred in order to further the cause of national integration. Far from it".

In the words of BHAGWATI, J., in *S.P. Gupta v. Union of India*, [AIR 1982 SC, at 218], "What was held by the Court was that the transfers of the High Court Judges during the emergency were made not for the purpose of furthering the cause of national integration but by way of punishment."

66. AIR 1977 SC 2279 : (1977) 4 SCC 98.

one High Court to another is a non-justiable matter. Transfer of a Judge ought not to be made as a punishment. A High Court Judge can be punished only according to Art. 217(1) read with Art. 124(4),[67] and not otherwise.

Again, the question of transfer of High Court Judges was raised in *S.P. Gupta v. Union of India*.[68] BHAGWATI, J., reiterated the minority view in *Sankalchand* that a Judge could not be transferred without his consent. In any case, he said that the transfer of a Judge could be exercised only in public interest and that transfer of a judge by way of punishment could never be in public interest. He emphasized that "whenever transfer of a Judge is effected for a reason bearing upon the conduct or behaviour of the Judge, it would be by way of punishment." Transfer being a serious matter, the burden of sustaining the validity of the transfer order must rest on the Government.[69] In the instant case, BHAGWATI, J., ruled that the transfer of the Chief Justice of the Patna High Court to the Madras High Court was bad because: (1) there was no full and effective consultation between the Central Government and the Chief Justice of India before the decision was taken to transfer him; (2) transfer was made by way of punishment and not in public interest.

FAZL ALI AND DESAI, JJ., joined BHAGWATI, J., in holding the said transfer to be bad. These Judges, however, did not agree with BHAGWATI, J., in his view that under Art. 222, for transfer, the consent of the Judge would be necessary. On the other hand, the majority view was that the transfer of the Chief Justice was valid. The consent of the Judge was not necessary for purposes of his transfer. Still the power of transfer vested in the Central Government was not absolute, but was subject to two conditions: (i) public interest; (ii) effective consultation with the Chief Justice of India. An order of transfer would become a justiciable issue and be liable to be quashed if—(a) it was not in public interest, or (b) it was passed without full and effective consultation; and (c) if the opinion of the Chief Justice was brushed aside or ignored without cogent reasons.

It was emphasized by the majority that transfer of a Judge could not be made for the purpose of punishing him. Therefore, a Judge can never be transferred on the grounds of misbehaviour or incapacity. It was also suggested by some of the majority Judges[70] that the concerned Judge should be consulted by the Chief Justice as regards his proposed transfer though his consent is not necessary. It was also emphasized by some Judges that any transfer with an oblique motive or for an oblique purpose, *e.g.*, not toeing the line of the Executive would be outside the purview of Art. 222.

In the instant case of the transfer of the Chief Justice, the reason was that people in his proximity had created an atmosphere injurious to the administration of Justice. This ground fell within the expression 'public interest'. There was no reflection on the conduct of the Chief Justice as there was no suggestion of any complicity or connivance on his part. There was thus no element of punishment involved in this transfer.

The position as regards transfer of a High Court judge as it emerged after the majority view in *Gupta* was unsatisfactory. There existed no real safeguard

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67. See *infra*, Sec. B(t), for this procedure.
68. AIR 1982 SC 149 : 1981 Supp SCC 87, *supra*, (c).
69. *Ibid*, 270.
70. TULZAPURKAR, PATHAK, GUPTA AND VENKATARAMIAH, JJ.

against an unwarranted transfer of a Judge. After all, during the emergency, 16 Judges were transferred after following the procedure laid down in Art. 222. As Justice BHAGWATI so aptly put it: "..... the so-called safeguard of consultation with the Chief Justice of India has proved to be of no avail." The one positive aspect of the *Gupta* case was that an order of transfer was held justiciable on some grounds and that some curbs were imposed on the power of the Executive.

On January 28, 1983, the Government of India formally announced its policy of having the Chief Justices of all the High Courts from outside the concerned State. For this purpose, the Government intended to use the provisions of Art. 217 or 222 relating to appointments or transfers. Another idea was to have one-third of the Judges in each High Court from outside the State.

This policy had been advocated by the Law Commission.[71] The Commission wanted this objective to be achieved through initial appointments. In the view of the Commission, this would not only help the process of national integration but also improve the functioning of various High Courts "as it would secure in the bench of each High Court the presence of a number of Judges who would not be swayed by local considerations or be affected by issues which may arouse local passions and emotions." Though it is a commendable policy, care needs to be taken that such a policy is implemented without doing anything to compromise the independence of the Judiciary. It is possible that transfer of a Judge (or Chief Justice) in implementation of this policy may be regarded as a matter of public interest but each case of transfer has to be considered on its own merits.

The question of transfer of High Court Judges has been considered again by the Supreme Court in the *Supreme Court Advocates-on-Record* case.[72] The proposition has been reiterated that there is no requirement of prior consent of the Judge before his transfer under Art. 222, but the opinion of the Chief Justice of India has been given 'not mere primacy' but a 'determinative' character in the transfer process. According to the majority opinion, the proposal for the transfer of a Judge/Chief Justice should be initiated by the Chief Justice of India alone. The power can be exercised only in "public interest." The transfer ought not to be "punitive" in nature. "Any transfer in accordance with the recommendation of the Chief Justice of India cannot be treated as punitive or an erosion in the independence of judiciary."[73]

Before giving his opinion, the Chief Justice of India has to consult the Chief Justice of the High Court from where the Judge is to be transferred and any Supreme Court Judge whose opinion may be significant for the purpose, as well as the views of at least one other senior High Court Chief Justice, or any other person whose views are considered relevant by the Chief Justice of India. The question of transfer of a Judge is justiciable but only on a limited basis, *i.e.,* transfer is being made without the recommendation of the Chief Justice of India and only the transferred judge has *locus standi* to question his transfer and no one else.

In *Dalpatray Bhandari v. Union of India*,[74] the Supreme Court has reiterated the proposition that a writ petition challenging the transfer of a Judge, filed by a

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71. *14th* and *80th REPORTS.*
72. *Supra*, Sec. B(d).
73. AIR 1994 SC, at 435.
74. **(**1995) Supp (1) SCC 682.

person other than the Judge himself, was not maintainable. "No one other than the transferred judge himself can question the validity of a transfer".

In Re Presidential Reference,[75] the Supreme Court has further elucidated its ruling in *Supreme Court Advocates* on the transfer of a High Court Judge. The Court has now stated that before recommending the transfer of a Judge of one High Court to another as a judge, the Chief Justice of India must consult a plurality of Judges. He must take into account the views of: (i) the Chief Justice of the High Court from which the Judge is to be transferred; (ii) any Judge of the Supreme Court whose opinion may have significance in the case; (iii) the Chief Justice of the High Court to which the transfer is to be effected.

All these views are to be expressed in writing and should be considered by a collegium consisting of the Chief Justice and the four senior-most puisne Judges of the Supreme Court. The collegium should consider the response of the Judge to be transferred. These views and those of the four senior-most judges should be conveyed to the Government of India along with the proposal for transfer. "Unless the decision to transfer has been taken in the manner aforesaid, it is not decisive and does not bind the Government of India."[76]

Because of all the safeguards mentioned above, the judicial review in case of transfer of a High Court Judge, according to the Court, would be limited to a case where transfer of a Judge has been made or recommended without obtaining the views and reaching the decision in the manner aforesaid.

The matter of transfer of a High Court Judge was raised again before the Supreme Court in *Reddy*.[77] It was argued that judicial review being a basic feature of the Constitution,[78] exclusion of judicial review in the matter of transfer could not be regarded as good law. There could be arbitrariness in transferring a High Court Judge. The Supreme Court rejected the contention. The Court observed :[79]

> "Every power vested in a public authority is to subserve a public purpose, and must invariably be exercised to promote public interest. This guideline is inherent in every such provision, and so also in Art. 222. The provision requiring exercise of this power by the President only after consultation with the Chief Justice of India, and the absence of the requirement of consultation with any other functionary, is clearly indicative of the determinative nature, not mere primacy, of the Chief Justice of India's opinion in this matter."

The consent of the Judge is not required for his transfer. The Chief Justice of India will recommend transfer of a Judge only in public interest, for promoting better administration of justice throughout the country, or at the request of the concerned Judge.

In the formation of his opinion for transfer of a High Court Judge, the Chief Justice of India would take into consideration the opinion of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India. The pri-

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75. AIR 1999 SC 1; see, *supra*, footnote 43.
76. AIR 1999 SC, at 21.
77. *K. Ashok Reddy v. Government of India*, AIR 1994 SC 1207 : (1984) 2 SCC 303.
78. See, Ch. XLI, *infra*, for discussion on this Doctrine.
79. AIR 1994 SC 1207 at 1210 : (1994) 2 SCC 303.

macy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is in itself a sufficient justification for the absence of the need for further judicial review of those decisions.

Judicial review is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of Judges in the formation of the opinion of the Chief Justice of India is another in built check against the likelihood of arbitrariness or bias. Further, the guideline of "public interest" is sufficient guideline for the proper exercise of the power and to ensure exclusion of the possibility of any arbitrariness in the exercise of power under Art. 222. Judicial review of transfer of a Judge is not excluded but only limited. The area of justiciability is restricted to the constitutional requirement of recommendation of the Chief Justice of India for exercise of the power under Art. 222 by the President of India. "The power under Art. 222 of the Constitution is to be exercised by the highest constitutional functionaries in the country in the manner indicated which provides several inbuilt checks against the likelihood of arbitrariness or bias." The judicial review of transfer can be invoked only at the instance of the transferred Judge and not at the instance of any one else.

(p) PROPRIETY OF APPOINTING ADDITIONAL JUDGES

It has already been mentioned above that under Art. 224(1), provision has been made for appointment of additional Judges for a term not exceeding two years at a time.

Questions have been raised from time to time as regards the advisability and propriety of appointing additional Judges. For example, it has been emphasized that it is the duty of the President to provide for adequate strength of permanent Judges in each High Court commensurate with the load of work before it. Then, it has been said that an additional Judge ought not to be appointed when there is a vacancy of a permanent Judge. It would not be proper to appoint an additional judge while keeping a permanent post vacant or unfilled. Further, it has been emphasized that the permanent strength of each High Court should be periodically reviewed. If the increase in work in a Court is permanent, then resort ought to be had to Art. 216 and not to Art. 224.[80] The purpose of appointment of additional judges is to meet temporary increase in work or arrears.

In India, the present position is that nearly one-third of the High Court Judges are additional Judges. A practice has developed over time that a person is appointed first as an additional judge and, then, when a permanent vacancy arises, he is promoted to be a permanent Judge. Since an additional Judge can be appointed for a maximum period of two years, at one time, his tenure is extended from time to time for a period of not more than two years at a time, and so his position remains vulnerable until he becomes a permanent Judge.

The various Judges participating in the *Gupta* decision,[81] sought to strengthen the position of the additional Judges to some extent so as to ensure their independence. The highest point was reached in this connection in the opinion of Gupta, J., who practically assimilated the position of an additional judge to that of a permanent Judge. According to him, the only consideration in extending his

80. See TULZAPURKAR, DESAI, VENKATARAMIAH, JJ. in *Gupta, supra,* Sec. B(c).
81. *Ibid.*

tenure is whether the volume of work pending in the Court requires his re-appointment. His tenure must be two years. Shorter tenure in the discretion of the executive without reference to the volume of work in a High Court militates against the concept of judicial independence.

An additional Judge like a permanent Judge could be removed by following the procedure laid down in Arts. 124(4) and (5) read with Art. 218.[82] Dropping an additional Judge at the end of his initial appointment on the ground that there are allegations against him without properly ascertaining the truth of the allegations may be expedient but it is destructive of judicial independence. Also, in the matter of re-appointment of an additional Judge, the opinion of the Chief Justice of India should have primacy over the opinion of the Chief Justice of the concerned High Court. PATHAK AND TULZAPURKAR, JJ., substantially agreed with GUPTA, J.

But the majority was not prepared to go to such a length to safeguard the position of additional Judges. The majority view may be summed up as follows :

(1) No additional Judge is to be appointed without complying with the requirement of Art. 217(1).[83]

(2) An Additional Judge has a right of being considered for appointment as a permanent Judge. The Government cannot drop him at its sweet will after the expiry of the original term.

(3) For re-appointment of an additional Judge after the expiry of his original term, the procedure laid down in Art. 217(1) must be followed.

(4) He has a right to be considered for re-appointment.

(5) A decision is to be taken in regard to him for re-appointment after consultation amongst the three constitutional authorities, *viz*., the Government of India, Chief Justice of India and Chief Justice of the concerned High Court.

(6) If it is found that there was no consultation with any of these authorities before decision is taken by the Government not to re-appoint an additional Judge, then the decision is bad.

(7) The outside limit of the term of appointment of an additional Judge is two years. When arrears of pending cases in a High Court is so large that it is not possible to dispose of them in the foreseeable future, there is no justification for appointing an additional judge for less than 2 years.

(8) If the Government decides not to re-appoint an additional Judge on irrelevant grounds or *mala fide* (other than fitness or suitability), then the decision will be bad and is challengeable.

(9) The Chief Justice of India's opinion stands *pari passu* with, and has no primacy over, the opinion of the Chief Justice of the High Court concerned in the matter of appointment or re-appointment of an additional Judge.

(10) An additional Judge is not a judge on probation.

By majority, the non-continuance of an additional Judge of the Delhi High Court was sustained as there was doubt about his honesty or integrity. The Chief

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82. See, *infra*, (t), this section.
83. *Supra*, (b), this section.

Justice of the High Court was against his continuance although the Chief Justice of India was for his extension on the ground that there was not sufficient material to doubt his integrity. The Central Government went by the opinion of the Chief Justice of the High Court in preference to that of the Chief Justice of India. The majority view was that in deciding whether to continue an additional Judge, his reputation as to honesty and integrity could be taken into account. There was no need to hold any judicial or *quasi*-judicial inquiry or give natural justice to the Judge concerned. Some of the Judges of the Supreme Court were, however, in favour of giving a fair play to the Judge.

The upshot of the majority decision in the *Gupta* case was to place a large reservoir of power in the hands of the Central Executive as regards appointment of High Court Judges. By refusing primacy of the opinion of the Chief Justice of India, the Central Executive was conceded power to decide finally as to whom to appoint when there was no unanimity of opinion among the three constitutional authorities concerned, *viz.*, the State Executive, the Chief Justice of the concerned High Court and the Chief Justice of India. However, the situation as regards appointment of High Court Judges (including additional Judges) has now undergone a change after the *S.C. Advocates- on-Record* case.[84] The opinion of the Chief Justice of India has now been given a primacy in the consultative process prior to the appointment of the Judges.

In relation to the recommendation made by the Chief Justice of a High Court for appointment of a person to an office created by a statute, the powers of judicial review is 'very restricted' e.g. when a relevant aspect is not considered.[85]

(q) TENURE

A High Court Judge (whether permanent, additional or acting) retires at the age of sixty-two years [Arts. 217(1) and 224(3)].

Any question as to the age of a High Court Judge is to be decided by the President after consulting the Chief Justice of India, and his decision is final [Art. 217(3)]. Thus, the jurisdiction to determine the Judge's age is vested exclusively in the President. Consultation with the Chief Justice of India is, however, mandatory, but his advice is not binding on the President.

No Court can claim jurisdiction to decide the question of age of a High Court Judge. No question of propriety, correctness or validity of the decision by the President can be raised before a Court.

It has been held by the Supreme Court that the President should follow natural justice, and before reaching his decision on the question, he ought to give to the Judge concerned a reasonable opportunity to give his version, and produce evidence in support of the age stated by him at the time of his appointment. "How this should be done, is, of course, for the President to decide; but the requirement of natural justice that the Judge must have a reasonable opportunity to put before the President his contention, his version and his evidence, is obviously implicit in the provision itself".[86]

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84. *Supra*, (d), this section.
85. *N. Kannadasan v. Ajoy Khose*, (2009) 7 SCC 1, 50.
86. *J.P. Mitter v. Chief Justice, Calcutta High Court*, AIR 1965 SC 961, at 966 : 1965 (2) SCR 53.

In the instant case,[87] the decision reached by the President as regards the age of a Calcutta High Court was quashed by the Supreme Court because of two infirmities therein:

(1) The evidence of the concerned Judge was not available to the President when he reached his decision. As the decision regarding his age affected the Judge in a very serious manner "considerations of natural justice and fair play require that before the question is determined by the President, the appellant should be given a chance to adduce his evidence."[88]

(2) The decision was made by the Home Minister and approved by the President. This was, therefore, the decision of the Government of India, "but that plainly is not the decision of the President" as envisaged by Art. 217(3). Accordingly, the matter was referred, to the President to decide it again after receiving the evidence from the concerned Judge.

After the President had made his decision in the above case, again the concerned Judge questioned the decision on several grounds. The Supreme Court in its decision[89] ruled against the Judge, upheld the decision of the President and laid down several important propositions as regards Art. 217(3).

The Court has stated that the President is not obligated to give a personal hearing to the Judge concerned. The Judge was entitled to make a representation but he cannot claim an oral hearing. It is for the President to decide whether in a particular case he should give a personal hearing.

The Supreme Court has emphasized that in deciding the age of the Judge, the President is to consult only the Chief Justice of India and none else. As the President performs a 'judicial function of grave importance', he cannot act in this matter on ministerial advice. The President has to reach his own decision. Although the President's decision is 'final', the Court has jurisdiction, in appropriate cases, to set aside the order "if it appears that it was passed on collateral considerations, or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the Executive, or it was founded on no evidence".

The Court would not, however, go into the merits of the President's decision. The Court has emphasized that under Art. 217(3), the President is invested with judicial power of great consequence having a bearing on the independence of the Judges of the higher courts. Accordingly, "there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India."[90]

In *Samsher v. State of Punjab*,[91] IYER AND BHAGWATI, JJ., have cast doubts on the correctness of the proposition regarding the 'personal satisfaction' of the President while acting under Art. 217(3) as stated above. They insist that the President's satisfaction is constitutionally secured when his Ministers arrive at such satisfaction. The independence of the judiciary, they think, is ensured by the

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87. *Ibid.*
88. On Natural Justice, see, M.P. JAIN, *A TREATISE ON ADM. LAW*, I, Chs. IX, X, XI & XII; JAIN, *CASES & MATERIALS ON ADM. LAW, I*, Chs. VIII, IX, X and XI.
89. *Union of India v. Jyoti Prakash*, AIR 1971 SC 1093 : (1971) 1 SCC 396.
90. *Ibid*, at 1106.
91. AIR 1974 SC 2192 : (1974) 2 SCC 831, See, Ch. III, Sec. B, *supra*.

mandatory requirement of consulting the Chief Justice with whom should rest the last word in the matter. Rejection of his advice may ordinarily be regarded "as prompted by oblique considerations vitiating the order". The ruling of these Judes in *Samsher* would deprive the President of any discretion in the matter and obligate him to act in accordance with the advice of the Chief Justice of India. But this has not yet become a binding norm as other Judes in *Samsher* expressed no opinion on this point."[92]

The *Samsher* ruling has the defect that it introduces the Council of Ministers in the decision–making process as regards the age of a High Court Judge which is objectionable. In *Samsher*, the Court was not considering the specific question in issue, but a different question altogether. As regards the specific question in issue, *Mitters'* ruling is to be preferred.[93]

Supporting *Mitter's* ruling, DESAI, J., has said in the *Additional Judges* case (*Gupta* case):[94]

> "Once the function of the President while exercising power under Art. 217(2) is held to be judicial it follows as a necessary corollary that the President has to act on his own after consultation with the Chief Justice of India but he cannot act on the advice of the Council of Ministers because a person discharging a judicial or *quasi*-judicial function cannot act at the behest or dictate of some other authority."

There are, however, two difficulties in the present provision:

(1) The advice of the Chief Justice has not been made binding on the President. Therefore, the President, in theory, can take a view different from that of the Chief Justice.

The view of IYER and BHAGWATI, J.J., expressed in *Samsher* on this point are only *obiter dicta*.

(2) Art. 361 bars any Court action against the President as such.[95] If he is to decide the matter himself (without the inter-position of the Central Government), how can President's decision be challenged in a Court on any ground?

As regards determination of the age of a Supreme Court Judge under Art. 124(2A), Parliament is to set up an authority for the purpose.[96] No such authority has been set up as yet. Therefore, for the present, the only method appears to be is to ask for *quo warranto* against the Judge concerned from the High Court and, finally, the matter can go on appeal to the Supreme Court.[97]

(r) RESIGNATION

A High Court Judge may resign from his office by writing to the President. [Proviso (a) to Art. 217(1)]. Resignation takes effect from the date on which the Judge of his own volition chooses to sever his connection with his office.

There is nothing in the Constitution which expressly or impliedly forbids the withdrawal of a communication by the Judge to resign his office before the arri-

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92. *Ibid*.
93. *Supra*, footnote 86.
94. *Supra*, this Ch. Sec. B(q).
95. See, Ch. III, Sec. A(i), *supra.*
96. *Supra*, Ch. IV, Sec. B(l).
97. For *quo warranto*, see, *infra.*

val of the date on which it was intended to take effect. A prospective resignation does not, before the intended future date is reached, become a complete, and operative act of 'resigning his office' by the Judge within the contemplation of proviso (a) to Art. 217(1).[1]

(s) VACANCY BY TRANSFER

The office of a High Court Judge falls vacant when he is appointed as a Supreme Court Judge, or is transferred to any other High Court [Proviso (c) to Art. 217(1)].

An additional Judge of the Kerala High Court was transferred to the Gujarat High Court and he was given time till 22/7/96 to join the transferee High Court. In the meantime, he continued to act as the Judge of the Kerala High Court. A petitioner filed a petition for *quo warranto* on the ground that because of the order of transfer under Art. 222, he ceased to be a Judge of the Kerala High Court under proviso (c) to Art. 217(1). Rejecting the petition, the High Court ruled that the transferred Judge continues to be a Judge of the transferor High Court and till he assumes charge in the transferee High Court, he does not cease to be a judge immediately the transfer order is issued.[2]

(t) REMOVAL OF A JUDGE

A High Court Judge may be removed from office in the same manner as a Supreme Court Judge, *i.e.*, on the two Houses of Parliament passing a resolution for his removal, by a special majority, for proved misbehaviour or incapacity.[3]

Parliament has enacted the Judges (Inquiry) Act, 1968, to regulate the procedure for investigation and proof of misbehaviour or incapacity of a Supreme Court or a High Court Judge for presenting an address by Parliament to the President for his removal. A notice of a motion for presenting such an address may be given by 100 members of the Lok Sabha, or 50 members of the Rajya Sabha.

The Speaker or the Chairman may either admit or refuse to admit the motion. If it is admitted, then the Speaker/Chairman is to constitute a committee consisting of a Supreme Court Judge, a Chief Justice of a High Court and a distinguished jurist. If notices of the motion are given on the same day in both the Houses, the Committee of Inquiry is to be constituted jointly by the Speaker and the Chairman. The Committee is to frame definite charges against the Judge on the basis of which the investigation is proposed to be held and give him a reasonable opportunity of being heard including cross-examination of witnesses. If the charge is that of physical or mental incapacity, the Committee may arrange for the medical examination of the judge by a medical board appointed by the Speaker/Chairman or both as the case may be.

The report of the Committee is to be laid before the House or Houses concerned. If the Committee exonerates the Judge of the charges, then no further action is to be taken on the motion for his removal. If the Committee finds the Judge to be guilty of misbehaviour or suffering from an incapacity, the House can take up consideration of the motion. On the motion being adopted by both

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1. *Union of India v. Gopalchandra Misra*, AIR 1978 SC 694 : (1978) 2 SCC 301.
2. *M.K. Sasidharan v. Hon'ble Chief Justice of India*, AIR 1997 Ker. 35.
3. Arts. 217(1)(*b*) and 124(4) and (5); *supra*, Ch. IV, Sec. B(l).

Houses according to the relevant constitutional provision [Art. 124(4) or 218(4)], an address may be presented to the President for removal of the Judge. Rules under the Act are to be made by a committee consisting of 10 members from the Lok Sabha and 5 members from the Rajya Sabha.

A question of some consequence has been considered by the Supreme Court in the following case.[4] What procedure should be followed when there are allegations of bad conduct against a High Court Judge but which falls short of the impeachable conduct, *viz.*, "proved misbehaviour or incapacity" [Art. 217(1)(*b*)]. The Court has emphasized that bad conduct or bad behaviour of a Judge, even though not impeachable, may yet be improper conduct not befitting the standard of a Judge. The bad conduct of a Judge has a rippling effect on the reputation of the judiciary as a whole. But the Bar Association ought not to criticise the Judge in such a manner as to amount to contempt of Court. The proper course for it would be to collect specific, authentic and acceptable material concerning the conduct of the Judge and the office-bearers of the Bar Association should see the Judge concerned, or the Chief Justice of the High Court who would make an inquiry and place the matter before the Chief Justice of India. If the conduct of the Chief Justice of the High Court is in question, the office bearers ought to approach the Chief Justice of India who will take necessary action in the matter. On the decision being taken by the Chief Justice of India, the matter should rest there.

In another case, the allotment of a plot of land to a High Court Judge by the State Government while the judge was hearing a challenge to the allotment process, was set aside by the Supreme Court and the plot directed to be vested in the State Government and sold, to "instill public confidence in the judiciary".[5]

To ensure that the highest standards of conduct are maintained, in 1999, a Code of Conduct was framed at the Chief Justices' Conference. An in-house procedure was evolved to deal with complaints against any sitting judge, which envisaged the taking of administrative steps, for example not posting cases for disposal before the judge concerned, after an enquiry by the Committee of Judges constituted for the purpose. However in the absence of any legislative sanction to the Code of Conduct, it is not enforceable nor can the proceedings of the Committee be made public.[6]

(u) OFFICERS AND EXPENSES

The officers and servants of a High Court are appointed by its Chief Justice, or such other judge or officer of the Court, as the Chief Justice may direct [Art. 229(1)]. This power of the Chief Justice is subject to three exceptions:

(1) The Governor may by rules require that, in cases mentioned in the rules, no person, not already attached to the Court, is to be appointed to any office connected therewith except after consultation with the State Public Service Commission [Proviso to Art 229(1)].

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4. *C. Ravichandran Iyer v. Justice A. M. Bhattacharjee*, (1995) 5 SCC 457 : 1995 SCC (Cri) 953.

5. *Tarak Singh v. Jyoti Basu*, (2005) 1 SCC 201 : AIR 2005 SC 338.

6. *Indira Jaisingh v. Registrar General, Supreme Court of India*, (2003) 5 SCC 494 : (2005) 11 JT 552. The Judges (Enquiry) Bill, 2006 substantially incorporates the in-house procedure evolved in the Code of Conduct.

(2) Subject to any law of the State Legislature, the conditions of service of officers and servants of the High Court may be prescribed by rules made by the Chief Justice, or any other Judge or officer of the Court as he may authorize for the purpose [Art. 229(2)].

(3) Such of the rules as relate to salaries, allowances, leave or pensions require the approval of the State Governor [Proviso to Art. 229(2)].

The article assumes that unless the Chief Justice has not only applied his mind or acted on the basis of the recommendations of a committee constituted for the purpose, but also framed Rules fixing the scales of pay of its employees, the State Government cannot be asked to fix the pay scales of the employees of the High Court.[7]

It is for the Governor (*i.e.*, the State Executive) to consider and give its approval to the proposed rules: The Court cannot issue *a mandamus* to the Governor directing him to give his approval.[8]

The Court has however expressed the hope that "one should accept in the fitness of things and in view of the spirit of Art. 229 that the approval, ordinarily and generally, would be accorded.[9] unless there were "justifiable reason" for not doing so.[10]

When the State Government refused to recommend Draft Rules forwarded by the Chief Justice inter alia relating to the pay-scales of the employees of the High Court on the ground of financial constraints, the Supreme Court directed the Chief Justice in consultation with the Government to constitute a Special Pay Commission consisting of judges and administrators, to submit a report to the Supreme Court on the basis of which "the Chief Justice and the Government shall thrash out the problem and work out an appropriate formula in regard to pay scales to be fixed for the High Court employees".[11] Pursuant to the direction a Special Pay Commission was set up and Draft Rules framed which, after some modification, was agreed by the Government before the Supreme Court, to be sent to the Governor for his approval.[12]

The Supreme Court has emphasized in *M. Gurumoorthy v. Accountant General, Assam & Nagaland*,[13] that in the matter of appointment of officers, *etc.*, of the High Court, it is the Chief Justice or his nominee who is to be the supreme authority, and the State Government cannot interfere except to the limited extent provided in Art. 229. Thus, the post of the Registrar of the High Court can be

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7. *State of UP v. Section Officer Brotherhood*, (2004) 8 SCC 286 : AIR 2004 SC 4769.

8. *State of Andhra Pradesh v. T. Gopalakrishna Murthi*, AIR 1976 SC 123 : (1976) 2 SCC 883.
Also, *State of Assam v. Bhuban Chandra Dutta*, AIR 1975 SC 889 : (1975) 4 SCC 1.
For discussion on *mandamus*, see, *infra*, Sec. E.

9. Also see, *Supreme Court Employees Welfare Association v. Union of India*, AIR 1990 SC 334 : (1989) 4 SCC 187; *High Court of Judicature, Rajasthan v. Ramesh Chand Paliwal*, AIR 1998 SC 1079, 1084-1085 : (1998) 3 SCC 72; *State of Maharashtra v. Association of Court Stenos*, (2002) 2 SCC 141 : AIR 2002 SC 555; *Union of India v. S.B. Vohra*, (2004)2 SCC 150 : AIR 2004 SC 1402.
On this point, also see, under the Supreme Court, *supra*, Ch. IV, Sec. I(g).

10. *State of Maharashtra v. Assn. of Court Stenos*, (2002)2 SCC 141 : AIR 2002 SC 555.

11. *High Court Welfare Assn.,Calcutta v. State of W.B*, (2004) 1 SCC 334 : AIR 2004 SC 354.

12. *High Court Welfare Assn.,Calcutta v. State of W.B*, (2007) 3 SCC 63 : AIR 2007 SC 1218.

13. AIR 1971 SC 1850 : (1971) 2 SCC 137.

filled only by the Chief Justice and not by the Government.[14] The power to appoint includes the power "to suspend, dismiss, remove or compulsorily retire from service". No outside executive authority can interfere with the exercise of the power by the Chief Justice. The object underlying Art. 229(1) is to ensure the independence of the High Court.[15]

The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, are charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court, form part of that Fund [Art. 229(3)].[16]

The Supreme Court has also held in the case noted below,[17] that under Art. 229, power to make appointments of High Court officers and servants is conferred on the Chief Justice, as such, and not on the High Court. The Chief Justice is the "sole authority" in the matter of appointment of the High Court staff and officers and no other Judge can usurp those powers. "The Chief Justice has been vested with wide powers to run the High Court administration independently so as not to brook any interference from any quarter, not even from his Brother Judges who, however, can scrutinize his administrative action or order on the judicial side like the action of any other authority".[18]

Commenting on Art. 229, the Supreme Court has observed: "the objects of this Article was to secure the independence of the High Court which cannot be regarded as fully secured unless the authority to appoint supporting staff with complete control over them is vested in the Chief Justice... There is imperative need for total and absolute administrative independence of the High Court."[19] But the Supreme Court has emphasized that the Chief Justice of the High Court ought not to exercise his power under Art. 229 in an arbitrary manner.

C. JURISDICTION AND POWERS

(i) COURT OF RECORD

A High Court is a Court of record and has all the powers of such a Court including the powers to punish for its contempt [Art. 215]. The power is similar in content, scope and nature to the corresponding power of the Supreme Court.[20]

As a Court of record, the High Court is entitled to preserve its original record in perpetuity. Besides, as a Court of record the High Court has twofold powers:

(i) it has power to determine the question about its own jurisdiction; and

(ii) it has inherent power to punish for its contempt summarily.[21]

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14. *State of Orissa v. Sudhansu Sekhar,* AIR 1968 SC 647 : (1968) 2 SCR 154; *S.C. Malik v. P.P. Sharma,* AIR 1982 Del, 83.

15. *Chief Justice, Andhra Pradesh v. L.V.A. Dikshitulu,* AIR 1979 SC 193 : (1979) 2 SCC 34.

16. *Supra,* Ch. VI, Sec. F(iii).

17. *High Court of Judicature, Rajasthan v. Ramesh Chand Paliwal,* AIR 1998 SC 1079 : (1998) 3 SCC 72.

18. *Ibid,* at 1086.

19. *H.C. Puttuswamy v. Hon'ble Chief Justice of Karnataka,* AIR 1991 SC 295, 298 : 1991 Supp (2) SCC 421.

20. *Supra,* Ch. IV, Sec. C(i).

21. *Naresh Shridhar Mirajkar v. State of Maharashtra,* AIR 1967 SC 1; *High Court of Judicature at Allahabad v. Raj Kishore,* AIR 1997 SC 1186 : (1997) 3 SCC 11 : (1966) 3 SCR 744.

In *Sukhdev v. Teja Singh*,[22] the Supreme Court refused to transfer contempt proceedings filed against the petitioner in the Pepsu High Court to some other High Court. The Constitution vests in the High Court itself the powers to deal with its contempt and, therefore, transfer of contempt proceedings from the Pepsu to another High Court would deprive the High Court of the jurisdiction vested in it by the Constitution.

The power to take proceedings for the contempt of Court is an inherent power of a Court of record and, therefore, the Criminal Procedure Code does not apply to such proceedings. The contemner is not in the position of an accused as "contempt proceeding is *sui generis*; it has peculiar features which are not found in criminal proceedings".[23]It has also been held that theContempt of Courts Act, 1971, reaffirms and reiterates the jurisdiction and power of a High Court in respect of its own contempt and of subordinate courts. "The Act does not confer any new jurisdiction instead it affirms the High Court's power and jurisdiction for taking action for the contempt of itself as well as of the subordinate courts".[24] The High Court's *suo motu* power to take cognizance of its contempt is not affected thereby.

In *Kapur*,[25] the Supreme Court has emphasized that as a Court of record under Art. 215, the High Court possesses inherent power and jurisdiction, not derived from the Contempt of Courts Act which does not affect that power or confer a new power or jurisdiction. In view of Art. 215, no law made by a legislature could take away the jurisdiction conferred on the High Court nor it could confer it afresh by virtue of its own authority.

The Supreme Court has further ruled in *Sukhdev*[26] that the High Court can deal with a contempt matter summarily and adopt its own procedure consistent with fair play and natural justice. "All that is necessary is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself."

A wilful violation or disobedience of an order of the High Court amounts to its contempt.[27] In 1965, the State of West Bengal issued an order prohibiting preparation of sweets from milk. A writ petition was moved in the High Court to challenge the order, the notice for which was duly served on the State. Thereafter, the Chief Minister in a broadcast made several comments on controversial matters pending before the Court. The Supreme Court held that the Chief Minister's speech was calculated to obstruct the course of justice and amounted to contempt of Court and his conduct merited disapproval.[28]

The Supreme Court has ruled in *Mohd. Ikram Hussain v. State of Uttar Pradesh*,[29] that the Constitution preserves the power of a High Court to punish

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22. AIR 1954 SC 186 : 1954 SCR 454.
23. *Delhi Judicial Service Association v. State of Gujarat*, AIR 1991 SC, at 2191 : (1991) 4 SCC 406.
24. *Ibid*, at 2198.
25. *R.L. Kapur v. State of Tamil Nadu*, AIR 1972 SC 858 : (1972) 1 SCC 651.
26. *Supra*, footnote 22.
27. *B.K. Kar v. Chief Justice*, AIR 1961 SC 1367 : (1962) 1 SCR 319; *Hoshiar Singh v. Gurbachan Singh*, AIR 1962 SC 1089 : (1962) Supp 3 SCR 127; *Aswini Kumar v. P.C. Mukherjee*, AIR 1965 Cal 484.
28. *In re, P.C. Sen*, AIR 1970 SC 1821 : (1969) 2 SCR 649.
29. AIR 1964 SC 1625 : (1964) 5 SCR 86.

for its contempt and such power is also inherent in a Court of record. The only curbs on such a power are those imposed by the Contempt of Courts Act which limits the term for which a person can be imprisoned for 6 months' simple imprisonment.[30] In the instant case, it has been ruled that disobedience of an order of the High Court amounts to contempt of the Court. A direction given by the High Court in a proceeding for writ of *habeas corpus* for the production of the body of a person has to be carried out and if disobeyed the contemner is punishable by attachment and imprisonment.[31]

The Supreme Court can also take cognisance *suo motu* of the contempt of a High Court under Art. 129.[32] The Supreme Court is the highest Court of record. It is charged with the duties and responsibilities of correcting the lower courts and tribunals and of protecting them from those whose misconduct tends to prevent the due performance of their duties. Art. 129 vests powers in the Supreme Court to punish for contempt of itself in its capacity as the highest Court of record and also as a Court charged with the appellate and superintending powers over the lower courts and tribunals as detailed in the Constitution. The Supreme Court has observed in this connection:

> "To discharge its obligations as the custodian of the administration of justice in the country and as the highest Court imbued with supervisory and appellate jurisdiction over all the lower courts and tribunals, it is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that justice is delivered without fear or favour and for that purpose all the courts and tribunals are protected while discharging their legislative duties."[33]

The Supreme Court has emphasizned that fair comments, even if outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith and in proper language, do not constitute contempt of Court.

A lawyer or a litigant who seeks to browbeat the Court and maligns the judge because he could not get a favourable order from the Court commits contempt of Court. If such activity is permitted, Judges would not be able to perform their duties freely and fairly with the result that administration of justice would become a casualty and Rule of Law would receive a set back.

The Supreme Court has cautioned the High Courts that the contempt jurisdiction ought to be exercised with scrupulous care and caution, restraint and circumspection. Recourse to this jurisdiction should be had whenever something is done which tends to affect the administration of justice, or which tends to impede its course or tends to shake public confidence in the majesty of law and to preserve and maintain the dignity of the Court.[34]

Reference may be made here to *State of Bihar v. Subhash Singh*,[35] a case of non-compliance of an order of the High Court by an executive officer. While dis-

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30. Entry 14, List III, runs as : "Contempt of Court, but not including contempt of the Supreme Court".

31. There have been quite a few cases of the High Courts punishing persons for their contempt. See, for example, *Pritam Pal v. High Court of M.P.*, (1993) Supp. (1) SCC 529 : AIR 1992 SC 904.

32. For discussion on Art. 129, See, *supra*, Ch. IV, Sec. (c).

33. *In re : Vinay Chandra Mishra*, AIR 1995 SC 2348, 2358 : (1995) 1 KLJ 504.

34. *Chetak Construction Ltd. v. Om Prakash*, AIR 1998 SC 1855 : (1998) 4 SCC 577.

35. AIR 1997 SC 1390 : (1997) 4 SCC 430.

posing of a writ petition, the High Court directed the concerned officer to consider the case of the writ petitioner and dispose it of with a reasoned order within two months. When this did not happen, the Court imposed the costs on the officer personally for non-compliance of its order. On appeal to the Supreme Court, the Court refused to interfere as the delay in complying with the High Court order was of 17 months and the concerned officer had not explained the reasons for the delay.

The Supreme Court has emphasized that the Head of the Department/designated officer is ultimately accountable to the Court for the result of the action or decision taken. The Executive is enjoined to comply with the orders passed by the Court in exercise of judicial review. The Court exercises its power of judicial review to ensure that the Executive discharges its power "truly, objectively expeditiously for the purpose for which substantive, acts/results are intended." All actions of the state or its officials must be carried out subject to the Constitution and within the limits set by the law. "Judicial review of administrative action is, therefore, an essential part of rule of law".

When the Court directs an officer to discharge its duties expeditiously and if it is not done, the official concerned is required to explain to the Court as to the circumstances in which he could not comply with the direction issued by the Court. If there was any unavoidable delay, he should have sought further time for compliance. In the instant case, the concerned official took no such step. The Supreme Court also impressed on the High Courts to be circumspect in imposing costs personally against the official and keep at the back of its mind the facts and the circumstances in each case.

The High Court ought not to pass an order holding a person guilty of its contempt and imposing on him punishment therefor without issuing him a show cause notice, or giving him an opportunity to explain the alleged contemptuous conduct.[36]

Can a statute passed by Parliament adversely affect the jurisdiction of the Supreme Court [Art. 129] and the High Courts [Art. 215] to punish for their contempt?

The Supreme Court has answered this question in *Pallav Sheth v. Custodian.*[37] The question was whether the contempt of courts Act, 1971, in any way affected the power of the High Court under Art. 215. The Supreme Court has stated that Constitution has conferred on the Supreme Court and the High Courts as courts of record the power to punish for their contempt. "This power cannot be abrogated or stultified." Any law which "stultifies or abrogates" this power under Art. 129/215 will not be regarded as having been validly enacted. But a law which provides "for the quantum of punishment, or what may or may not be regarded as acts of contempt, or even providing for a period of limitation for initiating proceedings for contempt cannot be taken to be a provision which abrogates or stultifies the contempt jurisdiction under Art. 129/215 of the Constitution."[38]

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36. *L.P. Misra v. State of Uttar Pradesh*, AIR 1998 SC 3337 : (1998) 7 SCC 379.
37. AIR 2001 SC 2763 : (2001) 7 SCC 549.
38. *Ibid.*, at 2773. For Art. 129, see, Ch. IV, Sec. C(i), *supra.*

(ii) GENERAL JURISDICTION

The Constitution does not contain detailed provisions to define the jurisdiction of the High Courts. It merely declares that their jurisdiction, the law administered by them, the respective powers of their Judges in relation to the administration of justice by the courts, and their rule-making power, all are to be the same as were enjoyed by them immediately before the commencement of the Constitution [Art. 225].

The Constitution thus maintains the *status quo* existing on January 25, 1950, in respect of the jurisdiction and powers of the High Courts. The reason for this is that the High Courts are institutions of respectable antiquity, that these courts had been in existence much before the advent of the present Constitution and they are not new bodies created for the first time by the Constitution.[39] The *status quo* in respect of the High Courts is subject to the provisions of the Constitution and any law made by the appropriate Legislature in pursuance of its powers under the Constitution [Art. 225].[40]

Accordingly, the three High Courts at Bombay, Calcutta and Madras (Chennai) possessed admiralty jurisdiction and they continue to possess this jurisdiction even after the Constitution has come into force. The Andhra Pradesh High Court being the successor of the High Court of Madras also enjoys the admiralty jurisdiction.[41]

In two important respects, however, the Constitution itself affects the *status quo* regarding the High Courts. First, any restriction on their original jurisdiction regarding a revenue matter, or an act ordered or done in revenue collection, existing in the pre-Constitution era is no longer to operate.[42] This affects the High Courts of Calcutta, Madras and Bombay from whose original jurisdiction, due to some historical circumstances, revenue matters were excluded.[43] The original jurisdiction of these Courts is now freed from a very ancient restriction dating back to the year 1781.

Secondly, a major change in the jurisdiction of the High Courts has been effectuated by Art. 226 which empowers them to issue writs and, thus, confers a significant power on them to enforce rights of the people, to administer justice and to review administrative action. This provision is discussed in detail below.[44]

Prior to the Constitution, only the three High Courts at Calcutta, Bombay and Madras could issue writs within the boundaries of their original jurisdiction. Now, Art. 226 treats all High Courts equally and confers the power on them all to issue writs within their territorial jurisdiction.

(iii) CONSTITUTIONAL QUESTION

Article 228 provides that if the High Court is satisfied that a case pending in a subordinate Court involves a substantial question of law regarding the interpreta-

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39. JAIN, *INDIAN LEGAL HISTORY*, Ch. XIX.
40. See, *infra*, See H., for legislative powers *vis-a-vis* the High Courts.
41. *M.V.AL. Quamar v. Tsavliris Salvage (Intl.) Ltd.*, AIR 2000 SC 2826 : (2000) 8 SCC 278.
42. Proviso to Art. 225.
43. Only these three High Courts had original jurisdiction in the pre-constitution days. For a detailed discussion on the genesis of this restriction, see, footnote 39, *supra*.
44. *Infra*, Secs. D and E.

tion of the Constitution, which it is necessary to determine to dispose of the case, the High Court shall withdraw the case to itself. It may then dispose of the whole case itself, or may determine only the constitutional law point and return the case to the subordinate Court for disposal in conformity with the High Court's judgment on the constitutional point.

The High Court will take action under Art. 228 only if the case cannot be disposed of without determining the constitutional question involved. This provision enables the High Court to determine the constitutional question at the earliest opportunity. The language of Art. 228 is such that once the conditions mentioned therein are satisfied, the High Court has no option but to withdraw the case to itself for disposal.[45]

(iv) POWER OF SUPERINTENDENCE

SALIENT FEATURES OF ART. 227

According to Art. 227(1), every High Court has the power of superintendence over all courts and tribunals within its territorial jurisdiction except those which are constituted by or under a law relating to the armed forces [Art. 227(4)].

This power of superintendence and control over all Subordinate Courts and tribunals is both of administrative and judicial nature, and, such power could be exercised *suo motu*. However the power of superintendence does not imply that the High Court can influence the subordinate judiciary to pass any order or judgment in a particular manner.[46] In *Waryam Singh v. Amarnath*,[47] a Constitution Bench of the Supreme Court traced the High Court's history of the power of Superintendence now elevated in the Constitution as Art. 227. The court pointed out that the material part of Art. 227 substantially reproduces the provisions of S.107 of the Government of India Act, 1917. The power of the High Court was not merely 'administrative superintendence' apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court. It was noticed that S. 107 was reproduced as S. 244 in the Government of India Act, 1935 which, in turn, was reproduced with some modification as Art. 227 of the Constitution.

The power of superintendence includes the power to call returns from the courts, to make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts, and prescribe forms in which books, entries and accounts are to be kept by the officers of such courts [Art. 227(2)].

Article 227 of the Constitution of India gives the High Court the power of superintendence over all Courts and tribunals throughout the territories in relation to which it exercise jurisdiction. This jurisdiction cannot be limited or fettered by any act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However the power under Article 227 is a discretionary power [and it is difficult to attribute to an order of the High Court, such a source of power, when

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45. *Ranadeb Chaudhary v. Land Acquisition Judge*, AIR 1971 Cal 368.
46. *Jasbir Singh v. State of Punjab, (*2006) 8 SCC 294 : (2006) 9 JT 35.
47. AIR 1954 SC 215.

the High Court itself does not in terms purport to exercise any discretionary power]. It is settled law that this power of judicial superintendence must be exercised sparingly and only to keep subordinate courts and tribunals within the bounds of their authority and not to correct mere errors. Further, where the statute bars the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could not be exercised in the "cloak of an appeal in disguise".[48]

The High Court may also settle tables of fees to be allowed to the officers of such courts and to attorneys, advocates and pleaders practising therein [Art. 227(3)]. However, the rules made, forms prescribed, or tables settled cannot be inconsistent with any law in force and require the previous approval of the Governor of the State concerned in which the subordinate courts are situated.[49]

The power of superintendence thus conferred on the High Court over the courts and tribunals within its territorial jurisdiction is very broad. It extends to administrative as much as judicial superintendence. It may even be exercised *suo motu* in the interest of justice.[50] The power and duty of the High Court under Art. 227 is essentially to ensure that the courts and tribunals, inferior to High Court, have done what they were required to do.

A notable point about Art. 227 is that it enables the High Court to superintend not only 'courts' but tribunals as well. This aspect of Art. 227 is very significant in the present era of proliferation of tribunals.[51]

SCOPE OF ART. 227

Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 CPC. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution.

It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior Court or tribunal purports to have passed the order or to correct errors of law in the decision.[52]

The power under Art. 227 is broader than that conferred on the High Court by Art. 226.[53] For example, through its power to issue *certiorari* under Art. 226, a High Court can annul the decision of a tribunal while under Art. 227 it can do

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48. *State v. Navjot Sandhu,* (2003) 6 SCC 641 : (2003) 4 JT 605. See also *Sneh Gupta v. Devi Sarup,* (2009) 6 SCC 194 : (2009) 2 JT 641, general principles of interference reiterated.
49. Proviso to Art. 227(3) read with Art. 231(2)(*b*).
50. *Pramod Saraswat v. Ashok Kumar,* AIR 1981 All 441; *Ratan Muni Jain Intermediate College v. Director of Education,* AIR 1997 All 163.
51. See, *infra,* Sec. I.
52. *Sadhana Lodh v. National Insurance Co. Ltd.,* (2003) 3 SCC 524 : AIR 2003 SC 1561.
53. See, Sec. D., *infra*.

that and do something more—it can issue further directions in the matter. But under Art. 227, the High Court does not sit as a Court of appeal.

