Sadhana Sharma Vs State of U.P. and Others

Court: Allahabad High Court (Lucknow Bench)

Date of Decision: Jan. 11, 2012

Acts Referred: Constitution of India, 1950 â€" Article 13, 13(2), 136, 14, 143
Criminal Procedure (Amendment) Act, 2005 â€" Section 4
Criminal Procedure (Uttar Pradesh Amendment) Act, 1991 â€" Section 2
Criminal Procedure Code, 1973 (CrPC) â€" Section 24, 24(4), 24(8), 25, 25A
Hindu Succession Act, 1956 â€" Section 23

Citation: (2012) 2 ADJ 607

Hon'ble Judges: Satish Chandra, J; Devi Prasad Singh, J

Bench: Division Bench

Advocate: Rahul Shukla and O.P. Srivastava, for the Appellant; Manish Kumar, for the Respondent

Judgement

Devi Prasad Singh, J.
Present writ petitions under Article 226 of the Constitution of India, have been preferred challenging the

constitutional validity of Section 2 of U.P. Act No. 18 of 1991 i.e., Code of Criminal Procedure (U.P. Amendment) Act, 1991, whereby, sub-

section (1) of Section 24 of Code of Criminal Procedure has been amended and sub-section (4), (5), (6) of Section 24 of Code of Criminal

Procedure (in short CrPC), has been omitted alongwith the provisions contained in sub-section (7) by which sub-section (6) has been referred to.

The petitioner has also assailed the Circular dated 13.8.2008 by which the Government of U.P., has amended, the L.R. Manual to the extent it

provides the consultation with the District Judge mandatory for appointment on the post of District Government Counsels alongwith consequential

action.

2. The present writ petitions were part of the bunch of writ petitions whereby, the Circular dated 13.8.2008 has been impugned, the leading one of

which is Writ Petition No. 7851 (M/B) of 2008: U.P. Shaskiya Adhivakta Katyan Samiti v. State of U.P., decided by separate judgment and

order dated 6.1.2012. Keeping in view the fact that vires of U.P. Amendment (supra), has been impugned in the present writ petitions, it is

decided by the present separate judgment.

3. The appointment of District Government Counsels in the State of U.P., has been drawing the attention of this Court as well as Hon''ble Supreme

Court from time to time particularly, after the impugned amendment done by the State Government to acquire unfettered discretion and to regulate

the appointment of District Government Counsels as well as the standing counsels of the High Court by executive instructions issued from time to

time compiled in the name and title of ""Legal Remembrancer Manual"" (in short the LR manual). After a lot of discussion and reports at various

levels, inviting opinions from different sections of society and the Governmental bodies including the report of Law Commission, the Parliament by

Act No. 2 of 1974, promulgated the Code of Criminal Procedure, 1973 (in short CrPC) to keep pace with time and discharge its obligations

within the constitutional scheme relieving the country from the outlived colonial, Code of Criminal Procedure namely, the Code of Criminal

Procedure, 1898.

But it appears that the Government of U.P. under the garb of LR manual, later on, to acquire unfettered discretion in the matter of appointment of

District Government Counsels by the impugned amendment, tried to restore the rusted ""colonial spoiled system"".

4. The petitioner for the first time, was duly appointed and selected as Additional District Government Counsel (Criminal) Budaun. On 23.5.1994

for the period of one year. The appointment was duly renewed from time to time. The renewal was done in pursuance of the recommendation of

the District Judge and District Magistrate from time to time. Being the senior most, Additional District Government Counsel, the petitioner

officiated as District Government Counsel (Criminal) from time to time and continuously held the post since April, 2008 to May, 2010. According

to petitioner''s counsel, one local MLA of District Budaun, Yogendra Sagar who was the accused in the case of rape of a girl under Case Crime

No. 378/2008, approached the petitioner for help. The Additional Chief Judicial Magistrate, Budaun by his order dated 18.8.2009, summoned the

MLA (Annexure 8 to the Writ Petition No. 4097 (M/B) of 2011). A Criminal Revision No. 271/2009 was filed by one of the accused against the

summoning order in the Court of Sessions Judge, Budaun and at the time, the petitioner was working as Additional District Government Counsel

(Criminal). The petitioner opposed the revision vehemently. In consequence thereof, the Criminal Revision was dismissed by the District Judge, by

the order dated 7.10.2009 (Annexure 6 to this writ petition). In consequence thereof on 13.10.2009, the MLA submitted some complaint to the

Chief Minister and requester for removal of the petitioner from the post of District Government Counsel Criminal (Annexure 7 to this writ petition).

