CHAPTER-VIII

JUDGEMENTS PRONOUNCED BY JUSTICE P.N.BHAGWATI ON SOME OTHER PROVISIONS OF THE CONSTITUTION
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8.1. General

Justice Bhagwati dealt with various issues concerned to other provisions of the Constitution of India, apart from the issues relating to Fundamental Rights and Directive Principles. Among them the provisions relating to the Union Judiciary and the Supreme Court, provisions relating to the State Judiciary, Services and Public Service Commission, Emergency, and procedure for Amendment to the Constitution are noteworthy.

8.2. Union Judiciary and the Supreme Court

In India the States and the Centre derive their authority from the Constitution. While deriving their authority and in exercising their duties there may arise disputes. In order to solve such disputes there must be an independent and impartial authority. The Supreme Court under Constitution is such arbitration. The independence and impartiality of the judiciary is one of the hallmarks of the Indian democratic setup. It is the final interpreter and guardian of the constitution. In addition to the above function of maintaining the supremacy of the constitution, the Supreme Court is also the guardian of the Fundamental Rights of the people. Truly, the Supreme Court has been called upon to safeguard civil and minority rights and plays the role of "guardian of the social revolution".

The judiciary should be an arm of the social revolution upholding the equality that Indians had lodged for. The Supreme Court is also the apex body to interpret the law of the country. It is the highest court of appeal in civil and criminal matters. There is no express provision in the Indian constitution empowering the courts to invalidate laws: but the constitution has imposed definite limitations upon each of the organs of the state, and any transgression of those limitations would make the law void. It is for the courts to decide whether any of the constitutional limitations has been transgressed or not, because the constitution is the organic law subject to which ordinary laws are made by the legislature which itself is setup by the constitution.\(^1\) Under Article 136 of the constitution the right of the Supreme Court to entertain appeal by Special leave in any cause or matter determined by any court or Tribunal in India, save military tribunals is limited.

8.2.1. Original Jurisdiction of the Supreme Court – Article 131

The Jurisdiction of the Supreme Court to issue the writs to enforce the fundamental rights is three-fold: (a) Original; (b) Appellate; and (c) Advisory. The original jurisdiction of the Supreme Court is dealt in Article 131 of the Constitution. The functions of the Supreme Court under Article 131 are purely of a federal character and are confined to disputes between the government of India and any of the States of the Union, the Government of India and any State or States on one side and any other State or States on the other side, or between two or more states *inter se*.

8.2.2. Art.141- Binding jurisdiction of the Supreme Court

The jurisdiction and powers of Supreme Court of India in its nature and extent is wider than those exercised by the highest court of any other Country. According to Article 141 the Supreme Court can be a federal

court, a court of appeal and a guardian of the Constitution. And the law declared by it, in the exercise of any of its jurisdictions under the Constitution, is binding on all other Courts within the territory of India.

The American Supreme Court's appellate jurisdiction is confined to cases arising out of the federal relationship or those relating to the constitutional validity of laws and treaties. But the Indian Supreme Court is not only a federal court and a guardian of the constitution, but also the highest court of appeal in the land relating to civil and criminal cases\(^1\) apart from cases relating to the interpretation of the constitution.

8.2.3. Power to Appointment of Judges

The Chief Justice of Supreme Court of India is appointed by the President with the consultation of such of judges of the Supreme Court and High Courts as he deems necessary for the purpose. The word 'may' used in Article 124 makes it clear that it is not mandatory on him to consult. But in appointing other judges\(^2\) the President shall always bound to consult the Chief Justice of India and he acts on the advice of the council of Ministers. Under this Article the Executive is required to consult persons who are ex-hypothesis well qualified to give proper advice in matters of appointment of Judges\(^3\). The well settled practice and convention in the appointment of Chief Justice of India is on the seniority (criteria) basis.

8.2.4. Justice Bhagwati's Judgments

According to Article 124, the President is required to consult legal experts in appointment of the Judges to the Supreme Court. But\(^4\) prior to

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\(^1\) Art. 133-134 of Constitution of India.
\(^2\) Article 124 (2) of the Constitution.
\(^3\) CAD Vol. VIII, p.285.
the decision of this Apex Court on *Supreme Court Advocate on - Record Association*, it has always been interpreted that the President was not bound to act in accordance with such consultation.

The dispute relating to the original jurisdiction of the Supreme Court must involve a question of law or fact on which the existence of legal right depends. *This means that the court has no jurisdiction in matters of political nature.* The term legal right means a right recognized by law and capable of being enforced by the power of a state but not necessarily in a court of law\(^1\).

When differences arises between the representatives of the state and those of the whole people of India a question of interpretation of the constitution which must affect the welfare of the whole people, and particularly that of the people of the state concerned. This issue was raised in *state of Karnataka V. Union of India*,\(^2\) the scope of Art. 131, based on the distinction between legal rights of the state and the legal rights of the government he held that 'it is not necessary in order to invoke the jurisdiction of the SC under Article 131 that the state should be able to show that some legal right of its is breached. It is enough to show that the state is interested not as a busy body or as a meddlesome interloper, but in real sense in questioning the power of the central Govt. to setup a commission of enquiry on the alleged charges of corruption, nepotism, favouritism and misuse of the Government’s power by the Chief Minister under section 3 of the Commissions of Inquiry Act, 1952’.

In *Union of India V. State of Rajasthan*\(^3\) When the Congress government had to relinquish the power at the centre and the Janata Government was came took over, they dissolved several Legislative

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1 United Provinces V. Governor General, AIR 1932, PC 58.
2 (1978) 11 SCJ, 190; AIR 1978 SC 68
3 1984(4) SCC-238
assemblies on the ground that the people had given a massive vote of no confidence against the congress and therefore even in the States where the congress was in power, the Assemblies could not be held intact and had to be dissolved.