In *Umaji v. Radhikabai*,[54] the Supreme Court has explained the difference between Arts. 226 and 227. The power to issue writs is not the same as the power of superintendence. A writ in the nature of *habeas corpus* or *mandamus* or *quo warranto* or prohibition or *certiorari* cannot be equated with the power of superintendence.[55] These writs are directed against persons, authorities and the state.

The power of superintendence conferred by Art. 227 is supervisory and not appellate jurisdiction. This jurisdiction is intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law. The power of superintendence is in addition to the power conferred on the High Courts under Art. 226. The powers conferred by Arts. 226 and 227 are separate and distinct and operate in different fields. Though, *prima facie*, it may appear that the writ of *certiorari* or prohibition partakes of the nature of superintendence inasmuch as at times the end result in both cases may be the same, in reality the nature of the power to issue these writs is different from the supervisory or superintending powers under Art. 227. The fact that the same result can at times be achieved by two different processes does not mean that both the processes are the same.

The power of superintendence is to be exercised to keep the courts and tribunals within the bounds of their authority and jurisdiction and not for correcting mere errors of law or facts. Art. 227 does not confer on the High Court power similar to that of an ordinary Court of appeal. The power under Art. 227 is to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and Tribunals within the bounds of their authority, and not for correcting mere errors.[56]

The High Court will usually interfere under Art. 227, if a Court or tribunal acts arbitrarily, or declines to do what is legally incumbent on it to do and thereby refuses to exercise jurisdiction vested in it by law, or exceeds its jurisdiction, or assumes erroneous jurisdiction, or a tribunal acts against natural justice, or its findings are based on no evidence, or are otherwise perverse, or there is an error of law apparent on the face of the record.[57]

When a tribunal has acted within its jurisdiction, the High Court does not interfere unless there is any grave miscarriage of justice or flagrant violation of law.[58] The Court would interfere only when the exercise of discretion by a tribunal is capricious, perverse or *ultra vires* and not when it is exercised judicially. The Court would not interfere merely because it might take a different view of the facts and exercise the discretion differently from what the tribunal has done.[59]

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54. AIR 1986 SC 1272, 1317 : 1986 Supp SCC 401.
55. For these writs, see, *infra*, Sec. E.
56. *Waryam Singh v. Amarnath*, AIR 1954 SC 215 : 1954 SCR 565; *Jijabai v. Pathankhan*, AIR 1971 SC 315 : (1970) 2 SCC 711; *Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ramtahel Ramnand*, AIR 1972 SC 1598 : (1972) 1 SCC 898.
57. *Dahya Lala v. Rasul Mohd. Abdul Rahim*, AIR 1964 SC 1320 : (1963) 3 SCR 1; *Ahmedabad Mfg, & Calico Ptg. Co. v. Ramtahel*, AIR 1972 SC 1568 : (1972) 1 SCC 898; *India v. Adhoc Claims Commissioner*, AIR 1977 Cal 393; *S. Mahalakshmi v. M. Syamala*, AIR 1997 Mad 34; *State of Maharashtra v. Milind*, AIR 2001 SC 393 : AIR 2001 SC 393.
58. *D.N. Banerjee v. P.R. Mukherjee*, AIR 1953 SC 58.
59. *Sarpanch v. Ramgiri Gosavi*, AIR 1968 SC 222 : (1967) 3 SCR 774.

The High Court would not re-appreciate, review or reweigh the evidence after the tribunal has appreciated the same and decided questions of fact.[60] Normally the High Court does not enter the arena of facts under Art. 227, but the High Court may interfere if a substantial portion of the evidence relied upon by the lower courts is found to be inadmissible, or of no evidentiary value,[61] or a finding of fact is not supported by any evidence, or is based on manifest misreading of evidence, or if its conclusions are perverse.[62] In this connection, the Supreme Court has observed.[63]

> "In the exercise of this jurisdiction [under Art. 227] the High Court can set aside or ignore the findings of fact of an inferior Court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the Court or tribunal has come to, or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact".[64]

In the instant case, the Supreme Court ruled that the findings recorded by the lower Court did not suffer from such an infirmity so as to justify interference with the said finding under Art. 227. The High Court in exercise of its jurisdiction under Art. 227 was not justified in setting aside the finding of fact recorded by the lower Court. Where the appellate authority under the W.B. Restoration of Alienated Land Act, 1973, gave a finding without considering the evidence on record, the High Court would be justified in interfering with such finding of fact and setting it aside.[65]

Similarly, the Supreme Court has asserted in another case[66] that under Art. 227, the High Court can set aside a finding of fact by a tribunal if it is arrived at by non-consideration of the relevant and material documents, the consideration of which could have led to an opposite conclusion.

It has been held by the Supreme Court that the High Court does not exercise its jurisdiction under Art. 227 if an alternative remedy is available.[67] But this is not an inflexible rule and there may be circumstances when, despite the existence of an alternative remedy, the High Court may deem it fit to intervene under Art. 227.[68]

When a High Court refuses to exercise its power of superintendence, the Supreme Court may itself, on an appeal from the High Court's order, exercise

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60. *Shaik Mohammed v. K.H. Karimsab,* AIR 1970 SC 61 : (1978) 2 SCC 47; *Maruti Lala Raut v. Dashrath Babu Wathare,* AIR 1974 SC 2051 : (1974) 2 SCC 615; *India Pipe Fitting Co. v. Fakruddin,* AIR 1978 SC 45 : (1977) 4 SCC 587; *Ganpat v. Sashikant,* AIR 1978 SC 955 : (1978) 2 SCC 573.

61. *Zenna Soralaji v. Virabell Hotel Co. (P) Ltd.,* AIR 1981 Bom 446.

62. *Gopala Genu v. N.P.A.A. Trust,* AIR 1978 SC 347 : (1978) 2 SCC 47; *Satyanarayan M. Sakaria v. Vithaldas Shyamlal Jhaveri,* 1994 Supp (1) SCC 614; *Achutananda Baidya v. Prafullya Kumar Gayen,* AIR 1997 SC 2077 : (1997) 5 SCC 76.

63. *Mani Nariman Daruwala v. Phiroz N. Bhatena,* AIR 1991 SC 1494 : (1991) 3 SCC 141.

64. Also see, *Chandravarkar Sita Ratna Rao v. Ashalata S. Guram,* AIR 1987 SC 117 : (1986) 4 SCC 447.

65. *Achutananda Baidya v. Prafullya Kumar Gayen,* AIR 1997 SC 2077, 2079 : (1997) 5 SCC 76.

66. *Baby v. Travancore Devaswom Board,* AIR 1999 SC 519 : (1998) 8 SCC 310.

67. *Mohd. Yunus v. Mohd. Mustaqim,* AIR 1984 SC 38 : (1983) 4 SCC 566.

68. *Union of India v. Ad-hoc Claims Commissioner,* AIR 1977 Cal 393.

the same powers in a suitable case.[69] The High Court's jurisdiction under Art. 227 cannot be controlled by a statute and it can be exercised even when a tribunal's decision is declared to be final and conclusive.[70]

The Supreme Court has held that the Commissioner of Hindu Religious Endowments who acts in a *quasi*-judicial capacity under the Orissa Hindu Religious Endowments Act is subject to High Court's superintendence under Art. 227. He is, therefore, bound to follow the decisions of the High Courts and it will amount to contempt of Court on his part if he deliberately avoids to follow the High Court's decision, *mala fide*, by giving wrong and illegitimate reasons.[71] The Court has emphasized that if the Commissioner does not follow the previous decisions of the High Court, it will create confusion in the administration of law, will undermine respect laid down by the High Court, and will impair the constitutional authority of the High Court.

When the statutory power of revision given to the High Court is inadequate, the High Court can fall back upon its supervisory power under Art. 227.[72]

Recently, the Supreme Court has emphasized [73]that the power of superintendence vested in the High Courts under Art. 227 is "part of the basic structure of the Constitution"[74]

Article 235 also vests in the High Courts some control over the subordinate courts. While Art. 227 deals with the official acts of the persons occupying those courts, Art. 235 deals with such persons themselves in relation to the discipline. Further, while the power of superintendence of the High Courts under Art. 227 extends to the courts and tribunals, the controlling power under Art. 235 extends only to courts and not to tribunals.[75]

(v) POWER OF REVIEW

There is no provision in the Constitution to confer on High Court power to review its own decisions. But the Supreme Court has ruled that a High Court being a superior Court has inherent power to review its own decisions.

The High Court can exercise the power of review to prevent miscarriage of justice, or correct grave and palpable errors committed by it. The High Court can review its decision on such ground as "error apparent on the face of the record."[76]

The Supreme Court has observed in *Thomas*[77] that a High Court being a Court of record [Art. 215][78] has inherent powers to correct its record by way of review. A Court of record envelopes all such powers whose acts and proceedings are to be

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69. *Hari Vishnu Kamath v. Ahmad Ishaq*, AIR 1955 SC 233 : (1955) 1 SCR 233.
70. *State of Gujarat v. Vakhat Singhji*, AIR 1968 SC 1481 : (1968) 3 SCR 692.
71. *B. Mishra v. B. Dixit*, AIR 1972 SC 2466 : (1973) 1 SCC 446.
72. *Baby v. Travancore Devaswom Board*, AIR 1999 SC 519 : (1987) 8 SCC 310.
73. *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125, 1150 : (1997) 3 SCC 261, also see, *infra*, Ch. XLI.
74. For explanation of this concept, see, *infra*, Ch. XLI.
75. *Infra*, Sec. G.
76. *Shivdeo Singh v. State of Punjab*, AIR 1963 SC 1909; *Ariban Tuleshwar Sharma v. Ariban Pishak Sharma*, AIR 1979 SC 1041 : (1979) 4 SCC 389; *Khaitan (India) Ltd. v. Union of India*, AIR 2000 Cal 1; *Ramakrishna Hela v. Official Liquidator*, AIR 2000 Cal 68.
77. *M.M. Thomas v. State of Kerala*, AIR 2000 SC 540 : (2000) 1 SCC 666.
78. *Supra*, Sec. C (a).

enrolled in a perpetual memorial and testimony. The High Court, as a Court of record, has a duty to itself to keep all its records correctly and in accordance with law. Hence if any apparent error is noticed by the High Court in respect of any order favoured, by it, the High Court has not only the power, but a duty, to correct it. The High Court's power in that regard is plenary. And where an order is obtained by fraud and misrepresentation the High Court can, inexercise of its inherent power, recall its order.[79]

D. WRIT JURISDICTION: ART. 226

(a) NATURE OF THE WRIT JURISDICTION

A very significant aspect of the Indian Constitution is the jurisdiction it confers on the High Courts to issue writs. The writs have been among the great safeguards provided by the British Judicial System for upholding the rights and liberties of the people. It was an act of great wisdom and foresight on the part of the Constitution-makers to introduce the writ system in India, and, thus, constitute the High Courts into guardians of the people's legal rights.

In the modern era of welfare state, when there is governmental action on a vast scale, a procedure to obtain speedy and effective redress against an illegal exercise of power by the Executive is extremely desirable. Through writs, the High Courts are able to control, to some extent, the administrative authorities in the modern administrative age. The writ system provides an expeditious and less expensive remedy than any other remedy available through the normal Court-process.

In the pre-Constitution era, only the High Courts of Calcutta, Madras and Bombay enjoyed the jurisdiction to issue writs. The jurisdiction was, however, limited territorially as each High Court could issue a writ not throughout the whole of its territorial jurisdiction but only within the area of the Presidency Town within which it enjoyed an original jurisdiction.[80] No other High Court had such a jurisdiction. Art. 226 thus affects all the High Courts in a fundamental manner and adds greatly to their power. Each High Court now has a writ jurisdiction, and even the Calcutta, Madras and Bombay High Courts have benefited for they can now issue writs even outside the limits of their original jurisdiction.

It is a public law remedy. The High Court while exercising its power of judicial review does not act as an appellant body. It is concerned with illegality, irrationality and procedural impropriety of an order passed by the State or a statutory authority.[81] Under Art. 226(1), a High Court is empowered to issue directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*, for the enforcement of a Fundamental Right and for any other purpose. High Courts exercise discretionary and equitable jurisdiction under Art. 226.[82]

The power of the High Court to entertain a petition under Art. 226 is an original power whereas the power of the Supreme Court while entertaining an appeal under Art. 136 is an appellate power[83].

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79. *Deepa Gourang Murdeshwar Katre v. Principal V.A.V. College of Arts,* (2007) 14 SCC 108 : (2007) 3 JT 403.
80. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, 303-308 (1990).
81. *Dwarka Prasad Agarwal v. B. D. Agarwal,* (2003) 6 SCC 230 : AIR 2003 SC 2686.
82. *U.P. State Sugar Corpn. Ltd. v. Kamal Swaroop Tondon,* (2008) 2 SCC 41, see also *Secretary, ONGC Ltd. v. V.U. Warrier,* (2005) 5 SCC 245 : AIR 2005 SC 3039; *Indian Overseas Bank, Annasalai v. P. Ganesan,* (2008) 1 SCC 650.
83. *State of Orissa v. Gokulananda Jena,* (2003) 6 SCC 465 : AIR 2003 SC 4207.

The significant point to note is that under Art. 226, the power of a High Court is not confined only to issue of writs; it is broader than that for a High Court can also issue any directions to enforce any of the Fundamental Rights or "for any other purpose". In a number of cases, courts have issued directions rather than writs.[84]

High Court can pass appropriate orders while exercising jurisdiction under Art. 226. Such power can neither be controlled nor affected by Or. 23 R. 3 CPC. Proceedings in exercise of writ jurisdiction are different from proceedings in a civil suit.[85]

Power under Article 226 can be exercised by the High Court to reach injustice wherever it is found.[86] But the Court has also set its own limits saying that even a wrong decision is not open to challenge unless it be mala fide. The doctrine of fairness does not convert the writ courts into appellate authorities over administrative authorities. Unless the action of the authority is mala fide, even a wrong decision taken by it is not open to challenge. Hence, whatever the wisdom (or the lack of it) of the conduct of such an authority, it will not be judicially reviewed and particularly so in commercial matters, the Courts should not risk their judgments for the judgments of the bodies to which that task is assigned.[87]

Further, it cannot supplant substantive statutory provisions. Hence, since the Land Acquisition Act, 1894 is a self-contained Code, the common law principles of justice, equity and good conscience cannot be extended in awarding interest, contrary to or beyond the provisions of the Statute and the Court has no power to award interest in a manner other than one prescribed by Statute while exercising jurisdiction under Article 226.[88]

The jurisdiction thus conferred on a High Court is to protect not only the Fundamental Rights but even any other legal right as is clear from the words 'any other purpose'. This Constitutional Right to access the High Court cannot be fettered and more so by the Court itself e.g. by directing the petitioner to deposit money as a condition precedent to such access.[89] Fundamental Rights of a citizen, whenever infringed, the High Court having regard to its extraordinary power under Article 226 of the Constitution, as also keeping in view that access to justice is a human right, would not turn him away only because a red corner notice has been issued by Interpol. The superior courts in criminal cases are entitled to go into the manner in which such red corner notice is sought to be enforced and/or whether local police is threatening an Indian citizen with arrest although they are not entitled to do so, except in terms of the Extradition Act, 1962.[90]

Any authority or body of persons having legal authority to adjudicate upon questions affecting the rights of a subject and enjoined with a duty to act judicially or quasi-judicially is amenable to the certiorari jurisdiction of the High Court. The proceedings of judicial courts subordinate to the High Court can be

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84. See, *Swayambar Prasad v. State of Rajasthan,* AIR 1972 Raj. 69; *Gujarat State Financial Corporation v. Lotus Hotel*, AIR 1983 SC 848 : (1983) 3 SCC 379; *Air India Statutory Corpn. v. United Labour Union*, AIR 1997 SC 645, 680 : (1997) 9 SCC 377.

85. *Commr. of Endowments v. Vittal Rao,* (2005) 4 SCC 120 : AIR 2005 SC 454.

86. *Secy. ONGC Ltd. v. V.U. Warrier,* (2005) 5 SCC 245 : AIR 2005 SC 3039, the Court referred to jurisdiction as 'equitable'.

87. *Karnataka State Industrial Investment & Development (Corpn.) Ltd. v. Cavalet India Ltd.,* (2005) 4 SCC 456 : (2005) 3 JT 570.

88. *Delhi Development Authority v. Mahender Singh,* (2009) 5 SCC 339 : (2009) 4 JT 208.

89. *Grand Vasant Residents Welfare Assn. v. DDA,* (2005) 12 SCC 281.

90. *Bhavesh Jayanti Lakhani v. State of Maharashtra,* (2009) 9 SCC 551.

subjected to certiorari. It is well settled principle that : (i) technicalities associated with the prerogative writs in English law have no role to play under the constitutional scheme; (ii) a writ of certiorari to call for records and examine the same for passing appropriate orders, is issued by a superior Court to an inferior Court which certifies its records for examination; and (iii) a High Court cannot issue a writ to another High Court, nor can one Bench of a High Court issue a writ to a different Bench of the High Court much less can the writ jurisdiction of a High Court be invoked to seek issuance of a writ of certiorari to the Supreme Court. The High Courts are not constituted as inferior courts in the constitutional scheme. Courts subordinate to the High Court are amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.[91]

Article 226 provides an important mechanism for judicial review of administrative action in the country. India is a democratic country governed by Rule of Law. Public authorities exercise various types of powers—executive, adjudicatory, legislative. It is necessary that public authorities act according to law and so they are subjected to judicial review. Judicial review of the action of the public authorities, is an essential part of Rule of Law and the courts have been expressly entrusted with the power of judicial review as sentinel in *qui vive*. In *L. Chandra Kumar*[92] a Seven Judge Bench of the Supreme Court held that the power of judicial review under Art. 226 of the Constitution was one of the basic features of the Constitution. Hairing held so, the court at the same time held a litigant cannot straight away invoke the High Court's constitutional jurisdiction at the first instance but must approach the Administrative Tribunal first. But even after considering the Seven Judge Bench decision in *L. Chandra Kumar* a two Judge Bench of the Supreme Court in relation to dismissal of two lakh employees by State Govt. for going on strike, held that the High Court was empowered to exercise its extra ordinary jurisdiction under Art. 226 to meet unprecedented extraordinary situations with no parallel and the availability of alternative remedy before Administrative Tribunal would not be a bar.[93]

The legal parameters of judicial review has undergone a change. WEDNESBURY principle of unreasonableness has been displaced by the doctrine of proportionality.[94] Although the Court referred to the observations of the House of Lords in Tweed Pardes Commission[95], it is doubtful whether the true implication of the observations of House of Lords results in the replacement of Wednesbury as conceived by the Supreme Court. After all, disproportionate exercise of power is also unreasonable exercise of power.

The Supreme Court has often said that judicial review is not concerned with policy making functions of the State and particularly those involving financial implications. Yet the Court appears to have made an uncharacteristic leap in *Mohd. Abdul Kadir,*[96] saying that where an issue involving public interest has

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91. *Surya Dev Rai v. Ram Chander Rai,* (2003) 6 SCC 675 : AIR 2003 SC 3044. See *Kannadasan,* (2009) 7 SCC 1, 50, where the Supreme Court has reiterated that judicial review itself is a part of the basic structure of the Constitution.

92. (1997) 3 SCC 261.

93. *T.K. Rangarajan v. Govt. of T.N.,* (2003) 6 SCC 581 : AIR 2003 SC 3032. The Court found that at the particular time there was only one member manning the Administrative Tribunal.

94. *State of Madhya Pradesh v. Hazarilal,* (2008) 3 SCC 273 : AIR 2008 SC 1300.

95. *Tweed v. Parades Commission,* (2007) 4 All ER 177.

96. (2009) 6 SCC 611 : (2009) 6 SCALE 615.

not engaged the attention of those concerned with policy, or where the failure to take a prompt decision on a pending issue is likely to be detrimental to public interest, Courts will be failing in their duty if they did not draw the attention of the authorities concerned to the issue involved in appropriate cases on the logic that the Courts are not framers but they can act as catalysts when there is a need for a policy or a change in policy.

The great advantage of Art. 226 is that its scope cannot be curtailed or whittled down by legislation. The jurisdiction of the High Court under Art. 226 cannot be taken away by any legislation. Even when the Legislature declares the action or decision of an authority final, and ordinary jurisdiction of the courts is barred, a High Court is still entitled to exercise its writ jurisdiction which remains unaffected by legislation.[1] A finality clause in a statute is no bar to the exercise of the High Court's jurisdiction under Art. 226.[2] The judicial review in India thus stands on a much firmer ground than in Britian because while the jurisdiction of the British courts to issue writs may be regulated by legislation, the same cannot be done in India.

A mere wrong decision without anything more is not enough to attract jurisdiction of the High Court under Art. 226.[3] The High Court acts as a supervisory authority and hence it cannot reappreciate the entire evidence adduced in the disciplinary proceeding to alter the findings of the enquiring authority.[4] Where a decision in an earlier writ petition adversely affected the interest of the appellants, a second writ petition at their instance was maintainable.[5]

Since exercise of power under Art. 226 is discretionary relief may be denied because of suppression of facts. But the suppressed fact must be material one, i.e. one which would have had an effect on the merits of the case. Hence where a suit is withdrawn and was not pending by the time the writ petition was heard and the writ petition was otherwise maintainable, it could not be rejected on the ground of suppression of the fact of filing of the suit.[6]

But in the judicial review jurisdiction the Court cannot change the policy by requiring the government to select the best from among "films made" instead of "films made and certified" for public exhibition.[7] The Court also found fault with the reasoning of the High Court which proceeded on the wrong assumption that the objects of the film festival and the national films awards were the same and, therefore, when permission was granted for entering the film in film festivals without certification by the Board, a similar treatment should be extended to entries for the national film award.[8]

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1. *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 : (1965) 1 SCR 933; *Custodian, Evacuee Property v. Jafran Begum*, AIR 1968 SC 169 : (1967) 3 SCR 736; *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569.
2. *Srikant K. Jituri v. Corp. of Belgaum*, see, *infra*, footnote 10.
3. *Sadhana Lodh v. National Insurance Co. Ltd.*, (2003) 3 SCC 524.
4. *Sub-Divisional Officer, Konch v. Maharaj Singh*, (2003) 9 SCC 191 : (2000) 8 SLJ 705.
5. *Pohla Singh v. State of Punjab*, (2004) 6 SCC 126 : AIR 2004 SC 3329.
6. *SJS Business Enterprises (P) Ltd. v. State of Bihar*, (2004) 7 SCC 166.
7. *Ibid*.
8. *Directorate of Film Festivals v. Gaurav Ashwin Jain*, (2007) 4 SCC 737 : AIR 2007 SC 1640.

Article 226 cannot be invoked for resolution of a private law dispute and recording a compromise as contradistinguished from a dispute involving public law character. It is also well settled that a writ remedy is not available for resolution of a property or a title dispute.[9]

Under Art. 226, the High Court may even grant a declaratory relief when writ is not a proper remedy.[10] A High Court can make an interim order pending final disposal of the writ petition.[11] A High Court cannot, however, give interim relief to the petitioner if it does not propose to determine the rights of the parties involved in the matter, but desires a regular suit to be filed for the purpose.[12]

Further, the words in the Article 'in the nature' of writs imply that a High Court is not obligated to follow all the procedural technicalities of the English law relating to writs, or changes of judicial opinions from case to case there, but should keep to the broad and fundamental features of these writs as followed in the English law. A petition is not thrown out merely because the proper writ has not been prayed for.[13]

It is impermissible for the High Court to adopt an adjudicatory role and decide upon the very existence or otherwise of the agreement as well as the tenability and legality or otherwise of making a reference to an arbitrator.[14]

The Court will not permit abuse of process by way of suppression of facts and the petition is liable to be dismissed at the threshold.[15] A writ petition cannot be filed under Art. 226 merely to enforce a purely contractual obligation. For this purpose, the proper remedy is a suit for damages or specific performance.[16] It has been held that the Courts have no jurisdiction to give directions for amending statutory rules framed by the executive.[17]

It is impermissible for the High Court to widen the scope of hearing of writ petitions without giving notice to parties concerned and without pleadings in respect of the wider questions taken up by it.[18]

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9. *Dwarka Prasad Agarwal v. B. D. Agarwal,* (2003) 6 SCC 230 : AIR 2003 SC 2686.

10. *Srikant K. Jituri v. Corpn. of the City of Belgaum,* (1994) 6 SCC 572 : AIR 1995 SC 288.

11. *Kanoria Chemicals & Industries Ltd. v. Uttar Pradesh State Electricity Board,* **(**1997) 5 SCC 772; *State of Madhya Pradesh v. M.V. Vyavsaya & Co.,* AIR 1997 SC 993 : (1997) 1 SCC 156.

12. *State of Orissa v. Madan Gopal,* AIR 1952 SC 12 : 1952 SCR 28.

13. *Basappa v. Nagappa,* AIR 1954 SC 440; *Kanu Sanyal v. Dist. Mag.,* AIR 1973 SC 2684 : (1973) 2 SCC 674.

14. *Food Corpn. of India v. Indian Council of Arbitration,* (2003) 6 SCC 564 : AIR 2003 SC 3011.

15. *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn.,* (2006) 11 SCC 731

16. *Har Shankar v. Dy. Excise and Taxation Commr.,* AIR 1975 SC 1121 : (1975) 1 SCC 737; *Divisional Forest Office v. Biswanath Tea Co. Ltd.,* AIR 1981 SC 1368 : (1981) 3 SCC 238; *Food Corporation of India v. Jagannath Dutta,* AIR 1993 SC 1494 : 1993 Supp (3) SCC 635; *State of Madhya Pradesh v. M.V. Vyavsaya & Co.,* AIR 1997 SC 993 : (1997) 1 SCC 156.

For further discussion on this point, see, Ch. XXXIX.

17. *State of Manipur v. Ksh. Moirangninthou Singh,* (2007) 10 SCC 544 : (2007) 3 SCALE 50.

18. *State of U.P. v. Satya Narain Kapoor,* (2004) 8 SCC 630 : (2004) 9 JT 410.

The Supreme Court has given an expansive interpretation to Art. 226 over time. Under Art. 226, instead of merely quashing an administrative order as invalid when it is found to be flawed, the judicial tendency is to mould the relief according to the needs of the situation. In this way, judicial review has assumed a very positive and creative complexion.[19]

Requirements of Or. 23 R. 3 CPC can be pressed into service in writ proceedings also even though in terms of explanation to S. 141 CPC the code is not applicable to proceedings under Art. 226.[20] Disposal of the case on a point not raised by the parties and omission to decide the question raised is improper.[21]

Although High Court lacked jurisdiction to entertain appeal against order of Tribunal passed in 1994 but when subsequently writ petition was filed against the Tribunal's order, it got jurisdiction in view of Supreme Court's decision in *L. Chandra Kumar* case.[22] The Court explained that the fact the jurisdiction of High Court came to be recognized only later, cannot change the situation, since when the High Court entertained the writ petition, it had jurisdiction to do so and also to consider what was the effect of the earlier order or proceeding before it and whether the earlier order was legal and justified.[23]

(b) TERRITORIAL JURISDICTION TO ISSUE WRITS

A High Court exercises its writ jurisdiction throughout the territories in relation to which it exercises its jurisdiction.

The High Court can issue a writ—

(1) to a person or authority having its location or residence within the Court's territorial jurisdiction; or,

(2) if the cause of action either wholly or partly arises within the High Court's territorial jurisdiction.

Although in view of Section 141 CPC the provisions thereof would not apply to writ proceedings, the phraseology used in Section 20(c) CPC and Article 226(2) being in *pari materia*, the decisions of the Supreme Court rendered on interpretation of Section 20(c) CPC shall apply to the writ proceedings also.[24]

The High Court can issue a writ even when the person resides, or the authority is located, outside its territorial jurisdiction if the cause of action wholly or partially arises within the Court's territorial jurisdiction. This is a very useful constitutional provision [Art. 226(2)] as a High Court within whose jurisdiction a

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19. *State of Gujarat Steel Tubes v. Its Mazdoor Sabha*, AIR 1980 SC 1896 : (1980) 2 SCC 593; *Shiv Shankar Dal Mills v. State of Haryana*, AIR 1980 SC 1037 : (1980) 2 SCC 437; *Nawabganj Sugar Mills Co. v. Union of India*, AIR 1976 SC 1152.
See, M.P. JAIN, *THE EVOLVING INDIAN ADMINISTRATIVE LAW*, 215-18 (1983).

20. *K. Venkatachala Bhat v. Krishna Nayak*, (2005) 4 SCC 117 : (2005) 3 JT 161.

21. *V. K. Majotra v. Union of India*, (2003) 8 SCC 40 : AIR 2003 SC 3909.

22. (1997) 3 SCC 261,

23. *Rama Rao v. M.G. Maheshwara Rao*, (2007) 14 SCC 54 : (2007) 10 JT 504.

24. *Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) 6 SCC 254 : AIR 2004 SC 2321.

cause of action arises is competent to issue writs to the Central Government located at New Delhi.

Cause of action implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitute the cause of action. Cause of action is not defined in any statute. It has, however, been judicially interpreted, *inter alia*, to mean every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Negatively put, it would mean that everything which, if not proved, gives the defendant an immediate right to judgment, would be part of cause of action. Its importance is beyond any doubt. The question as to whether the Court has territorial jurisdiction to entertain a writ petition, must be arrived at on the basis of averments made in the petition, the truth or otherwise thereof being immaterial. In order to confer jurisdiction on a High Court to entertain a writ petition it must disclose that the integral facts pleaded in support of the cause of action do constitute a cause so as to empower the Court to decide the dispute and that the entire or a part of it arose within its jurisdiction. The facts pleaded in the writ petition must have a nexus on the basis whereof a prayer can be granted. Those facts which have nothing to do with the prayer made therein cannot be said to give rise to a cause of action which would confer jurisdiction on the Court.[25] Even if a small fraction of the cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter. However, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merits. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum convenience.

When a part of the cause of action arises within one or the other High Court, it will be for the petitioner to choose his forum.[26]

Although the original order was given at a place outside the area where the appellate/revisional order was passed, it may give rise to a cause of action at the place where the original order was passed.

Even in a given case, when the original authority is constituted at one place and the appellate/revisional authority is constituted at another, a writ petition would be maintainable at both the places as order of the appellate authority constitutes a part of cause of action. A writ petition would be maintainable in the High Court within whose jurisdiction the appellate authority is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of the original authority merges with that of the appellate authority.[27]

In *Alchemist*[28] the Supreme Court has reiterated that for the purpose of deciding whether facts averred in a writ petition would or would not constitute a part of cause of action, one has to consider whether such facts constitute a material, essential or integral part of the cause of action and that in determining this ques-

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25. *Kusum Ingots & Alloys Ltd. v. Union of India,* (2004) 6 SCC 254 : AIR 2004 SC 2321.
26. *Kusum Ingots & Alloys Ltd. v. Union of India,* (2004) 6 SCC 254 : AIR 2004 SC 2321.
27. *Kusum Ingots & Alloys Ltd. v. Union of India,* (2004) 6 SCC 254 : AIR 2004 SC 2321.
28. *Alchemist Ltd. v. State Bank of Sikkim,* (2007) 11 SCC 335 : AIR 2007 SC 1812.

tion, the substance of the matter and not form has to be considered. Even if a small faction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the petition. The petitioner had filed a writ petition before the Punjab & Haryana High Court under Article 226 and invoked the Court's jurisdiction stating at its registered office was in Chandigarh; it carried on business at Chandigarh; It offer was accepted and such acceptance was communicated at Chandigarh; part performance of the contract took place at Chandigarh by reason of depositing of Rs. 4.50 crores as per the request of the State of Sikkim; negotiations were held between the parties at Chandigarh and, finally the letter of revocation was received by the petitioner at Chandigarh and the consequences of such revocation ensued at Chandigarh. These events had to be proved in order that the petitioner could establish that his rights had been affected by the revocation which was the reason for his filing the writ petition.[29]

Where the services of an employees of Eastern Coalfields Ltd., was terminated at Mugma (Jharkhand) where he was serving in the office of the General Manager and the entire cause of action arose in Mugma, the Supreme Court held that the mere fact that the head office of the Eastern Coalfields was in West Bengal by itself could not confer jurisdiction on the Calcutta High Court.[30] This is a patently erroneous decision. Art. 226(1) provides from the inception of the Constitution that the High Court within whose territorial jurisdiction the 'seat' of the authority was situate would have the power or jurisdiction to issue writs.[31] New India Assurance is wholly wrong and needs to be overruled as early as possible as otherwise it is productive of harm and mischief to citizens who seek relief from the High Courts of their respective states.

Where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. Hence the authorities cannot be allowed to take undue advantage of their own fault in failing to act in accordance with law.[32] Hence when under a ceiling law a return was filed and the statute required the final statement to be issued within a particular time or within a reasonable time after issuance of the order of a designated officer made in 1976 and the final statement attained finality, initiation of fresh proceedings against the landholder after the insertion of a new provision in the act to that effect could not be permitted.

It is the duty of the High Court before which the writ petition is filed to ascertain whether any part of the cause of action has arisen within the territorial limits of its jurisdiction. It depends on the facts of each case. When an order is challenged, cause of action arises.—

(i) at the place where the order was made, as well as;

(ii) at the place where its consequences fall on the person concerned.[33]

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29. The Court ought to have pointed out why these facts were not material or essential or integral part of the cause of action. As such this case begs the question of as to what such essential integral or material factors would be in a given situation.

30. *New India Assurance Co. Ltd. v. Vipin Behari Lal Srivastava,* (2008) 3 SCC 446 : AIR 2008 SC 1525.

31. *Ibid*

32. *Kusheshwar Prasad Singh v. State of Bihar,* (2007) 11 SCC 447 : (2007) 5 JT 237.

33. *SEBI v. Alka,* AIR 1999 Guj. 221; *Birla Institute of Technology v. Yamini Shukla,* AIR 1996 All 244.

Reference may be made here to *ONGC v. Utpal Kumar Basu*.[34] The petitioner company, having its registered office in Calcutta, read in a Calcutta newspaper the ONGC advertisement inviting tenders at Delhi for works to be executed in Gujarat. In response to this advertisement, the petitioner company sent its tender from Calcutta to the Delhi address. All the bids were analysed at Delhi and the petitioner company's bid was rejected on the ground that it did not fulfil the requisite experience *criteria* stipulated in the tender.

The company made representations from Calcutta against non-consideration of its offer but the same were rejected by ONGC at Delhi. The company then filed a writ petition against ONGC in the Calcutta High Court which issued direction to ONGC to consider the petitioner's tender.

On appeal by ONGC, the Supreme Court quashed the High Court order on the ground of lack of jurisdiction in the High Court as no part of the cause of action arose within the territorial jurisdiction of the Calcutta High Court. Under Art 226, a High Court can exercise its jurisdiction if a part of the cause of action arises within its territorial jurisdiction but, in the instant case, no part of the cause of action arose within the territorial jurisdiction of the Calcutta High Court.

Merely because the petitioner company read the advertisement at Calcutta, submitted the offer from Calcutta, made representations from Calcutta and received a reply thereto at Calcutta, cannot constitute facts forming an integral part of the cause of action. The advertisement itself mentioned that the tenders should be submitted at New Delhi, that they would be scrutinised there and the final decision arrived at New Delhi.

It was wrong for the Calcutta High Court to assume jurisdiction merely because the petitioner before it resided or carried on business at Calcutta. It is for the High Court to decide whether any part of the cause of action has arisen within its territorial limits of jurisdiction. The High Court ought not to claim jurisdiction merely because some insignificant event connected with the cause of action happened within its territorial limits.

Ordinarily, a High Court will not issue a writ of certiorari for quashing its own order.[35]

A FIR was filed in Shillong (Meghalaya) against the petitioner carrying on business in Bombay. The petitioner filed a writ petition in the Bombay High Court to transfer the FIR to Bombay on the ground that most of the facts on which the FIR was filed occurred in Bombay and most of the investigation in the complaint had to take place in Bombay. The Bombay High Court rejected the writ petition.

However, on appeal, the Supreme Court reversed the High Court and ordered transfer of the FIR from Shillong to Bombay.[36] The place of residence of the writ petitioner is not the criterion to determine the contours of the cause of action in a particular writ petition. Filing of a FIR in a particular State is not the sole criterion to decide that no cause of action has arisen even partly in the territorial limits of the jurisdiction of another State.

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34. (1994) 4 SCC 711.
35. *Dwarka Prasad Agarwal v. B. D. Agarwal*, (2003) 6 SCC 230 : AIR 2003 SC 2686.
36. *Navinchandra N. Majitha v. State of Maharashtra*, AIR 2000 SC 2966 : (2000) 7 SCC 640.

The passing of legislation by itself does not give rise to a cause of action to file a writ petition challenging its validity, and the situs of the office of Parliament, the State Legislature or authorities making the legislation or subordinate legislation, would not therefore be a place at which the cause of action arises wholly or in part. However, when an order is passed by a Court or tribunal or an executive authority, whether under provisions of a statute or otherwise, part of the cause of action arises at that place. So also where appellate/revisional authority is situated elsewhere a part of cause of action would arise there. Therefore a writ petition questioning the constitutionality of a parliamentary Act shall not be maintainable in the High Court of Delhi only because the seat of the Union of India is in Delhi.[37] Question of territorial jurisdiction to entertain a writ petition must be arrived at solely on the basis of averments made in the petition, the truth or otherwise thereof being immaterial.[38]

But the Court has been continually taking a restrictive approach and depriving persons to access the High Court in their own states for which the 15th amendment was made[39]

(c) WRIT JURISDICTION NOT APPELLATE BUT SUPERVISORY IN NATURE

The Supreme Court has emphasized time and again that the power of the High Court under Art. 226 is supervisory in nature and is not akin to appellate power. The main purpose of this power is to enable the High Court to keep the various authorities within the bounds of their powers, but not to sit as an appellate body over these authorities.

While exercising power under Art. 226, the High Court cannot go into the correctness or merits of the decision taken by the concerned authority but a review of the manner in which the decision is made[40]; it only ensures that the authority arrives at its decision according to law[41] and in accordance with the principles of natural justice wherever applicable.[42]

The Court can also intervene if the authority acts unfairly or unreasonably.[43] It is often said that judicial review is not directed against the decision, as such, but is confined to the decision-making process.

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37. *Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) 6 SCC 254 : AIR 2004 SC 2321.

38. *Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) 6 SCC 254 : AIR 2004 SC 2321.

39. *Alchemist Ltd. v. State Bank of Sikkim*, (2007) 11 SCC 335 : AIR 2007 SC 1812.

40. *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, (1992) Supp (2) SCC 312.

41. The Court quashed an illegal action in *Gurdeep Singh v. State of Jammu & Kashmir*, AIR 1993 SC 2638 : 1995 Supp (1) SCC 188.

42. *State of Madhya Pradesh v. M/s. M.V. Vyavasaya & Co.*, AIR 1997 SC 993, 997; *Indian Oil Corp. Ltd. v. Ashok Kumar Arora*, AIR 1997 SC 1030 : (1997) 3 SCC 72; *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, (1992) Supp. (2) SCC 312; *Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram H.S. School*, AIR 1993 SC 2155 : (1993) 4 SCC 10.

Also see, *infra*, under *Certiorari*, Sec. E.

43. *U.P. Financial Corporation v. M/s. Gem Cap (India) Pvt. Ltd.*, AIR 1993 SC 1435, at 1439 : (1993) 2 SCC 299; *Al-Karim Educational Trust v. State of Bihar*, AIR 1996 SC 1469 : (1996) 8 SCC 330.

For discussion on the concept of unreasonableness in Administrative Law, see, M.P. JAIN, *A TREATISE ON ADM. LAW*, I, 945-953; *CASES & MATERIALS ON INDIAN ADM. LAW*, III, 2229-2236.

Also see, *infra*, under *Mandamus*, Sec. E.

The Supreme Court has described the nature of the High Court's jurisdiction under Art. 226 as follows: [44]

> "... in a proceeding under Articles 226 and 227 of the Constitution the High Court cannot sit in appeal over the findings recorded by a competent Tribunal. The Jurisdiction of the High Court, therefore, is supervisory and not appellate. Consequently Art. 226 is not intended to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or order to be made."

But here also flexibility is recognized. In Rajendra Singh the Supreme Court, after setting aside the Speaker's decision declaring that certain MPs had not incurred disqualification as it was based on no evidence, did not remit the matter back to the Speaker but itself decided the issue and declared that the members were disqualified.[45]

The Supreme Court has often referred to the following extract from an English case[46] to define the nature of the jurisdiction conferred by Art. 226 :

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the Court."

This means that, generally speaking, the writ Court can quash a flawed decision but it cannot substitute its own decision for that of the concerned authority.

In exercise of its jurisdiction the High Court is not justified in going into merits and expressing its views and thereafter remitting the matter.[47]

Directing that final report of police under S. 173(2) Cr. P.C. was not to be accepted, and if accepted to be treated as rejected, the impugned order clearly indicated that the High Court wanted the rejection of the final report though it was not specifically spelt out, hence, impugned order set aside.[48]

The principle stated above represents the nature of the High Court's supervisory power under Art. 226.

(d) INTER-RELATIONSHIP OF ARTS. 32 AND 226

Article 226 operates "notwithstanding anything in article 32" [Art. 226(1)]. Thus, Art. 32 and Art. 226 exist independently of each other.

Article 226 is wider in scope than Art. 32. Under Art. 32, the Supreme Court may issue writs for the enforcement of Fundamental Rights only;[49] under Art. 226, on the other hand, a High Court may enforce not only a Fundamental Right but also any other legal right. For example, under Art. 265, no tax can be levied

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44. *Shama Prashant v. Ganpatrao,* AIR 2000 SC 3090, 3097 : (2000) 7 SCC 522.
45. *Rajendra Singh Rana v. Swami Prasad Maurya,* (2007) 4 SCC 270 : AIR 2007 SC 1305.
46. *Chief Constable of the North Wales Police v. Evans,* (1982) 3 All ER 141 (HL).
47. *Union of India v. Adani Exports Ltd.,* (2007) 13 SCC 207 : (2007) 13 JT 144.
48. *Sanjay Bansal v. Jawaharlal Vats,* (2007) 13 SCC 71 : AIR 2008 SC 207.
49. *Infra,* Chs. XX-XXXIII.

without the authority of law.[50] When, therefore, a tax imposed without the authority of law infringes a Fundamental Right, relief can be had either under Art. 32, or Art. 226. But when a Fundamental Right is not infringed, only Art. 226, and not Art. 32, can be invoked.[51]

For enforcement of Fundamental Rights, a parallel writ jurisdiction has been conferred on the High Courts as well as on the Supreme Court. The High Court's jurisdiction is not in derogation of the Supreme Court's jurisdiction.[52]

Although under the Constitution, Arts. 32 and 226 exist independently of each other, the courts have by their process of interpretation introduced the doctrine of *res judicata* to discourage multiple and overlapping writ petitions in the High Court and the Supreme Court to get the same relief in the same factual situation.[53]

(e) ARTS. 226 AND 136 COMPARED

The scope of Art. 136 has already been discussed earlier.[54] Art. 226 differs from Art. 136 in several respects.

While under Art. 136, the Supreme Court hears appeals from courts or tribunals, and not from any administrative body, under Art. 226, a High Court can issue a writ to any authority, *quasi*-judicial or administrative or legislative. That way, Art. 226, is broader in scope than Art. 136. But, from another point of view, Art. 226 is narrower in compass than Art. 136. Whereas Art. 136 confers appellate jurisdiction on the Supreme Court, Art. 226 confers only a writ jurisdiction on a High Court, and the scope allowed to a Court in its appellate jurisdiction is much wider than what is available to a Court in its writ jurisdiction.

Under Art. 136, the Supreme Court can go into questions of fact as well as of law and can give any remedy which appears to it to be suitable in the circumstances of the case. A High Court's powers under Art. 226 are not so broad. The High Court does not act as a Court of appeal under Art. 226.[55] The scope of writs is not as wide as that of an appeal as many more matters can be taken cognisance of in an appeal than under the writs, *e.g.*, in *certiorari*, a High Court goes into errors of law manifest on the face of the record while in an appeal under Art. 136 there is no such restriction on the Supreme Court.

In *Workmen, Cochin Port Trust v. Board of Trustees*,[56] an interesting question was raised : whether dismissal of the special leave appeal petition by the Supreme Court would necessarily bar a writ petition before the High Court under Art. 226 on the same grounds?

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50. *Supra*, Ch. II.
51. *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661 : (1955) 2 SCR 603.
52. Also see, *infra*, Ch. XXXIII, for application of the doctrine of *res judicata* to petitions under Art. 32.
53. See, *infra*, under *Res Judicata.*
54. See, *supra*, Ch. IV, Sec. D.
55. *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425 : (1955) 2 SCR 1.
56. AIR 1978 SC 1283 : (1978) 3 SCC 119.

The facts in the case were as follows: an industrial tribunal gave an award in favour of the workmen. A special leave petition under Art. 136 against the award was dismissed by the Supreme Court. The employees thereafter filed a writ petition in the High Court under Art. 226 substantially on the same grounds on which the special leave petition was based earlier. Objection against the maintainability of the petition was rejected by the Supreme Court. The Court emphasized that the question was whether the order dismissing the special leave petition had considered all the matters raised in the petition. When the Supreme Court rejected the special leave petition earlier, it decided nothing specifically except that it was not a fit case for appeal.[57]

When a person files a special leave petition in the Supreme Court under Art. 136, but withdraws the same, he cannot be barred from filing a writ petition in the High Court under Art. 226.[58] The situation would however be different if the appeal was dismissed on merits by the Supreme Court. In such a situation, the same matter cannot be re-agitated through a writ petition in the High Court under Art. 226.[59]

(f) INTER-RELATION BETWEEN ARTS. 226 AND 227

In practice parameters of exercising jurisdiction under either Articles 226 or 227 are almost similar and width of jurisdiction exercised by High Courts, unlike English courts, has almost obliterated distinction between the two jurisdictions. However, in *Radhey Shyam v. Chhabi Nath*,[60] another two judge Bench of the Supreme Court doubted the correctness of the decision in Surya Dev Rai and after pointing out the erroneous reading of a 9-judge Constitution Bench Judgement in *Naresh Shridhar Mirajkar*,[61] expressed its difference of opinion with the views expressed in Surya Dev Rai, directed the matter to be placed before the Chief Justice of India for constituting a larger Bench to consider the correctness or otherwise of the law laid down in Surya Dev Rai. Three differences that nevertheless exist, are: (i) Issuing writ of certiorari is an exercise of its original jurisdiction by High Court while exercise of supervisory jurisdiction under Art. 227 is not original, in this sense the latter is akin to appellate revisional or corrective jurisdiction; (ii) If the High Court issues writ of certiorari it may only annul or quash proceedings but cannot substitute its own decision in place thereof, while in exercise of supervisory jurisdiction High Court may not only quash or set aside the impugned proceedings, judgment or order but may also give suitable directions so as to guide the subordinate Court as to the manner in which it should proceed thereafter or afresh. In appropriate cases High Court may make an order in supersession or substitution of order of subordinate Court as the Court should have made in the facts and circumstances of the case; and (iii) Jurisdiction under Art. 226 has to be invoked by an aggrieved party, but supervisory jurisdiction under Art. 227 can be exercised *suo motu* as well.[62] Remedies under Articles 226 and 227 are not available for correcting mere errors of fact or law. They are

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57. On this point, see, also, Ch. IV, Sec. D(a), *supra*.
58. *Ahmedabad Mfg. & Calico Printing Co. v. Workmen*, AIR 1981 SC 960 : (1981) 2 SCC 663.
59. Also see, *infra*, under *Res Judicata.*
60. (2009) 5 SCC 616 : (2009) 6 JT 511.
61. AIR 1967 SC 1.
62. *Surya Dev Rai v. Ram Chandra Rai*, (2003) 6 SCC 675 : AIR 2003 SC 3044. See also *State of Madhya Pradesh v. Visan Kumar Shiv Charan Lal*, (2008) 15 SCC 233 and cases cited therein.

available only when (i) error is manifest and apparent on face of record, and (ii) grave injustice or gross failure of justice has been occasioned thereby. Further, ordinarily neither is available when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved but in a given situation. High Court has to choose between causing delay by its intervention and meet the need for imminent action.[63] The power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. The curtailment of revisional jurisdiction of the High Court under Section 115 CPC by Amendment Act 46 of 1999 does not take away and could not have taken away the constitutional jurisdiction of the High Court.[64]

In *MMTC*,[65] a 3 Judge Bench of the Supreme Court undertook an exhaustive study of the interrelation between Article 226 and 227 quoting a number of earlier observations of the Court converging to the view that the distinction between the two jurisdictions stands almost obliterated in practice and viewed the broad general difference between them as follows:

(a) A writ petition under Art. 226 was an exercise of the High Court's original jurisdiction whereas that under Art. 227 was of supervisory and in that sense it was akin to appellate, revisional or 'corrective' jurisdiction.