In consequence thereof, the District Magistrate, Budaun submitted a report dated 4.11.2009 to the State Government recommending petitioner''s

removal though according to petitioner''s counsel, the District Judge, Budaun has recommended the petitioner for renewal. The petitioner was

removed by the order dated 21.12.2009. The order of removal was challenged by the petitioner in Writ Petition No. 54 (M/B) of 2010. A

Division Bench of this Court, vide order dated 5.1.2010, directed the petitioner to continue on the post of District Government Counsel (Criminal).

According to petitioner''s counsel much before the expiry of term in April, 2011 the post of Additional District Government Counsel (Criminal), the

District Magistrate, by the order dated 24.12.2010, directed the petitioner to furnish details of work done which was received by the petitioner on

1.1.2011. The petitioner immediately responded and submitted her reply dated 3.1.2011 which was received in the Office of the District

Magistrate on 4.1.2011. However, before receipt of reply, the State Government has removed the petitioner on 30.12.2010.

5. The order of removal dated 30.12.2010 was impugned in Writ Petition No. 589 (M/B) of 2011. By the interim order dated 7.2.2011, the

Division Bench of this Court directed the petitioner to continue as Additional District Government Counsel (Criminal) Budaun till her renewal is

considered. In consequence thereof, the petitioner again resumed duty. Thereafter, District Magistrate Budaun, submitted a report dated

25.2.2011 with adverse comment against the petitioner and by the order dated 28.3.2011, the State Government rejected the renewal and in

consequence thereof, the District Magistrate has declined to renew petitioner''s tenure by the order dated 30.3.2011.

6. Writ Petition No. 4097 (M/B) of 2011 was filed by the petitioner challenging the order dated 28.3.2011 land 30.3.2011.

7. The present writ petitions have been preferred by the petitioner challenging the constitutional validity of amending Act of U.P. and the Circular

dated 13.8.2008, amending the L.R. Manual.

8. It has been stated by the State that the Additional District and Sessions Judge Court No. 9, submitted adverse report against the petitioner and

in consequence thereof, a decision was taken not to renew the service of the petitioner. On the other hand, the petitioner filed two certificates

issued by Additional District and Sessions Judge, whereby her work has been appreciated. The fact remains that no opinion was obtained from the

District Judge Budaun who was the competent authority under the L.R. Manual How the State has relied upon the opinion of the Additional

District Judge, has not been substantiated by the learned counsel for the State. Any opinion, tendered without authority, cannot be a ground to

form an adverse opinion against an employee or D.G.C.

I-STATUTORY PROVISIONS AND

PLEADINGS

9. Part-IX Chapter-38 of the Code of Criminal Procedure, 1898, deals with the procedure with regard to appointment of public prosecutors. The

provisions as modified upto 1st July, 1968, printed by the Manager Government of India Press Nasik and published by the Manager of

Publications, Delhi-6, 1968, is reproduced as under:

PART IX

SUPPLEMENTARY PROVISIONS

CHAPTER XXXVIII

OF THE PUBLIC PROSECUTOR

492. (1) [Central Government or the State Government] may appoint, generally, or in any case, of for any specified class of cases, in any local

area, one or more officers to be called Public Prosecutors.

(2) * * *The District Magistrate, or, subject to the control of the District Magistrate, the Sub-Divisional Magistrate, may, in the absence of the

Public Prosecutor, or where no Public Prosecutor has been appointed appoint any other person, not being an officer of police below [such rank as

the State Government may prescribe in this behalf], to be Public Prosecutor for the purpose of [any case].

493. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is

under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public

Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions.