The question rose before the court was whether the dissolution was valid. In this regard one important argument which was advanced on behalf of the Government of India was that this act was in exercise of political power and therefore the Supreme Court had no jurisdiction to go behind it. The argument was, to say the least, most unconvincing to Justice Bhagwati, who believed in unrestricted powers of the Apex Court. He not only rejected the argument outright but opined that no exercise of Constitutional power was beyond the scrutiny of the Court. Here again the legal philosophy adopted was that there had to be a control over exercise of power by the executive and in case the Executive acts in a manner not consonant with the dicta of the Constitution, or the law in general, it is the function of the court to speak up the fact flouts the principles laid down in the Constitution.

The supremacy of the Constitution is a matter stressed by the Justice time and again, he says “the executive, the legislature, and the judiciary, all three act under the powers given to them Constitution and if there is any violation of Constitutional limitations by the executive, or by the legislature, it is the function of the judiciary to point out the correct path and if in the process they have to strike down the action of the legislature or the executive which is contrary to the constitutional mandate, so be it.”

8.2.4.1. Appeal by Special Leave – Article 136.

Article 136(1) provides that notwithstanding under Article 136 the Supreme Court may in its discretion grant special leave to appeal from any judgment, decree, determination, sentence order in any case or matter passed or made by any court or tribunal in the territory of India. There is exception to this power of the Supreme Court with regard to any judgment, decree, determination, sentence or order of any court or tribunal constituted by or under any law relating to the Armed forces. This Article vests very wide powers in the Supreme Court such powers are residuary in the nature and are exercisable outside the purview of ordinary law.

In an appeal under Article 136 the Supreme Court does not allow the appellant to raise new plea for first time. This was observed by Justice Bhagwati in Rukmani Bai's case. This case is in relation to grant of quarry lease in respect of minor minerals. Wherein the State Government of Madhya Pradesh sanctioned grant of quarry lease in favour of respondent No. 5, the application of the appellant for grant of a fresh lease after the expiration of old one, was before the State Government and, therefore, it would seem that the State Government ought to have considered that application of the appellant along with the application of respondent No. 5 for the purpose of deciding whether quarry lease should be granted to the appellant in preference to respondent No. 5 even though the application of the appellant was received later than the application of respondent No. 5.

In the instant case Justice held that, "prima facie the State Government was in error in sanctioning grant of lease in favour of

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1. Jain, M.P.: Indian Constitutional Law; Wadhwa & Company, Nagpur
respondent No. 5 ignoring the application of the appellant. But we do not think we would be justified in interfering with the order of the State Government on this ground because we do not find that this contention was at any time raised by the appellant before the State Government or even before the High Court. The appellant could have raised this contention in the application for review preferred by her against the deemed refusal of her application for grant of a fresh lease and even if it was not raised at that stage, the appellant had another opportunity to raise it and that was in either of the two petitions filed by her in the High Court. But the appellant did not avail herself of this opportunity and it was only at the hearing of this appeal before us that she for the first time sought to raise this contention. We cannot permit that to be done and we accordingly do not propose to entertain this contention and interfere with the order of the State Government on this ground”.

Now the position is that, in Ramakant Ravi V. Madan Rai\(^1\) the Supreme Court has held that, where an accused is acquitted by the High Court and no appeal against the acquittal is filed by the State, a private party can file appeal under Article 136 against the acquittal order of the High Court. It is a plenary power exercisable outside the purview of ordinary law to meet the pressing demands of justice where a judgment of acquittal by the High Court has led to a serious miscarriage of justice. This court can not refrain from doing its duty and obtain from interfering on the ground that a private party and not the state has invoked the court’s jurisdiction.

8.2.5. Justice Bhagwati on the area of State Judiciary.

Article 222 (1) empowers the President after consultation with the Chief Justice of India to transfer a Judge from one High court to any other

\(^1\) AIR 2004 SC 77.
high court. In Union of India V. Sankal Chand Sheth's case the Supreme Court by a majority of 3:2 held that a judge of a High court could be transferred under Article 222 (1) without his consent.

But, Justice Bhagwati for himself and Untiwalia, J., in his dissenting judgment held that, "a judge of a High Court could not be transferred without his consent and interpreting Art. 222(1) in its context in the widest sense the correct meaning to be given to the word transfer was a consensual transfer that is, a transfer with the consent of the Judge. This consultation is not a mere idle formality, but has to be real and substantial, but even so I do not think it affords sufficient protection to the High Court Judge against unjustified transferred by the executive.

He observed that 'The history of the development of supremacy of the rule of law has been a constant struggle between assertion of power on the one hand and efforts to curb and control it on the other. The interpretation which has found favour with one places a limitation on the vast power reposed in the executive and this limitation is necessary—indeed it is fully justified by all recognised canons of construction in order that the superior judiciary may be free from executive influence or pressure.

To concede power in the executive to transfer a High Court Judge without his consent it would impinge on the independence of the Judiciary. Here there is a competition between the two categories of public interest. One is the public interest in seeing that a High Court Judge does not continue to remain at a place where he is polluting the pure fountain of justice and the other is the public interest in securing the independence of the High Court Judiciary from executive control or interference."

1. AIR 1977 SC 2328
2. Union of India V. Sankal Chand Sheth ; AIR 1977 SC 2360
However, in judges transfer case\(^1\) in a seven member bench of SC for the majority 4:3, Justice Bhagwati held that 'consent is not necessary element of Article 222 for a transfer of a judge from one High Court to another High Court. He suggested for Judicial Committee for recommending names of persons to the President in regard to the Judicial appointments of Supreme Court and High Courts.. He said it is unwise to entrust power in any significant or sensitive area to a single individual however high or important may be the office which he is occupying to avert adverse affect on the independence of Judiciary for recommending names of persons to the President for appointment as judge of the High Courts.