(b) In the case of a writ of certiorari, the records of the proceedings are certified and then sent up by the inferior court or tribunal is brought up before the High Court and it may 'simply annul or quash the proceedings and do no more' whereas in its supervisory jurisdiction the Court can go further in that after quashing the proceedings it may also 'give such direction as the facts and circumstances of the case may warrant and even substitute such a decision of its own in place of the impugned decision'.

The first decision of the High Court on a petition under Art. 226 or Art. 227 is by a single judge. Writ proceedings under Art. 226 fall on the original side of the High Court and therefore, an intra-Court appeal is possible from a single Judge to a Division Bench. Not so in case of Art. 227 for proceedings thereunder do not fall on the original side.

There are many situations where a petition can be filed under both the Articles. The Supreme Court has ruled that where the fact justifies a party filing a petition either under Art. 226 or Art. 227, and a party chooses to file the petition under both the Articles, in fairness to the petitioner concerned, the Court should treat the petition as having been filed under Art. 226 as this will protect petitioner's right to file an intra-Court appeal from the single Judge to the Division Bench.[66]

(g) ALTERNATIVE LEGAL REMEDY

A High Court does not ordinarily issue a writ when an alternative efficacious remedy is available. Under Art. 226, the High Court does not decide disputes for

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63. *Surya Dev Ra v. Ram Chandra Rai*, (2003) 6 SCC 675 : AIR 2003 SC 3044.
64. *Surya Dev Rai v. Ram Chandra Rai*, (2003) 6 SCC 675 : AIR 2003 SC 3044.
65. *MMTC Limited v. Commissioner of Income Tax*, (2009) 1 SCC 8 : AIR 2009 SC 1349.
66. *Umaji Keshao Meshran v. Radhikabai*, AIR 1986 SC 1272 : 1986 Supp SCC 401; *Lokmat Newspapers Pvt. Ltd. v. Shankar Pd.*, AIR 1999 SC 2423 : (1999) 6 SCC 275.

which remedies under the general law are available. Ordinary remedies are not sought to be replaced by Art. 226.

The principle has been stated by the Supreme Court as follows:[67]

> "It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs...."

Article 226 is not meant to short-circuit or circumvent statutory procedures.[68] In *State of West Bengal v. North Adjai Coal Co.*,[69] the Supreme Court has held that normally before a writ petition under Art. 226 is entertained, the High Court would insist that the party aggrieved by the order of a *quasi*-judicial tribunal should have recourse to the statutory authorities which have power to give relief.[70]

Thus, to question the election to an office or a body, the statutory procedure by way of election petition, and not Art. 226, ought to be resorted to.[71] The Supreme Court has stated recently that once an election is over the aggrieved candidate ought to pursue his remedy in accordance with the relevant statutory provisions and the Court will not ordinarily interfere with the elections under Art. 226. The Court will not ordinarily interfere where there is an appropriate or equally efficacious remedy available, particularly in relation to election disputes.[72]

When a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy and not the discretionary remedy under Article 226 of the Constitution.[73]

The Motor Vehicles Act contains a complete code for regulating issue of permits, and a person aggrieved by the refusal of a permit should take recourse to the remedies provided under the Act and not to a writ petition.[74]

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67. *Union of India v. T.R. Varma,* AIR 1957 SC 882 : 1958 SCR 499.

68. *Titaghur Paper Mills Co. Ltd. v. State of Orissa,* AIR 1983 SC 603 : (1983) 2 SCC 33; *Asstt. Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd.,* AIR 1985 SC 330 : (1985) 1 SCC 260; *Swetambar Stahanakwasi Jain Samiti v. The Alleged Committee of Management Sri R.J.I. College, Agra,* (1996) 3 JT (SC) 21 : (1996) 3 SCC 11; *APDDC Staff & Workers Union v. Govt. of AP,* AIR 2000 AP 70.

69. (1971) 1 SCC 309, 310 : (1971) 27 SCC 268.
Also see, *Sri Ramdas Motor Transport Ltd. v. Tadi Adhinarayana Reddy,* AIR 1997 SC 2189 : (1997) 5 SCC 446.

70. Also see, *U.P. Jal Nigam v. Nareshwar Sahai Mathur,* (1995) I SCC 21 : 1995 SCC (194) 209; See also *Radha Raman Samanta v. Bank of India,* (2004) 1 SCC 605 : (2003) 10 SCALE 1094, for the stage when the issue to be raised and decided.

71. *Prafulla Chandra v. Oil India Ltd.,* AIR 1971 Ass. 9; *Bar Council of Delhi v. Surjeet Singh,* AIR 1980 SC 1612 : (1980) 4 SCC 211; *Ravjibhai Bhikabhai v. Chief Officer, Bilimora Nagar Palika,* AIR 1982 Guj 163.
But see, *D.L. Suresh v. Institute of Chartered Accountants,* AIR 1983 Knt. 43, where the High Court interfered because the nomination paper was unduly rejected and the election petition could be filed only after the election. When an election petition is not available to cover a specific question arising out of a municipal election, a writ petition would be maintainable: *Navuba Gokalji v. Returning Officer,* AIR 1982 Guj 281.

72. *Umesh Shivappa Ambi v. Angadi Shekara Basappa,* AIR 1999 SC 1566 : (1998) 4 SCC 529.

73. *Seth Chand Ratan v. Pandit Durga Prasad,* (2003) 5 SCC 399 : AIR 2003 SC 2736.

74. *G. Veerappa Pillai v. Raman and Raman Ltd.,* AIR 1952 SC 192 : 1952 SCR 583.

For adjudication of labour disputes, recourse should be had to the machinery provided under the Industrial Disputes Act.[75] An income-tax assessee should take recourse to the machinery provided by the Income-tax Act in case he feels aggrieved by an action of the income-tax authorities.[76]

In relation to appointment of non-hereditary trustees from the Vysya community of Marwadies of Adilabad, appropriate remedy lies under S. 92. CPC or under provisions of the Hindu Religious Institutions and Endowments Act, 1987 and not under Art. 226.[77]

The petitioner was assessed to property tax by the Delhi Municipal Corporation. The petitioner challenged it as totally arbitrary and unwarranted through a writ petition under Art. 226. The High Court rejected the writ petition on the ground that the Delhi Municipal Corporation Act is "a complete code in itself. It provides for an appeal against the assessment and levy of house tax to the district judge. The Act, thus, provides for a machinery for redressal of grievances of a person who feels aggrieved on account of levy or assessment of any tax under this Act."[78]

When there is an arbitration clause in a contract the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless both the parties agree to another mode of dispute resolution.[79]

When no action is taken by the police on the information given to it, the complainant can have recourse to S. 190 r/w S. 200 Cr. P.C. to lay the complaint before the Magistrate concerned. Without availing that remedy, the complainant could not have approached the High Court by filing a writ application.[80] Where prosecution proceedings under S. 276 of the Income Tax Act were challenged on the ground that (i) there was no concealment of income and the allegation of tax evasion was based on no evidence, and (ii) the delay in filing returns happened in unavoidable circumstances and without any guilty mind it was held that the absence of culpable mental state could be pleaded in defence at the criminal trial and the High Court rightly did not deal with those aspects.[81]

Where a large number of employees of PSU transferred to a private organization in a terms of a bipartite agreement between the PSU and the private organization, writ petition challenging such transfer on the ground that in the absence of specific consent of the employees, such transfer was arbitrary and unreasonable, it was held that since the claim of the writ petitioner employees related to interpretation of the agreement and appointment letters and no disputed facts were involved and the issue related to employment of hundreds of employees and also because alternative remedy is a rule of discretion and not a rule of law,

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75. *Basant Kumar v. Eagle Rolling Mills,* AIR 1964 SC 1260 : (1964) 6 SCR 913; *Prafulla Chandra v. Oil India,* AIR 1971 Ass 9; See also *U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh,* (2004) 4 SCC 268, industrial dispute normally before the Tribunal.

76. *Champalal Binani v. CIT,* AIR 1970 SC 645 : (1971) 3 SCC 20.

77. *Rajasthani Pragathi Samaj v. Ramesh Kumar Sharma,* (2003) 11 SCC 680 : AIR 2004 SC 105.

78. *India Trade Promotion Organisation v. Deputy Assessor & Collector, MCD,* AIR 1997 Del. 74.

79. *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.,* (2004) 3 SCC 553 : (2003) 10 JT 300.

80. *Gangadhar Janardan Mhatre v. State of Maharashtra,* (2004) 7 SCC 768 : AIR 2004 SC 4753.

81. *Prakash Nath Khanna v. CIT,* (2004) 9 SCC 686 : AIR 2004 SC 4552.

remedy under industrial law was not a bar to maintainability of such writ petition[1]

The Supreme Court has observed in *Thansingh*[2] that though Art. 226 is couched in wide terms, the exercise of the jurisdiction is discretionary and is subject to several self-imposed restrictions, one of these being that ordinarily the writ jurisdiction is not to be resorted to if the petitioner can obtain an alternative remedy under the statute. "Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy."

Proceedings under Art. 226 are not a substitute for statutory appeal.[3] But an appeal to the Central Government from an order passed by the Reserve Bank of India would be an appeal from Caesar to Caesar since the Reserve Bank would hardly act without the concurrence of the Central Government.[4]

In the instant case, the petitioner challenged through a writ petition the decision made by the Commissioner of Sales Tax. Under the relevant law, a reference of questions of law could be made by the Commissioner to the High Court. The petitioner did not resort to this remedy but moved the writ jurisdiction of the High Court. The Supreme Court rejected the writ petition saying "the High Court normally will not permit by entertaining a petition under Art. 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up".[5]

The Government passed an order compulsorily retiring the writ petitioner. He filed a writ petition to challenge the order, but the writ petition was dismissed by the High Court on the ground that there was an alternative remedy available to him before the U.P. Service Tribunal which was the highest forum created by law to give full, complete and expeditious relief to public servants in service matters. The petitioner could not invoke the extraordinary jurisdiction under Art. 226 for redressal of his grievances, by-passing the special forum created specifically by law for redressal of such grievances efficaciously and adequately.[6]

The Supreme Court has laid down the proposition that when a statutory forum or tribunal is specially created by a statute for redressal of specified grievances of persons on certain matters, the High Court should not normally permit such persons to ventilate their specified grievances before it by entertaining petitions under Art. 226 of the Constitution.[7]

Although the High Courts do apply the rule of "exhaustion of the statutory remedy" before issuing a writ under Art. 226, the rule is not rigid but somewhat flexible and it is primarily a matter of the discretion of the writ Court.[8] The Su-

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1. *Balco Captive Power Plant Mazdoor Sangh v. NTPC,* (2007) 14 SCC 234 : AIR 2008 SC 336.
2. *Thansingh v. Supdt. of Taxes,* AIR 1964 SC 1419 : (1964) 6 SCR 654.
3. *Transmission Corpn. of A.P. v. Ch. Prabhakar,* (2004) 5 SCC 551 : AIR 2004 SC 3368.
4. *Reserve Bank of India v. M. Hanumaiah,* (2008) 1 SCC 770, 778 : AIR 2008 SC 994.
5. *All India Lawyers Forum for Civil Liberties v. Union of India,* AIR 2001 Del. 380.
6. *State of Uttar Pradesh v. Labh Chand,* AIR 1994 SC 754, 759 : (1993) 2 SCC 495.
Also see, *Thansingh, supra,* footnote 2.
7. *Secretary, Minor Irrigation and Rural Engineering Services v. Sahngoo Ram Arya,* (2002) 5 SCC 521.
8. *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani,* AIR 1961 SC 1506 : (1962) 1 SCR 753.

preme Court has characterised the rule of "exhaustion of the remedies" as "a rule of policy, convenience and discretion rather than a rule of law."[9]

A writ petition is maintainable when the lis involves a public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief. Question as to when discretionary jurisdiction is to be exercised or refused has to be determined having regard to the facts and circumstances of each case. No hard and fast rule can be laid down in this regard.[10]

The contention that in view of the provision in the agreement for cancellation of the agreement without assigning any reasons barred resort to writ jurisdiction under Art. 226 has been repelled as the cancellation was not for violation of any terms of the agreement and the Letter of Intent (LOI) holders and those awaiting issue of LOIs were also equally affected.[11]

The rule of exhaustion of remedies is not however an inflexible rule; it is a rule of policy, convenience and discretion rather than of law. It is a rule of practice rather than that of jurisdiction. Existence of an alternative remedy does not affect High Court's jurisdiction under Art. 226 and so it is not always obligated to relegate the petitioner to the other remedy available to him. The High Court's jurisdiction being discretionary, it will take into consideration the alternative remedy available and then decide whether in the circumstances of the case, it should grant or refuse to grant a remedy under Art. 226.[12]

The Supreme Court has observed in *Nooh*:[13]

> "If an inferior Court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior Court's sense of fairplay the superior Court may, we think, quite properly exercise its power to issue the prerogative writ of *certiorari* to correct the error of the Court or tribunal of first instance even if an appeal to another inferior Court or tribunal was available..."[14]

Where there is complete lack of jurisdiction of the officer or authority or tribunal to take action or there has been a contravention of fundamental rights or there has been a violation of rules of natural justice or where the Tribunal acted under a provision of law, which is ultra vires, then notwithstanding the existence of an alternative remedy, the High Court can exercise its jurisdiction to grant relief.[15]

A writ under Art. 226 is not denied when, for instance, the alternative remedy is ill-suited, burdensome and onerous, or the petitioner has lost it through no fault of his,[16] or if the tribunal in question acts under an *ultra vires* law,[17] or without a

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9. *State of Uttar Pradesh v. Mohd. Nooh*, AIR 1958 SC 86 : 1958 SCR 595.
10. *Sanjana M. Wig. v. Hindustan Petroleum Corpn. Ltd*., (2005) 8 SCC 242 : AIR 2005 SC 3454.
11. *Onkar Lal Bajaj v. Union of India*, (2003) 2 SCC 673 : AIR 2003 SC 2562.
12. *Gopal Sen v. State of West Bengal*, AIR 1981 Cal 437; See also *Indian Airlines Ltd. v. Prabha D. Kanan*, (2006) 11 SCC 67 : AIR 2007 SC 548.
13. *State of Uttar Pradesh v. Mohd. Nooh*, AIR 1958 SC 86 : 1958 SCR 595.
14. Also see, *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai*, AIR 1999 SC 22 : (1998) 8 SCC 1.
15. See also *Seth Chand Ratan v. Pandit Durga Prasad*, (2003) 5 SCC 399 : AIR 2003 SC 2736.
16. *Venkateswaran v. Wadhwani*, AIR 1961 SC 1506 : (1962) 1 SCR 753.
17. *E.B. Kendwadih Colliery Co. v. Union of India*, AIR 1983 Del 70.

law,[18] or exceeds its jurisdiction,[19] or has not followed the principles of natural justice,[20] or the writ petition seeks enforcement of a Fundamental Right.[21]

When an order has been made completely outside jurisdiction of the authority making it,[22] or in violation of natural justice,[23] the aggrieved party is entitled to invoke the writ jurisdiction of the High Court instead of availing the alternative statutory remedy. Thus, when a taxing authority acts despite the absence of basic jurisdictional facts, the assessee does not have to exhaust the available statutory remedy before seeking a writ and the High Court can stay assessment proceedings at its inception.[24]

The Registrar of Trade Marks *suo motu* gave a notice to the writ petitioner to show cause as to why the registration of his trade mark be not cancelled. The petitioner filed a writ petition questioning the notice on the ground that the Registrar had no power to issue any such notice. The High Court dismissed the writ petition by the petitioner on the ground that the petitioner had not exhausted the remedy provided by the relevant law, *viz*. The Trade and Merchandise Marks Act, 1958.

On appeal, the Supreme Court reversed the High Court saying that the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the petitioner was wholly without jurisdiction. The Supreme Court quashed the notice issued by the Registrar as he had no power to issue such a notice to the petitioner. The Supreme Court stated that the High Court can entertain a writ petition "in spite of the alternative statutory remedies" "in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation".[25]

In tax-assessment cases, where an appeal from the assessing officer can be taken to a higher authority only after depositing the tax assessed, the remedy provided is burdensome, and so the assessee can approach the High Court under Art. 226.[26] The Supreme Court has observed that it is not palatable to 'our jurispru-

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18. *N.M.C.S. & Weaving Mills v. Ahmedabad Municipality,* AIR 1967 SC 1801; *J.K. Manufacturers v. Sales Tax Officer,* AIR 1970 All 362.

19. *Kashi Nath v. Collector, Central Excise,* AIR 1972 All 16; *Bawa Gopal Das Bedi & Sons v. Union of India,* AIR 1982 Pat 152.

20. *Tata Electric Loco Co. v. Commr., Commercial Taxes,* AIR 1967 SC 1401; *Babu Ram Prakash Chandra Maheshwari v. Antarim Zila Parishad,* AIR 1969 SC 566 : (1969) 1 SCR 518; *T.R. Ramiah v. Dy. Commr.,* AIR 1975 Knt 77; *State of Uttar Pradesh v. Indian Hume Pipe Co.,* AIR 1977 SC 1132 : (1977) 2 SCC 724; *V. Vellaswamy v. Inspector General of Police, Tamil Nadu,* AIR 1982 SC 82 : (1981) 4 SCC 247.

21. *Whirlpool Corporation v. Registrar of Trade Marks,* AIR 1999 SC 22 : (1998) 8 SCC 1.

22. *Shyam Sunder Azad v. Transport Appellate Tribunal Rajasthan,* AIR 1971 Raj 97; *Whirlpool Corp., supra,* note 11; *Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya,* AIR 1987 SC 2186 : (1987) 4 SCC 525.

23. *Orient Paper Mills v. Deputy Collector,* AIR 1971 Ori 25; *Titaghur Paper Mills Co. Ltd. v. Orissa,* AIR 1983 SC 603 : (1983) 2 SCC 433; *Smt. Sushila Chand v. State Transport Authority,* AIR 1999 Ori 1; *Rajan Ramnath Patil v. State of Maharashtra,* AIR 2001 Bom. 361.

24. *Veeri Chettiar v. Sales Tax Officer,* AIR 1971 Mad. 155.

25. *Whirpool Corporation v. Registrar of Trade Marks, Mumbai,* AIR 1999 SC 22, at 27 : (1998) 8 SCC 1. Also, *Khaitan (India) Ltd. v. Union of India,* AIR 2000 Cal 1.

26. *Indian Oil Corporation Ltd. v. Union of India,* AIR 1982 Goa 26.

dence' to turn down the prayer for a writ on the negative plea of 'alternative remedy' since the root principle of law 'married to justice, is *ubi jus ibi remedium*'.[27]

The existence of an adequate alternative legal remedy is not a bar to the invocation of the High Court's jurisdiction under Art. 226 when relief is sought in case of infringement of a Fundamental Right.[28] The position in this regard is very much similar to that as under Art. 32.[29] When appeal against Tribunal's decision before High Court by U.P. Avas Evam Vikas Parishad was not maintainable under S. 381 of U.P. Nagar Mahapalika Adhiniyam, a writ petition filed under Art. 226 would be maintainable.[30]

Where a party has initiated an alternative remedy but not pursued it, the High Court can call upon the party to elect either the alternative remedy or the writ petition. If the party has withdrawn from the alternative remedy by the time the writ petition was heard, the writ petition should not be rejected if otherwise maintainable, even though the party had not disclosed pendency of the alternative remedy when it filed the writ petition. Therefore, the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits.[31]

A writ petition which seeks an interpretation of intricate questions of law, or an interpretation of constitutional provisions, and a petition which raises an issue of jurisdiction is directly maintainable in the High Court.[32] But when the order of Sales Tax Tribunal is challenged in appeal as well as in writ petition simultaneously, the petition has been held to be not maintainable.[33]

(h) LACHES

No period of limitation is prescribed for a High Court to exercise its power under Art. 226. Nevertheless, a writ petition under Art. 226 may be dismissed by a High Court on the ground of petitioner's laches because courts do not like stale claims being agitated and unsettle settled matters. Therefore, writ petitions filed after inordinate delay are usually dismissed.[34] For example, in *Sadasivaswamy,*[35]

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27. *Shiv Shankar Dal Mills v. State of Haryana*, AIR 1980 SC 1037 : (1980) 2 SCC 437. Also see, *Hay Lay Poultry v. State of Haryana*, AIR 1977 SC 685 : (1976) 4 SCC 87; *Anil Kumar Panda v. State of West Bengal*, AIR 1997 Cal 128.

28. *Himmat Lal v. State of Madhya Pradesh*, AIR 1954 SC 403 : 1954 SCR 1122.

29. *Infra*, Ch. XXXIII, for discussion on Art. 32.

30. *Kanak v. U.P. Avas Evam Vikas Parishad*, (2003) 7 SCC 693 : AIR 2003 SC 3894.

31. *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar*, (2004) 7 SCC 166 : AIR 2004 SC 2421.

32. *Modern Syntax [I] Ltd. v. Debts Recovery Tribunal, Jaipur*, AIR 2001 Raj 170.

33. *State of Punjab v. Punjab Fibres Ltd.*, (2005) 1 SCC 604 : AIR 2005 SC 437.

34. *Durga Pd v. Chief Controller*, AIR 1970 SC 769 : (1969) 1 SCC 185; *Krishnaswamy v. Union of India*, AIR 1973 SC 1168; *Amrit Lal v. Collector, C.E.G.*, AIR 1975 SC 538 : (1975) 4 SCC 714; *Gian Singh Mann v. High Court of Punjab & Haryana*, AIR 1980 SC 1894 : 1980 Supp SCC 449; *Roshan Lal v. International Airport Authority*, AIR 1981 SC 597 : 1980 Supp SCC 449; *R.S. Makashi v. I.M. Menon*, AIR 1982 SC 101; *Rattan Chandra Sammanta v. Union of India*, AIR 1993 SC 2276; *B.S. Bajwa v. State of Punjab*, AIR 1999 SC 1510; *Municipal Corp. of Greater Bombay v. Industrial Development Investment Co. Ltd.*, AIR 1997 SC 482; *Municipal Council, Ahmednagar v. Shah Hyder Baig*, AIR 2000 SC 671 : (2000) 2 SCC 48; See also *Printers (Mysore) Ltd. v. M. A. Rasheed*, (2004) 4 SCC 460 : (2004) 4 JT 158 delay of 3 years in challenging allotment of land. See also *State of U.P. v. Ved Pal Singh*, (2003) 9 SCC 212 : (2000) 8 SLT 706.

35. *P.S. Sadasivaswamy v. State of Tamil Nadu,* AIR 1974 SC 2271.

the writ petition was dismissed because the petitioner, a government servant, slept over the promotions of his juniors over his head for fourteen years. After such a long time, he filed the writ petition challenging these promotions. By the time the petition was filed the allottee had not only taken possession of the land but also made sufficient investment (about Rs. 80 crores in this case) as such the delay defeated the equity which had arisen in favour of the petitioner.[36] But this rule is not applied in a rigid manner. For example, dismissal on the ground of delay when the petition had been admitted and when it has been sufficiently explained has been set aside.[37] Dismissal on the ground of delay when the petition had been admitted and when it has been sufficiently explained has been set aside.[38]

When a person is not vigilant and acquiesces with the situation, and the acquiescence prejudices, or there is a change of position on the part of the party allegedly violating the rights, such person's writ petition cannot be heard after the delay on the ground that same relief should be granted as was granted to persons similarly situated but who were vigilant regarding their rights.[39]

In appropriate cases, a High Court may condone the delay if there is a satisfactory explanation for the same.

As the Supreme Court has emphasized in *Dehri Rohtas,*[40] the rule that the Court may not enquire into stale claims is not a 'rule of law' but a 'rule of practice' based on sound and proper exercise of discretion. Each case depends on its own facts. "It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how delay arose."

The principle on which the party is denied relief on the ground of laches or delay is that rights may have accrued to others by reason of the delay in filing the petition and the same ought not to be disturbed unless there is reasonable explanation for the delay.[41] The Supreme Court has observed on this point :

> "The real test to determine delay in such cases is that the petitioner should come to the writ Court before a parallel right is treated and that the lapse of time is not attributable to any laches or negligence."

In this case, the district board demanded a cess from the railway company for the period 53 to 67 which was *prima facie ultra vires.* The railway company filed a suit challenging the demand which was dismissed in 1971 and an appeal against it was dismissed in 1980. The company then filed a writ petition challenging the demand and, thus, the question of laches arose. The Supreme Court condoned the delay in the circumstances of the case saying: "The real test to determine delay in such cases is that the petitioner should come to the writ Court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence".

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36. *Chairman & MD, BPL Ltd. v. S. P. Gururaja,* (2003) 8 SCC 567 : AIR 2003 SC 4536. For adverse effect of delay see *Delhi Development Authority v. Rajendra Singh*, (2009) 8 SCC 582 : (2009) 10 JT 137.

37. *Ravindra Nath v. State Bank of India*, (2008) 15 SCC 256.

38. *Ravindra Nath v. State Bank of India*, (2008) 15 SCC 256.

39. *U.P. Jal Nigam v. Jaswant Singh,* (2006) 11 SCC 464 : AIR 2007 SC 924.

40. *Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur*, AIR 1993 SC 802 : (1992) 2 SCC 598.

41. *Ibid.*

When the order passed in the proceeding had worked itself out in that nothing further remained to be performed under the order in respect of which review was sought, a Court should not interfere and set the clock back after almost a decade.[42] What is the measure of delay? On this question the judicial pronouncements do not follow a coherent pattern. The Limitation Act, as such, does not apply to writ petitions but it may provide a standard to measure delay in invoking Art. 226. As the Supreme Court has observed in *Bhailal Bhai*[43]:

> "The provisions of the Limitation Act do not as such apply to the granting of relief under Art. 226. However, the maximum period fixed by the legislature as the time within which the relief by a suit in a civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured."

However, the High Courts are not mechanically bound by the period of limitation fixed in the Limitation Act. One can find cases where petitions filed within the period of limitation have been dismissed,[44] while there are cases where petitions filed after the period of limitation have been entertained by the courts.[45] In this connection, the Supreme Court has recently observed :

> "In exercise of its writ jurisdiction, facts and circumstances of each case are to be kept in mind in ascertaining whether there have been laches on the part of the parties seeking relief in due time or not."[46]

The position has been explained by the Supreme Court in *Shri Vallabh Glass Works Ltd. v. Union of India.*[47] Art. 226 prescribes no period of limitation. What relief should be granted to a petitioner under Art. 226 where the cause of action arose in the remote past is a matter of sound judicial discretion. A writ petition filed beyond the period of limitation fixed for filing suits without any explanation for delay is unreasonable. But this is not a rigid formula. There may be cases where even a delay of a shorter period may be considered sufficient to refuse relief under Art. 226. There may be cases where there may be circumstances which may persuade the Court to grant relief even though the petition has been filed beyond the prescribed limitation period for a suit. The Court has observed:

> "Each case has to be judged on its own facts and circumstances touching the conduct of parties, the change in situation, the prejudice which is likely to be caused to the opposite party or to the general public *etc*."

In the instant case, the Supreme Court directed refund of excess excise duty paid by the petitioners within three years prior to the filing of the writ petition.

In case of delay, the petitioner has to give a satisfactory explanation as to why he did not come to the Court earlier. For example, in *Haryana State Electricity Board v. State of Punjab*,[48] the Court entertained a writ petition in respect of a

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42. *Asha Prasad v. Chandrakant Gopalka*, (2003) 12 SCC 347

43. *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006 : (1964) 6 SCR 261.
Also, *D. Cawasji & Co. v. State of Mysore*, AIR 1975 SC 813 : (1975) 1 SCC 636.

44. *Kamini Kumar v. State of West Bengal*, AIR 1972 SC 2060 : (1972) 2 SCC 420.

45. *Sachindra v. N.E.F. Railways*, AIR 1973 Gau 108.

46. *U.P. Pollution Control Board v. Kanoria Industries Ltd.*, AIR 2001 SC 787, at 793 : (2001) 2 SCC 549.

47. AIR 1984 SC 971 : (1984) 3 SCC 362; *Govt. of A. P. v. Kollutla Obi Reddy*, (2005) 6 SCC 493 AIR 2006 SC 642.

48. AIR 1974 SC 1806 : (1974) 3 SCC 91.

long standing service matter because of the circumstances of the case. The real position in this regard has been stated by the Supreme Court as follows: "It is not that there is any period of limitation for the courts to exercise their powers under Art. 226, nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of certain length of time. But it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Art. 226 in case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters."[49] A person seeking relief against the state under Art. 226 cannot get discretionary relief under Art. 226, unless he is able to fully satisfy the High Court that the facts and circumstances of the case clearly justified the laches or undue delay on his part in approaching the Court for the grant of relief.[50] Unexplained delay would include a case where the illness of the Secretary was not of such a nature so as to prevent the union of workmen from filing the writ petition before the High Court.[51] Further, making of the representations is no excuse for long delay in filing writ petition.[52] As under Art. 32, so also under Art. 226, the Court adopts a case to case approach. The High Court does not bind its discretion by any fixed norm of limitation but decides the matter in the circumstances of each case.[53] Hence a claim by an illiterate widow with meagre resources who had been deprived by the Railways of her gangman husband's arrears of family pension was maintainable despite delay.[54] Explanation has been accepted where the widow of an employee challenged the order of dismissal based on a conviction which was subsequently set aside as the widow could only throw the challenge after setting aside of the conviction.[55]

The Supreme Court has emphasized that the question whether in a given case the delay involved is such that it disentitles a person from relief under Art. 226 is a matter within the discretion of the High Court which is to be exercised "judiciously and reasonably having regard to the surrounding circumstances."[56]

In 1980, the appellant applied for grant of a quarry lease. The same was denied to him in 1981. He filed a writ petition in 1989 challenging the order passed in

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49. *Tilokchand Motichand v. H.B. Munshi,* AIR 1970 SC 898 : (1969) 1 SCC 110; *P.S. Sadasivaswamy v. State of Tamil Nadu*, AIR 1974 SC 2271 : (1975) 1 SCC 152.

50. *State of Maharashtra v. Digambar,* AIR 1995 SC 1991, 1995 : (1995) 4 SCC 683.

51. *Jharkhand Mazdoor Sangh v. Presiding Officer,* (2002) 10 SCC 703 : (2001) 1 SLT 251.

52. *Yunus (Baboobhai) A. Hamid Padvekar v. State of Maharashtra*, (2009) 3 SCC 281 : (2009) 3 JT 487.

53. ALICE JACOB, Laches: Denial of Judicial Relief under Articles 32 and 226, 16 *JILI* 352 (1974); SEERVAI, The Supreme Court, Article 32 of the Constitution and Limitation, 71 *Bom LR* (Jl) 35-8 (1969), See also *State of Orissa v. Lochan Nayak*, (2003) 10 SCC 678 : (2003) 6 SCALE 268; *W.B. Govt. Employees (Food & Supplies) Co-op. Housing Society Ltd. v. Sulekha Pal (Dey)*, (2003) 9 SCC 253 : AIR 2003 SC 2328.
Also see, *infra*, under Art. 32, Ch. XXXIII.

54. *S. K. Mastan Bee v. GM, South Central Rly.*, (2003) 1 SCC 184 *:* (2002) 10 JT 50.

55. *Basanti Prasad v. Chairman, Bihar School Examination Board*, (2009) 6 SCC 791 : (2009) 8 JT 243.

56. *Ashok Kumar v. Collector, Raipur*, AIR 1980 SC 112 : (1980) 1 SCC 180; *Radhey Shyam v. State of Haryana*, AIR 1982 P & H 519; *Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur*, AIR 1993 SC 802 : (1992) 2 SCC 598.

1981. The Court rejected the writ petition on the ground of laches as there was no explanation for a delay of eight years in filing the writ petition.[57] The Supreme Court has observed in *State of Maharashtra v. Digambar*[58] "... Persons seeking relief against the state under Art. 226 of the Constitution, be they citizens or otherwise, cannot get discretionary relief obtainable thereunder unless they fully satisfy the High Court that the facts and circumstances of the case clearly justified the laches or undue delay on their part in approaching the Court for grant of such discretionary relief."[59]

(i) QUESTIONS OF FACT

In a writ petition, theoretically, the High Court has jurisdiction to determine questions both of fact and law. But, usually, the Court is reluctant to go into questions of fact which require oral evidence for their determination. The attitude of the courts is that questions of fact are best determined in an ordinary civil suit after adducing evidence, and not in a writ petition which is in essence supervisory and not appellate jurisdiction.[60]

Ordinarily, therefore, a writ is not issued to determine questions relating to immovable property. The reason is that this may involve determination of questions of fact and such questions are best decided in a civil suit because questions of fact cannot be decided without evidence, both oral or documentary. Whether the commodity sold by the respondents fell in the category of dementhol oil or not is a question of fact which must be left to the statutory authority.[61] It would be manifest and grave error to scan the evidence or to re-appreciate and reappraise the evidence led before an authority and arrive at a finding of fact.[62] Suspicious circumstances relating to disputed title is inappropriate for adjudication under Art. 226.[63]

But in an appropriate case the Court may direct the appointment of a committee to find out whether allotments were made involving political patronage and direct the authority concerned to proceed on the basis of the committee's findings.[64]

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57. *S.A. Rasheed v. Director of Mines & Geology,* AIR 1995 SC 1739 : (1995) 4 SCC 539.
58. AIR 1995 SC 1991, 1995 : (1995) 4 SCC 683.
59. On Laches, see : *Union of India v. S.S. Kothiyal,* (1998) 8 SCC 682; *Larsen & Toubro Ltd. v. State of Gujarat,* AIR 1998 SC 1608 : (1998) 4 SCC 387; see also *National Textile Corpn. Ltd. v. Haribox Swalram,* (2004) 9 SCC 786 : AIR 2004 SC 1998.
60. *D.L.F. Housing Construction v. Delhi Municipality,* AIR 1976 SC 386 : (1976) 3 SCC 160; *Union of India v. Bata India Ltd.,* AIR 1994 SC 921 : 1994 Supp (3) SCC 79; *M/s. Padmavathi Constructions v. The A.P. Industrial Infrastructure Corp. Ltd.,* AIR 1997 AP 1; *Brij Bihari Pandey v. State of Bihar,* AIR 1997 Pat. 74; *Goa v. Leukoplast (India) Ltd.,* AIR 1997 SC 1875 : (1994) 2 SCC 124; *Mahesh Chandra v. Zila Panchayat, Mainpuri,* AIR 1997 All. 248; see also *Grid Corpn. of Orissa Ltd. v. Timudu Oram,* (2005) 6 SCC 156 : AIR 2005 SC 3971.
61. *State of U.P.v. Chemtreat Chemicals,* (2002) 10 SCC 593. See also *Director of Entry Tax v. Sunrise Timber Company,* (2008) 15 SCC 287. See also *NTPC Ltd. v. Mahesh Dutta,* (2009) 8 SCC 339 : (2009) 9 JT 537. Question as to whether possession of land acquired in terms of Section 17(1) of the Land Acquisition Act, 1894 has been taken or not.
62. *Mahesh Chandra Gupta v. U.O.I.,* (2009) 8 SCC 273 : (2009) 9 JT 199.
63. *City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala,* (2009) 1 SCC 168 : AIR 2009 SC 571.
64. *Ambika Mandal v. State of Bihar (Now Jharkhand),* (2008) 15 SCC 743.

However, the matter is one of Court's discretion and not of its jurisdiction;[65] *i.e*., when an inquiry into questions of fact arise in a writ petition, it is a question of the High Court's discretion whether or not it will enter into such an inquiry; it is not that the Court does not have jurisdiction to do so.[66] In a given situation the High Court can set up an investigation committee. Thus in a writ petition against public sector banks against denial of amounts under FDRs alleging fraud on the part of depositors and officers of the bank, the bank asserting that the amounts had already been paid by way of loans. In such circumstances, although disputed question of fact were involved and relief in a private litigation might not have been permissible, High Court could, in view of involvement of a public law element concerning a large number of people, rightly treat the writ petition as PIL and invoke S.35A of the Banking Regulation Act, 1949 to direct constitution of a high powered committee to examine the matter in detail. However, the decisions of such a committee would not be necessarily decisive.[67] High Court directed to have evidence recorded on commission or by a subordinate Court.[68]

To decide questions of fact in a writ petition, the Court takes recourse to affidavits and it may even permit cross-examination of a person who has sworn to an affidavit.[69] But this is done very rarely.

The High Court can intervene if it is a mixed question of fact and law.[70] A finding of fact recorded by Financial Commissioner on relevant considerations and based on evidence does not care for interference.[71] But where there were no denials in the written statement that the wires were loose and dropping and that the respondent had asked the appellants to tighten the wires no disputed questions of facts arose.[72]

(j) LEGAL STANDING

A petitioner should have 'legal standing' to file a writ petition.[73] As the Supreme Court has observed, "The requirement of *locus standi* of a party to a litigation is mandatory; because the legal capacity of the party to any litigation

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65. *Muni Lal v. Prescribed Authority*, AIR 1978 SC 28 : (1977) 3 SCC 336; *Ajay Kumar v. Chandigarh Adm., Union Territory*, AIR 1983 P&H 8.

66. *Zeenat v. Prince of Wales Medical College,* AIR 1971 Pat. 43; *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot,* AIR 1974 SC 2105 : (1974) 2 SCC 706; see also *G.M. Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad* (2003) 8 SCC 639 : AIR 2003 SC 4531; see also *Rourkela Shramik Sangh v. Steel Authority of India Ltd.*, (2003) 4 SCC 317 : AIR 2003 SC 1060; *President, Poornathrayisha Seva Sangham v. K. Thilakan Kavenal,* (2005) 2 SCC 689 : AIR 2005 SC 2918; See also *New Okhla Industrial Development Authority v. Kendriya Karmachari Sahkari Grih Nirman Samity,* (2006) 9 SCC 524 : (2006) 6 JT 604*;* Petition raising complex question of fact should not be entertained.

67. *Indian Bank v. Godhara Nagrik Coop. Credit Society Ltd*., (2008) 12 SCC 541 : AIR 2008 SC 2585.

68. *B.L. Chakraborty v. State of West Bengal,* (2005) 12 SCC 148.

69. *Barium Chemicals v. Company Law Board*, AIR 1967 SC 295 : 1966 Supp SCR 311; *Gunwant Kaur v. Bhatinda Municipality*, AIR 1970 SC 802 : (1969) 3 SCR 769; *Babubhai v. Nandlal*, AIR 1974 SC 2105 : (1974) 2 SCC 706; *Jain Plastics & Chemicals Ltd. v. State of Bihar,* AIR 2001 Pat. 16.

70. *Shama Prashant v. Ganpatrao,* AIR 2000 SC 3094 : (2000) 7 SCC 522.

71. *Sadhu Ram v. Financial Commr. Haryana,* (2005) 10 SCC 226.

72. *HSEB v. Ram Nath,* (2004) 5 SCC 793.

73. *Prasar Bharati Broadcasting Corpn. of India v. Debyajoti Bose,* AIR 2000 Cal 43.

whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold".[74] Article 226 cannot be invoked on the basis of appeal to sympathy. The applicant must have a legal right.[75]

Where a statute provides for a right, but enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person concerned.[76]

Thus where permission was granted under Section 31(1) of the Himachal Pradesh Town and Country Planning Act, 1977 subject to the conditions that building permission would be obtained from the legal authority concerned before commencement of development work and an application for sanction of the building plan in terms of the Himachal Pradesh Municipal Corporation Act, 1994 was made but subsequently during the pendency of the application the government issued an order temporarily freezing the construction activities and the site was also declared to be a "heritage zone" it was held that the Municipal Corporation was not entitled to sanction the building plans.[77] The Supreme Court considered the concepts of 'ligitimate' or 'settled expectation' and expressed the view that they do not create any vested right (e.g. to obtain sanction of a building plan). Moreover such a settled expectation or 'legitimate expectation" cannot be countenanced against public interest and convenience and more so where the sanction violated the ecology and private interest is justly overridden.[78]

Ordinarily a person can approach the High Court under Art. 226 to enforce his legal right, or when he has sufficient interest in the subject-matter.[79] Until the petitioner shows that his legal rights are adversely affected, or that breach is likely to be committed, he is not entitled to file the petition.[80] This principle has been stated by the Supreme Court as follows in *S.P. Gupta v. President of India*:[81]

> "The traditional rule in regard to *locus standi* is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legally protected interest by the impugned action of the state or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress."

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74. *Janta Dal v. H.S. Chowdhary*, AIR 1993 SC 892 : (1992) 4 SCC 305.
75. *State of MP v. Sanjay Kumar Pathak*, (2008) 1 SCC 456 : (2007) 12 JT 219.
76. *Commissioner of Municipal Corporation Shimla v. Prem Lata Sood*, (2007) 11 SCC 40 : (2007) 7 JT 336.
77. *Ibid.*
78. *Commissioner of Municipal Corporation Shimla v. Prem Lata Sood*, (2007) 11 SCC 40 : (2007) 7 JT 336.
79. *Calcutta Gas v. State of West Bengal*, AIR 1962 SC 1044 : 1962 Supp (3) SCR 1; *Maganbhai v. Union of India (The Kutch case)*, AIR 1969 SC 783 : (1970) 3 SCC 400; *N.R. & F. Mills v. N.T.G. Bros.*, AIR 1971 SC 246; *Bennett Coleman Co. v. Union of India*, AIR 1973 SC 106 : (1972) 2 SCC 788; *Town Improvement Trust v. Sahaji Rao*, AIR 1978 MP 218; *Mohd. Ibrahim Khan v. State of Madhya Pradesh*, AIR 1980 SC 517. See also *State of Uttaranchal v. Alok Sharma*, (2009) 7 SCC 647 : (2009) 6 JT 463, aggrieved but not covered by circular—no rights.
80. *Charanjit Lal v. Union of India*, AIR 1951 SC 41 : 1950 SCR 869.
81. AIR 1982 SC 149 : 1981 Supp SCC 87.

It must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.[82] This "right" concept is not an absolute one [e.g. principles of promissory estoppel or legitimate expectations etc.]

However, this rule is not strictly applied in cases of writs of *quo warranto* and *habeas corpus.*[83]

Whether a person has sufficient interest or not is for the writ Court to decide.[84] Thus, the chairman of a statutory corporation which is superseded by the government can challenge the government's action.[85] A member of a municipality can challenge a resolution passed by the municipality on the ground that it is *ultra vires*. A tax-payer can file a writ petition against a municipal council if it misapplies its funds.[86] A resident in a locality may challenge a municipal resolution approving construction of a cinema in the locality.[87] When the Lt. Governor of Delhi superseded the New Delhi Municipal Committee, two members of the committee challenged the order on the ground that natural justice had been denied to the committee before it was superseded, and their contention was upheld.[88] A person in the same trade as another has a right to seek the cancellation of the licence granted to the latter in violation of a statute or the rules concerned.[89]

To maintain a petition for *mandamus* or *certiorari*, it is not necessary that petitioner's personal right must be infringed. If he has a genuine grievance arising from an action or inaction of the authority, he may invoke Art. 226. The Supreme Court has ruled that a rice mill-owner has no *locus standi* to challenge under Art. 226, the setting up of a new rice-mill by another person even if the setting up of a new rice-mill be in contravention of a statutory provision [s. 8(3)(*c*) of the Rice Milling Industry (Regulation) Act, 1958], the reason being that no right vested in such an applicant is infringed.[90] Similarly, the Court has ruled that the proprietor of a licensed cinema theatre has no *locus standi* to seek *certiorari* from the High Court to quash the 'no-objection' certificate granted by the Administration to a trade rival. In the Court's view, grant of 'no-objection' did not deny or deprive the petitioner of any legal right. "He has not been subjected to any legal wrong. He has suffered no legal grievance. He has no legal peg for a justiciable claim to hang on." The Court further observed that to issue *certiorari* at the petitioner's instance would, on balance be against public policy as "it will eliminate healthy competition in the business which is so essential to raise commercial morality" and it would perpetuate petitioner's monopoly of cinema business."[91]

The Supreme Court has recognized that there are other concepts (judicially evolved) which could confer a standing although no right as such is sought to be

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82. *Union of India v. C. Krishna Reddy*, (2003) 12 627 : AIR 2004 SC 1194.
83. See below.
Also, *infra*, under Art. 21, Ch. XXVI.
84. *J.M. Desai v. Roshan Kumar*, AIR 1976 SC 578 : (1976) 1 SCC 671.
85. *Jwala Prasad v. State of Rajasthan*, AIR 1973 Raj. 187.
86. *Varadarajan v. Salem Municipality*, AIR 1973 Mad. 55.
87. *K.R. Shenoy v. Udipi Municipality*, AIR 1974 SC 2177 : (1974) 2 SCC 506.
88. *S.L. Kapoor v. Jagmohan*, AIR 1981 SC 136 : (1980) 4 SCC 379.
89. *Sai Chalchitra v. Commr.*, (2005) 3 SCC 683 : (2005) 5 SLT 187 (2).
90. *Nagar Rice & Flour Mills v. N.T. Gowda*, AIR 1971 SC 246 : (1970) 1 SCC 575.
91. *Mithilesh Garg v. Union of India*, AIR 1992 SC 443 : (1992) 1 SCC 168.

vindicated. The Court has identified certain areas e.g. promissory estoppel, legitimate expectation which could be invoked where fairness is a criteria for conferring stnding. The law relating to promissory estoppel and its usual analogous principles of acquiescence and waiver as well as the principle of legitimate expectation have been discussed exhaustively by the Supreme Court in Southern Petrochemical.[1] The Court held that the doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia, exemption from payment of taxes or charges. The policy to exempt can not only be expressed by reason of notifications issued under statutory provisions but also under executive instructions.[2]

The Court has now strengthened the doctrine by raising it to the level of a right and has proceeded to observe that a right is preserved when it is not expressly taken away.[3] In unqualified terms the Court has held that unlike an ordinary estoppel, promissory estoppel gives rise to a cause of action. It creates a right and it also acts on equity.[4] But its application against a constitutional or statutory provision is impermissible in law.[5] The Court rejected the argument that the mere issuance of an exemption notification under a provision in a fiscal statute could not create any promissory estoppel because such an exemption by its very nature is susceptible to being revoked or modified or subjected to other conditions. Such an argument was of no avail where a right has already accrued e.g. in a case where the right to exemption of a tax for a fixed period accrues and the conditions for the exemption have also been fulfilled. In such a situation the withdrawal could not defeat the accrued right.[6]

In Southern Petrochemical[7] the Supreme Court has referred to legitimate expectation as an "emerging doctrine" of an expectation of substantive benefit. The Court has almost equated the efficacy of both the principles i.e. promissory estoppel and legitimate expectation observing that saying that if the "principle of promissory estoppel" would apply, there may not be any reason as to why the doctrine of legitimate expectation would not.

A right to an statutorily conferred cannot be taken away only because a proposal for such taking away was in the offing.[8]

In relation to challenge appointment to public post one who is qualified for the post and is a candidate for the post would have *locus standi*.[9]

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1. *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & Etio,* (2007) 5 SCC 447 : AIR 2007 SC 1984.
2. *Ibid.*
3. *Ibid.*
4. *Ibid*
5. *Ibid*
6. *Ibid*
7. *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & Etio,* (2007) 5 SCC 447 : AIR 2007 SC 1984.
8. *Commissioner of Municipal Corporation Shimla v. Prem Lata Sood,* (2007) 11 SCC 40 : (2007) 7 JT 336; referring to *T. Vijayalakshmi v. Town Planning Member,* (2006) 8 SCC 502 : AIR 2007 SC 25; *Howrah Municipal Corpn. v. Ganges Rope Co. Ltd.,* (2004) 1 SCC 663 : (2003) 10 JT 355; *Director of Public Works v. Ho Po Sang,* 1961 AC 901 : (1961) 2 All ER 721.
9. *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn.,* (2006) 11 SCC 731 : AIR 2006 SC 3106.

There are number of cases where the Supreme Court has held that unless pleaded, a party will not be permitted to run a case at the hearing. For example, although challenge to the constitutional validity of increased tax rates levied on contract carriage was raised in the writ petition, it suffered from proper pleadings i.e. in that very sketchy. Greater details were required to be furnished before the State could submit quantifiable and measurable data justifying the impugned rate.[10]

(k) PUBLIC INTEREST LITIGATION

Lately, the courts have shown a good deal of flexibility in the matter of legal standing because with the expansion of bureaucratic power, the chances of its misuse have increased.[11] The rule of *locus standi* has assumed much wider dimensions, in the day to day expanding horizons of socio-economic justice and welfare of the state. So much so that the courts have even sanctioned 'public interest' litigation where a question of public interest may be espoused through a writ petition by some one even though he may not be directly injured or affected by it, or may have any personal interest in the matter.[12] The petitioner comes to the Court to espouse a public cause. The expression "public interest litigation" means a legal action initiated in a Court for enforcement of public interest.