494. Any public Prosecutor * * * may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases

before the judgment is pronounced, withdraw from the prosecution of any person [either generally or in respect of any one or more of the offences

for which he is tried]; and, upon such withdrawal--

(a) if it is made before a charge has been framed, the accused shall be discharged [in respect of such offence or offences];

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted [in respect of such offence or

offences].

495. (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police

below a rank to be prescribed by the State Government in this behalf * * * but no person, other than the Advocate General, Standing Counsel,

Government Solicitor, Public Prosecutor or other officer [generally or specially empowered by the Central Government or the State Government]

in this behalf, shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by section 494, and the provision of that section

shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by a pleader.

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to

which the accused is being prosecuted.

10. A plain reading of aforesaid provisions reveals that the power of appointment of Public Prosecutors vests in the Central and State Government.

Subject to administrative control of the District Magistrates, the Sub-Divisional Magistrates were also authorised to appoint any person as Public

Prosecutors subject to direction of the State Government.

11. After independence, the Law Commission of India and different commissions and committees of State Government, Bar and members of

judiciary were feeling that the Code of Criminal Procedure 1898 outlived its utility and does not conform to constitutional mandate hence by Act

No. 2 of 1974, Indian Parliament promulgated the (new) Code of Criminal Procedure, 1973 which came into force with effect from 1.4.1974. It

received presidential assent on 25.7.1974. Prior to New CrPC, there was no uniform Code of Criminal Procedure for whole of India. There were

separate acts mostly revived in their character to regulate the procedure of the Courts of erstwhile provinces and the presidency towns. Those

applying to the presidency towns, were first consolidated by the Criminal Procedure Supreme Court Act, (XVI of 1852), which in due course of

time gave place to High Court Criminal Procedure Act, (XII of 1865). Later on, the Presidential Criminal Procedure Code was replaced by the

general Criminal Procedure Code, (Act XXV of 1861), which was later on, replaced by Act X of 1872. It was the Criminal Procedure Code of

1882 (Act X of 1882) which gave, for the first time, a uniform law of procedure for the whole of India both in presidency-towns and in the moffisil;

and later on, it was supplanted by the Code of Criminal Procedure, 1898 (Act V of 1898). This last mentioned Act had been amended by many

amending Acts, the most important being those passed in 1923 and 1955. The extensive amendments of 1955 were made with intent to simplify

procedure and speed up trials. The State Government too made a large number of amendments to the Code of 1898. But on the whole, the Code

of 1898 remained unchanged for a very long period.

12. While inserting Section 24 in the Code of Criminal Procedure, 1974, at the time of presentation of Bill, Clause (8) deals with the aims and

object, which is based on Law Commission Report and is reproduced as under:

Clause 8--The section is being amended (i) to enable the Central Government and State Government to appoint one or more Additional Public

Prosecutors for the High Court; (ii) to enable the Central Government to appoint one or more Public Prosecutors in any district or local area; (iii)

to enable counting of service rendered as Prosecuting Officer before or after coming into force of the Code of Criminal Procedure, 1973 as

service as an advocate for the purpose of appointment as Public Prosecutor or Additional Public Prosecutor or Special Public Prosecutor, and (iv)

to provide that in any State where there exists a regular cadre of Prosecuting Officers, appointment of Public Prosecutors or Additional Public

Prosecutors will be made only from that cadre and when there are no suitable persons available appointment can be made from the panel prepared

by the District Magistrate in consultation with the Sessions Judge.

13. In the new CrPC, Sections 24 and 25 deals with the appointment of District Government Counsels and Assistant Public Prosecutors. Section

25A deals with Directorate of prosecution. For convenience, Sections 24, 25 and 25A of the New Code of Criminal Procedure are reproduced

as under:

24. Public Prosecutors.--(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court,

appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutor for conducting in such Court, any prosecution, appeal

or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district,

or local area.

(3) For every districts the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors

for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or

an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consolation with the Sessions Judge, prepare, a panel of names of persons, who are, in his opinion fit to be

appointed as Public Prosecutor or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his

name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Not withstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State

Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting, such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government

may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by, the District

Magistrate under sub-section (4).