However, in the case of *State of Himachal Pradesh v. Parent of a Student*,\(^2\) which is an appeal by special leave directed against two orders made by a division bench of the High court of Himachal Pradesh, insofar as they directed the Chief secretary to the government of Himachal Pradesh to file an affidavit setting out what action has been taken by the State government towards implementation of the recommendation contained in paragraph 16 of the Report of the Anti Ragging Committee, the Apex Court held that “the impugned orders are wholly unsustainable”. In this case *Justice* observed that, the judiciary has to be extremely careful to see that under the guise of redressing a public grievance it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature. But when the executive is remiss in discharging its obligations under the Constitution or the law, court certainly can and must intervene and compel the executive to carry out its constitutional and legal obligations.

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1. SP Gupta and others V. Union of India and others, AIR 1982, SC 149
The division bench would have been certainly justified in inquiring from the Chief secretary as to what action the State government proposed to take in regard to the recommendation of the Anti-Ragging Committee to initiate legislation on the subject of ragging. Such enquiry could have been legitimately made by the division bench for the purpose of obtaining information on a matter which the division bench regarded rightly, as necessary for eradicating the evil practice of ragging which is not only subversive of human dignity.

8.2.6. Justice Bhagwati judgments on the Writ of Habeas corpus

(i) The Writ Jurisdiction of Supreme Court and High Courts

The Constitution of India provides under Article 32 the Supreme Court and under Article 226 the High Courts possess extraordinary jurisdiction which extends not only to inferior courts and tribunals but also to the state or any authority or person, endowed with state authority.

The peculiar of this jurisdiction is that being conferred by the constitution, it can not be taken away or abridged by any thing short of an amendment of the constitution itself. The Supreme Court can issue the writ only where a fundamental right has been infringed while a High Court can issue them not only in such cases but also where an ordinary legal right has been infringed, provided a writ is a proper remedy in such cases, according to well-established principles, the writs are 'Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo warranto.

While dealing with the writ petitions Justice Bhagwati had in many occasions dealt with writ of Habeas Corpus cases. In Latin the term habeas corpus means "you may have the body, is the dictionary meaning. The

writ is issued in form of an order calling upon a person by whom another person is detained to bring that person before the court and to let the court know by what authority he has detained that person. The main object of the writ is to give quick and immediate remedy to a person by the court order, who is unlawfully detained by the person whether in a prison or private custody. Such imprisoned or any other person on behalf of him can be made an application of habeas corpus, where if the power of detention vested in an authority was exercised \textit{mala fide} and is made in collateral or ulterior purposes.

If the following conditions are satisfied the detention is illegal and will be entitled to be released by the High Court (a) If the detention is made in accordance with the procedure established by law. The law must be valid Law and the procedure must be strictly followed.\(^1\) (b) The detention is lawful if the conditions laid down in Article 22\(^2\) are complied with. (c) If the detained person was produced before the magistrate with in 24 hours of his arrest. In \textit{Kanu Sanyal’s case}\(^3\) the short question that arisen for determination in this petition under Art. 32 of the Constitution is whether the production of the body of the person alleged to be unlawfully detained is essential before an application for a writ of habeas corpus. In the instant case Justice Bhagwati held that “the writ of habeas corpus is one of the most ancient writs known to the common law of England,…there is nothing in Art. 32 of the Indian Constitution which requires that the body of the person detained must be produced before an application for a writ of habeas corpus can be heard and decided by the Court. It is competent to the Court to dispense with the production of the body of the person detained while issuing a rule nisi under Order XXXV, rule 4 and the rule nisi can be heard and an appropriate order passed in

\(^{1}\) Article 21
\(^{2}\) Article 22 provides Safe guards against arbitrary arrest and detention.
\(^{3}\) Kanu Sanyal V. District Magistrate, Darjeeling, AIR 1974 SC 510.
terms of Order XXXV rule 5 without requiring the body of the person
detained to be brought before the Court”.

8.3. Services and Public Service Commission

The wisdom of the makers of the Indian constitution in giving a
constitutional basis by including the public services in one of the matters
which do not usually find place in a constitutional document as such are.
left to ordinary legislation and administrative regulations under other
constitutions. If properly assess one can understand the importance of
public servants in a modern democratic government. A notable feature of
the parliamentary system of government is that while the policy of the
administration is determined and laid down by ministers responsible to the
legislature, the policy is carried out and the administration of the country
is actually run by a large body of officials who have no concern with
politics.

In the language of political science, the officials form the
‘permanent’ Executives as distinguished from the Ministers who
constitute the political Executive. The permanent executive is appointed
by a different procedure and it maintains the continuity of the
administration and the neutrality in politics that characterizes the civil
servants who constitute the permanent executive and accounts for their
efficiency.1 While the minister, generally, cannot claim any expert
knowledge about the technique of administration and the details of the
administrative departments, the civil servants, as a body, are supposed to
be experts in the detailed working of governments.

As the joint select committee on Indian constitutional reforms
observed that “the system of responsible government to be successful in

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1 Durga Das Basu, Introduction to the Constitution of India, Eastern Economy
practical working, requires the existence of a competent and independent civil service staffed by persons capable of giving to successive ministers advice based on long administrative experience, secure in their positions, during good behaviour, but required to carry out the policy upon which the government and legislature eventually decide.¹

8.3.1. Doctrine of Pleasure in England

In England, the normal rule is that a civil servant of the Crown holds his office during the pleasure of the Crown. This means that a civil servant services can be terminated at any time by the Crown without assigning any reason. In other words, if a civil servant is dismissed from service he cannot claim arrears of salary or damages for premature termination of his service. The doctrine of pleasure is based on the public policy.