As the Supreme Court observed in an earlier case anticipating the future development: "Where a wrong against community interest is done, 'no *locus standi*' will not always be a plea to non-suit an interested public body chasing the wrong doer in the Court..... '*Locus standi*' has a larger ambit in current legal semantics than the accepted, individualistic jurisprudence of old."[13]

This observation referring to the legal standing of public body is now true of a private body as well. For example, in the *Additional Judges* case,[14] writ petitions under Art. 226 by lawyers raising certain significant questions concerning High Court Judges were held maintainable because the lawyers practicing in the High Courts have great interest in the independence of the High Courts and quick disposal of cases by them. If by any illegal state action, the independence of the judiciary is impaired, the lawyers would certainly be interested in challenging the constitutionality or legality of such action.

This case can be regarded as the precursor of public interest litigation in India. Enunciating the broad aspect of PIL, BHAGWATI, J., observed that:[15]

> "Whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, *any member* of the public acting *bona fide* and having sufficient interest can maintain an action for redressal of such wrong or public injury."

BHAGWATI, J., observed further:[16]

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10. *R.Senthil Babu v. State of T.N.*, (2009) 2 SCC 309 : (2008) 13 JT 508.
11. *Fertilizer Corp. Kamgar Union v. Union of India*, AIR 1981 SC 344 : (1981) 1 SCC 568; *Dutta & Associates v. State of West Bengal*, AIR 1982 Cal 225; *A.U.T. Association v. Chancellor, Allahabad University*, AIR 1982 All 343; *Geeta Bajaj v. State of Rajasthan*, AIR 1982 Raj 49.
12. *Jitendra Nath v. State of West Bengal Board of Examination*, AIR 1983 Cal. 275.
13. *Maharaj Singh v. State of Uttar Pradesh*, AIR 1976 SC 2602 : (1977) 1 SCC 155.
14. *S.P. Gupta v. Union of India*, AIR 1982 SC 149 : 1981 Supp SCC 87; *supra*.
15. *Ibid.*, at 190.
16. *Ibid.*, at 194.

> "We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision."

Emphasizing the need for PIL in India, BHAGWATI, J., observed:

> "If public duties are to be enforced and social collective "diffused" rights and interests are to be protected, we have to utilize the initiative and zeal of public minded persons and organizations by allowing them to move the Court and act for a general or group interest, even though, they may not be directly injured in their own rights".

Even in a case where a petitioner moves the Court in his private interest and for redressal of personal grievances, the Court may in furtherance of public interest consider it necessary to enquire into the state of affairs of the subject matter of litigation in the interest of justice reflecting the same approach as in a public interest litigation.[17]

The Supreme Court has observed in *M/s. J. Mohapatra & Co. v. Orissa*,[18] that to-day "the law with respect to *locus standi* has considerably advanced" and "in the case of public interest litigation it is not necessary that a petitioner should himself have a personal interest in the matter". The petitioner should not, however, come to the Court for personal gain or private profit or political motive or any oblique consideration.[19] Nevertheless, even though the scope of *locus standi* has been widened by the Supreme Court in the field of PIL, yet a mere busy body having no interest in the subject-matter cannot invoke the jurisdiction of the courts.[20] The Court should be careful and circumspect and should reject at the outset petitions especially involving service matters which in the guise of PIL are really intended to settle personal scores or to gain cheap popularity.[21] Where third party interest has been created on account of delay, PIL is liable to be dismissed.[22] When a public interest litigation was entertained the individual conduct of the writ petitioners would take a back seat.[23]

Public Interest Litigation relates to the nature of the proceedings and has no inbuilt implications as to the forum competent to deal with such litigation. In practice, however, PIL is, almost invariably, filed in the High Court under Article 226 or the Supreme Court under Article 32. When the complainant invokes the jurisdiction of the High Court or the Supreme Court under Articles 226 and 32 respectively, many of the principles applied by the Courts while reviewing under Article 226 or Article 32 are applied. For example, the principle that questions concerning title to property where there is a factual dispute, the High Court or the

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17. *Ashok Lanka v. Rishi Dixit*, (2005) 5 SCC 598 : AIR 2005 SC 2821.
18. AIR 1984 SC 1572, 1574 : (1984) 4 SCC 108.
19. *S. K. Kantha v. Qamarulla Islam*, (2005) 11 SCC 507, petition filed by a political rival to settle personal scores; *Delhi Municipal Workers Union v. Delhi Municipal Corpn.*, AIR 2001 Del. 68.
20. *Rajnit Prasad v. Union of India*, (2000) 9 SCC 313 : (2000) 1 SCR 663.
21. *Gurpal Singh v. State of Punjab*, (2005) 5 SCC 136 : AIR 2005 SC 2755.
22. *R&M Trust v. Koramangala Residents Vigilance Group*, (2005) 3 SCC 91 : AIR 2005 SC 894.
23. *Ashok Lanka v. Rishi Dixit*, (2005) 5 SCC 598 : AIR 2005 SC 2821.

Supreme Court will not take upon itself the burden of resolving such dispute; and more so when a civil suit relating to the same dispute and same property was pending.[24]

A few examples of writ petitions filed in the High Courts under Art. 226 as public interest litigation are mentioned below.

A member of the Legislative Assembly and an educationist can challenge the appointment of the Vice-Chancellor in the University on the ground that it has not been made properly. The M.L.A. being interested in public affairs and also being an educationist has interest in the universities and other educational institutions in the State. He therefore feels concerned if the appointment of the Vice-Chancellor has not been made properly. In case of an injury affecting the public, a public man having some interest can maintain an action challenging the action of the government.[25]

A medical practitioner who is interested in maintaining and promoting public health and an association formed for upholding public causes through litigation can maintain writ petitions challenging government decision to sell arrack in polythene containers. The grievance projected by the petitioners if substantiated would show that the government action may result in serious damage to public health. The question whether selling arrack in a polythene sachet is unsafe and a health hazard deserves serious consideration particularly in the light of Art. 47 of the Constitution. The cause sought to be espoused is a public cause and the petitioners are acting *bona fide* and, therefore, they have sufficient interest in the matter to maintain writ petitions.[26]

Where legal rights of the poor, ignorant, socially and economically disadvantaged persons are sought to be vindicated through a Court action, the High Courts permit public men or concerned voluntary associations to agitate such matters before them under Art. 226. The reason for this development is that it has been realised that if this is not permitted, rights of the poor will ever remain unredressed as such persons are least equipped to themselves bring their grievances before the courts and such a situation is destructive of Rule of Law.

A non-political, non-profit and voluntary organisation consisting of public spirited citizens interested in taking up the causes of ventilating legitimate public problems filed a writ petition to espouse the cause of old pensioners who were individually unable to seek redress through the labyrinth of legal and judicial process which is costly and protracted. The Supreme Court ruled that the body concerned undoubtedly had *locus standi* to raise the matter before the Court.[27]

Merely because it is a public interest litigation, its width cannot be unlimited. Hence, the Supreme Court held that when the grievance in such litigation is misuse of park, the High Court erred in directing cancellation of the lease of certain areas in the park because of unauthorized constructions made in such areas – particularly in the absence of requisite averments in the petition.[28]

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24. *Santosh Sood v. Gajendra Singh*, (2009) 7 SCC 314 : (2009) 8 SCALE 489.
25. *Balbir Singh v. F.D. Tapase*, AIR 1985 P & H 244.
26. *George Mampilly v. State of Kerala*, AIR 1985 Ker 24.
27. *D.S. Nakara v. Union of India*, AIR 1983 SC 130 : (1983) 1 SCC 305. Also, *Akhila Bharatiya Grahak Panchayat v. A.P.S.E. Board*, AIR 1983 AP 283.
28. *Allahabad Ladies' Club v. Jitendra Nath Singh*, (2007) 11 SCC 609 : (2007) 4 SCALE 541.

In a Public Interest Litigation the essential rules of adjudication cannot be ignored. Hence where there was no averment in the petition that the construction made were unauthorized it would not been in order for the High Court to direct cancellation of a lease on the ground of alleged violation of provisions of the U.P. Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975.[29]

Public interest litigation continues to flourish in India. A large number of writ petitions are filed in the High Courts under this category. More will be said on public interest litigation later in the book.[30]

(l) TO WHOM CAN A WRIT BE ISSUED?

The law on the point remains in a flux at the present moment and lately the courts have widened the writ jurisdiction by bringing more and more bodies under it.

Ordinarily a writ of *mandamus* or *certiorari* is issued to a government instrumentality whether statutory[31] or not.[32] Accordingly, writs have been issued to such statutory bodies as the International Airport Authority,[33] or the Warehousing Corporation,[34] or to non-statutory government companies registered under the Companies Act,[35] or to a registered society sponsored, financed and supervised by the government.[36]

The Supreme Court has thrown some light in this grey area. The Court has pointed out the difficulty in drawing a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. There cannot be any general definition of public authority or public action. The facts of each case decide the point.[37]

The Patna High Court has ruled that the Bihar Industrial and Technical Consultancy Organisation Ltd. (BITCO) is an instrumentality of the State as becomes clear from its Articles of Association and its functions. BITCO is treated as a unit of the State Government under the Rules of Executive Business. BITCO has been set up to promote industrial growth in the State; industrial growth being a matter

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29. *Allahabad Ladies' Club v. Jitendra Nath Singh*, (2007) 11 SCC 609 : (2007) 4 SCALE 541.

30. For further discussion on PIL, see, *infra*, Ch. XXXIII, Sec. B.
For a much more elaborate discussion on PIL, see, JAIN, *A TREATISE ON ADMINISTRATIVE LAW*, II.

31. *Rajasthan State Electricity Board v. Mohan Lal*, AIR 1967 SC 1857 : (1967) 3 SCR 377.

32. *Sukhdev v. Bhagat Ram*, AIR 1975 SC 1331 : (1975) 1 SCC 421; *Mathew v. Union of India*, AIR 1974 Ker 4; *Samir Kumar v. State of Bihar*, AIR 1982 Pat 66; *U.P. Singh v. Board of Governors, MACT*, AIR 1982 MP 59.

33. *Ramana Dayaram Shetty v. International Airport Authority*, AIR 1979 SC 1628 : (1979) 3 SCC 489.

34. *U.P. Warehousing Corp. v. Vijay Narain*, AIR 1980 SC 840. Also see, *Premji Bhai Parmar v. Delhi Development Authority*, AIR 1980 SC 738 : (1980) 2 SCC 129.

35. *Som Prakash v. Union of India*, AIR 1981 SC 212 : (1981) 1 SCC 449; *B. Satyanarayana v. State of Andhra Pradesh*, AIR 1981 AP 121.

36. *Ajay Hasia v. Khalid Majid*, AIR 1981 SC 487 : (1981) 1 SCC 722.

37. *Binny Ltd. v. V. Sadasivan*, (2005) 6 SCC 657 : AIR 2005 SC 3202.

of governmental concern, any body set up to promote this growth also discharges governmental function. All share holding in BITCO is held by various statutory bodies which are all instrumentalities of the government. BITCO is closely controlled by IDBI which is another governmental instrumentality.

The Council of Indian School Certificate Examination is a society registered under the Societies Registration Act. It exercises a public function of imparting education. The council is deeply impregnated with governmental character not only structurally but also functionally. The council has been held to be an instrumentality of the State.[38]

The U.P. State Co-operative Land Development Bank Ltd. functioning as a co-operative society under the Societies Act, but constituted under the Bank Act, has been held to be an 'instrumentality' of the State and hence an 'authority' under Art. 12. Therefore, writ petitions filed by its dismissed employees to challenge the orders of their dismissal were held to be maintainable.[39]

Recently, a non-statutory body, such as a government company, under the control of the State Government has been held to be an 'authority' under Art. 12.[40]

A government instrumentality is included in the term 'authority' which is regarded as a 'state' under Art. 12. All bodies falling under the coverage of Art. 12 are subject to Fundamental Rights as stated in the Constitution. This topic has been discussed later in detail.[41]

Besides Art. 12, the word 'authority' also occurs in Art. 226. There has been a question for the consideration of the courts whether the term 'authority' in Art. 226 ought to be interpreted in the same narrow sense as in Art. 12, or more broadly than that.[42] After much confusion of thought and several conflicting judicial *dicta*, the position as it has emerged now seems to be that Art. 12 is relevant only for purposes of Art. 32 under which the Supreme Court can issue a writ only for purposes of enforcement of Fundamental Rights.

Article 226 is broader in scope than Art. 32 as under Art. 226, a High Court may issue a writ not only for enforcement of fundamental rights but "for any other purpose" as well. So it is argued that the term "authority" in Art. 226 should be given a broader and a more liberal interpretation than the term "other authority" in Art. 12. There may be a body which may not fall within the compass of Art. 12 (as it may not be regarded as an 'instrumentality' of the state) but, nevertheless, it may still be regarded as an 'authority' under Art. 226 and may thus be subject to the writ jurisdiction of the High Court.

The Sanskrit Council constituted under a government resolution to hold examinations and publish results has been held to be subject to *Mandamus* because it performs a public, though not a statutory, duty.[43] A commission of enquiry ap-

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38. *Master Vibhu Kapoor v. Council of Indian School Certificate Examination,* AIR 1985 Del. 142.

39. *U.P. State Coop. Land Development Ltd. v. Chandra Bhan Dubey,* AIR 1999 SC 753 : (1999) 1 SCC 741.

40. *The Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officers Association,* AIR 2002 SC 609 : (2002) 2 SCC 167.

41. See, *infra,* Ch. XX, Sec. D.

42. For discussion on Art. 12, see, *infra,* Ch. XX, Sec. D.

43. *G. Misra v. Orissa Association of Sanskrit Language & Culture,* AIR 1971 Ori 212.

pointed under an administrative order, and not under a statutory provision, to enquire into certain allegations against an ex-Chief Minister has been held subject to *certiorari*.[44] *Certiorari* or *mandamus* may issue even to a private person or a body regarded as a government instrumentality even when it is incorporated or registered under a statute, *e.g.*, a co-operative society or a limited company.[45] A writ petition against a private unaided educational institution for refund of money paid against a payment seat for admission is maintainable.[46]

Formerly, the High Courts refused to issue *certiorari* or *mandamus* to a body not regarded as government instrumentality (*i.e.*, which fell outside Art. 12),[47] but now judicial perspective has widened. There have been cases where *mandamus* or *certiorari* has been issued under Art. 226 to such a body as well when it is a public utility service, or to enforce a statutory or public duty, or when it is discharging a function under some statutory provision. Thus, a writ can be issued to a company, or a co-operative society, or even a private person when it discharges functions under a statute. International Crops Research Institute is neither a State nor an authority as it was neither set up by a statute nor were its activities statutorily controlled nor did it perform any public or statutory duty or a public function.[48]

For purposes of Art. 226, it is not necessary that the body in question should have the character of a government instrumentality. In this sense, the scope of Art. 226 is much broader than Art. 32 where a writ can go only to a government instrumentality. For example, in *Praga Tools*,[49] the Supreme Court explained that the words "any person or authority" in Art. 226 are not to be confined only to statutory authorities and instrumentalities of the state. "They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists *mandamus* cannot be denied." The Court also maintained that *mandamus* cannot be denied on the ground that the duty to be enforced is not imposed by a statute. Only when such a person or body performed a public function or discharged a public duty that Art. 226 could be invoked and since a sugar mill was engaged in the manufacture and sale of sugar, which did not involve any public function, the jurisdiction of the High Court under Art. 226 could not be invoked.[50] And merely because there are regulatory provisions, to ensure that business or commercial activity carried on by private bodies remains within a discipline, do not confer any status upon the company nor any obligation upon it which may be enforced through issue of a writ under

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44. *Harekrishna Mahtab v. Chief Minister, Orissa*, AIR 1971 Ori 175.
45. *General Manager, United India Fire & General Ins. Co. v. Nathan*, (1981) Lab IC 1076; see also *Baba Kamala Nehru Engg. College v. Sanjay Kumar*, (2002) 10 SCC 487.
46. *Ramdeo Baba Kamala Nehru Engg. College v. Sanjay Kumar*, (2002) 10 SCC 487.
47. *Chakradhar Patel v. Sama Singha Service Co-op. Soc. Ltd.*, AIR 1982 Ori 38; *Pritam Singh v. State*, AIR 1982 P & H 228.
48. *G. Bassi Reddy v. International Crops Research Institute*, (2003) 4 SCC 225 : AIR 2003 SC 1764.
49. *Praga Tools Corp. v. C.V. Imanual*, AIR 1969 SC 1306 : (1969) 1 SCC 585; *District Co-operative Bank v. Dy. Reg., Coop. Societies*, AIR 1973 All 348.
50. *GM, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad*, (2003) 8 SCC 639 : AIR 2003 SC 4531.

Art. 226. Writ will not be issued where there is any non-compliance with or violation of any statutory provision by a private body.[51]

In *Mewa Singh*,[52] the Shrimoni Gurudwara Prabandhak Committee, a statutory body, has been held to be an "authority" for purposes of Art. 226. The body in question is a creation of the statute. The Supreme Court has insisted that the committee should function within the four corners of the law constituting it and the rules framed by it under statutory powers. Any violation of the provisions of the Act and the Rules made by it will certainly make it amenable to the writ jurisdiction of the High Court under Art. 226 of the Constitution.

This judicial trend to issue writs against private parties to enforce public duties imposed on them is gaining momentum. In *Sarvaraya Sugars Ltd. v. A.P. Civil Supplies Corpn. Ltd.*,[53] for example, the Andhra Pradesh High Court issued a writ to enforce a public duty on sugar manufacturers. In *Rohtas Industries v. Its Union*,[54] *certiorari* was issued against the award of an arbitrator appointed under s. 10A of the Industrial Disputes Act, 1947, as such an arbitrator can legitimately be regarded as part of the methodology of "the sovereign's dispensation of justice". Although the concerned parties name the arbitrator and voluntarily submit the industrial dispute to him, yet the arbitrator has the power not only to bind the immediate parties to the reference, but even third parties and arbitrator's powers flow from s. 10A.

In this connection, *T. Gattaiah v. Commissioner of Labour* is worth mentioning.[55] Some workmen were retrenched by a company. The workmen filed a writ petition against the company claiming that their retrenchment was against mandatory provisions of the Industrial Disputes Act. The Andhra High Court issued *mandamus* against the company to compel it to act according to law and to enforce a public duty imposed on the company by law not to retrench the workers except in accordance with the statutory conditions. The Court ruled that *mandamus* can be issued to enforce a statutory duty cast on a private body so long as it is a public duty. It is the nature of the duty and not the nature of the body which is important. The Andhra High Court was of the view that even *certiorari* can be issued to a private body, but the Punjab and Haryana High Court does not subscribe to this view.[56]

The significant point to note is (which High Courts ignore at times) that to issue a writ under Art. 32, it is necessary that the body in question be characterised as an instrumentality of the government,[57] but it is not necessary for purposes of issuing a writ under Art. 226.

Under Art. 226, a writ can be issued for—(i) enforcement of Fundamental Rights; and (ii) for any other purpose. Whereas, Fundamental Rights are enforceable only against the bodies mentioned in Art. 12,[58] for purposes of 'any other

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51. *Federal Bank Ltd. v. Sagar Thomas*, (2003) 10 SCC 733 : AIR 2003 SC 4325.
52. *Mewa Singh v. Shrimoni Gurudwara Prabandhak Committee*, AIR 1999 SC 688 : (1999) 2 SCC 60.
53. AIR 1981 AP 402, 406.
54. AIR 1976 SC 425. Also, *Gujarat Steel Tubes v. Mazdoor Sabha*, AIR 1980 SC 1896 : (1980) 2 SCC 593.
55. (1981) Lab IC 942 : (1976) 2 SCC 82.
56. *Pritam Singh*, *supra*, footnote 47.
57. For discussion on this point, see, *infra*, Ch. XX, Sec. D.
58. *Ibid*.

purpose', a writ may be issued to any body which has a public character even though it does not fall under Art. 12. Therefore, a High Court may issue *mandamus* or *certiorari* to a body which is imbued with some public character even though it may not be regarded as a "government instrumentality"if it is not a question of enforcement of a Fundamental Right.

The High Courts often miss this difference between Arts. 32 and 226. For instance, the Punjab and Haryana High Court refused to issue *mandamus* to the Indian Institute of Bankers saying that it is not an instrumentality of the government.[59] The Court failed to appreciate the point that for purposes of Art. 226, a body can still be regarded as an 'authority' even though it may not be an instrumentality of the government. The institute is registered as a company; it holds examinations for bank employees and imparts in-service training to bank employees through correspondence course. A candidate was debarred from appearing at an examination conducted by the Institute for three years for using unfair means at the examination. Obviously the Institute is discharging a public function and hence it is imbued with public character and so it ought to have been subject to *mandamus* under Art. 226

Ordinarily *mandamus* has not been issued to a privately-managed college affiliated to a University and receiving grants in aid to quash an order of dismissal of a member of the staff, primarily on the ground that the relationship between the two is contractual and a writ is not issued to enforce a contract.[60] But, this judicial approach is not correct because the relationship between an aided college and its teachers is not purely contractual; it is also a matter of status which is regulated by a number of rules made by the affiliating university.

Writs are issued now against educational institutions in matters of disciplinary proceeding against the students. For example, in *Harijander Singh v. Kakatiya Medical College*,[61] the Andhra Pradesh High Court held that *certiorari* can go to a private affiliated college and an order cancelling admission of a student in breach of natural justice was quashed. But the same High Court differed from the *Harijander* view later in *Shakuntala*,[62] mainly because of the Supreme Court's decision in *Vaish College*. In *Kumkum*,[63] the Delhi High Court issued *mandamus* against the Principal of such a private college on the petition of a student in the matter of exercise of his powers under the University Ordinances. The High Court ruled that the Principal holds a public office, has statutory duties to perform and acts in a public capacity. It is not necessary for purposes of *mandamus* that the office be the creature of a statute. Public office is one where the powers and duties pertaining to the office relate to a large section of the public.

In view of the author, the *Harijander* approach had much to commend itself. After all, these institutions use public funds, are subject to the discipline of the affiliating University, are bound by the rules and regulations of the University and so they cannot thus be regarded as purely private bodies with no public char-

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59. *Ram Parshad v. Indian Institute of Bankers*, AIR 1992 P&H 2-8.
60. *Vaish Degree College v. Lakshmi Narain*, AIR 1976 SC 888 : (1976) 2 SCC 58; *Arya Vidya Sabha, Kashi v. K.K. Srivastava*, AIR 1976 SC 1073 : (1976) 3 SCC 83; Ref. *Jwala Devi Vidyalaya*, AIR 1981 SC 122 : (1979) 4 SCC 160.
61. AIR 1975 AP 35.
62. *Shakuntala v. Director of Public Instruction*, AIR 1977 AP 381.
63. *Kumkum v. Principal, Jesus & Mary College*, AIR 1976 Del 35.

acter. They must therefore be subjected to the writ jurisdiction for certain purposes.[64]

The matter has now been placed beyond any shadow of doubt by the Supreme Court pronouncement in the *Anandi Mukta* case.[65] The Supreme Court has ruled that the words "any person or authority" used in Art. 226 would cover "any other person or body performing public duty". The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body.

In the instant case, a trust registered under the Trusts Act was running a school aided by the government. The teachers filed a writ petition claiming termination benefits from the trust when it closed down the school. The Court held the trust subject to the High Court's writ jurisdiction under Art. 226 as it was discharging a public function by way of imparting education to students; it was subject to rules and regulations of the affiliating university; its activities were closely supervised by the university authorities; employment in such an institution "is not devoid of any public character".

The Supreme Court has very clearly ruled in the instant case that:—

> "The term "authority" used in Article 226 in the context must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purposes of enforcement of Fundamental Rights under Art. 32. Article 226 confers powers on the High Courts to issue writs for enforcement of Fundamental Rights as well as non-fundamental rights."

Undoubtedly, the exposition of the law in *Anandi Mukta* has widened the scope of Art. 226 as well as that of *mandamus*.[66]

It is thus established now that the High Courts have power to issue writs not only to statutory authorities and instrumentalities of the state but also to "any other person or body performing public duty."[67] Thus, medical colleges which are affiliated to the Universities and are receiving aid from state funds have been held subject to Art. 226.[68] These colleges are supplementing the effort of the state.

Recently, the Supreme Court has ruled that a writ petition is maintainable even against an unaided private educational institution to enforce government instructions against it.[69] The Court has ruled that an educational institution performs a public function, *viz.* imparting education. When an element of public interest is

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64. For comments on *Harijander*, see, JAIN, *THE EVOLVING INDIAN ADM. LAW*, 263-6, (1983).

65. *Shri Anadi Mukta Sadguru Shree Muktajee Vandajiswami Surana Jayanti Mahatsav Smarak Trust v. Rudani,* AIR 1989 SC 1607 : (1989) 2 SCC 691.
Also see, *U.P. State Co-operative Land Development Bank Ltd. v. Chandra Bhan Dubey,* AIR 1999 SC 753 : (1999) 1 SCC 741.

66. For discussion on *mandamus*, see, Sec. E, *infra.*

67. *Sri Konaseema Coop. Central Bank Ltd. v. N. Seetharama Raju,* AIR 1990 AP 171.

68. *Ravneet Kaur v. Christian Medical College, Ludhiana,* AIR 1998 P&H 1. Also see, *Kobad Jehangir Bharda v. Farokh Sidhwa,* AIR 1991 Bom. 16; *TTC Yuvaraj v. Principal, Dr. B.R. Ambedkar Medical College,* AIR 1997 Kant. 261.

69. *K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engineering,* AIR 1998 SC 295 : (1997) 3 SCC 571 But see *State Bank of India v. K. C. Tharakan,* (2005) 8 SCC 428 : (2005) 12 JT 358.

created and the institution is catering to the element, the teacher, the arm of the institution, is also entitled to avail of the remedy provided by Art. 226. Under the government instructions, the teachers in the private institutions were entitled to the same pay as the government servants and it was held that the teachers could take recourse to a writ petition under Art. 226 to enforce the same because of Art. 39(d) of the Constitution which is a directive principle.[70]

This pronouncement expands the dimensions of judicial review a great deal. In the first place, even an unaided private educational institution is held subject to the writ jurisdiction under Art. 226, for certain purposes, because it performs a public function, *viz.* that of imparting education. Secondly, the Court has enforced in this case non-statutory administrative instructions which do not have any legal effect *per se*.[71]

A stock exchange has been held subject to Art. 226. A stock exchange is a public limited company but is recognised by the Securities and Exchange Board of India (SEBI) as a stock exchange and it has to comply with the conditions laid down in the Securities Contracts (Regulation) Act, 1956. The exchange is subject to the writ jurisdiction under Art. 226 if it fails to perform the public duty by going beyond the mandate of the rules and bye-laws made under the Act.[72]

As regards *certiorari*, there is no principle that it cannot go to a non-statutory body. Any adjudicatory body which affects the rights of the people may be held subject to *certiorari.* In a very famous English case,[73] the Court of Appeal has practically said that bodies which exercise public functions may be susceptible to judicial review whatever the source of power. The reason is that so long as there is a possibility, however remote, of the body abusing its powers, it would be wrong for the courts to abdicate their responsibility. In the instant case, the question was whether *certiorari* could be issued to the Panel on Take-overs and Mergers—a non statutory body. The Panel oversees and regulates an important part of U.K. Financial market. The panel has no legal authority behind it and has no statutory, prerogative or common-law powers. Yet the Panel has been held to be subject to *certiorari* because it performs public law functions with public law consequences. Its powers being great, there is need to control lest it should act in an unfair manner in any case. The significance of the case lies in the acceptance of the proposition that bodies which exercise public functions may be susceptible to judicial review, whatever the source of their powers. This case widely enhances the range of bodies to whom *certiorari* can be issued.

Certiorari has been issued to a large number of sundry bodies exercising some type of adjudicatory function, such as, industrial tribunals, disciplinary authorities, Court-martial held under the Army Act, 1950.[74]

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70. For discussion on "Directive Principles", see, *infra*, Ch. XXXIV.

71. For a detailed discussion on "Directions" see, M.P. Jain, *A TREATISE ON ADM. LAW*, Ch. VIII (1996); *CASES & MATERIALS ON INDIAN ADM. LAW*, Ch. VII (1994).

72. *Sijal Rikeen Dalal v. Stock Exchange, Bombay,* AIR 1991 Bom 30; *Rakesh Gupta v. Hyderabad Stock Exchange Ltd.,* AIR 1996 AP 413.

73. *R. v. Panel on Take-overs and Mergers, ex parte Datafin and Prudential Bache Securities Inc.,* [1987] 1 All ER 564.

74. *Union of India v. A. Hussain,* AIR 1998 SC 577 : (1998) 1 SCC 537.
For discussion on *Certiorari,* see, Sec. E, *infra.*

(m) APPLICABILITY OF CIVIL PROCEDURE CODE

A proceeding under Art. 226 is not a civil suit as envisaged in the Code of Civil Procedure. The Code itself provides that it will not apply to proceedings under Art. 226 (See explanation to S. 141 of the Code). But that does not bar the High Court from framing a rule providing that the Code would be applicable (See e.g. Rules of the Calcutta High Court relating to matters under Art. 226 of the Constitution). In any case, the principle underlying the procedure, provisions of the Code have been made applicable by judicial rulings. Thus, for example some of such provisions are cited hereafter but only as examples. Or. 8 Rule 5 of the Civil Procedure Code is applicable in relation to matters under Art. 226 of the Constitution and, as such, the absence of a specific denial of the averments made in the writ petition would be deemed to have been admitted.[75]

(i) Necessary Parties.—In a writ petition, necessary parties must, and proper parties may, be impleaded.

A necessary party is one without whom no effective order can be made. The question is whether the presence of a particular party is necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions which are involved in the writ petition.[76] If the number of such parties is large, at least some of them must be joined in a representative capacity. The Supreme Court has said in *Prabodh Verma v. State of Uttar Pradesh*[77] :

> "A High Court ought not to decide a writ petition under Art. 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large."

Selection and appointment of candidates made by the Subordinate Services Selection Board, Haryana, were quashed by the High Court without impleading the selected/appointed candidates as parties. The High Court order was set aside by the Supreme Court because the High Court quashed the selection/appointment without hearing the persons concerned. It is settled law that no order to the detriment of a person can be passed without hearing him.[78]

The Central Government allotted a limited quantity of liquid fuel to the State of Kerala. Several applicants including the respondent applied for allotment of fuel to their independent power projects (IPP). The entire quantity of the fuel was allotted to four IPPs excluding the respondent. The respondent filed a writ petition challenging the selection policy of the State without inpleading the applicants whose IPPs had been selected. The writ petition was held not maintainable in the absence of those applicants as parties.[79]

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75. *Bharat Sanchar Nigam Ltd. v. Abhishek Shukla*, (2009) 5 SCC 368 : (2009) 5 JT 310.

76. *A. Janardhana v. Union of India,* AIR 1983 SC 769 : (1983) 3 SCC 601; *State of Himachal Pradesh v. Kailash Chand Mahajan,* AIR 1992 SC 1277, 1308 : 1992 Supp (2) SCC 351; *Harcharan Singh v. Financial Commissioner, Revenue, Punjab, Chandigarh,* AIR 1997 P&H 40.

77. AIR 1985 SC 167, 180 : (1984) 4 SCC 258.

78. *Bhagwanti v. Subordinate Services Selection Board*, (1995) Supt. 2 SCC 663.
Also see, *Ishwar Singh v. Kuldip Singh,* (1995) Supt. I SCC 179**;** *Rajesh Kumar Gupta v. State of U.P.,* (2005) 5 SCC 172 : AIR 2005 SC 2540.

79. *State of Kerala v. W.I. Services & Estates Ltd.,* (1998) 5 SCC 583.

In a petition for *certiorari*, the tribunal whose order is sought to be quashed, and also the parties in whose favour the said order is issued, are regarded as necessary parties.[80]

A proper party is one, in whose absence, an effective order can be made but whose presence is considered proper for a complete and final decision on the question involved in the proceeding.[81] A proper party is one whose presence is considered to be proper in order to provide effective relief to the petitioner and for avoiding multiplicity of litigation. Proper party is one whose presence is considered appropriate for effective decision of the case, although no relief may have been claimed against him. Where High Court felt that issues concerning public interest had arisen it should have framed specific issues and then put the State on specific notice inviting pleadings and documents. Any other party likely to be adversely affected and interested in being heard should have been allowed an opportunity of doing so.[82]

SUPPRESSION OF FACTS

It is a well established principle that suppression of materials exposes the petitioner to the risk of threshold dismissal. The principle emanates from the very nature of the power of interference under Art.226 {and since the court is sitting} i.e. a discretionary jurisdiction. A person who approaches the court for justice must come with clean hands and not one who deliberately attempts to deflect the court from the true path of justice by leading the court to injustice.[83]

Since it is a discretionary jurisdiction a petition may be dismissed on the ground that the petitioners have suppressed material facts in their petition.[84] Identification of material facts will be a case by case exercise and the definition of the expression has been attempted. The latest attempt (2009) of the Supreme Court,[85] is prefaced by saying that there is no definition of "material facts" in the Code of Civil Procedure nor in many statutes which come before the courts. But the Supreme Court in a series of judgments has laid down that all facts necessary to formulate a complete cause of action should be termed as "material facts". All basic and primary facts which must be proved by a party to establish the existence of cause of action or defence are material facts. "Material facts" in other words mean the entire bundle of facts which would constitute a complete cause of action.[86]

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80. *Udit Narayan v. Board of Revenue*, AIR 1963 SC 786 : 1963 Supp (1) SCR 676; *Birendra Nath v. State of West Bengal*, AIR 1973 Cal 94.

81. *G.M., S.C. Rly v. A.V.R. Siddhanti*, AIR 1974 SC 1755; A. *Janardhana v. Union of India*, AIR 1983 SC 769 : (1983) 3 SCC 601.

82. *State of U. P. v. Satya Narain Kapoor*, (2004) 8 SCC 630 : (2004) 9 JT 410.

83. *Arunima Baruah v. U.O.I.*, (2007) 6 SCC 120 : (2007) 6 SCALE 293; *Bhagubhai Dhanabhai Khalasi v. State of Gujarat*, (2007) 4 SCC 241 : (2007) 5 SCALE 357; *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar*, (2004) 7 SCC 166 : AIR 2004 SC 2421.

84. See e.g. *Chancellor v. Bijayananda Kar*, AIR (1994) SC 529.

85. *Anil Salgaonkar*, (2009) 9 SCC 310.

86. *Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar*, (2009) 9 SCC 310, relying on *Manubhai Nandlal Amorsey v. Popatlal Manilal Joshi*, (1969) 1 SCC 372; *Samant N. Balkrishna v. George Fernandez*, (1969) 3 SCC 238; *Udhav Singh v. Madhav Rao Scindia*, (1977) 1 SCC 511; *V.Narayanaswamy v. C.P.Thirunavukkarasu*, (2000) 2 SCC 294 : AIR 2000 SC 694; *L.R. Shivaramagowda v. T.M.Chandrashekar*, (1999) 1 SCC 666; *Harmohinder Singh Pradhan v. Ranjeet Singh Talwandi*, (2005) 5 SCC 46 : AIR 2005 SC 2379; *Harkirat Singh v. Amrinder Singh*, (2005) 13 SCC 511 : AIR 2006 SC 713; *Hardwari Lal v. Kanwal Singh*, (1972) 1 SCC 214; *Sudarsha Avasthi v. Shiv Pal Singh*, (2008) 7 SCC 604 : AIR 2008 SC 2724.

The Supreme Court has reiterated that a Court of law is also a Court of equity and in granting relief under Art. 226 the Courts will bear in mind the conduct of the party who was invoking the jurisdiction. Non disclosure of full facts or suppression of relevant materials or otherwise misleading the Court would disentitled a party to any relief.[87] This was a case where the appellant company had taken a collusive route to prevent a bank from realizing its dues and also created third party interest in the property mortgaged with the Bank.

Where the agent of the State (Karnataka State Forest Industries Corporation) being a Government of Karnataka Undertaking, is guilty of suppression of facts, the State as the principal was obliged to disclose the entire facts before the Court.[88]

(ii) Res Judicata.—The rule of *res judicata* envisages that finality should attach to the binding decisions pronounced by courts of competent jurisdiction so that individuals are not made to face the same litigation twice. It is basically a rule of private law but has been transposed into the area of writs proceedings as well. Thus, a person is debarred from taking one writ proceeding after another, and urging new grounds every time, in respect of one and the same cause of action, thus, causing harassment to the opposite party. This means that when once a High Court has disposed of a writ petitition under Art. 226, then a subsequent writ petition under Art. 226 cannot be moved in the High Court relating to the same cause of action.[89]

In *Ram Saran Tripathy v. Chancellor Gorakhpur University*,[90] the High Court dismissed a writ petition under Art. 226 against the Chancellor and the Vice-Chancellor of the University. Thereafter, the petitioner made representation to the Vice-Chancellor and the Chancellor, but it was rejected. He then filed another writ petition under Art. 226 in the High Court on the same subject-matter, but the High Court dismissed the same on the ground of *res judicata.*

When once a tax assessment order has been unsuccessfully challanged through a writ petition, it cannot be challenged again even though the petitioner-assessee wishes to raise some new ground against the order which he failed to urge before. But a tax assessment order for the subsequent year may be challanged on the basis of new grounds.[91]

The principle *res judicata* has been applied by the Supreme Court to determine the mutual relationship under Arts. 32 and 226. Disposal of a writ petition under Art. 226 by a High Court on merits bars a subsequent petition for a writ under Art. 32,[92] or even a regular suit,[93] between the same parties for the same cause of action, because of the principle of *res judicata*.[94] Claiming in the second writ petition a relief which had been voluntarily not claimed in the earlier writ petition

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87. *Prestige Lights Ltd. v. State Bank of India*, (2007) 8 SCC 449 : (2007) 10 JT 218.
88. *Karnataka State Forest Industries Corporation v. Indian Rocks*, (2009) 1 SCC 150 : AIR 2009 SC 684.
89. *M.S.M. Sharma v. Sinha*, AIR 1960 SC 1136 : 1959 Supp (1) SCR 806; *Ishwar Dutt v. Land Acquisition Collector*, (2005) 7 SCC 190 : AIR 2005 SC 3165.
90. AIR 1990 All 96.
91. *Devilal v. S.T.O.*, AIR 1965 SC 1150 : (1965) 1 SCR 686.
92. *Daryao v. State of U.P.*, AIR 1961 SC 1457 : (1962) 1 SCR 574; *Nagabhushanam v. Ankem Ankaiah*, AIR 1968 AP 74; Also see, *infra*, under Art. 32, Part V, Ch. XXXIII.
93. *Gulab Chand v. State of Gujarat*, AIR 1965 SC 1153 : (1965) 2 SCR 547.
94. YOGENDER SINGH, Principle of Res Judicata & Writ Proceedings, 16 *JILI*, 399 (1974); ILI, *ANNUAL SURVEY OF INDIAN LAW*, 124 (1970).

filed against the same parties, is not permissible.[1] The principle of constructive *res judicata* is also applicable.[2] An issue not raised in the first round of litigation cannot be raised in the second.[3]

The Supreme Court has emphasized in *Daryao*[4] that the rule of *res judicata* is based on public policy. It is in the interest of the public at large that finality should attach to the binding decisions pronounced by the courts of competent jurisdiction. Further, it is also in public interest that individuals should not be vexed twice over the same kind of litigation. Therefore, if a writ petition filed under Art. 226 is disposed of on merits, the decision would bar a writ petition under Art. 32 made on the same facts and for obtaining the same or similar orders or writs.

But when a writ petition is dismissed by the High Court *in limine* without passing a speaking order, it does not create *res judicata*. If a writ petition is dismissed on the ground that the petitioner was guilty of laches, or that he had an alternative remedy, then it would not be a bar for a subsequent writ petition under Art. 32 "except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32."[5] And an order which is a nullity cannot be brought into effect for invoking the principles of estoppel, waiver or *res judicata*.[6]

In case a writ petition under Art. 226 is dismissed on any ground (laches, alternative remedy), then another writ petition under Art. 226 before another bench is barred. The reason is that entertaining the second writ petition would render the order of the same Court dismissing the earlier writ petition redundant and nugatory. Further, if a petitioner is allowed to file a second writ petition after the dismissal of his earlier petition *in limine*, it would encourage an unsuccessful petitioner to go on filing one writ petition after another in the same matter in the same High Court, and there could thus be no finality for a Court order dismissing a writ petition.[7]

When the Supreme Court dismisses a special leave appeal petition filed under Art. 136, without a speaking order, it does not create *res judicata* for a subsequent writ petition under Art. 226. Dismissal of a special leave petition only means that the Court had decided that the case was not fit for appeal; it is not a decision on merits and so a writ petition under Art. 226 is maintainable to try identical issues.[8]

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1. *State Bank of India v. K. C. Tharakan*, (2005) 8 SCC 428 : (2005) 12 JT 358.
2. *State of Punjab v. Varinder Kumar* (2005) 12 SCC 435. See also *Raghavendra Rao v. State of Karnataka*, (2009) 4 SCC 635 : (2009) 2 JT 520. See also *Food Corporation of India v. Ashis Kumar Ganguly*, (2009) 7 SCC 734 : AIR 2009 SC 2582, plea not available when representation was pending.
3. *M.P. Palanisamy v. A.Krishnan*, (2009) 6 SCC 428 : AIR 2009 SC 2809.
4. *Daryao v. State of U.P., supra*, footnote 92.
5. *Daryao v. State of U.P.*, AIR 1961 SC at 1466 : (1962) 1 SCR 574. *Hoshnak Singh v. Union of India*, AIR 1979 SC 1328 : (1979) 3 SCC 135.
6. *Jayendra Vishnu Thakur v. State of Maharashtra*, (2009) 7 SCC 104 at p. 108 : (2009) 8 JT 5.
7. *State of Uttar Pradesh v. Labh Chand*, AIR 1994 SC 754, at 761. Also, *Brij Bihari Pandey v. State of Bihar*, AIR 1997 Pat. 74.
8. *Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust*, AIR 1978 SC 1283 : (1978) 3 SCC 119; *supra*, 428; *Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. Workmen*, AIR 1981 SC 960 : (1981) 2 SCC 663; *Indian Oil Corporation Ltd. v. State of Bihar*, AIR 1986 SC 1780 : (1986) 4 SCC 146; *Sahi Ram v. Avtar Singh*, AIR 1999 Del 96.

In case of *habeas corpus*, the principle of *res judicata* does not apply. Thus, when a petition challenging an order of detention is dismissed by the High Court, a second petition can be filed on fresh, additional grounds to challenge the legality of the continued detention of the petitioner.[9] This is because the courts attach great value to the right of personal freedom of a person.[10]

When a writ petition under Art. 226 is withdrawn without seeking permission of the High Court to file a fresh petition, the petitioner cannot file a fresh writ petition for agitating the same cause once again. This is on the ground of public policy.[11] But when the subject matter of the second writ petition is different from that of the first, the second petition is competent.[12]

ABUSE OF PROCESS

Abuse of process means utilizing the court's process not for justice but for some other ulterior motive. For example, where the court directs the Government to consider a representation made by a school and in furtherance thereof the State Government, after hearing the party concerned rejects the representation but such rejection is not challenged, another Writ Petition for the same issue merely on the ground that a few subsequent representations had been made reiterating the same issue and seeking similar relief amounted to abuse of the process.[13]

(n) DISMISSAL OF WRIT PETITIONS *IN LIMINE*

The Supreme Court has at times come with a heavy hand on the practice of the High Courts dismissing writ petitions *in limine*. The Supreme Court has pointed out that the High Court may, in exercise of its discretion, decline to exercise its extra- ordinary jurisdiction under Art. 226. The discretion however is judicial.

If the petition makes a frivolous, vexatious, or *prima facie* unjust claim, or a claim which may not appropriately be tried, or seeks a relief which the Court cannot grant, in a petition invoking extraordinary jurisdiction, the Court may decline to entertain the writ petition.[14] But when a writ petition raises an arguable or triable issue, or when the party claims to have been aggrieved by the action of a public body on the plea that the action is unlawful, high-handed, arbitrary or *prima facie* unjust, he is entitled to a hearing on its petition on the merits. Dismissal of the petition *in limine* would be unjustified in such a situation.[15] If the Court finds that the writ petition on its face does not raise any triable issue, it is liable to be dismissed *in limine*.[16]

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9. *Lallubhai Jogibhai v. Union of India,* AIR 1981 SC 728 : (1981) 2 SCC 427; *Kirit Kumar v. Union ofIndia,* AIR 1981 SC 1621 : (1981) 2 SCC 436.

10. For a full-fledged discussion on "Right to Personal Liberty", see, *infra,* Ch. XXVI. For *habeas corpus,* see, Sec. E, *infra.*

11. *Sarguja Transport Service v. State Transport Appellate Tribunal,* AIR 1987 SC 88 : (1987) 1 SCC 5.

12. *G.N. Nayak v. Goa University,* (2002) 2 SCC 712 : AIR 2002 SC 790.

13. *State of Tamil Nadu v. Amala Annai Higher Secondary School,* (2009) 9 SCC 386.

14. *Gunwant Kaur v. Municipal Committee, Bhatinda,* AIR 1970 SC 802 : (1969) 3 SCC 769.

15. *Century Spg. & Mfg. Co. v. Ulhasnagar Municipality,* AIR 1971 SC 1021 : (1970) 1 SCC 582; *Exen Industries v. Chief Controller of Imports,* AIR 1971 SC 1025 : (1972) 3 SCC 176; *Prem Chandra v. Collector, Faizabad,* AIR 1970 SC 802.

16. *Himansu Kumar Base v. Jyoti Prakash Mitter,* AIR 1964 SC 1636; *Union of India v. S.P. Anand,* AIR 1998 SC 2615, at 2618; *Cf. Director of Entry Tax v. Sunrise Timber Company,* (2008) 15 SCC 287.

The High Court may decline a writ petition *in limine* if it is frivolous or without substance. But a writ petition should not be thrown out if a *prima facie* case for investigation is made out. The High Court may reject a petition *in limine* if it takes the view that the authority in question had not acted improperly, or if the Court feels that the petition raises complicated questions of fact for determination which could not be properly adjudicated upon in a proceeding under Art. 226.[17]

The Haryana Government superseded the Kaithal Municipality. The order was challenged through a writ petition on the ground of *mala fides* on the part of the government. The High Court dismissed the petition *in limine.* The Supreme Court criticised this and observed:[18]

> "... in a case of the present kind the writ petition ought not to have been dismissed in the manner in which it was done without obtaining any return from the respondents and considering the same."

The Supreme Court has emphasized that when the High Court seeks to dismiss a writ petition *in limine,* it should give reasons for doing so. Absence of reasons deprives the Supreme Court of knowing the circumstances which weighed with the High Court to dismiss the writ petition at the threshold. Also, the petitioner not knowing the reasons cannot challenge the reasons in the higher forum.

In the following cases,[19] the Supreme Court remanded the writ petitions to the High Court concerned for fresh disposal on merits, because these writ petitions had been dismissed *in limine* without reasoned orders by the High Courts.

(o) DECLARATORY RELIEF

Normally, under Art. 226, the High Court does not grant merely a declaration unless the person aggrieved has asked for the consequential relief available to him. But the High Court can grant a mere declaration if the petitioner is not entitled to the further consequential relief on account of some legal bar of circumstances beyond his control.

> "In exceptional cases, the High Court may be justified to grant the relief merely in a declaratory form after being satisfied that the person approaching the Court was prevented from praying for any other consequential relief on account of legal impediment or bar of jurisdiction created by same statute."

In the instant case,[20] the petitioner came to the High Court for declaration of a University Service Rule as unconstitutional. The problem was that unless the rule was declared unconstitutional, the petitioner could not get any relief. The relief

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17. *D.D. Suri v. A.K. Barren,* AIR 1971 SC 175 : (1970) 3 SCC 313; *Jagdish Prasad v. State of Uttar Pradesh,* AIR 1971 SC 1224; *Ram Chandra v. State of Madhya Pradesh,* AIR 1971 SC 128.

18. *Gyan Chand v. State of Haryana,* AIR 1971 SC 333 : (1970) 1 SCC 582.

19. *Subash Chandra Choubey v. State of Bihar,* (1998) 8 SCC 714; *State of Punjab v. Surinder Kumar,* (1992) 1 SCC 489; *Sat Pal Chopra v. Director-cum-Joint Secretary,* AIR 1991 SC 970 : 1991 Supp (2) SCC 352; *Gram Panchayat, Bari v. Collector, Sonepat,* AIR 1991 SC 1082 : 1991 Supp (2) SCC 407; *Llewyn Furtado v. Govt. of Goa,* (1997) 7 SCC 533; *Nurul Station Complex Businessmen's Assn. v. City and Industrial Development Corpn. of Maharashtra Ltd.,* (2005) 11 SCC 478.