(7) A person shall be eligible to be appointed as a public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section

(6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in

practice as an advocate for not less than ten years as a Special Public Prosecutor.

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice, is a pleader, or has rendered

(whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public

Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice

as an advocate.]

25. Assistant Public Prosecutors.--(1) The State Government shall appoint in every district one or more Assistant public Prosecutors for

conducting prosecutions in the Courts of Magistrates.

1[(1A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in

the Courts of Magistrates]

(2) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person

to be the Assistant Public Prosecutor in charge of that case:

Provided that a police officer shall not be so appointed-

(a) If he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted: or

(b) If he is below the rank of Inspector.

[25A. Directorate of Prosecution.--(1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution

and as many Deputy Directors of Prosecution as it thinks fit.

(2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as

an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.

(3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the

Head of the Home Department in the State.

(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section

(1), or as the case may be, sub-section (8), of section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section

(3), or as the case may be, sub-section (8), of section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed

under sub-section (1) of section 25 shall be subordinate to the Deputy Director of Prosecution.

(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy

Directors of Prosecution have been appointed shall be such as the State Government may, by notification, specify.

(8) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.].

14. Section 25A was inserted by the Code of Criminal Procedure Amendment Act, 2005 (Act No. 25 of 2005) Section 4 enforced from

23.6.2006 constituting Directorate of Prosecution. u/s 25A, the Head of Directorate of Prosecution shall be the Director of Prosecution. The

Director of Prosecution shall be the person who has been in practice as Advocate for not less than 10 years and his appointment shall be with the

concurrence of the Chief Justice of High Court. Thus, reading of Section 25A reveals that the Directorate of Prosecution shall be an independent

body of the State discharging their obligation under the Director of the Prosecution who is appointed with the concurrence of Chief Justice of the

High Court and will have supervisory jurisdiction on the Government counsels, prosecuting officers appointed u/s 24 and 25 of the CrPC.

15. However, next limb of Prosecuting Branch where the larger stakes are involved and harden criminals are tried, the State Government chooses

to acquire exclusive jurisdiction by the impugned amendment and issuing impugned consequential circular to regulate the appointment of District

Government Counsels and Prosecuting Officers who prosecute the accused in the Sessions Courts and in the High Court. The anomaly at the face

of record, does not rule out the involvement of political interest to restore spoil system in the State of U.P. By the impugned Amending Act, the

provisions contained in Section 24 of the Code of Procedure has been amended in such a manner so that the check and balance by judiciary to

make the Prosecuting Agency independent through its recommendation, has been given go bye. The impugned amendment under the Act No. 18

of 1991 is reproduced as under:

2. Amendment of Section 24 of Act No. 2 of 1974.--In Section 24 of the Code of Criminal Procedure, 1973, hereinafter referred to as the said

Code:-

(a) in sub-section (1), the word, ""after consultation with the High Court"", shall be omitted;

(b) sub-sections (4), (5) and (6) shall be omitted;

(c) in sub-section (7) the word, ""or sub-section (6)"" shall be omitted.

16. During the course of hearing, it has been admitted at bar that the impugned State Amendment has never been the subject-matter of judicial

review. The reason assigned is, the State was having a better and more balanced provisions in the form of LR Manual which is the compilation of

the Government orders issued from time to time regulating the appointment of District Government Counsels. The unamended LR manual contains

the provisions of not only the recommendations of the District Judge but also the maintenance of annual record containing the entry given by the

Presiding Officers of the Sessions Court and forming opinion on the basis of performance of Government counsels in respective Courts on the

basis of report given by the respective Presiding Officers.

17. The unamended LR Manual contains the provisions with regard to effective consultation with the District Judge while preparing the panel for

the District Government Counsels. According to original provisions, while choosing the Advocate, opinion should be formed keeping in view the

reputation, professional conduct, competency, behaviour and conduct of the lawyers.