8.3.2. Position in India

Article 310 of the Constitution of India incorporates the common law doctrine of pleasure. It expressly provides that all persons who are members of the defence services or the civil services of the union or of All-India Services hold office during the pleasure of the President. Similarly, members of the state services hold office during the pleasure of the Governor. However, this rule of English law has not been fully adopted in this Article. In State of Bihar V. Abdul Majid², the Supreme Court held that a civil servant in India could always sue the Crown for arrears of salary. Under Article 310 the rule is qualified by the words 'except or expressly provided by the constitution. Thus Article 310 itself places restrictions and limitations on the exercise of the pleasure under

². AIR 1954 SC 245
Article 310 are limited by Article 311(2). The services of permanent government servant cannot be terminated except in accordance with rules made under Article 309, subject to the procedure in Article 311(2) of the constitution and the fundamental rights.¹

8.3.3. Constitutional safeguards to Civil Servants and Restriction on doctrine of Pleasure.

The pleasure of the president or Governor is controlled by provisions of Article 311, so the field covered by Article 311 is excluded from the operation of the doctrine of pleasure.² The pleasure must be exercised in accordance with the procedural safeguards provided by Article 311.

Article 311(1) provides that no person holding a civil post under the union or the state shall be dismissed, or removed by authority subordinate to that by which he was appointed. And Art 311(2) says that no such person shall be 'dismissed', 'removed', or 'reduced' in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.³ But they have no right to strike. This was adjudicated in the case of T.R. Nagarajan V. Government of Tamilnadu by a two judge bench of the Supreme Court. The brief facts of the case are in the year 2002 the Government of Tamilnadu ESMA, 2002 and the Tamilnadu ordinance 2003, when the government employees had gone on strike for their demands. The government employees had challenged the validity of the above Act and Ordinance.


In this case the Supreme Court said that “Government employees cannot hold society to ransom by going on strike.” The bench said that “if the employees felt aggrieved by any government action, they should seek redressal from the statutory machinery provided under different statutory provisions for redressal of their grievances. The court said strike as a weapon is mostly misused and also agreed with the state government that 90 per cent of the revenue raised through direct tax was spent on the 12 Lakh government employees in state.

Thus in a society where there is large scale unemployment and a number of qualified persons are eagerly waiting for employment strike can not be justified on any equitable ground. The trade unions have a guaranteed right for collective bargaining on behalf of employees but they have no right to strike and no political party or organisation can claim a right to paralyse economic and industrial activities of a state or the nation or cause inconvenience to the citizens.”

Article 311(2) applies to both temporary and permanent servants. The case, Kanhialal Vs. District Judge¹, was allowed by the Apex Court by special leave and Justice Bhagwati held that “It is clear on the facts of the present case and particularly from the order passed by the Administrative Judge on 20th Nov; 1980 while disposing of the representation of the appellant that the only reason why he was discharged from service was that he was “prima facie responsible for the loss of some document from the judicial record on account of his negligence and carelessness.” The order of discharge passed against the appellant was, therefore clearly penal in character and there can be no doubt that even if he was a temporary servant, he was entitled to the protection of Article

¹ 1983-AIR (SC) 351 :: 1983-SCC-(3)-32
311 (2) of the Constitution and hence no penal order could be passed against him without complying with the requirements of that Article”.

In H. L. MEHRA Vs. Union of India\(^1\), the appellant was originally suspended under the order because a case against him in respect of a criminal offence was under investigation. This was followed by the institution of a criminal case against him and in this criminal case he was convicted by the Special Judge and his conviction was confirmed by the Bombay High Court. On the basis of the judgment of the Bombay High Court confirming his conviction, he was dismissed by the President by an order. The argument of the appellant was that on the passing of the order or dismissal, his suspension came to an end even though the order of dismissal was subsequently set aside the President by the first part of the impugned order, that did not have the effect of reviving the suspension and the appellant was accordingly not under suspension at the date when the impugned order was made.

The respondents, on the other hand, contended that by reason of sub-rule (5) (b) of Rule 10 the order of suspension passed on 11/04/1963 continued to remain in force despite the making of the order of dismissal and in any event, even if the suspension came to an end as a result of the passing of the order of dismissal, it was revived with retrospective effect when the order of dismissal was set aside by the President by the first part of the impugned order and, therefore, at the instant of time when the third part of the impugned order was made under sub-rule (5) (b) of Rule 10, the appellant was under suspension.

Answering to this principal question the speaking through Justice Bhagwati the Supreme Court observed that “When an order of suspension is made against a Government servant pending an enquiry into

\(^1\) 1974-AIR (SC) 1281 ; 1974-SCC-4-396.
his conduct, the relationship of master and servant does not come to an end. What the Government, as master, does in such a case is merely to suspend the Government servant from performing the duties of his office. The Government issues a direction forbidding the Government servant from doing the work which he was required to do under the terms of the contract of service or the statute or rules governing his conditions of service, at the same time keeping in force the relationship of master and servant. We must at this stage refer to one other contention advanced on behalf of the respondents in support of the third part of the impugned order. That contention was based on sub-rule (5) (a) of Rule 10, which provides that an order of suspension made or deemed to have been made under that rule shall continue to remain in force until it is modified or revoked by the authority competent to do so. As the result of the inquiry an order of dismissal by way of penalty had been passed against the appellant. With that order, the order of suspension lapsed. The order of dismissal replaced the order of suspension which then ceased to exist. The appellant was accordingly not under suspension at the point of time when the third part of the impugned order was made and under these circumstances the third part of the impugned order could not be justified under sub-rule (5) (b) of Rule 10.