20. *M.C. Sharma v. The Punjab University, Chandigarh,* AIR 1997 P & H 87.

could be given by the Administrative Service Tribunal and not by the High Court. But the Tribunal could not declare the rule in question unconstitutional. Only the High Court could do so. Because of this division of jurisdiction between the High Court and the Tribunal, the High Court gave the declaration holding the impugned rule to be unconstitutional.

After referring to earlier authorities, the Supreme Court has reiterated that in the absence of a statutory framework and depending on a given situation, it and the High Court can issue a "positive mandamus" by directing the authorities to do what was required to be done in such a situation.[21]

(p) MOULDING OF RELIEF

The High Courts under Art. 226 have power not only to issue writs but also to make orders and to issue directions. Accordingly, the High Courts do not only issue writs, but discharge a much wider function, *viz.*, to mould relief in accordance with the facts of the case with a view to do complete justice between the contending parties. One or two examples of how the courts mould relief may be given here. High Court's power to consider subsequent events is limited to the purpose of moulding the relief and does not extend to grant of a relief for which no foundation was laid in pleadings of the parties.[22]

In *Grindlays Bank v. I.T.O.*,[23] the High Court while quashing the income-tax assessment proceedings also directed that fresh assessment be made. The appellant company contested this direction on the ground that the I.T.O. could not make an assessment as it was time-barred. Over-ruling this objection, the Supreme Court held that under article 226, the High Court may not only quash the offending assessment order but may also mould the remedy to suit the facts of the case. A party ought not to be permitted to gain any undeserved or unfair advantage by invoking the Court's jurisdiction. The Court's direction for a fresh assessment was necessary for properly and completely disposing of the writ petition. It had jurisdiction to do so and acted in the sound exercise of its judicial discretion in making it.

In *Shiv Shankar Dal Mills v. State of Haryana*[24], the market committee increased the market fees from 2 per cent to 3 per cent and the appellants paid the increased fees. On being challenged, the Supreme Court held that the increase in fee was *ultra vires*. Consequently, the committee became liable to refund the illegal payment made to it. The Court ruled that there could be no dispute about the amounts payable. Where public bodies, under colour of public laws, recover people's money, later discovered to be erroneous levies, the *dharma* of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs.

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21. *Destruction of Public & Private Properties v. State of Andhra Pradesh*, (2009) 5 SCC 212 (3-Judge Bench) : AIR 2009 SC 2266.
22. *Ramrao v. All India Backward Class Bank Employees Welfare Asson.*, (2004) 2 SCC 76 : AIR 2004 SC 1459.
23. AIR 1980 SC 656 : (1980) 2 SCC 191.
24. AIR 1980 SC 1037.

However, in the instant case, the difficulty was that the petitioners, who were traders, had themselves collected the amount in question in small levies from the next purchasers. To meet the situation, the Court referred to the procedure devised by it in *Nawabganj Sugar Mills* case.[25] There the Court devised a scheme to enable the consumers who had paid the excess amount to get back their money. The Court justified its decision by saying that article 226 grants an 'extraordinary remedy which is essentially discretionary, although founded on legal injury', and it is perfectly open to the Court, 'exercising that flexible power', to pass such order as 'public interest dictates and equity projects.[26]

(q) GRANT OF COMPENSATION

A very innovative development has taken place with respect to Art. 226, namely, in certain situations, courts have granted compensation to the victims of government lawlessness or negligence. Although Art. 226 does not make any reference to "compensation", but only says that a High Court may issue "directions or orders or writs", the Supreme Court has interpreted this constitutional provision in a flexible manner so as to permit award of compensation where a person's fundamental or legal right is infringed.[27]

In *DK Basu v. State of West Bengal*,[28] the Supreme Court accepted that compensation can be awarded to the victims of torture in police custody. In the instant case, the Supreme Court granted compensation for the custodial death of a person as this was held to be an infringement of Art. 21.[29]

In a very recent case, under Art. 226, compensation has been awarded to a Bengala Deshi lady who was gang raped by railway employees at the Sealdah station.[30]

After the husband underwent vasectomy operation, his wife conceived. This happened because of the negligence of the doctor in the government hospital. The Allahabad High Court ruled that, in the circumstances, it was the duty of the State to maintain the child as the said lady never wanted another child. The Court directed the State Government to deposit Rs. 50,000 in a bank for the purpose.[31]

A six year old child fell in a deep sewerage tank and died. The tank was not covered with a lid and was left open. On a writ petition being filed by the mother of the child in the High Court under Art. 226, compensation of Rs. 50,000/- was awarded to her.[32]

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25. *Nawabganj Sugar Mills Co. v. Union of India*, AIR 1976 SC 1153.
26. Also see on this topic *infra*, Ch. XXXIII, under Art. 32.
27. *Nilabati Behera v. State*, 1993 AIR SCW 2366 : AIR 1993 SC 1960.
28. AIR 1997 SC 610.
Also see, *Rudal Shah v. State of Bihar*, AIR 1993 SC 1086 : (1983) 4 SCC 141; *Murti Devi v. Delhi*, (1998) 9 SCC 604; *Sebastian M. Hongray v. Union of India*, AIR 1984 SC 1026; *Rajendra Singh v. Smt. Usha Rani*, AIR 1984 SC 956; *Bhim Singh v. State of Jammu & Kashmir*, AIR 1986 SC 494 : (1985) 4 SCC 677; *Saheli v. Commr. of Police*, AIR 1990 SC 513 : (1990) 1 SCC 422; *Kumari (Smt.) v. State of Tamil Nadu*, (1992) 2 SCC 223 : AIR 1992 SC 2069.
For a full-fledged discussion on "compensation", see, M.P. JAIN, *A TREATISE ON ADM. LAW*, II; *CASES & MATERIALS ON ADM. LAW*, IV.
Also see, Ch. XXXIII, *infra*, Ch. XXXVIII, Sec. E.
29. For discussion on Art. 21, see, *infra*, Ch. XXVI.
30. *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988 : (2000) 2 SCC 465.
31. *Shakuntala Sharma v. State of Uttar Pradesh*, AIR 2000 All 219.
32. *Kumari (Smt.) v. State of Tamil Nadu*, AIR 1992 SC 2069 : (1992) 2 SCC 223.

Where, however, disputed questions of fact arise, a petition under Art. 226 is not a proper remedy.[33]

It is true that most of the cases coming before the courts for compensation under Art. 226, relate to deprivation of life or personal liberty guaranteed by Art. 21.[34] But, in theory, there could be no reason for not extending the same principle to the violation of any other Fundamental Right (under Art. 226) or to the breach of any other legal right.[35] The matter is discussed further at a later stage.[36]

(r) INTERLOCUTORY ORDERS

When a writ petition is filed, the Court may make an interim or interlocutory order. The purpose of such an order is to preserve in *status quo* the rights of the parties, so that, the proceedings do not become infructuous or ineffective by any unilateral overt acts by one side or the other during the pendency of the writ petition.[37]

The scope and effect of an interim order would depend upon terms of the order itself. In case of any ambiguity the interim order should be understood in the light of prayer made for interim relief, facts of the case and terms of the interim order.[38]

Exceptional situations can emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong *prima facie* case of a standard much higher than just *prima facie* case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The Court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the Court may put the parties on such terms as may be prudent. Hence the Court has accepted the submission that since the election was for a period of one year out of which a little less than half of the time has already elapsed and in the absence of interim relief being granted to him there is nothing which would survive for being given to him by way of relief at the end of the final hearing. In *Deoraj* the Supreme Court indicated the factors to be considered

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33. *Tamil Nadu Electricity Board v. Sumathi,* AIR 2000 SC 1603 : (2000) 4 SCC 543; *Chairman, Grid Corp. of Orissa v. Sukamani Das,* AIR 1999 SC 3412 : (1999) 7 SCC 298.
34. *Common Cause v. Union of India,* (1999) 6 SCC 667.
35. *Lucknow Development Authority v. M.K. Gupta,* (1994) 1 SCC 243.
Also see, *Rabindra Nath Ghoshal v. University of Calcutta,* (2002) 7 SCALE 137.
36. See, *infra,* Ch. XXXVIII. Also, Ch. XXXIII.
37. *Kihota Hollohon v. Zachillu,* AIR 1993 SC 412 : 1992 Supp (2) SCL 651.
38. *BPL Ltd. v. R. Sudhakar,* (2004) 7 SCC 219 : AIR 2004 SC 3606.

before granting any interim relief namely, *prima facie* case, irreparable injury and balance of convenience. The Court expressed the view that ordinarily the Court is inclined to maintain *status quo*. The Court said: Interim order should not be granted as a matter of course, particularly in relation to matter where standards of institutions are involved and the permission to be granted to such institutions is subject to certain provisions of law and regulations applicable to the same and unless the same are complied with. Indeed by grant of such interim orders students who have been admitted in such institutions would be put to serious jeopardy, apart from the fact whether such institutions could run the medical college without following the law.[39]

All India Dravida Munnetra Kazagam (AIADMK) along with other political parties gave a call for total cessation of work and closure of shops etc. on 1.10.2007. This call was challenged in a writ petition filed in Madras High Court contending that the call in substance was for a 'bandh'. The High Court, by its interim order gave various directions on State Government and its police officers, basically, to ensure that persons who were not honestly responsive to the call should be able to carry on their normal activities. Aggrieved by the order, AIDMK took the matter to the Supreme Court. The Court after referring to the Full Bench judgment of the Kerala High Court,[40] which had declared 'bandh' and its enforcement to be illegal and unconstitutional, virtually incorporated the Kerala judgment and held that although generally an interim order should not be granted which would result in granting the main relief, in cases such as the one under consideration such relief could be granted and confirmed the interim order of the Madras High Court.[41]

In Ghouse[42] a show cause notice issued under FERA was challenged and interim relief was prayed for staying the notice upon which the High Court directed status quo. The Supreme Court held that High Court ought to have give reasons for granting such relief. The Court, however directed that the proceedings before the authority would continue but the final order should not be communicated without leave or further orders of the High Court.

Where the landlord files an application for execution of a eviction decree filed but an order under U.P. Accommodation Requisition Act, 1947 passed for requisition of the premises and the landlord challenged the requisition order as well as order pursuant to which possession of the premises was taken by State, interim order was issued directing the State either to proceed under Land Acquisition Act or vacate the premises within a week. But neither the order of DM produced before the Court nor any law or rule brought to the notice of the Court which would authorize the DM to take possession of any premises in such manner in which possession was taken by DM, This was labelled as high handed, arbitrary and without any legal sanction.[43]

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39. *Medical Council of India v. Rajiv Gandhi University of Health Sciences,* (2004) 6 SCC 76 : AIR 2004 SC 2603.
40. *Bharat Kumar v. State of Kerala,* AIR 1997 Ker 291.
41. *All India Anna Dravida Munnetra Kazhagam v. L.K.Tripathi,* (2009) 5 SCC 417, 452 : AIR 2009 SC 1314.
42. *Ibid.*
43. *State of Uttranchal v. Ajit Singh Bhola,* (2004) 6 SCC 800 : (2004) 5 JT 513.

While considering an interim application High Court is not justified in rendering a categorical finding on merits.[44]

The Supreme Court has cautioned the High Courts that *ex parte* injunctions should be granted only under "exceptional circumstances".[45]

An exparte order on the view that since the matter had to be remitted no prejudice would be caused to the respondents if they were not brought on record has been negatived.[46]

E. THE WRITS

(i) HABEAS CORPUS

The writ of *habeas corpus* is used to secure release of a person who has been detained unlawfully or without legal justification. The great value of the writ is that it enables an immediate determination of a person's right to freedom. Detention may be unlawful if *inter alia* it is not in accordance with law, or the procedure established by law has not been strictly followed in detaining a person, or there is no valid law to authorise detention, or the law is invalid because it infringes a Fundamental Right, or the Legislature enacting it exceeds its limits.[47]

Detention should not contravene Art. 22, as for example, a person who is not produced before a magistrate within 24 hours of his detention is entitled to be released.[48] The power of detention vested in an authority, if exceeded, abused or exercised *mala fide* makes the detention unlawful.[49]

Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is such a device. The writ has been described as a writ of right which is grantable *ex debito justitiae*. Though a writ of right, it is not a writ of course. The applicant must show a *prima facie* case of unlawful detention. Once, however, he shows such a case and the return is not good and sufficient, he is entitled to this writ as of right. While dealing with a habeas corpus application undue importance is not to be attached to technicalities, but at the same time where the Court is satisfied that an attempt has been made to deflect the course of justice by letting loose red herrings, the Court has to take serious note of unclean approach.[50]

While dealing with a petition for a writ of *habeas corpus*, the Court may examine the legality of the detention without requiring the person detained to be pro-

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44. *Union of India v. Kundan Rice Mills Limited*, (2009) 1 SCC 553 : (2008) 12 JT 36.
45. *Morgan Stanley Mutual Fund v. Kartick Das*, (1994) 4 SCC 225; *Union of India v. Era Educational Trust*, AIR 2000 SC 1573 : (2000) 5 SCC 57; see also *State of U.P. v. Ram Sukhi Devi*, (2005) 9 SCC 733 : AIR 2004 SC 284.
46. *Cyrill Lasrado v. Juliana Maria Lasrado*, (2004) 7 SCC 431 : AIR 2004 SC 1367.
47. *State of Bihar v. K.P. Verma*, AIR 1965 SC 575 : (1963) 2 SCR 183.
48. *Infra*, Ch XXVII.
49. *G. Sadanandan v. State of Kerala*, AIR 1966 SC 1925 : (1966) 3 SCR 590; *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740 : (1966) 1 SCR 709.
50. *Union of India v. Paul Manickam*, (2003) 8 SCC 342 : AIR 2003 SC 4622.

duced before it.[51] Thus the High Court will not direct the authorities concerned to lodge the report with the Police along with documents to enable them to register a case under the provisions of the Indian Penal Code, since the matter in issue before the court was the validity of the detention order and the curtailment of the personal liberty of the detenu and nothing more. Further, in such a case the court was not justified in issuing a direction and awarding exemplary costs (Rs.50,000/-) to be paid by the petitioner.[52] The writ is issued to the authority having the custody of the aggrieved person. It may be prayed for by the prisoner himself, or if he is unable to do so, by someone else on his behalf.[53] The writ is not issued if the Court is satisfied that the prisoner is not under unlawful restraint.[54]

Because the courts regard personal liberty as one of the most cherished values of mankind, the Supreme Court has lately sought to reduce procedural technicalities to the minimum in the matter of issue of *habeas corpus*. The Supreme Court has pointed out in *Icchu Devi v. Union of India*, that in case of an application for a writ of *habeas corpus*, the Court does not, as a matter of practice, follow strict rules of pleading. Even a postcard by a detenu from jail is sufficient to activise the Court into examining the legality of detention. Also, because of Art. 21, the Court places the burden of showing that detention is in accordance with the procedure established by law on the detaining authority.[55] The Court may grant an interim bail while dealing with a *habeas corpus* petition.[56]

There have been cases where persons picked up by the police or the army have disappeared without a trace. In such cases, on petitions for *habeas corpus* being moved by their relatives, courts have awarded compensation.[57]

In October, 1991, some officers and policemen of the Punjab Police abducted seven persons. As all efforts to have these persons released failed, a petition for *habeas corpus* was filed in the Supreme Court under Art. 32 seeking release of these persons. After perusing the various affidavits filed by various persons and after hearing arguments of the counsels, the Court became convinced that the enquiry into the matter so far by the Punjab Police had been highly unsatisfactory and that an independent enquiry at a very high level was called for. Accordingly, the Court directed the Director, CBI, to personally conduct the enquiry into the matter and report to the Court.[58]

The above matter came before the Court again in 1995 after the Director, CBI, completed the inquiry and placed his report before the Court. The Director concluded that the seven persons had been liquidated by the police. The Court held the whole police action as illegal and expressed its 'disapprobation' of the Punjab Police as it failed to discharge its primary duty of upholding law and order and of protecting the citizens. Instead, the whole episode "betrays scant respect for the life and property of innocent citizens". The Court directed the State to pay Rs. 1.50

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51. *Kanu Sanyal v. District Magistrate*, AIR 1973 SC 2684 : (1973) 2 SCC 674.
52. *Pooja Batra v. U.O.I.*, (2009) 5 SCC 296 : AIR 2009 SC 2256.
53. *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378 : (1983) 2 SCC 96.
54. *Janardan v. State of Hyderabad*, AIR 1951 SC 217; *Godavari v. State of Maharashtra*, AIR 1966 SC 1404 : (1966) 3 SCR 314.
55. AIR 1980 SC 1983 : (1980) 4 SCC 531. Also see, *infra*, Ch. XXVII, Sec. B.
56. *State of Bihar v. Rambalak Singh*, AIR 1966 SC 1441 : (1966) 3 SCR 344.
57. *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960 : (1993) 2 SCC 746; *Smt. Postsangbam Ningol Thokchom v. General Officer Commanding*, AIR 1997 SC 3534 : (1997) 7 SCC 725. Also see, *infra*, Ch. XXXIII.
58. *Inder Singh v. State of Punjab*, AIR 1995 SC 312.

lakhs for each of the said seven persons to his legal representatives. The Court took the view that the police force being the arm of the State, it must bear the consequences for its failure to enforce law and order and protect the citizens. The Court also directed initiation of legal action against the guilty policemen. When the guilty policemen were identified, the State should seek to recover from them the amount paid by the State as compensation as this was the tax-payers' money.[59]

A *habeas corpus* petition was filed by the father of T. It was alleged that T had been kept in illegal custody by the police officers. It was established that T was killed in an encounter with the police. The Court awarded Rs. 5 lac as compensation to the petitioner.[60]

A foreigner who enters India secretly cannot claim freedom of movement, and his detention with a view to expel him from India is not illegal.[61]

The petitioner was convicted by a Court martial for criminal misappropriation of money and was sentenced to a term of imprisonment. Rejecting his petition for a writ of *habeas corpus*, the High Court stated that *habeas corpus* was not available to question the correctness of a decision by a legally constituted Court of competent jurisdiction. The High Court can go into questions of jurisdiction of the Court martial, or whether it was properly constituted, or whether there was such an irregularity or illegality as would go to the root of its jurisdiction.[62]

Habeas corpus may also be issued when a person complains of illegal custody or detention by a private person.[63] When conflicting claims are made for the custody of an infant, the Court can enquire into these claims and award the custody to the proper person.[64]

After dismissal of criminal appeal, review petition and curative petition, the petitioner's plea that the Supreme Court allowed his appeal to the extent that his conviction under S. 121 of IPC was set aside, but he was convicted under S. 123 of IPC read with S. 39 Cr. PC though this was not the charge against him, and therefore he was deprived of opportunity to defend himself, the Court held that this aspect had been considered while dismissing review and curative petitions and entertaining a fresh petition under Art. 32 on the same ground would require setting aside the orders passed in review and curative petitions.[65]

(ii) *QUO WARRANTO*

The writ lies only in respect of a public office of a substantive character.[66] The writ does not therefore lie to question the appointment of a college principal as it is not a public office.[67]

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59. *Inder Singh v. State of Punjab*, AIR 1995 SC 1949 : (1995) 3 SCC 702. Also see, *Malkiat Singh v. State of Uttar Pradesh*, AIR 1999 SC 1522.
60. *Malkiat Singh v. State of Uttar Pradesh*, AIR 1999 SC 1522.
61. *Anwar v. State of Jammu & Kashmir*, AIR 1971 SC 337.
62. *S. Soundarajan v. Union of India*, AIR 1970 Del. 29.
63. *Madhu Bala v. Narendra Kumar*, AIR 1982 SC 938.
64. *Gohar Begum v. Suggi*, AIR 1960 SC 93 : (1960) 1 SCR 597; *Veena Kapoor v. Varinder Kumar*, AIR 1982 SC 792 : (1981) 3 SCC 92.
65. *Shaukat Hussain Guru v. State (NCT) Delhi*, (2008) 6 SCC 776 : AIR 2008 SC 2419.
66. *Ram Singh Saini v. H.N. Bhargava*, AIR 1975 SC 1852 : (1975) 4 SCC 676; *Arun Kumar v. Union of India*, AIR 1982 Raj 67.
67. *Niranjan Kumar v. Univ. of Bihar*, AIR 1973 Pat 85. For a clear enunciation as to when such writ is issued see *N. Kannadasan v. Ajoy Khose*, (2009) 7 SCC 1, 55.

The writ calls upon the holder of a public office to show to the Court under what authority he is holding that office. The Court may oust a person from an office to which he is not entitled. It is issued against the usurper of an office and the appointing authority is not a party. The Court can thus control election or appointment to an office against law, and protect a citizen from being deprived of a public office to which he may be entitled.[68]

If the statute prescribes certain qualifications for holding a public office, it is certainly open to the Court on a petition filed by a citizen to scrutinise the qualifications of the person whose appointment to the public office is called into question.[69]

To file a petition for *quo warranto*, it is not necessary that the petitioner should have suffered a personal injury himself, or should seek to redress a personal grievance.[70] Petitions for *quo warranto* have been moved to test the validity of election of a person to a university syndicate, or as the mayor of a municipal corporation,[71] nomination of members to a Legislative Council by the Governor,[72] appointment of the Chief Minister of a State,[73] or the Chief Justice of India,[74] or the Advocate-General in a State,[75] or a public prosecutor,[76] University teachers,[77] presiding officer of a labour Court,[78] etc.

The motives of the appointing officer in making the appointment in question are irrelevant in a *quo warranto* petition.[79] Also, the Court would not issue the writ if it is futile, *e.g.*, if the person holding the office, on being ousted by *quo warranto* can be reappointed.[80]

A petition for *quo warranto* was filed against the Chief Minister of Rajasthan on the ground that he was not validly elected to the House. The Rajasthan High Court rejecting the petition ruled that *quo warranto* may be issued on the petition of a member of the public if a Chief Minister holds office without lawful authority, and in breach of any constitutional provision. The office of the Chief Minister is one of substantive character created by the Constitution. But membership of an Assembly is not an office for the purposes of *quo warranto* and it is not a proper remedy to raise questions relating to the election of the Chief Minister to the House. Such a question can be raised properly only through an election petition.[81]

When the Governor of a State appoints as the Chief Minister under Art. 164 of the Constitution a person who is not qualified, or is disqualified, to be a member

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68. *Univ. of Mysore v. Govinda Rao*, AIR 1965 SC 491 : (1964) 4 SCR 575; *Puranlal v. P.C. Ghosh*, AIR 1970 Cal 118.
69. *Durga Chand v. Administrator*, AIR 1971 Del. 73.
70. *Satish Chander v. Rajasthan Univ.*, AIR 1970 Raj 184. But see, *Arun Kumar v. Union of India*, AIR 1982 Raj 67.
71. *Rajendar Singh v. Shejwalkar*, AIR 1971 MP 248.
72. *Supra*, Ch. VI.
73. *Supra*, Ch. VII.
74. *Supra*, Ch. IV.
75. *Karkare v. Shevde*, AIR 1952 Nag 330; see, *supra*, Ch. VII.
76. *Mohambaran v. Jayavelu*, AIR 1970 Mad. 63.
77. *Supra*, footnote 68.
78. *State of Haryana v. Haryana Co-op. Transport*, AIR 1977 SC 237 : (1977) 1 SCC 271.
79. *S.C. Malik v. P.P. Sharma*, AIR 1982 Del. 83.
80. *P.L. Lakhanpal v. A.N. Ray*, AIR 1975 Del. 66; *supra*, Ch. IV.
81. *Purshottam Lal v. State of Rajasthan*, AIR 1979 Raj 23. Also see, *infra*, Ch. XIX, under Elections.

of the State Legislature, the appointment is contrary to Art. 164 and is, thus, unconstitutional. Although the discretion of the Governor is not challengeable because of Art. 361, the appointment of the Chief Minister can be quashed by the High Court by issuing *quo warranto* to him.[82]

No writ of *quo warranto* is issuable against the Council of Ministers on the ground that it does not command majority support in the House. Under Art. 164, the choice of the Chief Minister by the Governor is not circumscribed by anything in the Constitution in terms of majority or minority party. The only effective check is that the Ministry shall fall if it fails to command a majority in the Assembly. But once installed, so long as the Legislature is not in session, a Ministry may carry on without being sure of such a majority. So long as the Ministry enjoys the pleasure of the Governor, no *quo warranto* can issue on the ground that it does not command majority support of the Assembly without the Assembly itself deciding that matter on its floor. No one can say that the Ministry does not enjoy the confidence of the Assembly when it is prorogued. Even when the Ministry is defeated on the floor of the House, the Governor may ask it to stay in office until alternative arrangements are made and no *quo warranto* shall issue during that period.[83]

A *quo warranto* cannot be issued seeking dismissal of the Chief Minister of a State on the ground of non-performance of a constitutional duty.[84] The Chief Minister holds office during the pleasure of the Governor; the Council of Ministers is collectively responsible to the State Assembly.[85] Therefore, the matter liesprimarily in the domain of the State Assembly or the Governor's discretion who appoints the Chief Minister. The proper remedy in the situation may be *mandamus* directing the Chief Minister to discharge his constitutional obligation. In this connection, the A.P. High Court has observed:[86]

> "Ordinarily, no action would lie against a person who holds elected office by virtue of an election and one who is not removable by the elector cannot be removed by issuance of a writ in the nature of *quo warranto,* unless one has incurred the disqualification to hold the elected office, specifically provided by the Constitution or any statutory law enacted thereunder. Disqualification cannot be read into the Constitution implicitly or by process of reasoning and presumptions, how so ever moralistic, ethical, desirable, high sounding they may be".

The Speaker of the Goa Assembly declared the Chief Minister and his two colleagues in the Cabinet disqualified for membership of the Assembly under the Anti-defection law.[87] The High Court passed an interim stay order. Thereafter, the Assembly removed the Speaker from office and the Deputy Speaker, acting as the Speaker, reviewing the earlier Speaker's order set it aside and thus removed the disqualification of the Chief Minister and his two colleagues.

Nearly after ten months, a writ petition was filed challenging the order passed by the Deputy Speaker. It was argued that the writ petition was not maintainable

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82. *B.R. Kapur v. State of Tamil Nadu,* AIR 2001 SC 3435 : (2001) 7 SCC 231.
83. *R.K. Nokulsana Singh v. Rishang Keising,* AIR 1981 Gau 48. Also see, *supra,* Chs. III and VII.
84. *Y.S. Rajasekara Reddy v. Nara Chandrababu Naidu,* AIR 2000 AP 142.
85. *Supra,* Ch. VII, Sec. A(iii)(c); Sec. B.
86. AIR 2000 AP, at 147.
87. See, *supra,* Ch. II, Sec. F and Ch. VI, Sec. B(iv).

because of laches,[88] but the Supreme Court rejected the contention and held that the petition for *quo warranto* was maintainable in the instant case for the following reasons : the petitioner was not asserting any personal interest; the persons concerned were holding high public offices inspite of being disqualified for membership of the House, *i.e.*, these persons continued to usurp the office and perpetuate an illegality and it was necessary to prevent the same.[89]

Appointment of a government pleader was quashed because the procedure prescribed in the relevant rules for this purpose had not been followed. The petition was made one year after the appointment. Ignoring the plea of *laches*, the Court observed that in a matter involving the right to a public office and violation of legal procedure to be adopted in making appointment to a public office, delay should not deter the Court in granting the discretionary relief and rendering justice.[90]

(iii) *MANDAMUS*

Mandamus is a command issued by a Court commanding a public authority to perform a public duty belonging to its office.[91] *Mandamus* is issued to enforce performance of public duties by authorities of all kinds. For example, when a tribunal omits to decide a matter which it is bound to decide, it can be commanded to determine the questions which it has left undecided.[92] Although the Court ordinarily is reluctant to assume the functions of the statutory functionaries it will step in by mandamus when the State fails to perform its duty. It shall also step in when the discretion is exercised but the same has not been done legally and validly. And even though existence of an alternative remedy is no bar to exercise jurisdiction under Art. 226, it will not ordinarily do so unless it is found that an order has been passed wholly without jurisdiction or contradictory to the constitutional or statutory provisions or where an order has been passed without complying with the principles of natural justice.[93]

The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has established no specific remedy and where justice despite demanded has not been granted.[94] In the State of *Kerala Scheduled Tribes* case[95] although the statutory provision required restoration of "equal" extent of land, the Court, perhaps, without reference to the word "equal" issued a mandamus (in cases where restoration was not possible) directing the State to allot not only equal extent of land, but, where restoration was not possible to allot such land by taking recourse to acquisition proceedings with

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88. On 'Laches', see, *supra*, Sec. D(h).
89. *Kashinath G. Jalmi v. The Speaker*, AIR 1993 SC 1873 : (1993) 2 SCC 703.
90. *K. Bheema Raju v. State of Andhra Pradesh*, AIR 1981 AP 24.
91. *Guruswami v. Mysore*, AIR 1954 SC 592; Mysore *v. Chandrasekhara*, AIR 1965 SC 532; *S.I. Syndicate v. Union of India*; AIR 1975 SC 460; *Bihar Eastern Gangetic Fishermen Coop. Society v. Sipahi* Singh, AIR 1977 SC 2149 : (1977) 4 SCC 145; *Chet Ram v. Delhi Municipality*, AIR 1981 SC 653; *Samir Kumar v. State of Bihar*, AIR 1982 Pat. 66; *Comptroller & Auditor General v. K.S. Jagannathan*, AIR 1987 SC 537 : (1986) 2 SCC 679.
92. *Parry & Co. v. Commercial Employees Association*, AIR 1952 SC 179 : 1952 SCR 519; *K.V.R. Setty v. State of Mysore*, AIR 1967 SC 993.
93. *Guruvayoor Devaswom Managing Committee v. C.K. Rajan*, (2003) 7 SCC 546 : AIR 2004 SC 561.
94. *Union of India v. S. B. Vohra*, (2004) 2 SCC 150 : AIR 2004 SC 1402.
95. (2009) 8 SCC 46 : (2009) 9 JT 579.

a further direction not to allot hilly or other types of land not suitable for agricultural purposes. These directions are not in consonance with the substantive laws of the country and could be cited to effectively stifle non agricultural projects of national importance or conceived in public interest by vested interests This is what happened to the Tata Motors 'NANO' project when Tata pulled out of West Bengal due to political agitation and siege of the project site by a political party purportedly in the interest of owners of agricultural land acquired by Tata for setting up their plant.

Mandamus can be granted only when a legal duty is imposed on the authority in question and the petitioner has a legal right to compel the performance of this duty. The performance of the duty should be imperative and not discretionary. The existence of a right duty situation is no longer the sole basis for issuing a mandamus. The Courts now recognize promissory estoppel and legitimate expectations as causes of action for invoking the mandamus jurisdiction.[1]

It is not possible to lay down the standard exhaustively as to in what situation a writ of mandamus will issue and in what situation it will not. In other words, exercise of its discretion by the Court will also depend upon the law which governs the field, namely whether it is a fundamental law or an ordinary law. Ordinarily the Court will not exercise the power of the statutory authorities. It will at the first instance allow the statutory authorities to perform their own functions and would not usher the said jurisdiction itself.

The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law be it a legislative act of the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. Thus the Court will not exercise its jurisdiction to entertain a writ application wherein public law element is not involved. In any event, the modern trend also points to judicial restraint in relation to administrative action. It may not be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions. The question as to whether the judicial review is permissible and to what extent, will vary from case to case and no broad principles can be laid down.[2]

According to the Supreme Court, *mandamus* is issued, *inter alia*, "to compel performance of public duties which may be administrative, ministerial or statutory in nature". Usually the use of the word "shall" or "must" indicates a mandatory duty, but this is not conclusive and these words may be interpreted as "may". On the other hand, at times, the word "may" may be interpreted as "shall". Therefore, the Court has further observed: "What is determinative of the nature of duty, whether it is obligatory, mandatory or directory, is the scheme of the statute in which the 'duty' has been set out. Even if the 'duty' is not set out clearly and specifically in the statute, it may be implied as correlative to a 'Right'."[3] For example, *mandamus* can be issued directing the executive to do its legal duty by implementing the order of a tribunal.[4] Again, since it was the duty of

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1. See *Ramprovesh Singh v. State of Bihar*, (2006) 8 SCC 294 : (2006) 9 JT 35.
2. *Union of India v. S. B. Vohra*, (2004) 2 SCC 150 : AIR 2004 SC 1402.
3. *Mansukhlal Vithaldas Chauhan v. State of Gujarat*, AIR 1997 SC 3400 at 3405 : (1997) 2 SCC 622.
4. *Sharif Ahmad v. R.T.A., Meerut*, AIR 1978 SC 209 : (1978) 1 SCC 1.

the police to give necessary protection to properties being interfered with by lawless elements and unauthorized persons it is obliged to give such protection without insisting on payment by the private party seeking such protection.[5]

The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. However, the courts always retain the discretion to withhold the remedy where it would not be in the interest of justice to grant.[6]

Mandamus is a discretionary remedy and the High Court has full discretion to refuse to issue the writ in unsuitable cases.[7]

The Madhya Pradesh Government made a rule making it a matter of its discretion to grant dearness allowance to its employees. As no right was conferred on government servants to the grant of dearness allowance, and no duty was imposed on the government to grant it, and as the government had merely taken the power to grant the allowance at its own discretion, *mandamus* could not be issued to compel the government to exercise its discretionary power.[8]

Under Art. 229(2), the Chief Justice of a High Court can make rules prescribing conditions of service of officers and servants of the Court. However, the rules relating to salaries *etc*. require the approval of the State Executive.[9] It has been held that *mandamus* cannot be issued against the government directing it to give its approval to the rules made by the Chief Justice regarding salaries *etc*. of the staff the High Court. There is no obligation on the government to approve these rules. Also, the government's consent under the proviso to Art. 229(2) is not a mere formality.[10]

Article 16(4) of the Constitution confers discretion on the government to reserve posts for backward classes. Art. 16(4) neither imposes any obligation, nor confers power coupled with duty on the government to make reservations. Accordingly, *mandamus* cannot be issued directing the government to make reservations under Art. 16(4).[11]

The petitioner contended that persons junior to him in service had been appointed by the government but his claims had been ignored. The Supreme Court refused to issue the writ, for the persons appointed were qualified for the posts while the petitioner himself was not so qualified and so he could not be regarded as a person aggrieved for the purpose of the relief claimed.[12]

Mandamus cannot be issued to the State Government directing it to appoint a commission to inquire into changes in climatic cycle, floods in the State etc. be-

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5. *Howrah Mills Co. Ltd. v. Md. Shamin*, (2006) 5 SCC 539 : (2006) 6 SCALE 50.
6. *Binny Ltd. v. V. Sadasivan*, (2005) 6 SCC 657 : AIR 2005 SC 3202.
7. *State of Kerala v. K.P.W.S.W.L.C. Coop. Society Ltd.*, AIR 2001 Ker. 60.
8. *State of Madhya Pradesh v. Mandawar*, AIR 1954 SC 493 : (1955) 1 SCR 599.
In, *Jagdish Prasad v. M.C.D.*, AIR 1993 SC 1254 : 1993 Supp (2) SCC 221, the Supreme Court refused to issue *mandamus* to enforce the claim of municipal employees for transfer of ownership of municipal quarters to them because they had no legal right thereto.
Also see, *Rajashekhar v. State of Karnataka*, AIR 2000 Knt. 221.
9. *Supra*, this Chapter, Sec. B(u).
10. *State of Andhra Pradesh v. T. Gopalakrishnan*, AIR 1976 SC 123 : (1976) 2 SCC 883. Also, *State of Mysore v. Syed Mahmood*, AIR 1968 SC 1113 : (1968) 3 SCR 363; *Bihar E.G.F. Coop. Soc. v. Sipahi Singh*, AIR 1977 SC 2149 : (1977) 4 SCC 145; *State of Bihar v. Sri Chandradip Rai*, AIR 1981 SC 2071 : (1982) 2 SCC 272.
11. *Ajit Singh v. State of Punjab*, AIR 1999 SC 3471, 3481. Also see, Ch. XXIII, *supra.*
12. *Umakant v. State of Bihar*, AIR 1973 SC 964 : (1973) 1 SCC 485.

cause the government's power to appoint a commission is discretionary and optional.[13] *Mandamus* cannot be issued to the government directing it to bring a statute into force.[14] The writ cannot be issued to the legislature directing it to enact a particular law[15] *Mandamus* cannot also be issued directing a delegated legislative authority to make rules in furtherance of a statutory provision.[16] A policy decision or a matter of policy is not totally immune from judicial review. Inadequate study of a factor on the basis of which a policy decision is taken and where there is manifest arbitrariness or irrationality, interference by the courts is permissible.[17]

In the exercise of power of judicial review the Court cannot alter the status of a post e.g. directing the University to treat a honorary Visiting Professor a member of teaching post.[18]

In relation to a public interest litigation filed under Article 32 of the Constitution where a CBI investigation had been ordered relating to the protection of the Taj Mahal and it was alleged that the prosecuting Judges would not pursue the matter due to prevailing political situation, it was held that the jurisdiction of the Court was confined to seeing that proper criminal investigation is carried out and the Court cannot take over the function of the Magistrate or interfere with the Magistrate's function.[19] The Court however proceeded to observe that once a final report has been filed in terms of Section 173 of Cr. P.C. , it was the Magistrate alone who could take an appropriate decision in the matter which, however, could be subjected to judicial review.

Mandamus can be issued when the government denies to itself a jurisdiction which it undoubtedly has under the law.[20]

Mandamus is not issued if the right is purely of a private character. A private right, such as arising out of a contract, cannot be enforced through *mandamus* and the proper course is a civil suit except when the matter falls in the public law domain.[21] For example, in *Lotus Hotel*,[22] the Court issued a direction under Art.

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13. *Vijay Mehta v. State of Rajasthan*, AIR 1980 Raj 207.
For a full discussion on this point see, M.P. JAIN, *A TREATISE ON ADM. LAW*, Ch. XVI; *CASES & MATERIALS ON INDIAN, ADM. LAW*, III, Ch. XVII, Sec. B, 2465-2644.

14. *Altemesh Rein v. Union of India*, AIR 1988 SC 1768 : (1988) 4 SCC 54.

15. *State of Jammu & Kashmir v. A.R. Zakki*, AIR 1992 SC 1546 : 1992 Supp (1) SCC 548; *R.C. Poudyal v. Union of India*, AIR 1993 SC 1804 : 1994 Supp (1) SCC 324; *Union of India v. Deoki Nanda Aggarwal*, AIR 1992 SC 96; *R.K. Singh v. Union of India*, AIR 2001 Del. 12; *Karnataka v. State of Andhra Pradesh*, AIR 2001 SC 1560; *A.P. Sarpanchs Ass. v. State of Andhra Pradesh*, AIR 2001 AP 474.

16. *A.P. Sarpanchs Ass. v. A.P. supra.*

17. *Sanjay Singh v. U.P. Public Service commission, Allahabad*, (2007) 3 SCC 720 : AIR 2007 SC 950.

18. *State of Karnataka v. C. K. Pattamashetty*, (2004) 6 SCC 685.

19. *M. C. Mehta v. Union of India*, (2008) 1 SCC 407 : AIR 2008 SC 180.

20. *E.A. Coop. Society v. State of Maharashtra*, AIR 1966 SC 1149 : (1966) 3 SCR 365.

21. *Lekhraj Sathrandas v. Dy. Custodian*, AIR 1966 SC 334 : (1966) 1 SCR 120; *Har Shankar v. Dy. E.T Commr.*, AIR 1975 SC 1121 : (1975) 1 SCC 737; *D.R. Mills v. Commissioner, Civil Supplies*, AIR 1976 SC 2243; *Radhakrishna Agarwal v. State of Bihar*, AIR 1977 SC 1496; *Food Corporation of India v. Sujit Roy*, AIR 2000 Gau 61; *Divisional Forest Officer v. Bishwanath Tea Co.*, AIR 1981 SC 1368; *LIC v. Escorts Ltd.*, AIR 1986 SC 1370 : (1986) 1 SCC 264; *Namakkal South India Transports v. Kerala S.C.S. Corpn. Ltd.*, AIR 1997 Ker 56; *State of Gujarat v. M.P. Shah Charitable Trust*, (1994) 3 SCC 552; *Food Corpn. of India v. Jagannath Dutta*, AIR 1993 SC 1494; *State of Himachal Pradesh v. Raja Mahendra Pal*, AIR 1999 SC 1786; *State of Kerala v. K.P.W.S.W.L.C. Coop. Soc. Ltd.*, AIR 2001 Ker. 58; *LIC v. Asha Goel*, AIR 2001 SC 549 : (2001)

[Footnote 21 Contd.]

226 to enforce a contractual obligation by applying the doctrine of promissory estoppel.[23] Recourse may be had to *mandamus* if a public authority acts in an arbitrary and unlawful manner even though the source of the right of the petitioner may initially be in a contract.[24] As the Supreme Court has observed: [25]

> "Even though the rights of the citizens, therefore, are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play and natural justice, equality and non-discrimination."

Even in contractual matters, public authorities have to act fairly, and if they fail to do so, approach to Art. 226 would always be permissible because that would amount to violation of Art. 14 of the Constitution.[26] The Supreme Court has observed in *Mahabir Auto*:[27]

> "Even though the rights of the citizens are in the nature of contractual rights the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice , equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case".

The Supreme Court has emphasized in *Tata Cellular v. Union of India*[28] that while the Court does not interfere with government's freedom of contract, invitation of tenders and refusal of any tender which pertain to policy matter, the Court can interfere when the state decision or action is vitiated by arbitrariness, unfairness, illegality, irrationality or unreasonableness.

To the same effect is the following observation of the Supreme Court in *LIC v. Escorts Ltd.*:[29]

> "… If the action of the state is related to contractual obligations or obligations arising out of the tort, the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the Court

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[Footnote 21 Contd.]

2 SCC 160; *Alok Prasad Verma v. Union of India,* AIR 2001 Pat. 211; *State of Bihar v. Jain Plastics and Chemicals Ltd.,* AIR 2002 SC 206 : (2002) 1 SCC 216; *Supriyo Basu v. W. B. Housing Board,* (2005) 6 SCC 289 : AIR 2005 SC 4187.

For a fuller discussion on this topic, see, M.P. JAIN, *A TREATISE*, II; *CASES & MATERIALS*, IV; and Ch. XXXIX, *infra.*

22. *Gujarat State Financial Corporation v. Lotus Hotel,* AIR 1983 SC 848 : (1983) 3 SCC 379.

23. For the doctrine of promissory estoppel see, JAIN, A TREATISE ON ADM. LAW, II; JAIN, CASES & MATERIALS ON ADM. LAW, IV.

24. *D.F.O. v. Ram Sanehi Singh,* AIR 1973 SC 205 : (1971) 3 SCC 864.

25. *L.I.C. of India v. Consumer Education and Research Centre,* AIR 1995 SC 1811, 1821 : (1995) 5 SCC 482.

Also see, *R.D. Shetty v. International Airport Authority of India*, AIR 1979 SC 1628 : (1979) 3 SCC 489.

26. *Shreelekha Vidyarthi v. State of Uttar Pradesh*, AIR 1991 SC 537 : (1991) 1 SCC 212.

27. *Mahabir Auto Stores v. Indian Oil Corp*., AIR 1990 SC 1031, 1037 : (1990) 3 SCC 752.

Also see, *Radhakrishna Agarwal v. State of Bihar,* AIR 1977 SC 1496 : (1977) 3 SCC 457; *Sterling Computers Ltd. v. M.N. Publications Ltd*., (1993) 1 SCC 445; *Union of India v. Graphic Industries Co*., (1994) 5 SCC 398 : AIR 1995 SC 409.

For a full discussion on "Government Contracts and Writs", see, M.P. JAIN, *A TREATISE OF ADM. LAW*, II, Ch; *CASES & MATERIALS ON INDIAN ADM. LAW*, IV.

28. (1994) 6 SCC 651 : AIR 1996 SC 11.

29. AIR 1986 SC 1370. Also, *LIC of India v. Consumer Education & Research Centre*, AIR 1995 SC 1811 : (1995) 2 SCC 482.

> will examine actions of state if they pertain to the public law domain and refrain from examining them if they pertain to the private Law field".[30]

Mandamus is not available to enforce a payment of money due to the claimant under a civil liability, as this is a question which is better determined in a civil suit, but an order to pay money may be made against the State to enforce a statutory obligation.[31] But more in keeping with the trend of the law, the Court has held that a consequential monetary claim can be made and given.[32] *Mandamus* can be issued when tax is collected illegally.[33]

In the case noted below, a cess was collected from the sugar mills under an unconstitutional law. The mills paid the cess under protest and did not pass on the cess to any third party but bore the brunt themselves. In the circumstances, the Court issued *mandamus* to the taxing authorites to refund the money illegally collected as cess.[34]

Mandamus cannot be issued to the legislature to enact a particular legislation.[35] Similarly, *mandamus* cannot be issued to the executive to make a particular rule in the exercise of its power of delegated legislation, as the power to frame rules is legislative in nature.[36]

Mandamus cannot be issued to violate law. A writ of *mandamus* can be issued to a statutory authority to compel it to perform its statutory obligation. But *mandamus* cannot issue to compel it to pass an order in violation of a statutory provision.[37]

Mandamus cannot be denied on the ground that the duty to be enforced is not imposed by statute. As De Smith has observed:

> "To be enforceable by *mandamus* a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract".

The Supreme Court has adopted with approval the above statement in the *Shri Anadi Mukta Sadguru* case with the following observation:[38]

> "The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should

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30. Also see, *infra*, Chs. XXXVIII and XXXIX; See also *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517 : (2006) 14 SCALE 224.

31. *Burmah Construction v. State of Orissa*, AIR 1962 SC 1320 : 1962 Supp (1) SCR 242; *Hari Raj v. Sanchalak Panchayati Raj*, AIR 1968 All. 246.

32. *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*, (2004) 3 SCC 553 : (2003) 10 JT 300.

33. *Sales Tax Officer v. Kanhaiyalal*, AIR 1959 SC 135; *Sugammal v. State of Madhya Pradesh*, AIR 1965 SC 1740 : (1965) 56 ITR 84; *Shree Baidyanath Ayurved Bhawan Pvt. Ltd. v. State of Bihar*, AIR 1996 SC 2829 : (1996) 6 SCC 86.

34. *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*, AIR 2001 SC 787 : (2001) 2 SCC 549.

35. *Asif Hameed v. State of J&K*, AIR 1989 SC 1899, 1906 : 1989 Supp (2) SCC 364.

36. *Supreme Court Employees' Welfare Ass. v. Union of India*, AIR 1990 SC 334; *State of Jammu & Kashmir v. A.R. Zakki*, AIR 1992 SC 1546 : 1992 Supp (1) SCC 548; *A.P. Sarpanchs Ass. v. State of Andhra Pradesh*, AIR 2001 AP 474, 484.
Also see, *supra*, Ch. II, Sec. N.

37. *Santosh Kumar v. State of Bihar*, AIR 1997 SC 978; *Hope Textiles Ltd. v. Union of India*, (1995) Supp (3) SCC 199.

38. AIR 1989 SC 1607, at 1613 : (1989) 2 SCC 691.
For a discussion on "Administrative Duties, see, M.P. JAIN, *CASES & MATERIALS ON ADM. LAW*, III, Ch. XIX.

> remain flexible to meet the requirements of variable circumstances. *Mandamus* is a very wide remedy which must be easily available 'to reach injustice wherever it is found.' Technicalities should not come in the way of granting that relief under Art. 226."

In the modern era, extensive discretionary powers are being conferred on the executive.[39] In such cases, the Court cannot ask an authority to exercise its discretion in a particular manner not expressly required by law, or question its exercise on merits, or substitute its own discretion for that of the authority in which it is vested. The Court can issue *mandamus* only to direct the authority to exercise discretion according to law.[40]

When a statutory authority is invested with certain powers, it may do all things which are necessary for giving effect to such power. Hence directions given by the Delhi Electricity Regulatory Commission that all existing meters should be replaced by electronic meters in exercise of its power to frame tariff were held to be valid.[41] The Court observed that with the advance in science and technology it should adopt the course of creative interpretation of the provisions of a statute.[42]

The Court does not sit in appeal over the order and is not entitled to consider the propriety or the correctness or the satisfactory character of the reasons given by the government for making the order. But if an authority having discretion is also under a duty to act and exercise its discretion then the courts may enforce this duty and ask the authority to act according to law.[43]

A rule framed under the City of Bombay Police Act, 1902, provided that the Commissioner of Police "shall have power in his absolute discretion at any time to cancel or suspend any licence granted under these rules". Interpreting the rule, the Supreme Court stated that where the Commissioner has before him objections received from the public to the grant of a cinema licence, the Commissioner was obligated to exercise his discretion either to cancel the licence or to reject the objections.[44]

The Syndicate of a University cancelled the examination in a subject and directed re-examination as it was satisfied that there had been leakage of questions. The Supreme Court emphasized that it was not the Court's function to substitute its discretion for that of the University authorities.[45] The Supreme Court has observed recently in *State of West Bengal v. Nuruddin Malik*:[46]

> "The courts can either direct the statutory authorities, where it is not exercising its discretion, by mandamus to exercise its discretion or when exercised to see whether it has been validly exercised. It would be inappropriate for the Court to substitute itself for the statutory authorities to decide the matter."