18. Now, it is no more res integra that LR manual is authoritative compilation of Government orders and instructions for the conduct of legal affairs

of the State Government, vide Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, ; Harpal Singh Chauhan and others Vs. State

of U.P., ; State of U.P. and others Vs. U.P. State Law Officers Association and others, and State of U.P. and Another Vs. Johri Mal,

19. Paras 7.01, 7.02, 7.03, and 7.04 of LR Manual regulate the procedure for appointment of District Government Counsels which provide that it

shall be obligatory on the part of the District Magistrate to obtain the opinion of the District Judge. Before sending the panel to State Government,

applications should be invited from the lawyers having practice of 10 years in the case of District Government Counsels and 7 years in the case of

Assistant District Government Counsels and 5 years in the case of Sub-District Government Counsels.

20. Renewal has been given in Paras 7.06, 7.07 and 7.08 of the LR manual. Para 7.07 categorically provides that District Government Counsels

shall not participate in any political activities so long as they work as such. Otherwise, they shall incur a disqualification to hold the post. The

provisions of the LR manual also provides that lawyers of the same district and adjoining districts will be entitled to apply in response to notice

issued for the purpose.

21. Chapter XXI of the LR manual while dealing with renewal of District Government Counsels further provides that it shall have overriding effect.

It further provides that District Magistrate shall submit his report after consultation with the District and Sessions Judge with respect of Public

Prosecutor and Additional Public Prosecutor giving details about the percentage of success of cases conducted by them. It further provides that in

case the Government decides not to re-appoint the District Government Counsel, then the LR may call for a fresh recommendation. The LR

manual being exhaustive in nature, rather more elaborate than the provisions contained in Section 24 of the CrPC, the impugned amendment does

not become a matter of judicial review before the Court.

The provision contained in the LR manual and various judgment of the Allahabad High Court and Hon''ble Supreme Court have been discussed

while deciding the Writ Petition No. 7851 (M/B) of 2008, decided on 6.1.2012.

22. Section 24 of the Code of Criminal Procedure, 1973 was the subject-matter of interpretation before the Hon''ble Supreme Court in the case in

State of U.P. and Another Vs. Johri Mal, whereby, Hon''ble Supreme Court had approved the age old practice of calling recommendation of

District Judge in appointment of District Government Counsels. Their lordships opined that the District Judge is supposed to know the merit,

competence and capability of lawyers concerned for discharging their duties and the District Magistrate is supposed to know only the conduct

outside the Courts vis-a-vis the victim of offence, the public officers, witnesses etc. When their lordship has shown their shock and displeasure to

the impugned U.P. Amendment, the reply given by the State of U.P. was that exhaustive provisions are laid down in LR Manual, which is a

complete code in itself. To reproduce relevant portion, Para 84, 85, 86, and 87 of Johri Mal"s case (supra), as under:

84. Keeping in mind the aforementioned legal principles the question which arises for consideration in these appeals is, the nature and extent of

consultation, a Collector is required to make with the District Judge.

85. The age-old tradition on the part of the State in appointing the District Government Counsel on the basis of the recommendations of the District

Collector in consultation with the District Judge is based on certain principles, Whereas the District Judge is supposed to know the merit,

competence and capability of the concerned lawyers for discharging their duties; the District Magistrate is supposed to know their conduct outside

the Court vis-a-vis the victims of offences, public officers, witnesses etc. The District Magistrate is also supposed to know about the conduct of

the Government counsel as also their integrity.

86. We are also pained to see that the Stat of Uttar Pradesh alone had amended sub-section (1) of Section 24 and deleted sub-sections (3), (4)

and (5) of Section 24 of the Code of Criminal Procedure. Evidently, the said legislative step had been taken to overcome the decision of this Court

in Kumari Shrilekha Vidyarthi (supra). We do not see any rationale in the said action. The learned counsel appearing for the State, when

questioned, submitted that such a step had been taken having regard to the fact that exhaustive provisions are laid down in Legal Remembrancer

Manual which is a complete code in itself. We see no force in the said submission as a law cannot be substituted by executive instructions which

may be subjected to administrative vagaries. The executive instructions can be amended, altered or withdrawn at the whims and caprice of the

executive for the party in power. Executive instructions, it is beyond any cavil, do not carry the same status as of a statute.