However, as Rule 10 stands to-day, the suspension of the appellant under the order dated 11th April, 1963 came to an end on 25/10/1967 when the order of dismissal was passed against him and since then the appellant is no longer under suspension. The appellant must, therefore, be held to be entitled to salary from 25/10/1967 and an order for payment of arrears of salary must be passed in his favour".

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In another case regarding the service matters came before the apex Court in *Union Of India Vs. Gurbux Singh*¹, the question that arises for determination in this appeal is as to which authority was entitled to terminate the service of the first respondent Gurbux Singh whether the Central Government or the Government of Punjab.

The brief facts of the case were that, the first respondent Gurbux Singh was, prior to his appointment as an Assistant Settlement Commissioner, holding the post of Deputy Registrar, Land Record in a temporary capacity under the State of Punjab. The first respondent had no lien on any permanent post and was a temporary servant of the Punjab Government. On coming into force of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 it became necessary to appoint officers and staff in the State of Punjab for the purpose of carrying out various functions and duties under the Act. One of such functions and duties was grant of proprietary rights to quasi permanent allottees of agricultural land and houses in the rural areas in the State of Punjab. The President of India, therefore, sanctioned the creation of certain posts which included two posts of Assistant Director to be designated as Assistant Settlement Commissioner under the Act for a period of six months from the date of promulgation of the Rules framed under the Act "for the work connected with the conversion of quasi-permanent allottees into permanent ones" and the Central Government, by its letter dated 18/04/1955 conveyed this sanction to the State Government. This letter contained a direction that the over-all expenditure in connection with these posts sanctioned by the President of India should not exceed Rs. 6. 50 lacs and it would be shared between the Central Government and the State Government in the ratio of 50-50.

¹ 1975-AIR SC -641 :: 1975-SCC-3-638
The post of Assistant Settlement Commissioner having already been created by the Central Govt. by the sanction of the President of India as conveyed under the letter dated 23/07/1955, did not need validation from the order of the Government of Punjab dated 30/11/1955. In fact, when the question arose in regard to issue of pay slip in favour of the first respondent for the period subsequent to 29/02/1956, when the original sanction of the President of India for the post of Assistant Settlement Commissioner expired, the Accountant General, Punjab pointed out in his letter dated 21/04/1956 that the sanction to the continuance of the post by the Punjab Government was meaningless and ineffective and it could not be acted upon until receipt of sanction to the continuance of the post from the Central Government since the post was created by them.

In the above context Justice Bhagwati held that, "the post of Assistant Settlement Commissioner was created by the Central Government and the expenditure in connection with it was to be met out of the funds provided by the Central Government and it was the Central Government alone which was competent to make appointment to the post and in fact, the first respondent was appointed to the post by the Central Government by its order dated 3/09/1955. If this be the correct position, as it undeniably is, there can be no doubt that the Central Government alone could terminate the service of the first respondent. It is now a well-settled rule of interpretation that a power to appoint ordinarily implies a power to determine the employment"\(^1\).

This rule is also found incorporated in Section 16 of the General Clauses Act, 1897. It is, therefore, clear that the Central Government, which is given the power to make a appointment to the post of Assistant Settlement Commissioner under Section 3, would also have the power to

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\(^1\) Union Of India Vs. Gurbux Singh; 1975-AIR (SC) 641 :: 1975-SCC-3-638.
determine the appointment. The Central Government would also be entitled to terminate the appointment, since the post of Assistant Settlement Commissioner is a post under the Union of India and the person appointed to it would hold it during the pleasure of the President. There is no provision under which the Government of Punjab could have the power to determine the appointment as Assistant Settlement Commissioner made by the Central Government under Section 3. The Central Government alone could terminate the appointment, both as the appointing authority as also under Article 310 (1) of the Constitution.

Therefore, Justice upheld the High Court's view as right in taking the view that the order of the Punjab Government dated 17/04/1956 was ineffectual and invalid and the service of the first respondent as Assistant Settlement Commissioner was validly terminated only on 10/02/1959 when the Central Government, by its memorandum dated 10/01/1959, gave notice terminating the service of the first respondent. Hence the first respondent would be entitled to a sum of Rupees 22,927.34 p. as decreed by the High Court.

8.4. Justice Bhagwati's judgments on Emergency provisions in the Constitution

It is the merit of the constitution that it visualizes the circumstances when the strict application of the federal principles might destroy the basic assumptions on which the Indian constitution is built.1 According to Bryce Federal Government means weak government because it involves a division of power. Every modern federation, however, has sought to avoid this weakness by providing for the assumption of larger powers by the Federal Government whenever unified

action is necessary by reason of emergent circumstances, internal or external. But while in countries like the United States this expansion of Federal Power takes place through the wisdom of judicial interpretation, in India, the constitution itself provides for conferring extraordinary powers upon the union in case of different kinds of emergencies.

The Constitution of India under Article 352 as originally enacted enabled a Proclamation of Emergency to be made if the President was satisfied that a grave emergency existed whereby the security of India or any parts of its territory was by war or external aggression or internal disturbance. This may be referred as National Emergency under Article 356 – due to the failure of constitutional machinery in states; and under Article 360 Financial Emergency he (the President) may make a Proclamation of Emergency in respect of the whole India or any part of India as may be specified in the proclamation.

Subjective satisfaction of the president cannot be challenged in a court of law and even on ground that the opinion of the President had been actuated by mala fides. The question whether emergency exists is essentially a political question entrusted by the constitution to the Union Executive and therefore not justifiable before the court. The president is the sole judge to decide whether circumstances exist justifying the proclamation of emergency.