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39. For discussion on "Discretionary Powers" see, M.P. JAIN, *A TREATISE ON ADM. LAW*, I, Chs. XVII, XVIII & XIX; JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW*, III, Ch. XVI.

40. *U.P. State Road Transport Corpn. v. Mohd. Ismail*, AIR 1991 SC 1099 : (1991) 3 SCC 239; *State of Haryana v. Naresh Kumar Bali*, (1994) 4 SCC 448, 453.

41. *Suresh Jindal v. Bses Rajdhani Power Ltd.*, (2008) 1 SCC 341 : AIR 2008 SC 280.

42. *Ibid.*

43. *Comptroller and Auditor-General v. K.S. Jagannathan*, AIR 1987 SC 545 : (1986) 2 SCC 679.

44. *Commr. of Police v. Gordhandas*, AIR 1952 SC 16 : (1991) 3 SCC 239; *Ruttonjee v. State of West Bengal*, AIR 1967 Cal. 450.

45. *Vice-Chancellor v. S.K. Ghosh*, AIR 1954 SC 217 : 1954 SCR 883; *State of Mysore v. Chandrasekhar*, AIR 1966 SC 532.

46. AIR 1999 SC 1466 at 1471 : (1998) 8 SCC 143.

In case of discretion vested in an authority, the Court would ordinarily quash the order if discretion has been abused, or not been properly exercised, or when the public authority has acted against law or not in accordance with law,[47] or has exceeded the limits of its powers,[48] or has acted *mala fide*,[49] or has not applied its mind,[50] or has taken into account an irrelevant consideration,[51] or passes an order without there being any material to support the same.[52] Thus, under S. 10(1)(d) of the Industrial Disputes Act, 1947, the government may refer an industrial dispute for adjudication to an industrial tribunal. Once a matter has been so referred, the government has no power to cancel or supersede the reference subsequently, and if the government seeks to do so, *mandamus* can be issued.[53]

If the bid of a party was rejected erroneously, and he had no knowledge thereof, he can challenge not only the rejection of his bid but also a direction upon the authority for the acceptance of his bid as in such a situation, filing of another writ petition would have been an exercise in futility.[54]

A government decision taken on purely political considerations, without any material, can be quashed by the writ Court.[55]

Under sec. 6 of the Prevention of Corruption Act, 1947, a public servant could not be prosecuted for certain specified offences without the sanction of the concerned government. The Supreme Court has emphasized in the case noted below,[56] that the grant of sanction was a solemn affair and not merely a matter of form. Sanction granted mechanically and without the application of mind by the concerned authority could not be regarded as valid and *mandamus* could be issued to quash the same. The Court has observed in this connection:[57]

> "In the performance of this duty, if the authority in whom the discretion is vested under the statute, does not act independently and passes an order under the instructions and orders of another authority, the Court would intervene in the matter, quash the order and issue a mandamus to that authority to exercise its own discretion".

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47. *Satwant Singh v. A.P.O.*, AIR 1967 SC 1836 : (1967) 3 SCR 525; *Jaisinghani v. Union of India*, AIR 1967 SC 1427 : (1967) 2 SCR 703; *Mangudi v. State of Tamil Nadu*, AIR 1971 Mad. 275; *Krishna Cinema v. State of Gujarat*, AIR 1971 Guj. 103.

48. *Calcutta Discount Co. v. I.T.O.*, AIR 1961 SC 372 : (1961) 2 SCR 241.

49. *Pratap Singh v. State of Punjab*, AIR 1964 SC 72 : (1964) 4 SCR 733; *Rowjee v. State of A.P.*, AIR 1964 SC 962 : (1964) 6 SCR 330; *State of Punjab v. Ramjilal*, AIR 1971 SC 1228 : (1970) 3SCC 602; *A. Periakaruppan v. State of Tamil Nadu*, AIR 1971 SC 2303; *State of Haryana v. Rajendra*, AIR 1972 SC 1004; *State of Punjab v. Gurdial Singh*, AIR 1980 SC 319 : (1980) 2 SCC 471.

50. *State of Punjab v. Hari Kishan*, AIR 1966 SC 1081; *King-Emperor v. Sibnath Bannerjee*, 72 I.A. 241; *Kishori Mohan v. State of West Bengal*, AIR 1972 SC 1749; *Nandlal v. Bar Council*, AIR 1981 SC 477.

51. *Irani v. State of Madras*, AIR 1961 SC 1731; *Rohtas Industries v. S.D. Agrawal*, AIR 1969 SC 707; *Sheo Nath Singh v. App. Asstt. Commr. of I.T.*, AIR 1971 SC 2451; *Manu Bhushan v. State of West Bengal*, AIR 1973 SC 295; *Asstt. Controller of Estate Duty v. Prayag Dass*, AIR 1981 SC 1263 : (1981) 3 SCC 181.

52. *Union of India v. Brij Fertilizers Pvt. Ltd.*, (1993) 3 SCC 564.

53. *State of Bihar v. Ganguly*, AIR 1958 SC 1018 : 1959 SCR 1191; *Mahboob Sherrif v. Mysore State Tr. Authority*, AIR 1960 SC 321.

54. *Jespar I. Slong v. State of Meghalaya* (2004) 11 SCC 485 : AIR 2004 SC 3533.

55. *N.V. Rajula Reddy v. Govt. of A.P.*, AIR 1997 AP 222.

56. *Mansukhlal Vithaldas v. State of Gujarat*, AIR 1997 SC 3400 : (1997) 7 SCC 622.

57. *Ibid*, at 3405.

A mere irregularity, however, in an authority exercising its power is not a sufficient ground for issue of the writ.[58] A *mandamus* can be issued to restrain a public authority from acting under a void law.[59] Ordinarily *mandamus* would not be issued to enforce administrative directions which do not have the force of law,[60] but in some cases, the courts have enforced the directions.[61]

A *mandamus* can issue to quash an illegal assessment of a tax and for refund of money illegally realised as tax as a consequential relief.[62] But *mandamus* would not issue merely for refund of money due from the State on account of its having made an illegal exaction, and for this purpose a suit should be filed in a civil Court.[63]

A party seeking *mandamus* must first call upon the authority concerned to do justice by performing its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before applying to a Court for *mandamus* even where the alleged obligation is established.[64]

But, the Patna High Court has disagreed with this approach.[65] The Court has characterised this rule as a "technical requirement of the English Courts" which need not be followed in India. As has been emphasized by the Supreme Court, the law relating to writs in India "has gone far ahead of the technicalities which are associated with the issuance of writ in English courts." If, therefore, in a given situation, the Court finds that the demand for justice would be an idle formality, the Court can issue *mandamus.*

Where a challenge is thrown to show cause notice against proposed classification of goods under Central Excise Tariff Act, 1985, the Court will follow normal practice of principle non interference at the stage of issuance of show cause notice. However, a show cause notice issued without jurisdiction or in abuse of process of law would certainly be interfered with. Such interference would be rare and in order to invoke such interference, it should be *prima facie* established that the notice was without jurisdiction or was abuse of process of law. Mere assertion to such effect will not be sufficient. The Supreme Court upheld the High Court quashing the show cause notice on the ground that the same was a mere

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58. *Cooverji v. Excise Commr.*, AIR 1954 SC 220.

59. *Dwarka v. State of Uttar Pradesh*, AIR 1954 SC 224.

60. *State of Assam v. A.K. Sarma*, AIR 1965 SC 1196 : (1965) 1 SCR 890; *Fernandez v. State of Mysore*, AIR 1967 SC 1753 : (1967) 3 SCR 636; *J.R. Raghupaty v. State of Andhra Pradesh*, AIR 1988 SC 1681 : (1988) 4 SCC 364.

61. *Jewat Bai & Sons v. G.C. Batra*, AIR 1967 Del 310; *Baleshwar Dass v. State of Uttar Pradesh*, AIR 1981 SC 41 : (1980) 4 SCC 226; *Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh*, AIR 1982 SC 33 : (1982) 1 SCC 39.

For a full discussion on "Directions", see, M.P. JAIN, *A TREATISE ON ADM. LAW*, I, Ch. VIII; *CASES & MATERIALS*, I, Ch VII.

62. *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006 : (1964) 6 SCR 261; *A. Match Industries v. Union of India*, AIR 1971 AP 69; *SAIL v. State of Orissa*, AIR 2000 SC 946 : (2000) 3 SCC 200; *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*, AIR 2001 SC 787 : (2001) 2 SCC 549.

63. *Suganmal v. State of Madhya Pradesh*, AIR 1965 SC 1740 : (1965) 56 ITR 84.

But see, *Food Corporation of India v. Viramgam Nagar Palika*, AIR 2000 Guj 91.

64. *State of Haryana v. Chaman Mal*, AIR 1976 SC 1654; *Kamini Kumar Daschoudhary v. State of West Bengal*, AIR 1972 SC 2060 : (1972) 2 SCC 42; *S.I. Syndicate v. Union of India*, AIR 1975 SC 460; *Amritlal v. Collector, C.E.C. Revenue*, AIR 1975 SC 538 : (1975) 4 SCC 714.

65. *Hem Narain Singh v. Ganesh Singh*, AIR 1995 Pat. 1.

repetition of earlier show cause notices with slight variations not relatable to any different test.[66]

(iv) CERTIORARI & PROHIBITION

The writs of *certiorari* and prohibition are issued practically on similar grounds. The only difference between the two is that *certiorari* is issued to quash a decision after the decision is taken by a lower tribunal while prohibition is issuable before the proceedings are completed.

The object of prohibition is prevention rather than cure. For example, the High Court can issue prohibition to restrain a tribunal from acting under an unconstitutional law. But if the tribunal has already given its decision then *certiorari* is the proper remedy in such a situation.

It may be that in a proceeding before an inferior body, the High Court may have to issue both prohibition and *certiorari*; prohibition to prohibit the body from proceeding further, and *certiorari* to quash what has already been done by it.

In the absence of very cogent or strong reasons, issuance of writs of prohibition is improper. It was pointed out that since under CPC the civil Court had sufficient powers to decide its own jurisdiction the High Court erred in interfering by prohibition and directed the civil Court to decide preliminary issues as to the maintainability of the suit and applicability of the bar of res judicata/estoppel.[67]

The jurisdiction to issue *certiorari* is a supervisory jurisdiction and the High Court exercising it is not entitled to act as an appellate Court.

The Supreme Court has emphasized that a writ in the nature of *certiorari* is a wholly inappropriate relief to ask for when the constitutional validity of a legislative measure is being challenged. In such a case, the proper relief to ask for would be a declaration that a particular law is unconstitutional and void. If a consequential relief is thought necessary, than a writ of *mandamus* may be issued restraining the state from enforcing or giving effect to the provisions of the law in question.[68]

Certiorari can be issued even if the lis is between two private parties. The law has always been, that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi judicial body conferred with power to determine question affecting the rights of subjects and obliged to act judicially. Since the Writ of certiorari is directed against the act, order or proceedings of the subordinate Court, it can issue even if the lis is between two private parties.[69]

These writs go to a body acting in an adjudicatory capacity and according to natural justice or fair procedure and not to one acting in a purely administrative

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66. *Union of India v. Vicco Laboratories,* (2007) 13 SCC 270 : (2007) 13 SCALE 481.

67. *Thirumala Tirupati Devasthanams v. Thallappaka Ananthacharyulu,* (2003) 8 SCC 134 : AIR 2003 SC 3290.

68. *Praboth Verma v. Uttar Pradesh,* AIR 1985 SC 167 : (1984) 4 SCC 251; See also *Surya v. Ram Chander Rai* (2003) 6 SCC 675 : AIR 2003 SC 3044.

69. *Surya Dev Rai v. Ram Chander Rai,* (2003) 6 SCC 675 : AIR 2003 SC 3044; *T. C. Basappa v. T. Nagappa,* AIR 1954 SC 440 : (1955) 1 SCR 250; *Province of Bombay v. Khushaldas S. Advani,* AIR 1950 SC 222 : 1950 SCR 621; *Dwarka Nath v. ITO,* AIR 1966 SC 81 : (1965) 3 SCR 536 relied on *Ganga Saran v. Civil Judge, Hapur,* 1991 All LJ 159 : AIR 1991 All 114 (FB).

manner. It is not usual to find an express provision in a statute to indicate whether the body set up by it is to act according to natural justice or otherwise. In most cases, it is to be implied from the statute. A writ of certiorari can be issued in relation to an order passed by a subordinate court.[70]

Over time, courts have been expanding the horizons of natural justice.[71] Thus, *certiorari* has been issued to: authorities dealing with licensing liquor shops,[72] passing the order of confiscation or imposing penalty under the Sea Customs Act,[73] tax assessment proceedings,[74] cancellation of examination results of a candidate, or expulsion of a student by a University,[75] an enquiry commission under the Commissions of Enquiry Act,[76] industrial tribunals,[77] election tribunals,[78] dismissal from service,[79] or removal from membership of a body,[80] cancellation of a licence,[81] requisitioning of property for a public purpose,[82] or an enquiry committee.[83]

The District Consumer Forum, the State Consumer Forum as well as the National Commission constituted by the Consumer Protection Act, 1986, have adjudicatory powers and also have same "trappings of a Court". These bodies can therefore be regarded as 'tribunals'[84] and, thus, subject to *certiorari.*

Certiorari can be isued under Art. 226 to a Court-martial. A Court-martial is not subject to High Court's superintendence under Art. 227.[85] In *Major A. Hussain*[86] the Supreme Court pointed out that Court Martial is to a significant degree a specialized part of overall mechanism by which the military discipline is preserved. It is its special character which justifies adjudication by such courts try offences under the Army Act. The Court Martial discharges judicial functions. Their decisions are reviewable under Art. 226 if the Court martial has failed to follow the prescribed

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70. *Surya Dev Raj v. Ram Chander Rai*, 2003 (6) SCC 675 : AIR 2003 SC 3044.

71. *Ridge v. Baldwin*, (1963) 2 WLR 935; *Kraipak v. Union of India*, AIR 1970 SC 150 : (1969) 2 SCC 262; 13 JILI 362 (1971).

For a detailed discussion on the concept of natural justice, see, M.P. JAIN, *A TREATISE OF ADMINISTRATIVE LAW*, I, Chs. IX-XII; M.P. JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW*, I, Chs. VIII-XI.

72. *Nagendra v. Commr., Hills Division*, AIR 1958 SC 398 : 1958 SCR 1240; also *infra*.

73. *Sewpujanrai v. Customs Collector*, AIR 1958 SC 845 : 1959 SCR 821; *Asstt. Collector Customs v. Malhotra*, AIR 1972 SC 2083.

74. *K.T. Moopil Nair v. State of Kerala*, AIR 1961 SC 552 : (1961) 3 SCR 77; *Board of Revenue v. Vidyawati*, AIR 1962 SC 1217 : 1962 (Supp) 3 SCR 50; *Sovachand Mulchand v. Collector, Central Excise*, AIR 1968 Cal. 174.

75. *Board of High School v. Ghanshyam*, AIR 1962 SC 1110 : 1962 Supp (3) SCR 36; *Board of High School v. Chitra*, AIR 1970 SC 1039 : (1970) 1 SCC 121.

76. *State of Jammu & Kashmir v. Bakshi Ghulam Mohd.*, AIR 1967 SC 122.

77. *Kirloskar Electric Co. v. Their Workmen*, AIR 1973 SC 2119 : (1973) 2 SCC 247.

78. *Durga Shankar v. Raghuraj*, AIR 1954 SC 520 : (1955) 1 SCR 267.

79. *State of Orissa v. Dr. Binapani*, AIR 1967 SC 1269 : (1967) 2 SCR 625.

80. *State of Punjab v. Bakhtawar Singh*, AIR 1972 SC 2083; *Bhagat Ram v. State of Punjab*, AIR 1972 SC 1571 : 1972 (2) SCC 170.

81. *Mahabir Prashad Santosh Kumar v. State of Uttar Pradesh*, AIR 1970 SC 1302 : (1970) 1 SCC 764.

82. *Madan Gopal v. District Magistrate*, AIR 1972 SC 2656 : (1973) 1 SCC 89.

83. *Union of India v. M.B. Patnaik*, AIR 1981 SC 858 : (1981) 2 SCC 159.

84. *Spring Meadows Hospital v. Haroj Ahluwalia*, AIR 1998 SC 1801 : (1998) 4 SCC 39.

85. *Ranjit Thakur v. Union of India*, AIR 1987 SC 2386 : (1987) 4 SCC 611; *Union of India v. Major A. Hssain*, AIR 1998 SC 577; *Union of India v. R.K. Sharma*, AIR 2001 SC 3053.

86. *Union of India v. Major A. Hussain*, (1998) 1 SCC 537 : AIR 1998 SC 1344.

procedure or act without or in excess of has jurisdiction and the evidence is sufficient for the punishment.[87]

The grounds for the issue of *certiorari* have been succinctly stated by the Supreme Court in *Syed Yakoob v. K.S. Radhakrishnan.*[88] The writ of *certiorari* or prohibition is issued, *inter alia* on the following grounds:

(1) when the body concerned proceeds to act without, or in excess of, jurisdiction, or
(2) fails to exercise its jurisdiction[89]; or
(3) there is an error of law apparent on the face of the record in the impugned decision of the body; or
(4) the findings of fact reached by the inferiror tribunal are based on no evidence; or
(5) it proceeds to act in violation of the principles of natural justice; or
(6) it proceeds to act under a law which is itself invalid, *ultra vires* or unconstitutional, or
(7) it proceeds to act in contravention of the Fundamental Rights.[90]

(a) JURISDICTIONAL ERROR

Want of jurisdiction may arise from the nature of the subject-matter so that the inferior body might not have authority to enter on the inquiry.[91] It may also arise from the absence of some essential preliminary, or from the absence of a jurisdictional fact. A plea as to the lack of jurisdiction where it does not involve any question of fact and is a pure question of law can be raised even before the highest Court.[92]

Where the jurisdiction of a body depends upon a preliminary finding of fact in a proceeding for writ of *certiorari*, the Court may determine whether or not that finding of fact is correct. The reason is that by wrongly deciding such a fact, the body cannot give itself jurisdiction;[93]

In *Anisminic,*[94] the House of Lords has given a very broad connotation to the concept of "jurisdictional error". It has been laid down in *Anisminic* that a tribunal exceeds jurisdiction not only at the threshold when it enters into an inquiry which it is not entitled to undertake, but it may enter into an enquiry within its jurisdiction in the first instance and then do some thing which would deprive it of its jurisdiction and render its decision a nullity. In the words of Lord Reid :

> "But there are many cases where, although the tribunal had jurisdiction, to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given

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87. Followed in *Pradeep Singh v. Union of India,* (2007) 11 SCC 612 : (2007) 6 JT 1.
88. AIR 1964 SC 477 : (1964) 5 SCR 64.
89. *S.T.O. v. Shiv Ratan,* AIR 1966 SC 142 : (1965) 3 SCR 71; *C.I.T. v. A. Raman & Co.*, AIR 1968 SC 49; *Chetkar v. Viswanath,* AIR 1970 SC 1832 : (1970) 2 SCC 217; *Tata Consulting Engineers v. Workmen,* AIR 1981 SC 599.
90. *U.P. Sales Tax Service Assn. v. Taxation Bar Assn.,* (1995) 5 SCC 716.
91. *Express Newspapers. v. Workers,* AIR 1963 SC 569; *Mayapati v. State of Haryana,* AIR 1973 P&H 356.
92. *Pushpa Devi Bhagat v. Rajinder Singh,* (2006) 5 SCC 566 : AIR 2006 SC 2628.
93. *Raja Brahma Anand v. State of U.P.*, AIR 1967 SC 1081 : (1967) 1 SCR 373; *State of Madhya Pradesh v. Jadav,* AIR 1968 SC 1186; *Raja Textiles v. I.T.O., Rampur,* AIR 1973 SC 1362.
94. *Aiminic Ltd. v. Foreign Compensation Commission,* [1969] 2 AC 147.

> its decision in bad faith. It may have made a decision which it had not power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account some thing which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

The essence of the above observation is that even though a tribunal may have 'threshold jurisdiction' to enter upon an inquiry yet it may later do something which may render its decision invalid. The events amount to jurisdictional errors, mentioned above, are : bad faith, non complying with natural justice, making the formal order without having any power to do so, misconstruing decision-making power so that the decision-maker fails to deal with the question remitted to him but decides some other question not remitted to him for decision, not taking into account relevant considerations, or basing the decision on irrelevant considerations. In any of these circumstances, the decision of a body would be a nullity. This list is not exhaustive but only represents the variety of 'jurisdictional' grounds of attack. *Anisminic* has thus given a very broad significance to the expression "jurisdictional error". In any of these circumstances, the writ Court can issue *certiorari* to quash the decision.

(b) ERRORS OF LAW

The writ is also issued for correcting an 'error of law apparent on the face of the record.'[1]

To attract the writ, a mere error of law is not sufficient; it must be one which is manifest or patent on the face of the record; mere formal or technical errors, even of law, are not sufficient'.[2]

This concept is indefinite and cannot be defined precisely or exhaustively, and so it has to be determined judicially on the facts of each case. The concept, according to the Supreme Court, "is comprised of many imponderables: it is not capable of precise definition, as no objective criterion can be laid down, the apparent nature of the error, to a large extent, being dependent upon the subjective element."[3]

A general test to apply however is that no error can be said to be apparent on the face of the record if it is not 'self-evident' or 'manifest', if it requires an examination or argument to establish it, if it has to be established by a long drawn out process of reasoning, or lengthy or complicated arguments, on points where there may conceivably be two opinions.[4] If two opinions on the same material are reasonably possible, the finding arrived at one way or the other cannot be called a patent error.[5] But this test is not articulate and may fail because what might be

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1. *J.D. Jain v. Management, State Bank,* AIR 1982 SC 673; *State of Uttar Pradesh v. Prescribed Authority Kichhu,* AIR 1982 All. 151.
2. *Padeananda v. Board of Revenue,* AIR 1971 Ass 16.
3. *Shanmugam v. S.R.V.S.,* AIR 1963 SC 1626 : (1964) 1 SCR 809; *T. Prem Sagar v. S.V. Oil Co.,* AIR 1965 SC 111 : (1964) 5 SCR 1030.
4. *Satyanarayan v. Mallikarjun,* AIR 1960 SC 137 : (1960) 1 SCR 890.
5. *Ranjeet Singh v. Ravi Prakash* (2004) 3 SCC 682 : AIR 2004 SC 3892.

considered by one Judge as self-evident might not be considered so by another Judge.[6]

The Supreme Court has observed on this point:[7]

> "Where it is manifest or clear that the conclusion of law recorded by an inferiror Court, or tribunal is based on an obvious misinterpretation of the relevant statutory provision, or something in ignornace of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of *certiorari.*

In *Ambica Mills v. Bhatt*,[8] the construction placed by the Tribunal on two clauses of an agreement between the Ahmedabad Mill-Owners' Association and the Textile Labour Association was held to be patently and manifestly erroneous. "It is not a case where two alternative conclusions are possible; it is a case of plain misreading of the two provisions ignoring altogether the very object with which the two separate provisions were made."

Where the question involved is one of interpreting a statutory provision which is reasonably open to two interpretations, of which the authority concerned adopts one interpretation, *certiorari* would not be issued merely on the ground that the view taken by the authority appears to be less reasonable than the alternative construction.[9]

Mere formal and technical errors of law are not sufficient to attract the writ. If a *quasi*-judicial authority ignores relevant considerations, or takes into account irrelevant considerations, it would amount to an error of law.[10]

There is a distinction between an error of law pure and simple, and one of jurisdictional nature. The former can be cured only when *patent*, but the latter can be cured even if not patent for no authority can be allowed to assume jurisdiction by taking a wrong view of law.[11]

A *certiorari* or prohibition does not lie when a tribunal disregards executive directions having no statutory force.[12]

When a person obtains an order from a tribunal by fraud, the High Court is bound to exercise its jurisdiction under Art. 226 and quash such an order. Fraud and justice never go together.[13]

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6. *Baldwin and Frances Ltd. v. Patents Appeal Tribunal*, (1959) 2 WLR 826, illustrates the difficulties of applying this rule. *H.V. Kamath v. Ishaque*, AIR 1955 SC 233 : (1955) 1 SCR 1104.

7. *Syed Yakoob v. K.S. Rahdakrishnan*, AIR 1964 SC 477 : (1964) 5 SCR 64.
Also see, *Sohan Modi v. Special Court under A.P. Land Grabbing (Prohibition) Act*, AIR 2000 AP 482.

8. AIR 1961 SC 970 : (1961) 3 SCR 220.

9. *Syed Yakoob v. Radhakrishnan*, AIR 1964 SC 477 : (1964) 5 SCR 64; *Principal, Patna College v. Raman*, AIR 1966 SC 707; *V. V. Iyer v. Jasjit Singh*, AIR 1973 SC 194 : (1973) 1 SCC 148.

10. *Sri R.V. Service v. Chandrasekharan*, AIR 1965 SC 107 : (1964) 5 SCR 869; *Murlidhar v. State of Uttar Pradesh*, AIR 1974 SC 1924 : (1974) 2 SCC 472; *Kays Concern v. Union of India*, AIR 1976 SC 1525 : (1976) 4 SCC 706; *Smt. Ram Piari v. Rallia Ram*, AIR 1982 SC 1314 : (1982) 2 SCC 536.

11. *Joharimal Saraogi v. Bakhatawar Singh*, AIR 1967 Man. 1.

12. *Raman & Raman v. State of Madras*, AIR 1959 SC 694; *Shanmugam v. S.R.V.S.*, AIR 1963 SC 1626 : (1964) 1 SCR 809.

13. *United India Insurance Co. Ltd. v. Rajendra Singh*, AIR 2000 SC 1165 : (2000) 3 SCC 581.
The Court of Appeal in England has observed : "No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister can be allowed to stand, if it has been obtained by fraud. Fraud unravels everything."
Lazarus Estates Ltd. v. Beasley, [1956] 1 All ER 341.

(c) FINDINGS OF FACT

Certiorari does not lie to correct mere errors of fact even though these may be apparent on the face of the record. The writ jurisdiction is supervisory and the Court exercising it is not to act as an appellate Court.[14]

The writ Court would not re-appreciate evidence and substitute its own conclusions of fact for that recorded by the adjudicating body below.[15] A finding of fact recorded by the adjudicatory body cannot be challenged in proceedings for *certiorari* on the ground that the relevant and material evidence adduced before the concerned body was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal and these points cannot be agitated before the writ Court.[16]

The relevant principle in this connection has been laid down by the Supreme Court as follows:[17]

> "The findings of fact recorded by a fact finding authority duly constituted for the purpose and which ordinarily should be considered to have become final, cannot be disturbed for the mere reason of having been based on materials or evidence not sufficient or credible in the opinion of the writ Court to warrant those findings at any rate, as long as they are based upon some material which are relevant for the purpose or even on the ground that there is yet another view which can be reasonably and possibly under taken".

But findings of fact based on *no* evidence or purely on surmises and conjectures, or which are perverse, may be challenged through *certiorari* as such findings may be regarded as an error of law.[18] Interference will be justified if finding of fact is perverse or not based on legal evidence.[19]

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14. *Pioneers Traders v. C.C. Exports & Imports*, AIR 1963 SC 734 : 1963 Supp (1) SCR 349; *S.T.O. v. Shiv Ratan,* AIR 1966 SC 142; *C.I.T. v. Walchand & Co.*, AIR 1967 SC 1435; *Andhra Scientific Co. v. Seshagiri Rao*, AIR 1967 SC 408; *Dabur v. Workmen*, AIR 1968 SC 17 : (1968) 1 SCR 61; *Rukmanand v. State of Bihar*, AIR 1971 SC 746.
But see, footnote 93, *supra,* concerning jurisdictional facts.

15. *Joao Andrade e Souza v. K.S. Vediekdir,* AIR 1971 Goa 2; *Mukund Lal Bhandari v. Union of India,* 1993 AIR SCW 2508 : AIR 1993 SC 2127; *Union of India v. Mohan Singh,* (1996) 10 SCC 35; *Union of India v. R.V. Swamy,* AIR 1997 SC 2069 : (1997) 9 SCC 446; *Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi,* (1991) 2 SCC 714.

16. *Hari Vishnu Kamath v. Ahmad Ishaque,* AIR 1955 SC 233 : (1955) 1 SCR 804; *Nagendra Nath v. Commissioner of Hills Division,* AIR 1958 SC 398 : 1958 SCR 1240; *Kaushalya Devi v. Bachittar Singh,* AIR 1960 SC 1168; *Syed Yakoob v. K.S. Radhakrishnan,* AIR 1964 SC 477 : (1964) 5 SCR 64.

17. *Indian Overseas Bank v. I.D.B. Staff Canteen Workers' Union,* AIR 2000 SC 1508, 1517 : (2000) 4 SCC 245.

18. *D.C. Works v. Saurashtra,* AIR 1957 SC 264 : 1957 SCR 152; *Syed Yakoob v. Radhakrishnan,* AIR 1964 SC 477 : (1964) 5 SCR 64; *Parry & Co. v. Second Ind. Tr.,* AIR 1970 SC 1334; *Sub-divisional Officer v. Gopal Chandra,* AIR 1971 SC 1190; *Aziz Wani v. Director, Consolidation,* AIR 1971 J&K 67; *Swaran Singh v. State of Punjab*, AIR 1976 SC 232; *M. Mayandi v. Director, T.N. State Transport Dept.,* AIR 1981 SC 1707; *Mukunda v. Bangsidhar,* AIR 1980 SC 1524 : (1980) 4 SCC 336; *Gujarat Steel Tubes v. Its Mazdoor Sabha,* AIR 1980 SC 1896 : (1980) 2 SCC 593; *Bhagat Ram v. State of Himachal Pradesh,* AIR 1983 SC 454 : (1983) 2 SCC 442; *State of West Bengal v. Atul Krishna Shaw,* AIR 1990 SC 2205 : 1991 Supp (1) SCC 414; *Ahmedabad Municipal Corpn. v. Virendra Kumar J. Patel,* AIR 1997 SC 3002 : (1997) 6 SCC 650; *Union of India v. Mustafa & Najibhai Trading Co.,* AIR 1998 SC 2526 : (1998) 6 SCC 79.

19. *Madurantakam Coop. Sugar Mills Ltd. v. S. Viswanathan,* (2005) 3 SCC 193 : AIR 2005 SC 1954.

The collector of central excise confiscated some foreign and local coins and imposed a fine on the petitioner without there being any evidence to establish that the said coins were imported by the accused. The High Court quashed the order on the ground of *no* evidence.[20] The rule of 'no' evidence envisages that if there is *some* evidence to support a finding of fact, the Court will not interfere with it.[21]

The findings of fact may also be questioned if it is shown that in recording them, the adjudicatory body has erroneously refused to admit admissible and material evidence, or has erroneously admitted inadmissible evidence which has influenced the impugned findings.

In *Dulal Chandra*[22] the High Court quashed the finding by the revenue board on the ground that it was not based on evidence, was even contrary to the evidence on record and was vitiated by non-consideration of relevant materials on record.

The findings of fact are not challengeable merely on the ground that the evidence to sustain them is inadequate or insufficient. Adequacy, reliability or sufficiency of evidence on a point, review or appreciation thereof, and the inference of facts to be drawn therefrom are matters exclusively for the adjudicatory body concerned.[23]

As the Supreme Court has observed : "A finding of fact recorded by the tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal."[24] The Supreme Court has observed recently in the case noted below in relation to disciplinary proceedings:[25]

> "… the departmental authority… is the sole judge the facts, if the inquiry has been properly conducted. The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Art. 226 of the Constitution.

The Supreme Court has emphasized that in departmental disciplinary proceedings against employees, the disciplinary authority is the sole judge of facts. Once findings of fact, based on appreciation of evidence are recorded, the High Court in its writ jurisdiction does not normally interfere with those findings unless these findings are based on *no* evidence, or the findings are wholly perverse and/or legally untenable, or the findings are such which no reasonable person would have reached.[26] The High Court does not concern itself with the adequacy or inadequacy of evidence.

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20. *Amulya Chandra v. Collector, Central Excise,* AIR 1971 Tri. 3. Also, *Teja Singh v. Union of India,* AIR 1971 P&H 96.
21. *Shew Bhagwan v. Collector of Customs,* AIR 1971 Cal 112.
22. *Dulal Chandra v. Assam Board of Revenue,* AIR 1971 Ass 123.
23. *Shew Bhagwan v. Collector of Customs, supra,* footnote 21; *Nand Kishore v. State of Bihar,* AIR 1978 SC 1277 : (1978) 3 SCC 366.
24. *State of Andhra Pradesh v. Chitra Venkata Rao,* AIR 1975 SC 2151 : (1975) 2 SCC 557.
25. *High Court of Judicature at Bombay v. Shashikant S. Patil,* AIR 2000 SC 22 at 26 : (2000) 1 SCC 416.
26. *Apparel Export Promotion Council v. A.K. Chopra,* AIR 1999 SC 625 : (1999) 1 SCC 759; *Kuldeep Singh v. Commissioner of Police,* AIR 1999 SC 677 : (1999) 2 SCC 10; *Yoginath D. Bagde v. State of Maharashtra,* AIR 1999 SC 3734 : (1999) 7 SCC 739.

But even in cases where the 'no evidence' rule or perversity is established, the court will not ordinarily substitute finding with its own. It will set aside the erroneous order and remand the matter to the authority concerned.[27]

In the matter of punishment imposed by the disciplinary authority, ordinarily the High Court does not interfere as it is a matter of the discretion of the disciplinary authority. The High Court can interfere only if the punishment is impermissible, or is such that it shocks the conscience of the Court.[28] The punishment awarded has to be reasonable. If it is unreasonable; Art. 14 is infringed.[29] The Court can decide upon the proportionality of the punishment when punishment is shockingly disproportionate. In a recent case,[30] the Supreme Court has observed in this connection:

> "It is only in extreme cases, which on their face show perversity or irrationality that there can be judicial review. Merely on compassionate grounds a Court should not interfere."
>
> The Court would not under Art. 226 or 32 interfere with the punishment "because it considers the punishment disproportionate."

The law regarding judicial review of administrative action through *certiorari* or prohibition has become complicated and involved in many artificial distinctions, as for example, distinction is drawn between an error of law and one which is 'patent'. There was no compulsive reason for the courts in India to adopt such a distinction from Britain. As already noted, the Indian courts do not have to follow the whole of the English Law in the area of writs and they could have thus taken upon themselves the task of curing errors of law in decisions of *quasi*-judicial bodies.[31] Similarly, on facts, instead of adopting the restrictive *no* evidence rule, the Indian courts could have adopted the more broad-based American rule of substantial evidence[32] which would have enabled the courts to better supervise *quasi*-judicial adjudications than what they do at present and that would have been in accord with the modern enlightened democratic thinking in many countries.

(d) NATURAL JUSTICE

Certiorari or prohibition usually goes to a body which is bound to act fairly or according to natural justice and it fails to do so.[33] In recent days, there is an in-

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27. For propriety of remand see *DCM Limited v. Commissioner of Sales Tax, Delhi,* (2009) 4 SCC 231 : (2009) 4 JT 395.

28. *B.C. Chaturvedi v. Union of India,* (1995) 6 SCC 749; *Apparel Export Promotion Council v. A.K. Chopra,* (1999) I SCC 759, 770, 771 : AIR 1999 SC 625; *Union of India v. Permananda,* (1989) 2 SCC 177; *B.C. Chaturvedi v. Union of India,* (1995) 6 SCC 749; *State of Tamil Nadu v. A. Rajapandian,* (1995) I SCC 216 : AIR 1995 SC 561.

29. *Infra,* Ch. XXI.

30. *Union of India v. R.K. Sharma,* AIR 2001 SC 3052, at 3056 : 2001 (9) SCC 592.

31. *Supra*.

32. *Universal Camera Corp. v. N.L.R.B.* 340 U.S. 474.
See, BYSE, *The Federal Administrative Procedure Act,* I JILI, 89 (1958).
On questions of law, S. 706 of the A.P.A. provides that the reviewing Court would decide all relevant questions of law, interpret constitutional and statutory provisions.

33. *U.P., Warehousing Corp. v. Vijay Narain,* AIR 1980 SC 840; *State of Punjab v. Dewan Chuni Lal,* AIR 1970 SC 2086 : (1970) 1 SCC 479; *Ravi Bhatt v. The Director General, Armed Forces Medical Services,* AIR 1997 Mad. 78.

creasing judicial trend of imposing the requirements of natural justice on different types of bodies and different types of administrative action.[34]

If a policy decision is accepted without any demur by the complaining party, it would not be permissible for him to say that the implementation of the policy without giving any hearing was in violation of the principles of natural justice.[35]

Fixation of rent by a market Committee being an executive function, the courts will not interfere except on Wednesbury principles[36]. The Court observed:

> "There is broad separation of powers under the Constitution and ordinarily one organ of the State should not encroach into the domain of another. Montesquieu's theory of separation of powers (XIth Chapter of his book The Spirit of Laws) broadly applies in India too."

These appeals to MONTES QUIRE'S theory in todays Constitutionalism which features overlapping of functions of the different organs of the State of which executive law making (or delegated legislation) is a prime example.

The concept of natural justice is very important in the modern Administrative Law for it provides a basis for judicial control of the procedure followed by adjudicatory bodies, but it is vague, and has no fixed connotation. The concept of natural justice is flexible as its content depends *inter alia* upon the nature and constitution of the body concerned, the function it is exercising, the stature under which it is acting.

The question whether in a particular case principles of natural justice have been contravened or not is a matter for the courts to decide from case to case.[37] However, even with all its vagueness and flexibility, its two elements have been generally accepted, *viz.*,

(1) that the body in question should be free from bias, and

(2) that it should hear the person affected before it decides the matter.

That the principles of natural justice requires circumstantial flexibility was considered by the Supreme Court in a case where the Reserve Bank of India issued a requisition to the Registrar, Co-operative Societies to supersede the board and appointed an administrator under section 30(5) of Karnataka Cooperative Societies Act, 1959. The requisition was made in public interest and to prevent the conduct of the affairs of the Cooperative Bank in a manner detrimental to the interest of the depositors and for securing proper management of the bank. Rejecting the complain that no hearing had been given to the management of the bank, the Supreme Court held that on a receipt of a requisition in writing from Reserve Bank of India, the Registrar, cooperative Societies was statutorily bound

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34. This topic is discussed extensively in JAIN, *A TREATISE ON ADM. LAW*, I, Chs. IX-XII (1995); *CASES & MATERIALS ON INDIAN ADM. LAW*, I, VIII–XI (1994).

Also see, *A.K. Kraipak v. Union of India*, 1970 SC 150 : (1969) 2 SCC 262; *Mohinder Singh v. Chief Election Commr*., AIR 1978 SC 851 : (1978) 1 SCC 405; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248; *S.L. Kapoor v. Jagmohan*, AIR 1981 SC 136; *Swadeshi Cotton Mills v. Union of India*, AIR 1981 SC 818; *Fedco v. Bilgrami*, AIR 1960 SC 415; *Hira Nath v. Rajendra Medical College*, AIR 1973 SC 1260 : (1973) 1 SCC 805; *State of Punjab v. Ajudhia Nath*, AIR 1981 SC 1374 : (1981) 3 SCC 251; *Raj Restaurant v. Municipal Corp., Delhi*, AIR 1982 SC 1550 : (1982) 3 SCC 338.

35. *Central Power Distribution Company v. Central Electricity Regulatory Commission*, (2007) 8 SCC 197 : AIR 2007 SC 2912.

36. *Fruit Commission Agents Assn. v. Govt. of A.P.*, (2007) 8 SCC 511 : AIR 2008 SC 34.

37. *A.K. Roy v. Union of India*, AIR 1982 SC. 709.

to issue an order of supercession of the body of management and at that stage the affected Bank or its Managing Committee had no right of hearing or to raise any objection.[38]

The Supreme Court has observed that the principles of natural justice have undergone a sea change and it is now settled that complainant must show that he has suffered some real prejudice. It is not applied in a vacuum without reference to the relevant facts. It is no unruly horse nor could it be put in a strait jacket formula. A decision will be vitiated where no hearing is given at alland nor where the infringement is technical.[39] This decision like its precursors cited therein and particularly Sharma[40] has caused confusion in the law. S. L. Kapoor[41] which unqualifiedly stated that non observance of the principle of natural justice itself causes prejudice has not been overruled. So long as the view in Kapoor remains it is almost impossible to reconcile the two inconsistent views which subsist in relation to invoking the principles of natural justice.

The subject of Natural Justice is discussed elaborately in the area of Administrative Law rather than under Constitutional Law. Below is given a rather sketchy description of the subject.

RULE AGAINST BIAS

The first principle means that the adjudicator should be disinterested and unbiased; that the prosecutor himself should not be a judge; that the judge should be a neutral and disinterested person; that a person should not be a judge in his own cause; that a person interested in one of the parties to the dispute should not, even formally, take part in the adjudicatory proceedings.

It is often said that justice should not only be done but it should appear to have been done. Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking : "The Judge was biased". The logic is equally applicable to governmental action and the Government.[42]

The basis of this principle is that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[43]

Actual existence of bias is not necessary. The test of bias is "real likelihood of bias." "If a reasonable man would think on the basis of the existing circumstnaces that he (i.e. adjudicator) is likely to be prejudiced, that is sufficient to quash the decsion.".[44]

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38. *Reserve Bank of India v. M. Hanumaiah,* (2008) 1 SCC 770 : AIR 2008 SC 994.
39. *P. D. Agarwal v. State Bank of India,* (2006) 8 SCC 776 : AIR 2006 SC 2064 .
40. (1996) 3 SCC 364 : AIR 1996 SC 1669.
41. (1980) 4 SCC 379.
42. *Centre for Public Interest Litigation v. Union of India,* (2005) 8 SCC 202 : AIR 2005 SC 4413.
43. See, JAIN, *A TREATISE, op cit.,* Ch. XI; *Cases, I, op. cit.,* Ch. X.
44. *S. Parthasarathi v. State of Andhra Pradesh,* AIR 1973 SC 2701 : (1974) 3 SCC 459.
Also see, *Metropolitan Properties Co. Ltd. v. Lannon,* [1968] 3 W.L.R 694; *Manak Lal v. Prem Chand,* AIR 1957 SC 425 : 1957 SCR 575; *Blaze and Central (P) Ltd., v. Union of India,* AIR 1980 Knt 186; *Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram Hr. Sec. School,* AIR 1993 SC 2155 : (1993) 4 SCC 10; *Tata Cellular v. Union of India,* AIR 1996 SC 11; *Kumaon Mandal Vikas Nigam v. Girja Shankar Pant,* AIR 2001 SC 24 : (2001) 1 SCC 182; *State of Punjab v. V.K. Khanna,* AIR 2001 SC 343 : (2001) 2 SCC 330; *Amar Nath Chowdhury v. Braithwaite & Co. Ltd.,* AIR 2002 SC 678 : (2002) 2 SCC 290.

Bias may arise when the adjudicator has some interest in the subject-matter of the proceedings before him. If the interest is pecuniary, disqualification arises howsoever small the interest may be. In case of other interest, it is necessary to consider whether there is a reasonable ground for assuming the likelihood of bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice.

In a departmental inquiry against N.,[45] the person presiding over the inquiry himself gave evidence against N., and thereafter continued to preside over the inquiry. This clearly evidences a state of biased mind against N.

In *Gullapalli I*, the hearing held under S. 68(*d*) of the Motor Vehicles Act by the Secretary of the Transport Department was held to be vitiated because his Department had prepared the scheme against which the hearing had taken place and "it is one of the fundamental principles of judicial procedure that the person or persons who are entrusted with the duty of hearing a case judicially should be those who have no personal bias in the matter."[46]

In *Gullapalli II*,[47] the Supreme Court held that the hearing given by the Chief Minister was not vitiated because there was an essential distinction between the functions of a Secretary and a Minister; the former was a part of the Department and the latter was only primarily responsible for the disposal of the business pertaining to that department and, therefore, the Minister could not be regarded to suffer from bias like the Secretary.[48]

If a person is hostile to a party whose cause he is called upon to try, that introduces the infirmity of personal bias and would disqualify him from trying the cause.[49] The chairman of a statutory corporation dismissed an employee. The employee preferred an appeal to the board of directors of the corporation. The board at a meeting at which the chairman was present, dismissed the appeal. The board's decision was quashed as there was likelihood of bias because of the presence of the chairman who had dismissed the employee.[50]

The all-important *Kraipak* case[51] may also be noted here. In a selection board for certain posts, a member was himself a candidate who was selected along with a few others. On a challenge by the candidates not selected, the Supreme Court quashed the list of successful candidates on the ground of bias in so far as a person personally interested in the matter sat on the selection committee. Similarly,

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45. *State of Uttar Pradesh v. Nooh*, AIR 1958 SC 86 : 1958 SCR 595.
46. AIR 1959 SC 308 : 1959 Supp (1) SCR 319. But see, *T.G. Mudaliar v. State of Tamil Nadu*, AIR 1973 SC 974 : (1973) 1 SCC 336.
47. AIR 1959 SC 1376.
48. *Kondala Rao v. A.P.S.R.T. Corp.*, AIR 1961 SC 82. But see, *T.G. Mudaliar v. State of Tamil Nadu, supra.*
49. *Mineral Development Ltd. v. State of Bihar*, AIR 1960 SC 468; *Registrar, Cooperative Societies v. Dharam Chand*, AIR 1961 SC 1743; *State of Andhra Pradesh S.R.T. Corp v. Satyanarayana Transports*, AIR 1965 SC 1303.
50. *K. Chelliah v. Chairman, I.F. Corp.*, AIR 1973 Mad 122.
51. AIR 1970 SC 150 : (1969) 2 SCC 262.
For comments on the case, see, 13 *JILI* 362 (1971).

selection of a candidate was quashed because his son-in-law was a member of the selection committee.[52]

A senior officer expresses appreciation of the work of a junior in the confidential report. It does not amount to bias nor would it disqualify the senior officer from being a part of the departmental promotion committee to consider the junior officer along with others for promotion. The Supreme Court has stated that every preference does not vitiate an action. "If it is rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision".[53]

FAIR HEARING

Another cardinal principle of natural justice is that the body deciding upon the rights of a party must give a reasonable opportunity to the party concerned to present his case. That no one should be condemned unheard is an important maxim of civilised jurisprudence.[54]

But the Court will not strike down an order merely because the order has been passed against the petitioner in breach of natural justice. It would be justified in refusing to do so if such striking down would result in restoration of another order passed earlier in favour of the petitioner and against the opposite party in violation of principle of natural justice or is otherwise not in accordance with law.[55]

The right to fair hearing does not necessarily include an oral hearing. What is essential is that the party affected should be given sufficient opportunity to meet the case against him and this could be achieved by filing written representations.[56] The party concerned should have adequate notice of the case against him which he has to meet, and that the party affected should be apprised of the evidence on which the case against him is based and be given opportunity to rebut these materials.[57]

Refusal of sufficient time to file a reply to MPs who were charged with incurring disqualification was recognized in principle, but on facts it was held that adequate time was given.[58]

No evidence should be taken behind the back of the party.[59] Though the Indian Evidence Act, as such, does not apply to *quasi*-judicial bodies, yet the rules of natural justice require that such a body does not act on evidence which has no probative value.[60] A party should have the opportunity of adducing all relevant evidence on which he relies.

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52. *D.K. Khanna v. Union of India,* AIR 1973 HP 30. Also see *S.P. Kapoor v. State of Himachal Pradesh,* AIR 1981 SC 2181 : (1981) 4 SCC 716.
53. *G.N. Nayak v. Goa University,* (2002) 2 SCC 712 : AIR 2002 SC 790.
54. *Board of Education v. Rice,* 1911 A.C. 179; *Local Govt. Board v. Arlidge,* 1915 A.C. 120; *North Bihar Agency v. State of Bihar,* AIR 1981 SC 1758 : (1981) 3 SCC 131.
55. *Raj Kumar Soni v. State of UP,* (2007) 10 SCC 635 : (2007) 5 JT 114.
56. *M.P. Industries v. Union of India,* AIR 1966 SC 671.
57. *D.C. Mills v. Commr., Income-tax,* AIR 1955 SC 65; *Prem Prakash v. Punjab University,* AIR 1972 SC 1408 : (1973) 3 SCC 424; *U.P. Warehousing Corp. v. Vijay Narayan; supra.*
58. *Jagjit Singh v. State of Haryana,* (2006) 11 SCC 1 : AIR 2007 SC 590.
59. *S.C. Paul v. Calcutta University,* AIR 1970 Cal . 282; *State of Orissa v. Murlidhar,* AIR 1963 SC 404; see also *Administrator, Unit Trust of India v. B. M. Malani,* (2007) 10 SCC 101 : (2007) 12 SCALE 107.
60. *Union of India v. Verma,* AIR 1957 SC 882; *B.E. Supply Co. v. The Workmen,* AIR 1972 SC 303.