87. The State should bear in mind the dicta of this Court in Mundrika Prasad Singh (supra) as regard the necessity to consult the District Judge.

While making appointments of District Government Counsel, therefore, the State should give primacy to the opinion of the District Judge. Such a

course of action would demonstrate fairness and reasonableness of action and, furthermore, to a large extent the action of the State would not be

dubbed as politically motivated or otherwise arbitrary. As noticed hereinbefore, there also does not exist any rationale behind deletion of the

provision relating to consultation with the High Court in the matter of appointment of the Public prosecutors in the High Court. The said provision

being a salutary one, it is expected that the State of U.P. either would suitably amend the same or despite deletion shall consult the High Court with

a view to ensure fairness in action.

23. Virtually, the statement given on behalf of the State Government before the Hon''ble Supreme Court defending the impugned amendment was

an undertaking before the highest Court of land to maintain the consultative process of District Judge of the district concerned for appointment of

District Government Counsels. Apart from the undertaking, the observations of Hon''ble Supreme Court in Johri Mal''s case (supra), are command

on the State Government to continue with the consultative process with the District Judge while making appointment on the post of District

Government Counsels.

24. Even earlier to Johri Mal''s case (supra), a Division Bench of Allahabad High Court while deciding a case in Virendra Pal Singh Rana Vs. State

of U.P. and Others, had issued mandamus directing the State Government of U.P. to follow the LR Manual in strict sense and make necessary

amendments to give primacy to opinion of District Judge over and above the District Magistrate.

25. Hon''ble Supreme Court in the case in Mundrika Prasad Singh Vs. State of Bihar, ; Harpal Singh Chauhan and others Vs. State of U.P., ;

State of U.P. and Others Vs. Netra Pal Singh and Others, ; State of U.P. and Others Vs. Hirendra Pal Singh etc., as well as in the case of Johri

Mal (supra), held that it is mandatory to obtain the opinion of District Judge while making appointment on the post of District Government

Counsels and in the event of conflict, the opinion of the District Judge shall prevail.

26. Ignoring the consistent view of this Court and Hon''ble Supreme Court and the binding precedents, by the impugned Circular dated 13.8.2008,

the age old provisions contained in LR Manual is amended and entire recommendatory power has been conferred on the District Magistrate of the

district concerned that too, in violation of Chapter XXI of LR Manual itself and mandamus issued by this Court in the case of Virendra Pal Singh

Rana''s case (supra), as well as Johri Mal''s case (supra). The impugned Circular dated 13.8.2008 contained in Annexure 3 to the writ petition and

the amended provisions is reproduced as under:

27. While assailing the impugned U.P. Amendment Act, Sri Manoj Goyal, learned counsel has relied on the cases in Kumari Shrilekha Vidyarthi

and Others Vs. State of U.P. and Others, ; Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, ; Harpal Singh Chauhan

and others Vs. State of U.P., ; State of U.P. Vs. Ramesh Chandra Sharma and others, ; State of U.P. and Another Vs. Johri Mal, ; State of U.P.

and Others Vs. Netra Pal Singh and Others, ; State of U.P. and Others Vs. Hirendra Pal Singh etc., ; State of U.P. and Others Vs. Rakesh

Kumar Keshari and Another, ; Indian Council of Legal Aid and Advice, etc. etc. Vs. Bar Council of India and another, ; Sube Singh and Others

Vs. State of Haryana and Others, ; Kailash Chand Sharma Vs. State of Rajasthan and Others, ; Dr. K. R. Lakshmanan Vs. State of Tamil Nadu

and another, ; Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc., ; Hamdard Dawakhana and Another, Kalipada

Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and

Others, ; Shiv Kumar Vs. Hukam Chand and Another, ; Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi), ; and Mundrika Prasad

Singh Vs. State of Bihar, ; Mrs. Neelima Sadanand Vartak Vs. State of Maharashtra and Others, ; Bombay High Court, Writ Petition No. 4822

of 2009; decided on 15.12.2009, Vinay Kumar Srivastava Vs. The State of U.P., ; Ghanshyam Kishor Bajpayee and Others Vs. State of U.P.