In ADM Jabalpur V. Shukla, popularly known as the habeas corpus case, the respondents challenged the validity of the proclamation of

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3. AIR 1976 SC 1207

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Emergency by the president under Article 352 made on 25th June, 1975, and the order of detention made against them there under. In the instance case the respondents were detained under Section 3 of the MISA. They filed applications in different High courts for the issue of writ of habeas corpus. The preliminary objection was raised on behalf of the state that the President's order was a bar to invoke writ jurisdiction of the high courts. The High courts held that notwithstanding the continuance of emergency and the presidential order suspending the enforcement of rights conferred by Articles 19, 21 and 22 and High Court could examine whether an order of detention was in accordance with the provisions of the (MISA) Maintenance of Internal Security Act whether the order was mala fide or was made on the basis of relevant materials by which the detaining authority could have satisfied that the order was necessary. In the above situation the state appealed to the Supreme Court. The main questions for consideration of the Supreme Court were two: first whether in view of the presidential order, dated 27th June, 1975 and 8th January, 1976 made under clause (1) of Article 359 any writ petition under Article 226 would lie in a High court for Habeas Corpus to enforce the right to personal liberty of a person detained under the Act on the ground that the order of detention was not in compliance with the Act. Secondly, if such a petition was maintainable what the scope of judicial security particularly in view of the Presidential Order maintaining Article 22 and Section 16-A of the MISA. This section 16-A of MSIA prohibits the detaining authority to communicate grounds of detention to the detenu.

In the instant case Justice Bhagwati is a member of Five member Bench, consisting N Ray, C.J., Beg, Chandrachud and Bhagwati JJ., (and khanna, J., dissenting )held that in view of the presidential order dated 27th June, 1975 no person had any locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or
order or direction to challenge the legality of an order of detention on the
ground that the order was not under or in compliance with the Act or was
illegal, or was vitiated by *mala fides* factual or legal or has based on
extraneous considerations.

The word satisfaction mentioned under Article 356(1) means the
satisfaction of the cabinet and not the personal satisfaction of the
governor. The satisfaction of the president can be challenged on two
grounds that (1) it has been exercised *mala fide*, (2) based on wholly
extraneous and irrelevant grounds because in that case it would be no
satisfaction of the president. The second ground was raised in the case of
*State of Rajasthan Vs. Union of India*¹ in this case Justice Bhagwati is a
member in a seven member Bench and the Apex Court unanimously held
that “the satisfaction of President under Article 356 could not be
questioned .The President not only act on the report of the Governor but
on otherwise. This means that the satisfaction can be based on material
other than Governor’s report. However, Justice Bhagwati, (for himself and
Gupta, J.,) observed that “if the satisfaction is *malafide* or is based on
wholly extraneous and irrelevant grounds the court would have
jurisdiction to examine it because in that case there would be satisfaction
of the President”.

In the *Minerva Mills case*² Justice Bhagwati had an
occasion to deal with the power of Court to judicial review of Emergency
provisions provided under the Constitution. He quoted the words of Dr.
Ambedkar thus: This power of judicial review is conferred on the
judiciary Art. 32 and 226 of the constitution speaking about draft article
25, corresponding to present Art 32 of the constitution, Dr. Ambedkar the
Principal Architect of our Constitution said in the Constituent Assembly

¹ AIR 1977 SC 1361

² Minerva Mill Ltd., V. Union of India, AIR 1980 SC 1789.
9th Dec. 1948. "If I was asked to name any particular Article in this Constitution as the most important—very heart of it and I am glad that the House has realised its importance .(CAD, Vol.VII, p. 953.) It is a cardinal principle of our constitution that no one however highly placed and no authority ...(p.381, SCJ(1) 1981).

In this very important case Justice Bhagwati held that "there is no bar to judicial review of the validity of a Proclamation of the Emergency issued by the President under Article 352(1). Merely because a question of political complexion, it is no ground why the court should shrink from performing its duty under the constitution that if it raises an issue of Constitutional determination. However, the Court's power is limited only to examining whether the limitations conferred by the Constitution have been observed or not. The court can not go in to question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Government is based. The satisfaction of the President is a condition precedent and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be Constitutionally invalid. Where at all, the satisfaction is absurd or perverse or malafide or based on wholly extraneous and irrelevant ground, it would be liable to be challenged before a court of law".

In a landmark judgment the Supreme Court had laid down guidelines for imposing President's rule, in the case of S.R. Bommai V. Union of India1 hearing the appeal from the judgment of the Allahabad High Court. A nine member constitution bench of the Supreme Court has been held that the dismissal of the BJP governments in M.P., Rajasthan and Himachal Pradesh in the wake of the Ayodhya incident of December 6, 1992 was valid and imposition of the President's rule in these States was constitutional.

1 1994 (3) SCC 1
In the instant case the apex court has held that 'secularism' is a basic feature of the constitution and any state government which acts against that ideal can be dismissed by the President and in matters of religion the state has no place. No political party can simultaneously be a religious party as well as political party.

The court agreed with the seven-Judge Bench decision in the *Rajasthan V. Union of India* (Supra) that the court could undertake judicial review of presidential proclamation if allegations of *mala fide* exercise of power were made in the petition. The majority held that simply because a political party had overwhelming majority at the centre, it could not advise the president under Article 356 to dissolve the Assemblies of opposition ruled states.