A person lodging a FIR is entitled to hearing when on the basis of police report Magistrate prefers to drop the proceedings instead of taking cognizance of offence.

If a particular Association was not called to participate in a discussion relating to policy making, such decision making policy would not be hit by the principle of natural justice. Hence the policy regarding integration of employees and other technical matters while considering the merger of Airlines—Vayudoot with Indian airlines, the decision will not be arbitrary, unreasonable or capricious, and particularly so, when lengthy deliberation had taken place in various meetings to arrive at a proper decision. It was reiterated that a policy which did not suffer from any arbitrariness, the courts will not interfere.[61]

In *Central Power Distribution Company*,[62] it was urged that the order made by the Central Electricity Regulatory Commission fixing Unscheduled Interchanged Charges was made in breach of the principles of natural justice inasmuch as the same was made suo moto and without hearing the parties concerned. The contention was rejected on the ground that it had been passed after hearing of parties including the predecessor (State of Andhra Pradesh) of the Central Power Distribution Company.[63]

Representation by a lawyer is not regarded as a necessary element of natural justice, but there may be circumstances when denial of a lawyer may amount to denial of natural justice, *e.g.*, when one side is represented by a legally trained officer, it will be denial of natural justice to refuse representation by a lawyer to the other side.[64]

It is not necessary to permit cross-examination of witnesses in all cases.[65] However, in disciplinary proceedings against civil servants, this has been held to be essential.[66]

An obligation to give reasons for their decisions has also been imposed on *quasi*-judicial bodies.[67]

And subsequently the court has emphasized that the necessity of giving reasons is not confined to tribunals, lower courts or administrative bodies but extends to High Courts also.[68]

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61. *Indian Airlines Officerss' Assn. v. Indian Airlines Ltd.*, (2007) 10 SCC 684 : AIR 2007 SC 2747.

62. *Central Power Distribution Company v. Central Electricity Regulatory Commission*, (2007) 8 SCC 197.

63. Judgment however is not very clear on facts as to why and how the State of A.P. was the predecessor of the Central Power Distribution Company.

64. *Kalindi v. Tata Loco & Eng. Co.*, AIR 1960 SC 914 : (1960) 3 SCR 407; *Zonal Manager, L.I.C. v. City Munsif, Meerut*, AIR 1968 All. 270; *C.L. Subramanian v. Collector of Customs*, AIR 1972 SC 2178; *Nandlal v. State of Punjab*, AIR 1981 SC 2041 : (1981) 4 SCC 327; *Board of Trustees, Port of Bombay v. Dilipkumar*, AIR 1983 SC 109 : (1983) 1 SCC 124.

65. *State of Jammu & Kashmir v. Bakshi Gulam Mohd.*, AIR 1967 SC 122 : 1966 Supp SCR 401.

66. *Channabasappa v. State of Mysore*, AIR 1972 SC 32 : (1971) 1 SCC 1. Also see, *infra*, Ch. XXXI.

67. *Travancore-Rayons v. Union of India*, AIR 1971 SC 862 : (1969) 3 SCC 868. See for a comment, 14 *JILI*, 602 (1972) Also, *Siemens Engg. & Mfg Co. v. Union of India*, AIR 1976 SC 1785 : (1976) 2 SCC 981; *Imperial Chemical Industries Ltd. v. Registrar Trade Marks*, AIR 1981 Del. 190; *Cycle Equipments (P.) Ltd. v. Municipal Corp. of Delhi*, AIR 1983 Del. 94; *Alok Prasad Verma v. Union of India*, AIR 2001 Pat. 211, at 217.

68. *State of Himachal Pradesh v. Sada Ram*, (2009) 4 SCC 422 : (2009) 4 JT 165.

Interference by High Court without assigning any reason is unsustainable.[69]

Where the High Court, without recording any error or perversity in appointment process, reverses the Collector's decision which based its judgment on stray facts, the Supreme Court held the reversal was not proper and without jurisdiction.[70]

REASONS

It has been held that an order of affirmation by an appellate authority must also disclose reasons even though not as elaborately as a reversal.[71]

F. INDEPENDENCE OF THE HIGH COURTS

In a democracy governed by law, independence of the judiciary is very essential. Judiciary constantly stands as the sentinel on the *qui vive* to protect the Fundamental Rights of the people. The judiciary keeps the scales of justice even between the citizens and the state, or between the Centre and the States, or between the States *inter se*.

Independence of the judiciary is an essential attribute of Rule of Law. Because of these paramount considerations, judicial review, independence of the judiciary, and Rule of Law have been declared as the basic features of the Constitution which cannot be deleted even by a constitutional amendment.[72]

As in the case of the Supreme Court,[73] so in the case of the High Courts, there exist provisions in the Constitution to preserve and safeguard their impartiality, integrity and independence. In the appointment of the High Court Judges, the Chief Justice of India plays a crucial role; they are appointed for a fixed tenure, and the process to remove them from office before the age of retirement is very dilatory and elaborate.[74]

The expenses of a High Court are charged on the State Consolidated Fund [Art. 202(3)(d)].[75] The conduct of a High Court Judge in discharge of his duties cannot be discussed in the State Legislature or Parliament except when a motion for his removal is under consideration.[76] The salaries of the High Court Judges are determined by Parliament by law.[77] The allowances, leave and pension of a High Court Judge are determined by Parliament by law, but these cannot be varied to his disadvantage after his appointment. [Art. 221].[78] It is laid down in Art. 220 that after retirement, a permanent High Court Judge shall not plead or act in a Court or before any authority in India, except the Supreme Court and a High Court other than the High Court in which he has held his office.

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69. *Mohd. Yusuf v. Faij Mohammad*, (2009) 3 SCC 513 : (2009) 1 SCALE 71.
70. *Mahavir Singh v. Khiali Ram*, (2009) 3 SCC 439 : AIR 2009 SC 1761.
71. *Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank v. Jagdish Sharan Varshney*, (2009) 4 SCC 240 : (2009) 4 JT 519.
72. See, *infra*, Ch. XLI.
73. *Supra*, Ch. IV, Sec. K.
74. *Supra*, this Chapter, Sec. B(r).
75. *Supra*, Ch. VI, Sec. F(iii).
76. *Supra*, Ch. II, Sec. L(i)(a); Ch. VI, Sec. H(a).
77. *Supra*, this Chapter, Part B(l).
78. *Ibid*.

The jurisdiction of a High Court in so far as it is specified in the Constitution, as for example, Art. 226 cannot be curtailed by the Legislature. In other respects, however, the matter of jurisdiction has been left to Parliament and the State Legislatures.[79] However, as pointed out earlier, if a State law derogates from the constitutional position of the High Court, then the Bill has to be reserved by the Governor for Presidential assent.[80] But the constitution and organisation of the High Courts fall under the legislative sphere of Parliament and, thus, the High Courts have been largely insulated from local influences.[81]

The State Executive does not have much say *vis-a-vis* the High Court. It is consulted at the time of appointment of the Judges.[82] It also approves the rules made, and the table of the fees prescribed, by the High Court; it also approves the rules made by the Chief Justice of the High Court specifying the salaries *etc.* of officers and servants of the High Court.[83]

As already stated earlier, Art. 224(1) provides for the appointment of additional judges in the High Courts. Such judges are appointed for a period of two years and may be made permanent Judges thereafter. The institution of additional judges somewhat detracts from the independence of the judiciary. The reason is that an additional Judge may not be able to act fully independently as he may be obsessed with the fear of losing his job after two years. The provision in the Constitution permitting appointment of additional Judges on a temporary tenure is however open to objection, more so as there is no limit on the number of such Judges who can be appointed at one time.[84] The criticism is however diluted to some extent by the fact that the power in this respect lies with the Centre and not with the State Executive and the power is exercisable on the advice of the Chief Justice of India.[85] Lastly, the dangers inherent in the re-employment of retired Judges have already been pointed out and these operate as much in the case of High Courts as in the case of the Supreme Court.[86]

Great emphasis has been laid on the independence of the High Courts by several Judges of the Supreme Court in *S.P. Gupta v. Union of India*.[87] It has been said that judicial independence is one of the central values inherent in the Constitution; that the judiciary plays a creative role in so far as it keeps government organs within legal limits and protects the citizen against abuse of power by them and so it is essential that the judiciary be free from government pressure or influence.

In the *S.C. Advocates-on-Record* case,[88] again, the Supreme Court has laid great emphasis on the independence of the Judiciary in a democratic society. "Independence of the judiciary" has been characterised "as a part of the basic structure of the Constitution", "to secure the 'rule of law', essential for the preserva-

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79. *Infra*, Sec. H.
80. *Supra*, Ch. VI, Sec. F(i).
81. *Infra*, Sec. H.
82. *Supra*, Sec. B(b).
83. *Supra.*Sec. B(t).
84. *Supra*, Sec. B(h) and (p).
85. *Ibid.*
86. The question regarding the appointment of additional Judges to the High Courts has been thoroughly discussed by the Supreme Court in *S.P. Gupta v. Union of India*, *supra*, Sec. B(c).
87. AIR 1982 SC 149; *supra*, Sec. B(c).
88. *Supra*, Sec. B(d).

tion of the democratic society".[89] In *Kumar Padma Prasad v. Union of India*[90] the Supreme Court has observed: "The independence of judiciary is part of the basic structure of the Constitution."[91]

Emphasizing upon the independence of the judiciary in a democracy, the Supreme Court has observed in *Shishir Patil* :[92]

> "In a democracy governed by rule of law, under a written constitution, judiciary is the sentinel on the *qui vive* to protect the fundamental rights and posed to keep even scales of justice between the citizens and the state or the states *inter se*. Rule of law and judicial review are basic features of the Constitution. As its integral constitutional structure, independence of the judiciary is an essential attribute of rule of law. Judiciary must, therefore, be free from pressure or influence from any quarter. The Constitution has secured to them, the independence".

It has been judicially ruled that the Judges of the Supreme Court and the High Courts are not government servants in the ordinary sense of the term. A Judge of any of these Courts does not hold "a post in the service under the State". He is not under the Government of India as to hold so will militate against the concept of independence of the judiciary which is a basic feature of the Constitution.[93] A Judge holds a constitutional office. In *Union of India v. Sankalchand Himatlal Sheth*[94], the Supreme Court has described the position of a High Court Judge as follows:

> "... Judges of the High Court owe their appointment to the Constitution and hold a position of privilege under it... They, the Judges of the High Court, are not government servants in the ordinary signification of that expression... In fact a High Court Judge has no employer, he occupies a high constitutional office which is coordinate with the executive and the legislature. The independence of the judiciary is a fighting (sic) faith of our Constitution".

The same is true of the Supreme Court Judges. The Supreme Court has ruled in *Union of India v. Pratibha Bonnerjee*[95] that Arts. 50, 214, 217, 219 and 231 of the Constitution show that a High Court Judge belongs to the third organ of the State which is independent of the other two organs, the Executive and the Legislature. Therefore, a person belonging to the judicial wing cannot be subordinate to the other two wings of the State. A High Court Judge occupies a unique position under the Constitution. He will not be able to discharge his duty without fear or favour, affection or ill will, unless he is fully independent of the Executive. Hence the relation between the Government and a High Court Judge is not that of master and servant; the Judge does not hold his office under the Government; he cannot be regarded as a gov-

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89. AIR 1994 SC at 421 : (1993) 4 SCC 441.
Also see, *High Court of Judicature of Bombay v. Shirish Kumar R Patil,* AIR 1997 SC 2631 : (1997) 6 SCC 339.
For explanation of the concept of "Basic Structure of the Constitution", see, *infra,* Ch. XLI.

90. AIR 1992 SC 1213, 1232 : (1992) 2 SCC 428, Sec. B(b).

91. For discussion on the doctrine of "Basic Structure of the Constitution", see, *infra,* Ch. XLI.

92. *High Court of Judicature at Bombay v. Shirish Kumar R. Patil,* AIR 1997 SC at 2627.

93. *Supreme Court Advocates on Record Assn. v. Union of India,* (1993) 4 SCC 441.
Also see, *infra,* Ch. XLI, under Constitutional Amendment, for discussion on this concept.

94. *Supra,* Sec. B(o).
Also see, *All Kerala Poor Aid Legal Ass., Trivandrum v. Chief Justice of Kerala,* AIR 1990 Ker 241.

95. **(**1995) 6 SCC 765 : AIR 1996 SC 693.

ernment servant; he holds a constitutional office and is able to function independently and impartially because not being a government servant he does not take orders from any one.

It is arguable that the increasing control that the Supreme Court has exercised not only in the matter of appointment of High Court judges, their transfers to other High Courts, their appointment as Chief Justices of High Courts and as Judges of the Supreme Court, but also in matters which pertain to the internal administration of the High Court, has led to an unwonted deference by the judges of the High Court to the judges of the Supreme Court. There is a danger consequently of a lack of robust independence in the High Court, although the Supreme Court has justified its interference on the ground of judicial independence.[1]

At times, sitting High Court Judges are appointed to head tribunals or commissions. To preserve the independence of High Court Judges, the Supreme Court has now laid down guidelines for the appointment of these Judges to tribunals, committees or commissions.[2]

G. SUBORDINATE JUDICIARY

In each State there is a system of subordinate courts below the High Court.[3] The Constitution makes a few provisions in Articles 233 to 237 to regulate the organisation of these courts and to ensure independence of the subordinate judges.

The Supreme Court has emphasized again and again on the maintenance of independence and integrity of the subordinate judiciary which is closest to the people.[4] Accordingly, the Court has through its various decisions promoted the independence of these courts from executive control and, to this effect, has expanded the control of the High Courts over the subordinate judiciary, so as to strengthen the independence of the subordinate courts from executive control.

The subordinate judiciary constitutes a very important segment of the judicial system as it is in these courts that the judiciary comes in close contact with the people. It is therefore essential to maintain the independence and integrity of the subordinate judiciary and for this purpose Arts. 233 to 237 have been placed in the Constitution. These Articles have been so interpreted by the Supreme Court as to strengthen the control of the High Courts on the subordinate judiciary. It is thus incumbent on each High Court to maintain and uphold the honour and integrity of the subordinate judiciary in the concerned State.

The Supreme Court through its various pronouncements, which are noted below, has sought to strengthen the position of the subordinate judiciary in several ways, *viz.*,

(1) The subordinate courts have been freed from executive control and brought under the control of the concerned High Court.

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1. *Tirupati Balaji v. State of Bihar,* (20040 5 SCC 1 : AIR 2004 SC 2351.
2. *T. Fenn Walter v. Union of India,* (2002) 6 SCC 184 : AIR 2002 SC 2679.
3. For a description of the Judicial System in the States, see, Jain, *OUTLINES OF INDIAN LEGAL HISTORY,* Ch. XVIII.
4. See, for example, *State of Maharashstra v. Labour Law Practitioners' Association,* AIR 1998 SC 1233 : (1988) 2 SCC 688.

(2) The disciplinary control over the subordinate courts vests in the High Court. The Supreme Court has sought to ensure that the High Court exercises this jurisdiction properly and according to the principles of natural justice.

(3) To protect these courts, the Supreme Court has assumed power to punish contempt of these courts. Likewise, a High Court can also do so.

(4) The Supreme Court has directed the High Courts not to make stringent remarks in their decisions against the subordinate judiciary.

(5) Disciplinary action cannot be initiated against a subordinate judge for just delivering a wrong decision on making a wrong order.

A mistake made by a judge can always be corrected on appeal.

(6) The Supreme Court has constantly endeavoured to improve the working conditions of the subordinate courts and to improve the logistic/infrastructrual support to these judges. The Supreme Court has constantly sought to improve the pay scales of these judges and seek for them other necessary facilities.

(a) STRENGTH OF THE SUBORDINATE JUDICIARY

Having regard to the huge backlog of cases and the recommendations of the Law Commission in its 120th Report the Standing Committee of Parliament in its 85th Report and the observations of the Chief Justice of India, in 2002, the Supreme Court in *All India Judges' Assn. v. Union of India*[5] felt that it was constitutionally obliged to ensure that the disposal of cases was increased because

> "[a]n independent and efficient judicial system is one of the basic structures of our Constitution. If sufficient number of judges are(is) not appointed, justice would not be available to the people, thereby undermining the basic structure".

It therefore directed the filling in of all vacancies within 1 year and the increase in the judge strength from the ratio of 13 judges per 10,00,000 people to 50 judges per 1,00,000 people within 5 years.

(b) APPOINTMENT OF DISTRICT JUDGES

Under Art. 233 (1), appointment, posting and promotion of district judges[6] in a State are made by the Governor in consultation with the High Court. Under Art. 233(2), a person not already in the 'service of the State' is eligible to be appointed as a district judge only if—

(*i*) he has been for not less than seven years an advocate or a pleader, and

(*ii*) is recommended by the High Court for such appointment.

From the tenor of Art. 233, it appears that there are two sources of recruitment of district judges, *viz*.;

(i) service of the Union or the State;

(ii) members of the Bar.

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5. (2002) 4 SCC 247 : AIR 2002 SC 1752.

6. The expression 'district judge' includes judge of a city civil Court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause Court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge: Art. 236(*a*).

The judges from the first source are appointed in *consultation* with the High Court [Art. 233(1)], and those from the second source are appointed on the recommendation of the High Court [Art. 233(2)] No one can be appointed from the Bar until and unless his name is recommended by the High Court.

These constitutional provisions have given rise to several important controversies.

The Governor of Rajasthan made a rule, in consultation with the Rajasthan High Court, laying down the condition that an advocate who had practised in the Rajasthan High Court for 7 years would be eligible to be appointed in the State Higher Judicial Service. The rule thus excluded all advocates practising in other High Courts even from applying for the post in the Rajasthan Higher Judicial Service. The Supreme Court ruled that the rule was unconstitutional being violative of Art. 14. The Court asserted that India is one country from Kashmir to Kanyakumari and there is no "intelligible differentia" distinguishing advocates practising in the Rajasthan High Court from those practising in other High Courts.[7]

Under Art. 233(2), a candidate from the Bar can be appointed as a district judge only on the recommendation of the High Court and not otherwise.[8] In *Chandra Mohan v. State of U.P.*,[9] the Supreme Court held that the appointment of district judges on the recommendation of a Selection Committee consisting of two High Court Judges and the Judicial Secretary, and not in consultation with the High Court, as a whole, was unconstitutional.

The Supreme Court has emphasized in *Bal Mukund Sah*[10] that Art. 233 enacts a complete code for the purpose of appointment of district judges and consultation with the High Court is an inevitable essential feature of Art. 233.

The Supreme Court has interpreted the term "advocate" in Art. 233(2)(i), somewhat broadly. If a person on being enrolled as an advocate ceases to practise law and takes up employment, he is not regarded as an "advocate". But, if a person who is on the rolls of any Bar Council, is engaged either by employment or otherwise of the Union or any State, corporate body or person, practices as an advocate before a Court for and on behalf of such government, corporation or authority or person, he is to be regarded as an "advocate". Thus, an assistant government advocate is qualified to be appointed as a district judge.[11]

The Supreme Court has also ruled that the words 'service of the State' mean only 'judicial service'[12] and no other service. Noting that the Constitution lays emphasis on the independence of the judiciary, and on the separation of the ex-

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7. *Ganga Ram Moolchandani v. State of Rajasthan*, AIR 2001 SC 2616 : (2001) 6 SCC 89. For Art. 14, see, Ch. XXI, *infra*.

8. *A. Panduranga Rao v. State of Andhra Pradesh*, AIR 1975 SC 1922 : (1975) 4 SCC 709; *M.S. Jain v. State of Haryana*, AIR 1977 SC 276 : (1977) 1 SCC 486.

9. AIR 1966 SC 1987 : (1967) 1 SCR 77.

10. *State of Bihar v. Bal Mukund Sah*, AIR 2000 SC 1296, 1321 : (2000) 4 SCC 640. Also see, *infra*, for further discussion on this case.

11. *Sushma Suri v. Govt. of N.C.T. of Delhi*, (1999) I SCC 330 : 1999 SCC (L &S) 208.

12. According to Art. 236(b), the expression "judicial service" means "a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge". Also see, *Satya Narain Singh v. High Court at Allahabad*, AIR 1985 SC 308.

ecutive and the judiciary,[13] the Court has concluded that only persons from 'judicial service' were eligible to be appointed as district judges and not persons from any other service like police, excise *etc*. The Court has taken the view that appointment of executive officers as district judges would damage the good name of the judiciary. This pronouncement has made a significant contribution to the long term improvement of the quality of the subordinate judiciary by ensuring its separation from the executive.

The appointment to the posts of district judges, and their first posting, are to be made by the Governor in consultation with the High Court. The consultation with the High Court is mandatory.[14] The consultation with the High Court has to be 'meaningful and purposive'. Therefore, the Governor has to consult the High Court in respect of appointment of each person as a district judge or additional district judge[15] and the opinion of the High Court must be given full weight by the Governor, which means the State Executive.[16]

In *M.M Gupta v. State of Jammu & Kashmir*,[17] appointment of district judges by the Government was quashed because these appointments were made without full and effective consultation with the High Court. The Supreme Court held that, normally, as a rule, the High Court's recommendations for the appointment of a district judge should be accepted by the State Government, and the Governor should act on the same. If, in any particular case, the State Government for good and weighty reasons finds it difficult to accept the High Court's recommendations, it should communicate its views to, and have complete and effective consultation with, the High Court. There is no doubt that if the High Court is convinced that the Government's objections are for good reasons, it will reconsider its earlier recommendation. Efficient and proper judicial administration being the main object, both the High Court and the State Government must necessarily approach the question in a detached manner.

The Supreme Court has emphasized that the expression "consultation" does not mean "concurrence", but it does postulate effective consultation which involves exchange of mutual view points of each other and examination of the relative merits of the other point of view. Consultation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views.

In *State of Kerala v. A. Lakshmikutty*,[18] the Supreme Court has elaborately discussed the respective roles of the Government and the High Court in the matter of appointment of district judges. This matter is governed by Art. 233 of the Constitution according to which the appointment of district judges is to be made by the State Governor in *consultation* with the High Court [Art. 233(1)]. A person not being in the service of the State or of the Centre can be appointed only when

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13. Directive Principle 50; *infra*, Ch. XXXIV.
14. *Prem Nath v. State of Rajasthan*, AIR 1976 SC 1599 : (1967) 3 SCR 186; *State of Assam v. Ranga Mohammad*, AIR 1967 SC 903 : (1967) 1 SCR 454; *Chandramouleshwar v. Patna High Court*, AIR 1970 SC 370 : (1969) 3 SCC 56.
15. Including district sessions judge or additional district or sessions judge.
16. *A Panduranga Rao v. State of Andhra Pradesh*, AIR 1975 SC 1922 : (1975) 4 SCC 709.
17. AIR 1982 SC 1579. Also see, *Chandramouleshwar Prasad v. Patna High Court*, AIR 1970 SC 370 : (1969) 3 SCC 56.
18. AIR 1987 SC 331 : (1986) 4 SCC 632.

recommended by the High Court [Art. 233(2)]. Some of the salient points which emerge from the Court's opinion in *Lakshmikutty* are:

1. The power of the State Government to appoint district judges is not absolute and unfettered but is hedged in with restrictions. The power is conditioned by the requirement of "consultation" with the High Court.

2. The power of appointment is an executive function of the Government.

3. The eligibility for appointment as a district judge by direct recruitment depends entirely on the High Court's recommendation. The State Government cannot appoint any one from outside the panel of names forwarded by the High Court.

4. 'Consultation' between the High Court and the State Government, as envisaged by Art. 233(1), must be "real, full and effective". This means that there must be an interchange of views between the High Court and the State Government. On this point, the Court has emphasized thus:

> "If the State Government were simply to give lip service to the principle of consultation and depart from the advice of the High Court in making judicial appointments without referring back to the High Court the difficulties which prevent the Government from accepting its advice, the consultation would not be effective and any appointment of a person as a district judge.....under Art. 233(1) would be invalid."[19]

5. Normally, as a matter of rule, the recommendation of the High Court for appointment as a district judge should be accepted by the State Government. If, in any particular case, the State Government for "good and weighty" reasons finds it difficult to accept the recommendations of the High Court, the Government should communicate its views to the High Court and must have complete and effective consultation with the High Court in the matter.

In the instant case, the High Court forwarded to the State Government, a panel of names for appointment as district judges. For some reasons, the State Government did not want to accept the panel but it did not communicate its views to the High Court in the matter. The Supreme Court ruled that before rejecting the panel forwarded by the High Court, the Government should have conveyed its views to the High Court to elicit its opinion. The Government should have taken the High Court into confidence. Accordingly, a *mandamus* was issued to the State Government requiring it to communicate its views to the High Court to elicit its opinion.

It becomes clear from the above pronouncements that no recruitment to the post of a district judge can be made by the Governor without recommendations of the High Court.

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19. Commenting on this provision [Art. 233(1)], AHMADI, J., has observed in *S.C. Advocates on Record v. Union of India*, AIR 1994 SC 268, 376 : (1993) 4 SCC 441.

"Consultation would not be complete, meaningful and effective unless there has been an exchange of views and in the event of disagreement the executive has indicated the reasons for its disagreement with the High Court and has disclosed the material on which the disagreement is based.... In order that the requirement of consultation does not end up as an empty formality or is not reduced to a mere mockery it is essential that in the event of difference of opinion there is an effective interchange of view points between the two functionaries so that each is able to appreciate the views of the other and there is a genuine attempt to iron out the creases before a final decision is taken".

While there is no legal bar against the High Court reviewing its earlier decision taken on the administrative side on the question of *inter se* seniority of recruitees, it can do so only after hearing the parties likely to be affected by the decision, and provided there has been no judicial decision directly deciding the issue *inter partes*.[20]

If any rules are made (under Art. 309)[21] for regulating recruitment and conditions of service of district judges, the rules have to be in conformity with Art. 233. The rules will be *ultra vires* if they violate the constitutional mandate of Art. 233.[22]

(c) APPOINTMENT OF SUBORDINATE JUDGES

Below the district judges, there are other subordinate courts. According to Art. 234, appointment of persons, other than district judges, to the State judicial service[23] is made by the Governor in accordance with the rules made by him for the purpose after consultation with the State Public Service Commission and the High Court.

Consultation with the High Court under Art. 234 is mandatory. If rules are made by the State Government without consulting the High Court then such rules would be *ultra vires.*[24] "Consultation" envisaged by Art. 234 is not a matter of mere formality; it has to be meaningful and effective. Rules made without consultation with the concerned High Court are void and a nullity. The reason underlying Art. 234 is that judicial service must be independent of the executive influence. Therefore, judicial service has been placed on a pedestal different from other services under the State. The constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy.[25]

Certain rules made by the Governor of Gujarat regulating promotion of civil judges to the posts of assistant judges were declared by the Supreme Court as "irrational, arbitrary and unreasonable" as these rules came in conflict with Arts. 14 and 16.[26]

Under Art. 234, the consultation with the High Court is only in respect of making the rules and not for actual selection of the appointees.[27] However, in view of the High Court's ultimate responsibility for judicial administration in the State, the Law Commission has suggested that the Article be suitably amended so as to provide that persons appointed to the subordinate judiciary may be persons recommended by the High Court.[28]

Now, the deficiency in the phraseology of Art. 234 has been removed by the Supreme Court through its ruling in *Ashok Kumar Yadav v. State of Haryana.*[29]

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20. *D. Ganesh Rao Patnaik v. State of Jharkhand,* (2005) 8 SCC 454, 472 : AIR 2005 SC 4321.
21. *Infra,* Ch. XXXVI, Sec. B.
22. *Hari Datt v. State of Himachal Pradesh,* AIR 1980 SC 1426 : (1980) 3 SCC 189.
23. For definition of "judicial service", see, *supra,* note 70.
24. *A.C. Thalwal v. High Court of Himachal Pradesh,* AIR 2000 SC 2732 : (2000) 7 SCC 1.
25. *Ibid.*
26. *Indravadan v. State of Gujarat,* AIR 1986 SC 1035 : 1986 Supp SCC 254.
For discussion on Arts. 14 and 16, see, *infra,* Chs. XXI and XXIII.
27. *Farzand v. Mohan Singh,* AIR 1968 All. 67; *State of West Bengal v. N.N. Bagchi,* AIR 1966 SC 447 : (1966) 1 SCR 771.
28. LAW COMM, *XIV REPORT,* 217-220.
29. AIR 1987 SC 454 : (1985) 4 SCC 417.
The Court has reiterated this view in *State of Uttar Pradesh v. Rafiquddin,* AIR 1988 SC 162 : 1987 Supp SCC 401.

The Court has laid down a procedure to recruit subordinate judges where the High Court will have a substantial role to play. The Court has insisted that when selection of judges is being made by the State Public Service Commission, a sitting Judge of the High Court, nominated by the Chief Justice, should be invited to participate in the interview as an expert and, ordinarily, his opinion ought to be accepted, except when there are strong and cogent reasons for not accepting his advice. These reasons must be recorded in writing by the chairman and the members of the Commission.

The Supreme Court has emphasized that it is necessary to recruit as judges "competent and able persons possessing a high degree of rectitude and integrity," otherwise, the whole democratic set up in the country will be put in jeopardy. The Court gave this direction to the Public Service Commission in every State because it was anxious that "the finest talent should be recruited in the Judicial Service and that can be secured only by having a real expert whose advise constitutes a determinative factor in the selection process".[30]

The Supreme Court had imposed the qualification of minimum three years' practice for recruitment to the lowest rung of judicial office.[31] Although the Supreme Court reiterated this ruling in the case noted below[32] and stated that while the qualification of a minimum of three years' legal practice is a must for recruitment in the lowest rung of judicial office, it is open to a State to prescribe a higher qualification by way of standing at the Bar, this requirements has subsequently been dispensed with.[33]

The persons presiding over industrial and labour courts constitute a 'Judicial Service' and so these judges ought to be recruited in accordance with Art. 234.[34]

(d) DE FACTO DOCTRINE

When appointment of a district judge was declared invalid because of the breach of Art. 233, the decisions given by him were not affected because of the *de facto doctrine*.[35]

Again, in *State of Uttar Pradesh v. Rafiquddin*,[36] appointment of munsiffs suffered from legal infirmity as these were made inconsistent with the relevant rules. Nevertheless, the decisions given by them as munsiffs were protected by applying the *de facto* doctrine.

The Supreme Court has asserted that the doctrine is founded upon sound principles. These judges could not be regarded as usurpers of office. These persons, though not qualified according to the rules, were, nevertheless, appointed by competent authority to the posts of munsiffs with the concurrence of the High Court. They had been working all these years in the Judicial Service. They had been performing their functions and duties as *de facto* judicial officers. "A person who is ineligible to judgeship, but who has nevertheless been duly appointed and

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30. The Court has reiterated this ruling in *All India Judges' Ass. v. Union of India*, AIR 1993 SC at 2506, 2507 : (1993) 4 SCC 288.
31. *All India Judges' Association v. Union of India*, AIR 1993 SC 2493 : (1993) 4 SCC 288.
32. *All India Judges' Association v. Union of India*, AIR 1994 SC 2771 : (1994) 6 SCC 314.
33. All India Judges Association III: (2002).
34. *State of Maharashtra v. Labour Law Practitioners' Association*, AIR 1998 SC 1233 : (1998) 2 SCC 688.
35. *Gokaraju Rangaraju v. State of Andhra Pradesh*, AIR 1981 SC 1473 : (1981) 3 SCC 132.
36. AIR 1988 SC 162, 179-180 : 1987 Supp SCC 401.

who exercises the powers and duties of office is a *de facto* judge, he acts validly until he is properly removed." Judgments and orders made by a *de facto* judge cannot be challenged on the ground of his ineligibility for appointment.

(e) HIGH COURT'S CONTROL OVER DISTRICT AND SUBORDINATE COURTS

According to Art. 235, the control over district and subordinate courts is vested in the High Court, including the posting and promotion of, and the grant of leave to, persons belonging to the State judicial service, and holding a post inferior to that of a district judge. However, the High Court is not authorised to deal with any such person otherwise than in accordance with the conditions of service prescribed under the law. Art. 235 is not to be construed as taking away from any such person any right of appeal which he may have under the law regulating his conditions of service.

In what came to be known as the "fodder scam", ex-Chief Minister of Bihar, had been charged with large scale defalcation of public funds and falsification of accounts. The High Court's appointment of a particular Additional District Judge as a Special Judge to conduct the trials was subjected to scrutiny by the Supreme Court in *Rajiv Ranjan Singh "Lalan" (VI) v. Union of India*[37]. The issue had come up before the Supreme Court by way of public interest litigation in which a prayer was made for monitoring the conduct of the trials. On the ground that the question of appointment of a Special Judge was exclusively within the domain of the High Court, the prayer for change of the Special Judge was ultimately rejected.[38]

Article 235 is the pivotal provision. The control vested in the High Court by Art. 235 over the subordinate judiciary is for the purpose of preserving its independence and its protection from executive interference.

The control vested in the High Court by Art. 235 over the judiciary below it complete and comprehends a wide variety of matters and is "exclusive in nature, comprehensive in extent and effective in operation."[39] The High Court is the sole custodian of the control over the judiciary. The word 'control' in Art. 235 is used in a comprehensive sense; it includes general superintendence over the working of the subordinate courts. The expression control in Art. 235 includes "disciplinary control".

Transfers, promotions and confirmations including transfer of district and subordinate judges vest in the High Court. Therefore, a judicial officer who had, with the consent of the High Court, been appointed as an ad-hoc Deputy Secretary in the Legislative Department of the State Government could not be regularized or promoted by the State Government without consultation with the High

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37. (2006) 1 SCC 356 : (2005) 9 SCALE 332.

38. *Rajiv Ranjan Singh "Lalan" (VIII) v. Union of India*, (2006) 6 SCC 613 : (2006) 8 JT 328; See also *Tirupati Balaji Developers (P.) Ltd. v. State of Bihar*, (2004) 5 SCC 1 : AIR 2004 SC 2351.

39. *Chief Justice, Andhra Pradesh v. L.V.A. Dikshitulu*, AIR 1979 SC 193, 201 : (1979) 2 SCC 34. See also *Gauhati High Court v. Kuladhar Phukan*, (2002)4 SCC 524 : AIR 2002 SC 1589*; High Court of Judicature for Rajasthan v. P.P. Singh*, (2003) 4 SCC 239 : AIR 2003 SC 1029*; D. Ganesh Rao Patnaik v. State of Jharkhand*, (2005) 8 SCC 454 : AIR 2005 SC 4321; *Parkash Singh Badal v. State of Punjab*, (2007)1 SCC 1 : AIR 2007 SC 1274*; Anil Kumar Vitthal Shete v. State of Maharashtra*, (2006) 12 SCC 148 : AIR 2006 SC 2167.

Court. The Supreme Court cited the doctrine of separation of powers and the need for an independent judiciary to invalidate the regularization and promotion by the State Government.[40]

The power to transfer subordinate judges, including district judges, from one place to another,[41] power to promote persons from one post in the subordinate judiciary to another, and the power to confirm such promotions,[42] vest in the High Court and not the State Government,*e.g.*, power to promote a munsiff to the post of a subordinate judge[43], or promotion of a subordinate judge to the selection grade post of subordinate judge, or his promotion from one post to another in the same judicial service.

Article 235 would not apply when one reaches the stage of giving promotion as a district or additional district sessions judge, and the power to give promotion would vest in the Governor after consultation with the High Court which means on its recommendation. However, giving of further promotion to district judges is the sole right of the High Court.[44]

The power of confirmation of district judges and below lies with the High Court and not the State Government. Accordingly, a rule vesting power of confirmation of district judges in the Governor (in consultation with a High Court) has been declared *ultra vires* the Constitution, for the power of confirmation vests in the High Court.[45] Under Art. 235, the High Court exercises disciplinary powers over the district and subordinate judges.[46] 'Control' under Art. 235 is control over the conduct and discipline of the judges. The control is vested in the High Court to secure the independence of the subordinate judiciary. Accordingly, the High Court can suspend a judge with a view to hold disciplinary inquiry.

An inquiry into the conduct of a member of the judiciary can be held by the High Court alone and by no other authority.[47]

The High Court can itself impose punishments over judicial officers, short of 'dismissal or removal' or 'reduction in rank'. These major punishments fall within the purview of the Governor under Art 311,[48] but even such an action can be taken only on the recommendation of the High Court made in exercise of the power of control vested in it. The advice of the High Court is binding on the Governor in this matter.[49] The Governor should not consult the Public Service

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40. *Gauhati High Court v. Kuladhar Phukan*, (2002) 4 SCC 524 : AIR 2002 SC 1586.
41. *State of Assam v. Ranga Mohammad, supra; Chandramouleshwer v. Patna High Court, supra.*
42. *State of Assam v. Sen*, AIR 1972 SC 1028 : (1971) 2 SCC 889; *State of Bihar v. Madan Mohan Prasad*, AIR 1976 SC 404 : (1976) 1 SCC 529.
43. *High Court, Calcutta v. Amal Kumar*, AIR 1962 SC 1705 : (1963) 1 SCR 437.
44. *Punjab & Haryana High Court v. State of Haryana, supra; State of Assam v. Kuseswar Saikia*, AIR 1970 SC 1616 : (1969) 3 SCC 505.
45. *Punjab & Haryana H.C. v. State of Haryana, ibid*.
46. *State of West Bengal v. N.N. Bagchi, supra*, footnote 27; *Baradakanta v. Registrar, Orissa High Court*, AIR 1974 SC 710 : (1974) 1 SCC 374.
47. *Punjab & Haryana High Court v. State of Haryana*, AIR 1975 SC 613 : (1975) 1 SCC 843.
48. See, *infra*, Ch. XXXVI.
49. *Baldev Raj v. Punjab & Haryana High Court*, AIR 1976 SC 2490; *B Mishra v. Orissa High Court*, AIR 1976 SC 1899 : (1976) 3 SCC 327; *State of Haryana v. Inder Prakash*, AIR 1976 SC 1841; *T. Lakshmi Narasimha Chari v. High Court of Andhra Pradesh*, AIR 1996 SC 2067 : (1996) 5 SCC 90.

Commission in respect of judicial officers.[50] In *State of West Bengal v. Nripendra Nath Bagchi*,[51] the Supreme Court set aside an order of dismissal of an officiating district and sessions judge passed by the Governor after consulting the State Public Service Commission but without consulting the High Court.

Compulsory retirement is not dismissal or removal or reduction in rank because the concerned person does not lose the terminal benefits earned by him. The power to recommend compulsory retirement of a district and subordinate judge belongs to the High Court and it is binding on the Governor.[52] Article 235 enables the High Court to assess the performance of any judicial officer at any time with a view to discipline the black sheep or weed out the deadwood. The constitutional power of the High Court cannot be circumscribed by any rule or order.[53]

As the Governor is the appointing authority, so he makes a formal order of compulsory retirement but only in accordance with the recommendation of the High Court. However formal the Governor's power to make such an order may be, such an order is essential for effectuation of the retirement of the concerned person.[54] When the State Government compulsorily retired a subordinate judge against the recommendation of the High Court to revert him, the government order was quashed.[55] The Supreme Court emphasized:

> "The control vested in the High Court is that if the High Court is of the opinion that a particular judicial officer is not fit to be retained in service the High Court will communicate that to the Governor because the Governor is the authority to dismiss, remove, reduce in rank or terminate the appointment. In such cases it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court. If the recommendation of the High Court is not held to be binding on the State consequences will be unfortunate. It is in public interest that the State will accept the recommendation of the High Court. The vesting of complete control over the subordinate judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State. The Government will act on the recommendation of the High Court. That is the broad basis of Article 235."

While, in form, the High Court's recommendation is advisory, in substance and effect, it is well nigh peremptory. The recommendation of the High Court is binding on the Government. But the High Court cannot pass the order itself; it is only the recommending authority.[56]

In Art. 235, the word 'control' has been used in a comprehensive sense. The High Court exercises administrative, judicial and disciplinary control over the members of the judicial service in the State. It includes general superintendence

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50. *Baldev Raj, ibid*.
For Public Service Commission, see, *infra*, Ch. XXXVI, Sec. K.

51. AIR 1966 SC 447 : (1966) 1 SCR 771.

52. *High Court of Punjab and Haryana v. State of Haryana*, AIR 1967 SC 613 : (1975) 1 SCC 843; *State of Uttar Pradesh v. Batuk Deo Pati Tripathi*, 1978 Lab. IC 839; *Chief Justice, State of Andhra Pradesh v. L.V.A. Dikshitulu*, AIR 1979 SC 193 : (1979) 2 SCC 34. *Nawal Singh v. State of U.P*, (2003) 8 SCC 117 : AIR 2003 SC 4303; *Chandra Singhd v. State of Rajasthan*, (2003) 6 SCC 545, 562 : AIR 2003 SC 2889.

53. *Chandra Singh v. State of Rajasthan*, (2003) 6 SCC 545 : AIR 2003 SC 2889.

54. *Registrar, High Court of Madras v. R. Rajiah*, AIR 1988 SC 1388 : (1988) 3 SCC 211.

55. *State of Haryana v. Inder Prakash Anand*, (1976) 2 SCC 977 : AIR 1976 SC 1841.

56. *Registrar (Adm.), High Court of Orissa v. Sisir Kanta Satapathy*, AIR 1999 SC 3265 : (1999) 7 SCC 725.

of the working of subordinate courts, disciplinary control over judges and recommending the imposition of punishment of dismissal, removal, reduction in rank and compulsory retirement. This Constitutional power of the High Court cannot be circumscribed by any rule or order[57] 'Control' would also include suspension of a judge for purposes of holding a disciplinary inquiry and also transfer, confirmation and promotion.[58]

The disciplinary control which the High Court exercises over the subordinate judiciary is a very sensitive and delicate function. The Supreme Court has cautioned that in exercising its disciplinary powers over the subordinate judiciary, the High Court is to act with fairness and in a non-arbitrary manner. While, on the one hand, it is imperative on the High Court to protect honest judges, on the other hand, it cannot ignore any dishonest performance by any subordinate judge. As the Supreme Court has emphasized, judicial service is not merely an employment nor the judges merely employees. "They are holders of public offices of great trust and responsibility." "Dishonest judicial personage is an oxymoron".[59]

There have been several occasions when the Supreme Court has quashed the action taken by the High Courts against subordinate judges because of one infirmity or another.[60] For example, in *R.C. Sood*,[61] the Supreme Court has characterised the action of the High as lacking in *bona fides.* The Court has observed: "The High Court acted in the manner which can only be termed as arbitrary and unwarranted, to say the least".[62]

The High Court of Madhya Pradesh recommended compulsory retirement of a sessions judge and the State Government passed the necessary order. But the Supreme Court quashed the High Court's recommendation (as well as the government order) because the High Court had not taken into consideration all the relevant material in reaching its decision.[63]

Similarly, in *Madan Mohan Choudhary v. State of Bihar*[64] the Supreme Court quashed the recommendation made by the High Court to compulsorily retire a district judge as it was a case where there was no material on the basis of which an opinion could have been reasonably formed that it would be in the public interest to retire the district judge from service prematurely. If there is some material before the High Court against a member of the judicial service, and on the basis of this material the High Court takes the view that he be compulsorily re-

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57. *Chandra Singh v. State of Rajasthan,* (2003) 6 SCC 545, 562 : AIR 2003 SC 2889.

58. *State of Rajasthan v. Ramesh Chand Paliwal,* AIR 1998 SC 1079 : (1998) 3 SCC 72. See also *Gauhati High Court v. Kuladhar Phukan,* (2002) 4 SCC 524 : AIR 2002 SC 1589.

59. *High Court of Judicature at Bombay v. Shashikant S. Patil,* AIR 2000 SC 22, at 27 : (2000) 1 SCC 416.

Also, *High Court of Judicature at Bombay v. Shirishkumar Rangrao Patil,* AIR 1997 SC 2631 : (1997) 6 SCC 339; *Ramesh Chandra Singh v. High Court of Allahabad,* (2007) 4 SCC 247 : (2007) 4 JT 135.

60. *R.C. Sood v. State of Rajashtan,* 1995 AIR SCW 198 : 1994 Supp (3) SCC 711; *Yoginath D. Bagde v. State of Maharashtra,* AIR 1999 SC 3734 : (1999) 7 SCC 739; *High Court of Judicature at Allahabad v. Sarnam Singh,* AIR 2000 SC 2150 : (2000) 2 SCC 339.

61. *R.C. Sood v. High Court of Judicature at Rajasthan,* AIR 1999 SC 707 : (1998) 5 SCC 493.

62. *Ibid*., at 716.

63. *Brij Behari Lal v. High Court of Madhya Pradesh,* AIR 1981 SC 594 : (1981) 1 SCC 490.

64. AIR 1999 SC 1018 : (1999) 3 SCC 396.

tired, "the adequacy or sufficiency of such materials cannot be questioned, unless the materials are absolutely irrelevant for the purpose of compulsory retirement."

An order of compulsory retirement was also quashed in *Rajiah*[65]as there was no material before the High Court to justify such a decision.

Under Art. 235, the Governor can pass an order of premature retirement only on the recommendation of the High Court. The Supreme Court has emphasized that it is for the High Court, on the basis of assessment of performance and all other aspects germane to the matter, to come to the conclusion whether any particular judge is to be prematurely retired. The conclusion has to be of the High Court since the control vests therein. The recommendation of the High Court should precede the Governor's order.

The initiative to retire a subordinate judge rests with the High Court and not with the government. If the government has any material having a bearing on the conduct of a subordinate judge, it can bring the same to the notice of the High Court, but the ultimate decision in the matter rests with the High Court. The recommendation of the High Court is binding on the government.[66]

In *Nripendra*,[67] the State Government passed an order dismissing a district judge after consulting the State Public Service Commission but not the High Court. The Supreme Court quashed the order.

As stated above, under Art. 235, "total and absolute" control over subordinate judiciary is vested in the full High Court. All the High Court Judges collectively and individually share that responsibility. But the full Court can pass a resolution and delegate its power to a committee of Judges. If so, the committee can then act on behalf of the Court without making any reference to it. The decision of the committee is then regarded as the decision of the Court itself.[68]

The full Bombay High Court passed a resolution constituting a disciplinary committee of five Judges for taking disciplinary action against subordinate judges. The Supreme Court ruled that the committee was competent to take procedural steps from appointment of enquiry officer, framing of charges and to recommend to the Government imposition of penalty of dismissal. There was no further necessity to refer the matter again to the full Court. The concurrence of the full Court is not necessary in such a situation.[69]

According to the rules made by the Allahabad High Court, the Administrative Committee could act for, and on behalf of, the Court, and, therefore, the Administrative Committee could recommend to the Governor to pass an order of compulsory retirement in respect of a district judge or a subordinate judicial officer. In the instant case,[70] an order was passed by the State Government for premature

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65. *Rajiah*, *supra*, footnote 54.
66. *Registrar (Administration), High Court of Orissa, Cuttack v. Sisir Kumar Satapathy*, AIR 1999 SC 3265 : (1999) 7 SCC 725.
67. *State of West Bengal v. Nripendra Nath Bagchi*, AIR 1966 SC 447 : (1966) 1 SCR 771.
68. *State of Uttar Pradesh v. Batuk Deo Pati Tripathi*, 1978 Lab IC 839: (1978) 2 SCC 102; See also *High Court of Judicature for Rajasthan v. P.P. Singh*, (2003) 4 SCC 239 : AIR 2003 SC 1029.
69. *High Court of Judicature at Bombay v. Shirish Kumar R. Patil*, AIR 1997 SC 2631 : (1997) 6 SCC 339; *Yoginath D. Bagde v. State of Maharashtra*, AIR 1999 SC 3734 : (1999) 7 SCC 739.
70. *Tej Pal Singh v. State of Uttar Pradesh*, AIR 1986 SC 1814 : (1986) 3 SCC 604.

retirement of an additional district and sessions judge on the basis of the recommendation of the Administrative Judge. The Administrative Judge gave his opinion in favour of premature retirement of the concerned judge without consulting his other colleagues in the Administrative Committee. The Committee came to know of the order only after it had been passed by the Governor when it approved the recommendation of the Administrative Judge. The Supreme Court quashed the order as null and void on the ground that the government had passed the same without the recommendation of the full Court or its Administrative Committee. The Administrative Judge alone could not have so acted; he had no such power and his own agreement to the proposal of compulsory retirement would be of no consequence. His satisfaction could not be regarded as the satisfaction of the Court for purposes of Art. 235 of the Constitution. The approval was given by the Administrative Committee *ex post facto* and this did not validate the order. According to the Court : "The deviation in this case is not mere irregularity which can be cured by the *ex post facto* approval given by the Administrative Committee to the action of the Governor after the order of premature retirement had been passed. The error committed in this case amounts to an incurable defect amounting to an illegality."[71]

The Supreme Court has ruled that the decisions regarding confirmation, promotion, supersession of subordinate judges, ought to be taken at full Court meetings, and not by the Chief Justice alone. Every High Court Judge is expected to contribute to the discussion and participate in the decisions arrived at. This mode of dealing with the confirmation, promotions and supersessions of subordinate Judges is a sure safeguard against arbitrary or motivated decisions. This case is interesting because here the order of the High Court passed on its administrative side was quashed by a Division Bench of the Court. The High Court appealed to the Supreme Court against the decision of the Division Bench. The dispute was regarding the date of confirmation of a civil Judge. The Supreme Court quashed the decision of the Division Bench and restored the decision of the High Court.[72]

The Supreme Court has clarified in the instant case that the decision as to disciplinary action of a subordinate judge is taken by the High Court on the Administrative side of the High Court; this decision can be challenged through a writ petition under Art. 226 on the judicial side of the High Court. The petitioner can make the High Court a party to the writ proceedings as it is the High Court order which is being challenged. If the writ petition is decided by the Division Bench against the High Court, and its administrative order is set aside, it will then be an aggrieved party and, as such, it can appeal to the Supreme Court under Art. 136.