and Others, ; Badri Vishal Gupta Vs. State of M.P. and Others, ; I.R. Coelho (Dead) By LRs. Vs. State of Tamil Nadu and Others, ; Atyant

Pichhara Barg Chhatra Sangh and Another Vs. Jharkhand State Vaishya Federation and Others, ; T. Barai Vs. Henry Ah Hoe and Another, ;

Zaverbhai Amaidas Vs. The State of Bombay, ; Thirumuruga Kirupananda Variyarthavathiru Sundara Swamigalme Vs. State of Tamil Nadu and

Others, ; Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., ; Mohd. Shaukat Hussain Khan Vs. State of Andhra

Pradesh, ; Shri Mulchand Odhavji Vs. Rajkot Borough Municipality, ; Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co., ; State of

Maharashtra Vs. The Central Provinces Manganese Ore Co. Ltd., ; Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh

and Others, ; Bharat Coking Coal Ltd. v. State of Bihar and others, (1990) 4 SCC 557; S. Pratap Singh Vs. The State of Punjab, ; Relevant

Extracts of 197th Report of the Law Commission on Public Prosecutor''s Appointments; Cr.P.C. (Uttar Pradesh Amendment) Ordinance 1991

and CrP.C. (Uttar Pradesh Amendment) Act, 1991; State of Tamil Nadu and Others Vs. K. Shyam Sunder and Others, Commissioner of Police,

Bombay Vs. Gordhandas Bhanji, ; Secretary to Govt., Tamil Nadu and Another Vs. K. Vinayagamurthy, ; Ramana Dayaram Shetty Vs.

International Airport Authority of India and Others, ; Sarbananda Sonowal Vs. Union of India (UOI) and Another, ; Rattan Arya and Others Vs.

State of Tamil Nadu and Another, ; and State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others,

28. On behalf of the State, it has been vehemently argued that the impugned amendment has been challenged after two decades hence writ petition

should be thrown out on this ground alone. Learned Senior Counsel Sri Raghwendra Kumar Singh, also claimed that power of State Government

to amend the CrPC, is constitutional power and Courts should not interfere with the impugned amendment. He also claims State''s right to amend

the CrPC and objected to Courts'' power of judicial review under the doctrine of separation of powers. He submits that once the President of

India has assented and impugned amendment has been incorporated, it is not open to judicial review that too, when the matter relates to

appointment of District Government Counsels. He submits that it is the discretion of the State Government to make appointment or engage

counsels of its choice since the engagement is purely professional.

29. On behalf of the State, learned Senior Counsel has relied upon the cases in State of Andhra Pradesh and others, etc. Vs. McDowell and Co.

and others, etc., ; State of Bihar and others, etc. etc. Vs. Bihar Distillery Ltd., etc., ; Public Services Tribunal Bar Association Vs. State of U.P.

and Another, ; Dharam Dutt and Others Vs. Union of India (UOI) and Others, ; Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi

Devi, ; State of U.P. Vs. Manbodhan Lal Srivastava, ; Indian Medical Association v. Army College of Medical Sciences and others, 2011 AIR

SCW 3469; Narmada Bachao Andolan v. State of Madhya Pradesh and others, 2011 AIR SCW 3337 and Union of India (UOI) and Another

Vs. Arulmozhi Iniarasu and Others, .

II-WHETHER WRIT PETITION IS

BARRED BY DELAY AND LACHES?