On the advice of the council of Ministers to the president the majority held that Article 74(2) of the constitution which bars an enquiry into the question whether any or what advice was given by the council to Ministers, does not bar the court to call upon the union government to disclose to the court the material upon which the president had formed the requisite satisfaction. In this regard has laid down the following guidelines:

- Presidential proclamation dissolving a state legislative assembly is subject to judicial review.
- If a state government works against secularism, president's rule can be imposed.
- No wholesale dismissed of opposition ruled states governments when a new political party assumes power at the centre.
- If president's rule is imposed only on political considerations the court can even restore the Assembly.
- Imposition of President’s Rule and dissolution of State Assembly cannot be done together.

- State Assembly can be dissolved only after parliament approves central rule.

- The Supreme Court or High Court can complete the Union Government to disclose material on whose basis President’s Rule is imposed on a state.

- The power of the President under Article 356 is a constitutional power, it is not an absolute power. The existence of material is a pre-condition to form the satisfaction to impose the president’s rule.

The majority judgment of the court will act as a check on motivated and arbitrary dismissal of the state governments by the centre in future, as had happened in a number of cases in the past. The court observed that Article 356 which Dr. Ambedkar had hoped would be a dead letter of the constitution had turned out to be a dead letter for a number of State Governments and Legislative Assemblies. Since the Governments and Legislative Assemblies, since the commencement of the constitution, the court noted that ‘the president’s rule had been imposed on more than 100 occasions’. Apart from the above court observations there were in many occasions President’s rule has been imposed in UP in 1995 and 1998 in Gujarat in 1996, in 1999 in Bihar, in 2005 in Goa and Bihar on various grounds like neither party has acquired majority in elections, due to disturbance and failure of government in controlling violence which caused two successive massacres of weaker sections etc are some of the reasons for imposition of presidential rule.
8.5. Amendments of the Constitution of India

The first time Amendment to the Constitution of India was made, when the Bihar Land Reforms Act, 1950 was held to be void as violating Art.14, the Constituent Assembly; functioning as the provincial Parliament under Art. 379, passed the Constitution (1st Amendment ) Act, 1951.

In the words of K.C. Wheare, a Federal Constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment and American constitution is very difficult. So is the case with Australia, Canada and Switzerland. It is a common criticism of federal constitution that is too conservative, too difficult to alter and that it is consequently behind the times. But the framers of the Indian Constitution were keen to avoid exercise rigidity and were anxious to have a document which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. And also they were aware of the fact that if the constitution was so flexible it would be a playing of the whims and caprices of the ruling party, hence, they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes.2

Will is in his book on the constitutional law of the United States says, “if no provisions for amendment were provided, there would be constant danger of revolution. If the method of Amendment were too easy, these would be the danger of too hastily action all the time. In either case there would be a danger of the overthrow of our political institutions. Hence the purpose for providing for the amendment of the constitution is

to make it possible gradually to change the constitution in an orderly fashion as the changes in social condition make it necessary to change the fundamental law to correspond with such social changes.”

The draft Chair man of the Constitution\(^1\), explaining the proposals for amendment introduced by in the constituent assembly said that “those who are dissatisfied with the constitution have only to obtain a two-thirds majority, and if they cannot obtain even a two-thirds majority in the Parliament elected on adult franchise in their favour, their dissatisfaction with the constitution cannot be deemed to be shared by the general public.

Elements of flexibility were therefore imported into a federal constitution which is inherently rigid in its nature. The framers of our constitution were also impaired by the need for the sovereignty of the parliament elected by universal sufferance to enable it to achieve a dynamic national progress. Therefore, they prescribed an easier mode for changing those provisions of the constitution which did not primarily affect the federal system. One can therefore safely say that the Indian federation will not suffer from the faults of rigidity of legalism. Its distinguishing feature is that it is a flexible federation”. In *Kesavananda Bharati's case*\(^2\) the Supreme Court observed that “The constitution makers have, therefore, kept the balance between the danger of having non-amendable constitution and constitution which is too easily amendable.”

The process of amending the constitution is the legislative process governed by the rules of that process, and this was doe in two ways. Most of the provisions of the constitution can be amended by an ordinary legislative process. Only a few provisions which deal with the federal

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principle require a special majority i.e., 2/3rd of members of the House of Parliament present and voting and also satisfaction by the states. While other provisions can be amend by the Special majority. The procedure to amend the constitution is, however, not as difficult as in America or Australia. The difficult procedure of referendum followed in Australia and Switzerland or Constitutional conventions followed in America have not been adopted in Indian constitution.

8.5.1. Article 368 and 42nd Amendment

The constitution (42nd Amendment) Act, 1976 was passed by adding clause (4) and (5) to Article 368 after the decisions of the Supreme Court in Keshavananda Bharati and Indira Nehru Gandhi cases. Clause (4) provided that no constitutional amendment (including the provision of Part III) or purporting to have been made under Article 368 whether before or after the commencement of the constitution (42nd Amendment) Act, 1976 shall be called in any court on any ground. Clause (5) removed any doubts about the scope of the amending power. Thus, by inserting clause (5) made it clear that even the ‘basic feature’ of the constitution could be amended. But the constitutional amendments made under Article 368 can still be challenged on the ground that they are destructive of the ‘basic features of the constitution’.

8.5.2. Bhagwati’s contribution in adjudicating the Amendment provisions of the Constitution.

The judgments of the Supreme Court make it clear that the Constitution – not the Parliament – is Supreme in India. This is in

1. Durga Das Basu; Introduction to the Constitution; Prentice – Hall, India, 18th Ed., 1997; p.,149.

accordance with the intention of the framers who adopted a written constitution for the country. Under the Written Constitution there is a clear distinction between the ordinary legislative power and the constituent power (amending power) of parliament.