The Supreme Court has emphasized in *Samsher Singh v. State of Punjab,*[73] that under Art. 235 the High Court is invested with control over the subordinate judiciary. The members of the subordinate judiciary are not only under the control, but also under the care and custody, of the High Court. Accordingly, the Supreme Court has emphasized that enquiries against subordinate judges should be held by the High Court through judicial officers subject to its control and it should not leave this task to the government. To do so will be an act of self-

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71. *Ibid.*, at 1821.

72. *High Court of Madhya Pradesh v. Mahesh Prakash,* AIR 1994 SC 2595 : (1995) 1 SCC 203. Also see, *Tejpal Singh v. State of Uttar Pradesh, supra,* footnote 70; *Yoginath, infra,* footnote 75.

73. AIR 1974 SC 2192 : (1974) 2 SCC 831; see, Ch. III, *supra.*

abnegation on the part of the High Court. "The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity".

Any inquiry against a judicial officer must be conducted according to natural justice.[74] An order of the High Court dismissing a subordinate judge was quashed by the Supreme Court because the High Court failed to act according to natural justice. The concerned judge was not given a hearing by the High Court.[75]

The Supreme Court has emphasized that as the appointing authority the Governor has to pass the ultimate order imposing punishment on a member of subordinate judiciary, he cannot take any action without, or contrary to, the recommendation of the High Court. After the High Court comes to the conclusion that some action by way of imposition of punishment needs to be taken against a member of the subordinate judiciary, the Court makes a recommendation to the Governor and he passes the order accordingly.[76] "The test of control is not the passing of the order against a member of the subordinate judicial service, but the decision to take such action".

The Supreme Court has pointed out that disciplinary action against a government employee has two parts—(1) a decision has to be taken if any disciplinary action is to be taken; (ii) this decision is then carried out by a formal order. The control of the High Court over subordinate judiciary relates to the first stage. The second stage comes after the High Court decision to take disciplinary action. The High Court makes a recommendation to the Governor who then issues a formal order in accordance with the High Court recommendation. The recommendation of the High Court is binding on the Governor, but the High Court itself cannot issue the formal order. While the High Court has disciplinary control over the subordinate judiciary, including the power to initiate disciplinary proceedings, suspend them pending inquiries and impose punishments on them, but when it comes to the question of dismissal, removal, reduction in rank or termination of service of a judicial officer on any count whatsoever, the High Court acts as a recommendatory authority and cannot itself pass such an order.

At times, while disposing of appeals from lower courts, the High Court Judges make adverse remarks on the performance of the judges in the lower courts. Such remarks may affect the reputation and career of such judges. In this connection, the Supreme Court has advised caution and restraint on the part of the High Court Judges in making adverse comments on the judges of the lower courts. The aggrieved judge may move the Supreme Court to expunge the adverse remarks against him because he has no other remedy in law to vindicate his position. In quite a few cases, the Supreme Court has expunged such adverse remarks.[77]

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74. *State of Andhra Pradesh v. S.N. Nizamuddin*, AIR 1976 SC 1964 : (1976) 4 SCC 745; *State of Gujarat v. Ramesh Chandra Mashruwala*, AIR 1977 SC 1619 : (1977) 2 SCC 12.

75. *Yoginath D. Bagde v. State of Maharashtra*, AIR 1999 SC 3734, 3477 : (1999) 7 SCC 739.

76. *The Registrar, High Court of Madras v. R. Rajiah*, AIR 1988 SC 1388 : (1988) 3 SCC 211; *Registrar (Admn.), High Court of Orissa v. Sisir Kanta Satapathy*, AIR 1999 SC 3265 : (1999) 1 SCC 725.

77. *Ishwari Prasad Mishra v. Mohd. Isa*, AIR 1963 SC 1728 : (1963) 3 SCR 722; *K.P. Tiwari v. State of Madhya Pradesh*, AIR 1994 SC 1031; *Kashi Nath Roy v. State of Bihar*, 1996 AIR SCW 2098 : (1996) 4 SCC 539; *Brij Kishore Thakur v. Union of India*, AIR 1997 SC 1157; *In the matter of : 'K'— a Judicial Officer*, AIR 2001 SC 972 : (2001) 3 SCC 54; In the matter of *R. v. A Judicial Officer*, (2007) 7 SCC 729 : (2007) 9 JT 1.

Posting of judicial officers to administrative posts can be with the consent of the High Court and for such time as it agrees.[78] The practice of appointing judicial officers to administrative posts is not sound as it dilutes the principle of separation of the judiciary from the executive. The fact that a post in the Secretariat is in the line of promotion of a judicial officer may offer temptations from which a judge should be immune. Therefore, the principle that a judicial officer can be seconded to an administrative post only for such time as the High Court may permit is salutary to the extent it goes but the better thing will be to stop this practice altogether so that the judiciary may be immunized from any temptation whatsoever.

In *B.S. Yadav v. State of Haryana*,[79] the Supreme Court has ruled that the power to make the law regulating conditions of service of the judicial officers of the State vests in the Legislature under Art. 309, and, until it acts, the Governor can make rules for the purpose.[80] The Supreme Court has suggested that the High Court may be consulted while framing or amending the rules though it is not mandatory under Art. 309.

These rules must be of general application and they must not interfere with the powers of the High Court. Thus, while the Governor can formulate the rules of seniority of the district and sessions judges, the application of the rules to individual cases must be left to the High Court. Similarly, though rules can provide for a period of probation, the question whether a particular judicial officer has satisfactorily completed his probation or not is a matter lying exclusively in the domain of the High Court.

In *Beena Tiwari v. State of Madhya Pradesh*,[81] the Supreme Court has reiterated that the question of confirmation of a member of subordinate Judicial Service is absolutely the concern of the High Court as the matter squarely falls within Art. 235. No rule framed by the State Government can interfere with the control vested in the High Court under Art. 235. Rules made by the Government are to be read subject to, and in harmony with, the control vested in the High Court under Art. 235.[82]

The Supreme Court has suggested that *in exercise of* its control function, the High Court should devise a proper and uniform system of inspection of the courts subordinate to it. The Supreme Court has emphasized that such inspection is of vital importance as it helps these courts to give the best results. But the inspection should not be casual but both effective and productive.[83]

In *K.K. Dhawan's* case,[84] the Supreme Court has indicated the basis on which disciplinary action can be initiated against subordinate Judges, viz. :

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78. *State of Orissa v. Sudhansu Sekhar,* AIR 1968 SC 647 : (1968) 2 SCR 154.
79. AIR 1981 SC 561 : 1980 Supp SCC 524.
80. For discussion on Art. 309, see, *infra,* Ch. XXXVI, Sec. B.
81. AIR 1988 SC 488 : 1988 Supp SCC 213.
82. *The Registrar, High Court of Madras v. R. Rajiah,* AIR 1988 SC 1388 : (1988) 3 SCC 211.
83. *High Court of Punjab and Haryana v. Ishwarchand Jain,* AIR 1999 SC 1677 : (1999) 4 SCC 579.
Also, *High Court of Judicature at Allahabad v. Sarnam Singh,* AIR 2000 SC 2150 : (2000) 2 SCC 339.
84. *Union of India v. K.K. Dhawan,* AIR 1993 SC 1478 : (1993) 2 SCC 56.
Also see, *Union of India v. A.N. Saxena,* AIR 1992 SC 1333; *Ishwar Chand Jain v. High Court of Punjab and Haryana,* AIR 1988 SC 1395 : (1988) 3 SCC 370.

(1) Where the judicial officer has conducted in a manner as would reflect on his reputation or integrity or good faith or devotion to duty;

(2) that there is *prima facie* material to show recklessness or misconduct in the discharge of his duty;

(3) that he has acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(4) that he had acted to unduly favour a party;

(5) that he had been actuated by corrupt motive.

The Supreme Court has clarified that there is possibility on a given set of facts to arrive at a different conclusion. This cannot be a ground "to indict a judicial officer for taking one view" and to infer misconduct for that reason alone. Merely because the order passed by a judicial officer is wrong or that the action taken could have been different would not warrant initiation of disciplinary proceedings. According to the Supreme Court, unless there are strong grounds to suspect the officer's bonafides and that the order has been actuated by malice, bias or illegality, disciplinary proceedings against the officer would affect the morale of the subordinate judiciary and no officer would be able to exercise power freely and independently.[85]

In *P.C. Joshi v. State of Uttar Pradesh,*[86] the Supreme Court quashed an order of dismissal passed on a judicial officer by the High Court of Allahabad because there was no material to prove that there was any "*mala fide* or extraneous reasons" on the part of the judge to pass the order. Merely because some orders passed by the judge are wrong, it does not warrant initiation of disciplinary proceedings against the judge.

The Court has observed in *Joshi*:[87]

> "If in every case where an order of a subordinate Court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly."

The "control" under Art. 235 extends to ministerial officers and servants on the establishment of the subordinate courts as well.[88]

(f) CRIMINAL JUDICIARY

Ordinarily the magistracy is under the control of the State Executive and is not covered by the constitutional provisions above-mentioned. However, separation of the judiciary from the executive being an accepted policy objective,[89] Art. 237 gives power to the State Executive to direct, by a public-notification, that any of the above-mentioned constitutional provisions relating to persons in the State Judicial Service [Arts. 233-235] will apply to any class of magistrates in the State with such exceptions and modifications as it may deem fit. This Article thus

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85. *Ramesh Chander Singh v. High Court of Allahabad,* (2007) 4 SCC 247 : (2007) 4 JT 135.
86. AIR 2001 SC 2788 : 2001 SCC (L&S) 984.
87. *Ibid,* at 2789.
88. *R.M. Gurjar v.High Court of Gujarat,* AIR 1992 SC 2000 : (1992) 4 SCC 10.
89. Directive Principle 50, see, *infra,* Ch. XXXIV on "Directive Principles".

makes a flexible arrangement and enables a State to take measures progressively to secure the control of the High Court over the magistracy as well.

Explaining the purport of Art. 237, the Supreme Court has observed:[90]

> "Art. 237 enables the Governor to implement the separation of the judiciary from the executive. Under this Article, the Governor may notify that Arts. 233, 234, 235 and 236 of the Constitution will apply to magistrates subject to certain modifications or exceptions, for instance, if the Governor so notifies, the said magistrates will become members of the judicial service; they will have to be appointed in the manner prescribed in Art. 234; they will be under the control of the High Court under Art. 235 and they can be appointed as District Judges by the Governor under Art. 233(1). To state it differently, they will then be integrated in the judicial service... Indeed, Art. 237 emphasizes the fact that till such an integration is brought about, the magistrates are outside the scope of the said provisions. The said view accords with the constitutional theme of independent judiciary..."

Reference may be made to one serious problem existing in the area of criminal justice, viz., delayed justice. It usually takes long to complete a criminal trial.

The Supreme Court has interpreted Art 21 to include the right to a speedy trial.[91] Nevertheless, the Court has refused to set a maximum time-limit within which a criminal trial must be completed. The question is far too complex to impose a rigid maximum time-limit for all criminal trials to complete. Each case needs to be decided on its own facts whether there has been undue delay and the trial needs to be quashed.

The Court has however reminded the State that it is its constitutional obligation to dispense speedy justice, more so in the field of criminal law.[92]

(g) IMPROVEMENT OF SUBORDINATE JUDICIARY

The Supreme Court has constantly endeavoured to secure the betterment of the conditions of service of the members of the subordinate judiciary.

In 1992, in *All-India Judges' Association v. Union of India*[93] the Supreme Court considered a writ-petition under Art. 32[94] filed by the All-India Judges' Association seeking directions for setting up of an All-India Judicial Service and for bringing about uniform conditions of service for members of the subordinate judiciary throughout the country. The Court referred to what the Law Commission had said in its XIV Report in the year 1958 on the question of setting up of an All-India Judicial Service and observed:

> "There is considerable force and merit in the view expressed by the Law Commission. An All-India Judicial Service essentially for manning the higher services in the subordinate judiciary is very much necessary. The reasons advanced by the Law Commission for recommending the setting up of an All-India Judicial Service appeal to us."

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90. *Chandra Mohan v. State of Uttar Pradesh*, AIR 1966 SC 1987 : (1967) 1 SCR 77.
91. See, Ch. XXVI, *infra*, for discussion on this question.
92. *P. Ramachandra Rao v. State of Karnataka*, (2002) 4 SCC 578, 604 : AIR 2002 SC 1856. Also see, Ch. XXXIV, on Directive Principles of State Policy.
93. AIR 1992 SC 165 : (1992) 1 SCC 119.
94. For discussion on Art. 32, see, *infra*, Ch. XXXIII, Sec. A.

The Court has thus directed the Central Government and other authorities concerned to take appropriate steps to set up an All-India Judicial Service, and bring about uniformity in the designation of judicial officers. This requires action being taken under Art. 312.[1]

In addition, the Supreme Court also directed various improvements being effectuated in the conditions of service of the subordinate judiciary, *e.g*., raising the retirement age to 60 years, examination of the pay structure of judicial officers, provisions of allowance for purchase of law books and journals for a residential library for every judicial officer, provision of residential accommodation, *etc.*

Justifying the higher retirement age for judicial officers than executive officers, the Court has said that the work of a judge involves more of a mental activity than physical. In case of a judge "experience is an indispensable factor and subject to the basic physical fitness with growing age experience grows".

On the question of pay scales for judiciary, the Court had said that "the judiciary compares unfavourably with the executive branches of the Government". This opinion was subsequently modified.[2]

On the need for a library allowance for subordinate judiciary, the Supreme Court justified it by saying: "Law books, Law reports and legal journals are indispensable to a judicial officer. They are in fact his tools".

The Court also observed: "Provision of an official residence for every judicial officer should be made mandatory".

The Court emphasized that "dispensation of justice is an inevitable feature in any civilized society". The Court also pointed out that income from Court-fees is more than the expenditure on the administration of justice.[3] The Court, therefore, suggested that "what is collected as Court-fees at least be spent on the administration of justice instead of being utilised as a source of general revenue of the State". The Court has also suggested that provision must be made for in-service training of judicial officers.

Petitions for review of the above decision were filed by several State Governments and the Central Government. They raised several objections to the directions given by the Supreme Court in the above case. The main objections on their behalf were—(1) It falls within the exclusive purview of each State to regulate service conditions for subordinate judiciary. When the Supreme Court gives directions for this purpose, it encroaches upon the State power; (2) Implementation of the directions given by the Supreme Court would impose a heavy financial burden on the States.

After considering these objections, the Court rejected the same and reiterated its earlier directions in *All-India Judges Association v. Union of India* (II).[4] The Court asserted that it made the recommendations to improve the system of justice and thereby to improve the content and quality of justice administered by the courts.

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1. For this provision, see, Ch. XIII, Sec. G, *infra.*
2. *All India Judges Assn.v. Union of India (III),* (2002) 4 SCC 247, 266-267 : AIR 2002 SC 1752. See further *infra*.
3. For discussion on Court fees, see, *infra*, Ch. XI, Sec. H.
4. AIR 1993 SC 2493 : (1993) 4 SCC 288.

Commenting on the various objections raised by the various governments to the directions issued by the Court to improve the working conditions for subordinate judiciary, the Court stated that this was because of lack of realization that judicial service is different from executive service. In this connection, the Court has stated:

> "The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary they exercise the sovereign judicial power of the state".

The Supreme Court had prescribed the qualification of minimum of three years' legal practice for recruitment in the lowest rung of judicial office,[5] justifying such a qualification, saying:

> "Considering the fact that from the first day of his assuming office, the judge has to decide, among others, questions of life, liberty, property and reputation of the litigants, to induct graduates fresh from the Universities to occupy seats of such vital powers is neither prudent nor desirable".

Nevertheless, this requirement was done away with in the subsequent decision of the Supreme Court in All India Judges' Assocn.(III) in 2002.[6]

The Court also recommended that the service conditions of the judicial officers should be laid and reviewed from time to time by an independent commission exclusively constituted for the purpose. The judiciary should be adequately represented in the composition of the commission.[7]

Pursuant to the directions of the Supreme Court, the Central Government constituted the First National Judicial Pay Commission under the Chairmanship of Justice K.J.Shetty. The Commission submitted its Report in 1999 making various recommendations relating to the betterment of the service conditions of the subordinate judiciary, including a revision of pay scales. This led to the filing of the third writ petition before the Supreme Court by the All India Judges' Association for enforcement of the recommendations.[8] On the basis of the Shetty Report, the Supreme Court revised its earlier views regarding parity of pay scales between the Administrative Service and the Judiciary[9] and the requirement of an advocate to have experience of three years as a criteria for eligibility to enter the judicial service[10]. In addition directions were issued regarding recruitment to the Higher Judicial Service, accommodation and other allowances[11].

The highlight of the Court's pronouncement in the second All India Judges Association case is that the Court has distinguished judicial service from executive service and put the former on a higher pedestal than the latter. The Court has emphasized that "the Judicial service is not service in the sense of 'employment'. "The Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State". The Court has observed further on this point.[12]

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5. AIR 1993 SC 2493 : (1993) 4 SCC 288.
6. (2002) SCC 247, 272 (Para 32) : AIR 2002 SC 1752; see also *infra*.
7. Also see, *State of Rajasthan v. Rajasthan Judicial Service Officers' Association*, (1999) 5 SCC 675 : AIR 1999 SC 1965.
8. *All India Judges' Assocn v. Union of India (III)*, (2002) 4 SCC 247 : AIR 2002 SC 1752.
9. *Ibid*, p. 267
10. *Ibid*, p. 272
11. *Ibid*, pp. 270, 273.
12. AIR 1993 SC at 2502.

> "The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally."

The Court has put great emphasis on judicial independence and, in the opinion of the Court, this cannot be secured if the judges are kept in want of their essential accoutrements. The Court has emphasized that judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. "It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence". The society has a stake in ensuring the independence of the judiciary, and "no price is too heavy to secure it."[13]

In *All-India Judges Ass. v. Union of India* (III),[14] the Supreme Court considered such questions pertaining to district and subordinate judges as pay scales, sufficiency of judicial strength, qualifications and recruitment of judges. The Court gave suitable directions as regards these matters.

The Court has also answered the objection that by making the directions, the Court was encroaching upon the powers of the State conferred by Art. 309.[15] The Court has observed in this connection:[16]

> "But the mere fact that Art. 309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary does not mean that the judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary".

Because of these reasons, the Supreme Court has reiterated what it said in its 1992 judgment for effectuating various improvements in the service conditions of the district and subordinate judges. The Court has however modified somewhat its direction to raise the age of retirement to 60 years. The benefit of this extension in retiring age would not accrue automatically to all judicial officers irrespective of their past record of service and evidence of their continued utility to the judicial system in future. The benefit would be available only to those whom the High Court thought "have a potential for continued useful service".

In subsequent, pronouncements, the Supreme Court has reiterated some of the abovementioned directions. For example, in *All India Judges' Association v. Union of India*,[17] the Court has ruled again that the "qualification of legal practice for a minimum three years is a must for recruitment in the lowest rung of judicial office." A State can however make rules prescribing a higher qualification, *e.g.*, five years standing at the Bar.

When a State makes rules enhancing the age of retirement of judicial officers to 60 years, the direction issued by the Court on this point ceases to operate. The

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13. *Ibid.*
14. (2002) 4 SCC 247.
15. For Art. 309. see, *infra,* Ch. XXXVI.
16. AIR 1993 SC at 2503.
17. AIR 1994 SC 2771 : (1994) 6 SCC 314.

enhancement in the age of retirement of judicial officers comes into operation by virtue of the rules. This means that the rider put by the Court concerning review of the work of a judicial officer before extending his age of retirement to 60 years also comes to an end.[18]

In the case noted below,[19] the Supreme Court has called upon the High Courts to furnish a detailed status report of the compliance of its orders made by it in the above two cases.

(h) FAST TRACK COURTS

The Supreme Court has been insisting from time to time that adequate number of judges be appointed in the subordinate courts to cope with the large number of cases filed in these courts. "Justice delayed is justice denied." The Court has emphasized in *Judges* (iii):[20] "an independent and efficient judicial system is one of the basic structures of our constitution. If sufficient number of Judges are not appointed, justice would not be available to the people, thereby undermining the basic structure."

To deal with the long standing problem of backlog of cases pending for long, the Central Government put into force a scheme of setting up fast track courts in the States. In *Brij Mohan Lal v. Union of India*,[21] while commending the scheme, the Supreme Court issued certain directions, consistent with Arts. 233 and 234, discussed above, with a view to ensure the independence and efficiency of these courts.

(i) FAMILY COURTS

Family Courts set up under the Family Courts Act, 1984 are subject to the supervisory jurisdiction of the High Court under Article 235. Although the State Government has the power to create and shift a family Court from one place to another, the High Court has a say in the matter and can make its recommendations for the shifting having regard to its control over sub-ordinate courts on its administrative side. In *M.P.Gangadharan v. State of Kerala*[22] the Supreme Court said that while constituting a family Court the State must provide adequate infrastructure so as to meet the objects for which family courts are established.

(j) RESERVATION OF JUDICIAL POSTS FOR BACKWARD CLASSES

The Supreme Court has made a very momentous pronouncement in *State of Bihar v. Bal Mukand Sah*[23] settling a very significant problem having an abiding impact on the integrity and independence of the subordinate judiciary.

In *Bal Mukand*, the Court considered the question: Can a State Legislature enact a law to reserve posts in the subordinate judiciary for Scheduled Castes, Scheduled Tribes and other backward classes?

The question arose in the following factual context.

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18. *Rajat Baran Ray v. State of West Bengal*, AIR 1999 SC 1661 : (1999) 4 SCC 235.
19. *All India Judges Association v. Union of India*, AIR 1999 SC 1555.
20. *Ibid.*
21. (2002) 5 SCC 1 : AIR 2002 SC 2096.
22. (2006) 6 SCC 162 : AIR 2006 SC 2360.
23. AIR 2000 SC 1296 : (2000) 4 SCC 640.

The Bihar Legislature enacted the Bihar Reservation of Vacancies in Posts and Services (for Schedule Castes, Scheduled Tribes and other Backward Classes Act (1991). The Act reserved 50% posts for Scheduled Castes, Scheduled Tribes and other Backward Classes in Government services. The question for the consideration of the Supreme Court in *Bal Mukund Sah* was whether this Act could be applied to the recruitment of district judges [Art. 233(2)] and to direct recruitment at grass root level of the subordinate judiciary in the State [Art. 234]. The Court answered in the negative.

The Court has argued that Arts. 233-235 make special provisions for appointment to the posts of district and subordinate judges. These Articles constitute a complete code.

First, as to recruitment of district judges. The Court has argued that Art. 233 dealing with appointment of district judges, on its own express terminology, projects a complete scheme regarding appointment of persons to the posts of district judges. Art. 233 is not made subject to any law passed by the State Legislature. So far as direct recruitment to the posts of district judges is concerned, Art. 233(2) leaves no doubt that unless a candidate is recommended by the High Court, the Governor cannot appoint him as a district judge.[24]

As regards the appointment of judicial officers other than district judges, a complete scheme is provided by Art. 234. Under Art. 234, Governor makes rules in consultation with the High Court. Art. 234 is not made subject to the laws made by the State Legislature. This means that the State Legislature cannot make any law regulating the appointment of subordinate judges.[25]

Under Art. 309, rules can be made for regulating conditions of service of these judges. The State Legislature can make a law under Art. 309 for similar purposes. But Art. 309 is expressly made subject to other provisions of the Constitution and rules concerning appointment of the subordinate judiciary can only be made under Art. 234 which is beyond legislative interference. The field of recruitment to the judicial service is carved out of Art. 309 by Art. 234.[26]

Similarly, Art. 245[27] is made subject to other provisions of the Constitution which would include Arts. 233 and 234. As these twin articles cover the entire field regarding recruitment and appointment of district judges and subordinate judges at base level pro tanto, the legislative power of the State Legislature to operate in this field clearly gets excluded by the constitutional scheme itself.

Both Arts. 245 and 309 have to be read subject to Arts. 233 and 234. If any reservation of judicial posts is to be made, it can be done only through rules made under Arts. 233 and 234 after consultation with the High Court. The Legislature cannot by-pass the High Court and enact a law making reservation in judicial appointments for district judges and subordinate judiciary. No law can be made to interfere with the process of recruitment and appointment to the district judiciary without consultation with the High Court.

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24. For Art. 233, see, this Chapter Sec. G(b), *supra.*
25. For Art. 234, see, Sec. G(c), *supra.*
26. For Art. 309, see, *infra*, Ch. XXXVI, Sec. B.
27. See, *infra*, Ch. X, Secs. A and B.

The Court linked the process of appointment of these judges with independence of the judiciary which is one of the basic features of the Constitution. It is with a view to fructify the independence of judiciary that Arts. 233 and 234 insulate the process of recruitment and appointment of these judges from outside legislative interference. Arts. 233 and 234 constitute a complete code for the purpose.

Referring to *Indra Sawhney*;[28] the Supreme Court has stated that even if under Art. 16(4),[29] the State proposes to provide reservation on the ground of inadequate representation of certain backward classes in services "if it is considered by the appropriate authority that such reservation will adversely affect the efficiency of the administration, then exercise under Art. 16(4) is not permissible".[30] The matter whether efficiency will be affected in the judicial administration if reservation is made, is within the exclusive jurisdiction of the High Court which has to be consulted in this regard.

Therefore, no law can be made under Art. 16(4) concerning judicial service without consultations with the High Court. No law can therefore be made to interfere with the process of recruitment and appointment to the district judiciary without consultation with the High Court as this is essential "for fructifying the constitutional mandate of preserving the independence of judiciary which is its basic structure".[31] The Supreme Court has declared: "Judicial independence is the very essence and basic structure of the Constitution".[32]

The Ex-servicemen (Reservation of Vacancies in the H.P. Judicial Service) Rules, 1981, framed by the Governor, without consultation with the High Court, as required by Art. 234, have been held to be invalid by the Supreme Court in *A.C. Thalwal v. High Court of Himachal Pradesh*.[33] The Supreme Court has insisted that consultation with the High Court is mandatory and consultation must be effective and meaningful and not merely formal. The constitutional scheme seeks to attain an independent judiciary which is the bulwork of democracy.

(k) CONTEMPT OF SUBORDINATE JUDICIARY

As already stated,[34] a High Court is a Court of record under Art. 215 and has power to punish for its own contempt. Under Art. 227, a High Court has power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

Interpreting Ss. 10, 14 and 15 of the Contempt of Courts Act, 1971, the Supreme Court has ruled in *S.K. Sarkar, member, Board of Revenue, State of U.P. v. Vinay Chandra*[35], that the High Court can take cognizance of criminal contempt of a subordinate Court *suo motu* on its own motion on the basis of information received by it. The Court has also ruled that the phrase "courts subordinate to it" used in S. 10 is wide enough to include all courts which are judicially

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28. *Infra*, Ch. XXIII
29. *Infra*, Ch. XXIII.
30. See, *infra*, Ch. XXXV.
31. For discussion on this doctrine, see, *infra*, Ch. XLI
32. See, *High Court of Orissa, Cuttack v. Sisir Kanta Satapathy*, AIR 1999 SC 3265 : (1999) 7 SCC 725.
33. AIR 2000 SC 2732 : (2000) 7 SCC 1.
34. *Supra*, this Chapter, Sec. C(i).
35. AIR 1981 SC 723.

subordinate to the High Court, even though administrative control over them under Art. 235 does not vest in the High Court. Therefore, the Board of Revenue is a Court subordinate to the High Court within the contemplation of S. 10.

Under Art. 129, the Supreme Court has been declared a Court of record and can punish for its own contempt.[36] The Supreme Court has made a very creative use of Art. 129 to protect the honour and integrity of the lower courts. In *Delhi Judicial Service Association v. Gujarat*,[37] the Supreme Court has given a broad and liberal interpretation to its contempt power. The Court has ruled that under Art. 129, it has power to punish not for its own contempt but even that of the High Courts and the lower courts.[38] Explaining the reasons for taking such a liberal view of its own contempt power, the Court has observed:

> "The subordinate courts administer justice at the grass roots level. Their protection is necessary to preserve the confidence of people in the efficacy of courts and to ensure unsullied flow of justice at its base level."

The Court has emphasized that as it has the power of judicial superintendence and control over all the courts and tribunals. Correspondingly it has a duty to protect and safeguard the inferior courts so as to keep the flow of justice. The subordinate courts do not have adequate power under the law to protect themselves and, therefore, it is necessary that the Supreme Court should protect them.

In the instant case, police had misbehaved with a magistrate in a State. The Supreme Court took a very serious view of the misbehaviour by the police officers, initiated contempt proceedings against these officers and awarded them suitable punishments.

This is a pronouncement of great significance. This ruling will go a long way towards maintaining the integrity and independence of the subordinate judiciary. The Supreme Court has now taken them all under its own protective umbrella.[39]

The Supreme Court has again reiterated in *Re Ajay Kumar Pande*[40] that Art. 129 is not restricted or limited by the contempt of Courts Act, 1971. As the highest Court of the land, the Supreme Court has not only the right to protect itself but also has the right, jurisdiction and the authority to protect the High Courts and the subordinate courts from being insulted, abused or denigrated in any other way.

H. LEGISLATIVE POWER REGARDING THE JUDICIARY

The legislative power regarding the High Courts and the subordinate courts are distributed between the Centre and the States.[41]

Article 4 is an independent power not referable to List I Entry 78. There is ample power under Art. 4 to clothe Parliament with power to invest High Courts with the necessary "jurisdiction and powers" of every description.[42]

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36. *Supra*, Ch. IV, Sec. C(i)(a).
37. AIR 1991 SC 2176.
38. Also see, *supra*, Ch. IV, Sec. C(i)(b).
39. *Income Tax Appellate Tribunal v. V.K. Agarwal*, 1999(1) SCC 16 : AIR 1999 SC 452.
40. (1996) 6 SCC 510 : 1996 SCC (Cri) 1391. See *Pallav Seth v. Custodian*, (2001) 7 SCC 549, 561-562 : AIR 2001 SC 2763.
41. Part IV, Ch. X, *infra*.
42. *Jamshed N. Guzdar v. State of Maharashtra*, (2005) 2 SCC 591 : AIR 2005 SC 862.

Parliament has exclusive power to make laws with respect to: Constitution, organisation, jurisdiction and powers of the Supreme Court; persons entitled to practise before the Supreme Court (entry 77, List I); Constitution and organisation of the High Courts except provisions as to officers and servants of the High Courts; persons entitled to practise before the High Courts (List I, entry 78); Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union Territory (List 1, entry 79); Jurisdiction and powers of all courts except the Supreme Court, with respect to any of the matters in the Union List; admiralty jurisdiction (List 1, entry 95); Allowances, leave of absence and pensions of the High Court Judges [Art. 221(2)].[43] Further, under Art. 247, Parliament has been authorised to establish any additional courts for the better administration of law made by it.

"Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Courts" has now been transferred from List II to List III (Entry 11A in List III). The topics of "officers and servants of the High Courts; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court (List II, entry 3)"; "Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any matter in the State List (List II, entry 65)" remain exclusively State subjects.

Under List III, entry 46, a concurrent legislative power has been conferred on Parliament and the State Legislatures to make laws with respect to the "jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters" in the Concurrent List.

The 'administration of justice' is now a concurrent subject (Entry 11A, List III). Barring affecting the constitution and organisation of the High Courts, a State Legislature can create courts, invest them with power and jurisdiction to try every cause and matter, whether civil or criminal, and define, enlarge, alter, amend and diminish the jurisdiction of courts and define their jurisdiction, in a general manner, except admiralty jurisdiction.[44] The State can create courts of general jurisdiction. Thus, a State Legislature is competent to confer power on village panchayats to try criminal offences.[45]

Entry 65, List II, confers special power on the State Legislature. Therefore, under entry 65, the Legislature while legislating with regard to a matter in List II can make provisions concerning the jurisdiction and powers of the courts with respect to that subject-matter specifically. The Legislature can exclude or bar the jurisdiction of a Court, or confer special jurisdiction on it, with regard to a matter in that List.

Similar is the case with regard to a matter in the Concurrent List. Parliament can, under entry 95, List I, or entry 46 in List III, specifically confer jurisdiction on any Court, or bar its jurisdiction, in relation to any matter in List I or List III, but so long as the jurisdiction is not barred, a Court is entitled to try all cases as authorised under the State legislation even with respect to matters in List I or List III. List III, entry 3, authorises the conferment of general jurisdiction on courts

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43. *Supra*, this Chapter.
44. *K. Kumaraswani v. Premier Electric Co.*, AIR 1959 AP 3; *Mohindroo v. Bar Council*, AIR 1968 SC 888 : (1968) 2 SCR 709.
45. *Infra*, , Ch. X; entry 5, List II.

while all other entries authorise the creation of special jurisdiction limited to particular matters.

As regards the High Courts, their constitution and organisation is a central subject. Parliament can set up a High Court, constitute and organise it. Thus, a uniformity can be maintained among the various High Courts in the matter of their constitution and organisation. It may however be noted that for the most part the Constitution itself fixes the constitution and organisation of the High Courts and only a few matters have been left to Parliament, *e.g.*, fixing of allowances, leave and pensions of Judges. Parliament has no control over the officers and servants of a High Court who fall within the State sphere.[46]

Recently, however, the Supreme Court has claimed a say in settling the service conditions of the staff of the subordinate courts on the ground that this matter constitutes a significant factor "having relevance in the functioning of the subordinate courts. This question is, therefore directly connected with the administration of justice and thereby with the rule of law". This being so, the Court can examine this matter in a writ petition under Art. 32 of the Constitution. "If necessary, with the aid of Art. 142 of the Constitution of India, this Court can issue necessary directions to the State Governments/Union Territories for due compliance."[47]

As regards the jurisdiction of a High Court, Parliament has power to confer special jurisdiction on a High Court with respect to any matter in List I or List III.[48] Parliament or a State Legislature can confer general jurisdiction on it under its power to legislate for administration of justice (List III, entry 11A). A State Legislature can invest it specifically with any special jurisdiction with respect to any matter in List II or List III. A law enacted by the Madras Legislature establishing courts of sessions to try criminal cases committed within the Presidency Town of Madras and, to that extent, curtailing the original criminal jurisdiction of the Madras High Court, was held valid. It would fall under entries 1, 2, 11-A and 46 of List III, and not under entry 78 of List I.[49]

A State Law establishing a City Civil Court at Calcutta, giving it jurisdiction to try cases up to Rs. 50,000, to enable it to try suits of certain types, and excluding the High Court from trying those types of suits has been held to be valid as falling under entry 11-A, List III.[50] A State law making a change in the number of judges who should hear an appeal in the High Court is a matter pertaining not to the constitution and organisation of the High Court, but to "administration of justice" (entry 11 A, List III) and is, thus, valid.[51] A State law abolishing letters patent appeals in a High Court in matters pertaining to 'land' has been held valid un-

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46. Art. 229(2): List I, entry 78; List II, entry 3.

47. *All India Judges Association v. Union of India*, AIR 1999 SC 1555.
See, Ch. IV, Sec. G, *supra*, for Art. 142.
See, *infra*, Ch. XXXIII, Sec. A, for Art. 32.

48. *Amarendra v. Bikash*, AIR 1957 Cal. 534.
For an illustration, see, the Income-tax Act where the High Court has been given an advisory role in income-tax assessments.

49. *Ahmed Moideen v. Inspector, D. Div.*, AIR 1959 Mad. 261.

50. *Indu Bhushan De. v. State of West Bengal*, AIR 1986 SC 1783 : 1980 Supp SCC 343.

51. *Panicker v. Panicker*, AIR 1953 TC 53; *Shivarudrappa v. Kapurchand*, AIR 1965 Mys. 76.

der entry 18, List II, which gives power to the State Legislature to legislate in relation to 'land'.[52]

The Bombay City Civil Court Act, 1948, establishing a City Civil Court and excluding the original jurisdiction of the High Court from trying civil cases upto one lakh within the local limits of Bombay was held valid in *State of Bombay v. Narottamdas*.[53] The Court explained that the terms "administration of Justice" and "constitution and organisation of courts" are "wide enough to include the power and jurisdiction of courts". The power of the State includes "the power of defining, enlarging, altering, amending and diminishing the jurisdiction of the courts and defining their jurisdiction territorially and pecuniarily."[54]

Consequently, legislation by the States effectively denuding the High Court of its original jurisdiction and abolishing Letters Patents Appeals were held to be constitutionally valid.[55]

Parliament has extensive power to re-organise States and to do every thing that is consequential thereto.[56] Therefore, while forming a new State, or reorganising the existing States, Parliament has power not only to constitute and organise a new High Court but even to vest it with general jurisdiction. The legislative power with respect to the Supreme Court is exclusively vested in Parliament.

I. TRIBUNALS

Article 323A and 323B provide for proliferation of the tribunal system in the country.

Article 323A provides that Parliament may by law establish tribunals for adjudication of disputes concerning recruitment and conditions of service of persons appointed to public service under Central, State or any local or other authority, or a corporation owned or controlled by the government. The law made by Parliament for the purpose may specify the jurisdiction and procedure of these tribunals. Under Cl. 2(d), the parliamentary law may exclude the jurisdiction of all courts, except that of the Supreme Court under Art. 136, with respect to the service matters falling within the purview of these tribunals.[57] Under Cl. 3 of Art. 323A, the provisions of Art. 323A override any other provision in the Constitution or in any other law.

Articles 323B(1) and (2) empower the appropriate legislature[58] to provide, by law, for adjudication or trial by tribunals of any disputes and offences with respect to the following matters:

(i) taxation:
(ii) foreign exchange;

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52. *Hakim Singh v. Shiv Sagar*, AIR 1973 All. 596.
53. AIR 1951 SC 69 : 1951 SCR 69.
54. AIR 1951 SC 69 : 1951 SCR 69. See also *Amarendra Nath Ray Chowdhary v. Bikash Chandra Ghose*, AIR 1957 584.
55. *Jamshed N.Gazdar v. State of Maharashtra,* (2005) 2 SCC 591 : AIR 2005 SC 591.
56. *Supra*, Ch. V.
57. For discussion on Art. 136, see, *supra*, Ch. IV, Secs. D and E.
58. "Appropriate Legislature" means Parliament or the State Legislature which may be competent to legislate with respect to the concerned matter in accordance with the scheme of distribution of power under Act. 246 read with Schedule VII. See, *infra*, Part IV, Ch. X.

(iii) industrial and labour disputes;
(iv) land reforms;
(v) ceiling on urban property;
(vi) elections to Parliament or State Legislature;
(vii) production, procurement, supply and distribution of foodstuffs and other essential goods and control of prices of such goods;
(viii) rent, regulation of tenancy issues including the right, title and interest of landlords and tenants;
(ix) offences against laws with respect to these matters.

Such a law may establish a hierarchy of tribunals [Art. 323B(3)(a)], specify their powers and jurisdiction [Art. 323B(3)(b)], and lay down their procedure [Art. 323B(3)(c)]. Under cl. 3(d) of Art. 323B, the law establishing these tribunals may exclude the jurisdiction of all courts except of the Supreme Court under Art. 136, with respect to all or any of the matters falling within the jurisdiction of these tribunals. Under Art. 323B(4), Art. 323B has effect notwithstanding anything in any other constitutional or legal provision.

The provisions contained in Arts. 323A and 323B are not self-executing provisions. These are enabling provisions. Tribunals can be set up when necessary legislation is enacted for the purpose by the concerned legislature. This means that Arts. 323A and 323B only provide the necessary constitutional authority for such legislation. A law under Art. 323A can be enacted by Parliament alone; a law under Art. 323B can be enacted both by Parliament and the State Legislatures. They do not however, bar the legislature from establishing tribunals not covered thereunder but covered under appropriate legislative entries of Schedule VII (Para 36).[59] Arts. 323A and 323B do not derogate from legislative competence of the Parliament to establish other tribunals like Central or State Commissions under the Consumer Protection Act, 1986.[60]

It was envisaged that these provisions when fully implemented would drastically change the character of the Indian Judicial System. The tribunals established under Art. 323B can be authorised to try certain categories of criminal offences and thus impose penal sanctions. This was an innovation in the Indian legal system for criminal punishments were imposed only by the courts and not by non-judicial bodies. The idea underlying these provisions was to lighten the load of work on the courts. For example, a large number of service cases came before the High Courts through writ petitions. It was also hoped that establishment of these tribunals would make for an effective enforcement of some of the laws for the tribunals can decide cases much more quickly than the courts. In fact, the Tribunals being replications of the Courts have not succeeded in fulfilling either of the objectives. The delays in determination have led to a large pendency of cases. Furthermore since every decision of a tribunal is judicially reviewable, the work of the High Courts has not been reduced. On the other hand where a petitioner could have an issue decided by the High Court directly, which was only subject to appeal by the Supreme Court, at present an additional round of litigation has been added which compels the litigant to approach the tribunal first.

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59. *State of Karnataka v. Vishwabharathi House Building Coop. Society,* (2003) 2 SCC 412 : AIR 2003 SC 1043.
60. *State of Karnataka v. Vishwabharathi House Building Coop. Society,* (2003) 2 SCC 412 : AIR 2003 SC 1043.

The idea underlying Arts. 323A and 323B was that the tribunals established thereunder will practically have the same status as the High Courts as appeals from these tribunals could go to the Supreme Court under Art. 136. Under Cl. 2(d) of Art. 323A and cl. 3(d) of Art. 323B, the relevant law establishing these tribunals could exclude the jurisdiction of the High Courts in relation to the matters falling within the jurisdiction of these tribunals. Thus, the High Courts could be barred from exercising their writ jurisdiction under Art. 226 or their power of superintendence under Art. 227. Even the writ jurisdiction of the Supreme Court under Art. 32 could be excluded.[61] The Supreme Court accepted this position in *S.P. Sampath Kumar v. Union of India.*[62]

However, the Supreme Court changed its position in *L. Chandra Kumar v. Union of India*.[63] The Court ruled that since judicial review is a fundamental feature of the Constitution,[64] the jurisdiction conferred on the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 of the Constitution cannot be ousted even by a provision in the Constitution. The Court has observed:

> "The jurisdiction conferred upon the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 of the Constitution is part of the inviolable basic structure of our Constitution".

In view of the above position, the courts and tribunals "may perform a supplemental role in discharging the powers conferred by Arts. 226/227 and 32 of the Constitution". About the Tribunals created under Arts. 323-A and 323-B, the Court has said that these tribunals—

> "are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of those Tribunals will, however, be subject to scrutiny before a Divisions Bench of the High Court within whose jurisidction the concerned Tribunal falls. The Tribunals will, nevertheless continue to act like courts of first instance in respect of the areas of law for which they have been constituted."

The Court ruled that "all decisions of Tribunals, whether created pursuant to Art. 323 A or Art. 323B, of the Constitution will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular tribunal falls."[65]

Under the presently prevailing arrangement, direct appeals lie from all tribunals to the Supreme Court under Art. 136. The Court has now ruled that no appeal from the decision of a tribunal will henceforth directly lie to the Supreme Court under Art. 136. The aggrieved party will now be entitled to move the High Court under Arts. 226/227 and from the High Court decision, the aggrieved party could then move the Supreme Court under Art. 136.[66]

The Court has firmly asserted that the jurisdiction conferred upon the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 "is part of the invio-

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61. For a fuller discussion on Art. 32, see, *infra*, Ch. XXXIII.
62. AIR 1987 SC 386 : (1987) 1 SCC 124. Also, *Union of India v. Deep*, (1992) 4 SCC 432 : AIR 1993 SC 382.
63. AIR 1997 SC 1125 : (1997) 3 SCC 261.
64. See, *infra*, Ch. XLI.
65. AIR 1997 SC at 1154 : (1997) 3 SCC 261. See also *State of West Bengal v. Ashish Kumar Ray*, (2005) 10 SCC 110 : AIR 2005 SC 254.
66. *State of H.P. v. Pawan Kumar Rajput*, (2006) 9 SCC 161 .

lable basic structure of our Constitution," "an integral and essential feature of the Constitution constituting part of its basic structure".[67] It means that these powers of judicial review cannot be ousted by any constitutional or statutory provision.

Other courts may perform a supplemental role in discharging the powers conferred by Arts. 32, 226 and 227 on the Supreme Court and the High Courts. Accordingly, the Supreme Court has declared Cl. 2(d) of Art. 323A and Cl. 3(d) of Art. 323B unconstitutional to the extent these clauses bar the jurisdiction of the High Courts under Art. 226/227 and that of the Supreme Court under Art. 32. All clauses in the legislation enacted under Arts. 323A and 323B excluding the High Court's, and Supreme Court's writ jurisdiction are unconstitutional.

The supervisory jurisdiction of the High Courts under Art. 227 has also been declared to be part of the basic structure of the Constitution.[68]

In pursuance of Art. 323A, Parliament has enacted the Administrative Tribunals Act, 1985, setting up the Central Administrative Tribunal (CAT) to adjudicate upon service matters pertaining to Central Employees. An appeal from the Tribunal lies to the Supreme Court by special leave under Art. 136.[69]

In these days of tribunalisation, a question has been raised whether Parliament has power to create any other tribunal outside Arts. 323A and 323B. The question has been raised in the context of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act, 1993) enacted by Parliament with a view to set up the Debt Recovery Tribunal. The tribunal has been set up to hasten the recovery of debts due to the banks. The question has been whether Parliament has power to enact such an Act.

The Supreme Court has ruled in *Union of India v. Delhi High Court Bar Association*[70] that Parliament has power to enact the law in question. The Court has argued that Arts. 323A and 323B are enabling provisions which specifically authorise the legislatures to enact laws for the establishment of tribunals, in relation to the matters specified therein. The power of Parliament to establish a tribunal for any other matter not covered by Arts. 323A and 323B has not been taken away. Parliament has exclusive jurisdiction to make a law with respect to any entry in List I, as well as in the residuary area—area not covered by List II and III.[71]

The Supreme Court has justified the RBD Act as falling under entry 45, List I—dealing with Banking. Banking operations do include acceptance of loans and deposits and recovery of the debts due to banks.

The tribunals have now become an essential part of the judicial system in India. These bodies, though not courts, yet do perform an effective role in justice delivery system in India.[72]

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67. AIR 1997 SC 1125 at 1156 : (1997) 3 SCC 261.

68. Also see, *Asish Kumar Roy v. Union of India,* AIR 1999 Cal 242; *Commissioner of Entertainment Tax v. Mitra Cinema,* AIR 2000 Cal. 247. For Art. 227, see, *supra.*

69. For detailed discusson on this Tribunal, see, JAIN, *A TREATISE ON ADM. LAW,* I, 563-570. *CASES & MATERIALS,* II, Ch. XII, Sec. W, 1215-1254.

Also see : *Kendriya Vidyalaya Sangathan v. Subhash Sharma,* JT 2002 (2) SC 568 : (2002) 4 SCC 145.

70. (2002) 4 SCC 274 : AIR 2002 SC 1479; See also *State of Karnataka v. Vishwa Bharti House Building Co-op. Society,* (2003) 2 SCC 412 : AIR 2003 SC 1043.

71. See, *infra,* Chs. XI-XIV.

72. Also see, Ch. XXXIV, *infra,* under Directive Principles.