Waman Rao Vs. Union of India\(^1\), regarding the Amendments to the Constitution, Justice Bhagwati observed that: “Amendments to the Constitution made on or after 24/04/1973 by which the 9th Schedule to the Constitution was amended from time to time by the inclusion of various Acts and Regulations therein, are open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of the Parliament since they damage the basic or essential features of the Constitution or its basic structure.”

He had not pronounced upon the validity of such subsequent constitutional amendments except to say that if any Act or Regulation included in the 9th Schedule by a constitutional amendment made after 24/04/1973 is saved by article 31-C as it stood prior to its amendment by the 42nd Amendment, the challenge to the validity of the relevant Constitutional Amendment by which that Act or Regulation is put in the 9th Schedule, on the ground that the Amendment damages or destroys a basic or essential feature of the constitution or its basic structure as reflected in Articles 14, 19 or 31, will become otiose”.

Justice Bhagwati observed that “Article 31-C of the Constitution, as it stood prior to its amendment by S. 4 of the Constitution (42nd Amendment) Act, 1976, is valid to the extent to which its constitutionality was upheld in Kesavananda Bharati. Article 31-C, as it stood prior to the Constitution (42nd Amendment) Act does not damage any of the basic or essential features of the Constitution or its basic structure”.

\(^1\) 1980 - SCC (3) 587
In *S.P. Sampat Kumar v. Union of India* Justice Bhagwati agreeing with the judgment of Justice Ranganath Misra, in his concurring judgment as far as concerned to the structure of the judicial system and the principle of independence of the Judiciary, the exclusion of the jurisdiction of the High Court under Arts. 226 and 227 of the Constitution in service matters specified in S. 28 of the Administrative Tribunals Act, 1985, he articulated his own reasons in the following way prefacing with his decision in *Minerva Mills Ltd. v. Union of India* that “judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited Government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution.

Further he pointed out that, “a question may arise as to what are the powers of the Executive and whether the Executive has acted within the scope of its power. Such a question obviously cannot be left to the Executive to decide and for two very good reasons”. The reasons he explained are; first the decision of the question would depend upon the interpretation of the Constitution and the laws and this would prominently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field. Secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action.

1. AIR 1987 SC 386
"The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. The judiciary is constituted as the ultimate interpreter of the Constitution and it is assigned to the delicate task of determining what is the extent and scope of the power conferred on each branch of Government (i.e., executive, legislature, and judiciary), what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits”.

So far as the appointment of judicial members of the Administrative Tribunal is concerned, there is a provision introduced in the Administrative Tribunals Act, 1985, by way of amendment that the judicial members shall be appointed by the Government concerned in consultation with the Chief Justice of India. Obviously no exception can be taken to this provision because even so far as Judges of the High Court are concerned, their appointment is required to be made by the President *inter alia* in consultation with the Chief Justice of India. But so far as the appointment of Chairman, Vice-Chairmen and administrative members is concerned, the sole and exclusive power to make such appointment is conferred on the Government under the impugned Act. As there is no obligation cast on the Government to consult the Chief Justice of India or to follow any particular selection procedure in this behalf.

In the above context Justice Bhagwati opined that “this absolute unfettered discretion of the Government to appoint such person or persons as it likes may tend, directly or indirectly, to influence their decision-making process particularly since the Government would be a litigant in most of the cases coming before the Administrative Tribunal and it is the action of the Government which would be challenged in such cases”.

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Therefore, he suggested two procedures for appointments the first one is the appointment of Chairman, Vice-Chairman and administrative members should be made by the concerned Government only after consultation with the Chief Justice of India and such consultation must be meaningful and effective and ordinarily the recommendation of the Chief Justice of India must be accepted unless there are cogent reasons, in which event the reasons must be disclosed to the Chief Justice of India and his response must be invited to such reasons.

The another alternative is, the Government for making such appointments it may do, by setting up a High Powered Selection Committee headed by the Chief Justice of India or a sitting Judge of the Supreme Court or concerned High Court nominated by the Chief Justice of India. Otherwise, he held that "the appointment will be outside the scope of the power conferred on Parliament under Art. 323-A. However, in conclusion, Justice Bhagwati said that "this judgment will operate only prospectively and will not invalidate appointments already made to the Administrative Tribunal".

While dealing with the case of S.P. Sampat Kumar V. Union of India, Justice Bhagwati had explained and emphasized the power of Supreme Court to judicial review in the following way: "The basic principle of the Rule of Law which permeates every provision of the Constitution and which forms its very core and essence is that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the

1 AIR 1987 SC 386
hands of the judiciary for maintenance of the Rule of Law. The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the Rule of Law would become a teasing illusion and a promise of unreality”.

There is also another alternative which may be adopted-by the Government for making appointments of Chairman, Vice-Chairmen and members and that may be by setting up a High Powered Selection Committee headed by the Chief Justice of India or a sitting Judge of the Supreme Court or concerned High Court nominated by the Chief Justice of India. Both these modes of appointment will ensure selection of proper and competent persons to man the Administrative Tribunal and give it prestige and reputation which would inspire confidence in the public mind in regard to the competence, objectivity and impartiality of those manning the Administrative Tribunal. If either of these two modes of appointment is adopted, it would save the Administrative Tribunals Act, 1985 from invalidation. Otherwise, it will be outside the scope of the power conferred on Parliament under Art. 323-A.

However, in conclusion, Justice Bhagwati said that “this judgment will operate only prospectively and will not invalidate appointments already made to the Administrative Tribunal. But if any appointments of Vice-Chairmen or administrative members are to be made hereafter, the same shall be made by the Government in accordance with either of the aforesaid two modes of appointment”.

Thus, Justice made his contributions to the provisions relating to the judiciary, public service commission matters and amendment provisions of the Indian Constitution.
CHAPTER – IX

CONCLUSION