30. It has not been disputed at bar that the impugned State amendment has never been challenged. However, while assailing the impugned

amendment, Sri Manoj Goyal, learned counsel on behalf of petitioner submits that necessity to challenge the amendment has arisen only after the

impugned circular dated 13.8.2008 issued by the State Government whereby the Government had tried to re-introduce the ''spoil system'' existing

prior to 1.4.1974 under the Old Code of Criminal Procedure, 1898 of the colonial era (supra). Learned counsel submits that in the Johri Mal''s

case (supra) before the Hon''ble Supreme Court, the State of U.P. has made statement that the LR Manual is complete Code in itself regulating the

appointment of District Government Counsels hence the impugned amendment shall not affect the merit in any manner whatsoever. Learned

counsel fairly admits the unamended LR Manual is very exhaustive and meet out the requirement to continue as independent prosecuting agency in

the State of U.P. Accordingly, there was no need to challenge the amendment but as and when the State Government has issued the impugned

Circular dated 13.8.2008, the Government has acquired the unfettered power to appoint the District Government Counsels which makes the

situation ''status quo anti'' by turning the clock to same position which the Government has been enjoying in the pre-constitutional era during the

colonial rule with regard to appointment of District Government Counsels under the Code of Criminal Procedure, 1898. Needless to retreat that

under Part IX of Code of Criminal Procedure, 1898 (supra), the entire power with regard to appointment of District Government Counsels was

vesting in the District Magistrate of District under the control of the State and the Central Government which was given go bye in the new Code of

Criminal Procedure, 1973 through Section 24 of the Act.

31. The argument of the learned counsel for the petitioner seems to carry weight. Upto 13.8.2008, there was no need to challenge the impugned

amendment since the appointment of the District Government Counsels was regulated by the procedure contained in the LR Manual. By issuing the

Circular dated 13.8.2008, the State Government virtually, is trying to enforce the Amending Act No. 18 of 1991 for the first time acquiring the

power to appoint the District Government Counsels without obtaining the recommendation of the District Judge.

32. It is trite in law that the Constitution has not prescribed any period of limitation for filing writ petition under Article 226 of the Constitution of

India and the power conferred upon the High Court to issue prerogative writ, is not hedged with any condition or constraint. Ordinarily, the

principle underlying the rule is one who is not vigilant and does not seek interference of Court within reasonable time from the date of accrual of

cause of action or alleged violation of constitutional, legal or other right should ordinarily, may not be entitled to invoke Article 226 of the

Constitution of India. However, all these depend upon the facts and circumstances of each case and no-hard-and-fast rule can be laid down and

no straight jacket formula can be evolved for deciding the question of delay and laches.

While reiterating this broader proposition, Hon"ble Supreme Court in a case in Royal Orchid Hotels Limited and Another Vs. G. Jayarama Reddy

and Others, considered the question with regard to delay and laches. The relevant portion from the judgment (supra), is reproduced as under:

26. In Dehri Rohtas Light Railway Company Limited v. District Board, Bhojpur, this Court set aside the judgment of the Patna High Court

whereby the writ petition filed by the appellant against the demand notice issued for levy of cess for the period 1953-54 to 1966-67 was dismissed

only on the ground of delay. The facts of that case show that the writ petition filed by the appellant questioning the demand for 1967-68 to 1971-

72 was allowed by the High Court. However, the writ petition questioning the demand of the earlier years was dismissed on the premise that the

petitioner was guilty of laches.

27. While dealing with the question of delay, this Court observed: (Dehri Rohtas case, SCC pp. 602-03, paras 12-13)

12. The question thus for consideration is whether the appellant should be deprived of the relief on account of the laches and delay. It is true that

the appellant could have even when instituting the suit agitated the question of legality of the demands and claimed relief in respect of the earlier

years while challenging the demand for the subsequent years in the writ petition. But the failure to do so by itself in the circumstances of the case, in

our opinion, does not disentitle the appellant from the remedies open under the law. The demand is per se not based on the net profits of the

immovable property, but on the income of the business and is, therefore, without authority. The appellant has offered explanation for not raising the

question of legality in the earlier proceedings. It appears that the authorities proceeded under a mistake of law as to the nature of the claim. The

appellant did not include the earlier demand in the writ petition because the suit to enforce the agreement limiting the liability was pending in appeal,

but the appellant did attempt to raise the question in the appeal itself. However, the Court declined to entertain the additional ground as it was

beyond the scope of the suit. Thereafter, the present writ petition was filed explaining all the circumstances. The High Court considered the delay

as inordinate. In our view, the High Court failed to appreciate all material facts particularly the fact that the demand is illegal as already declared by

it in the earlier case.

13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and

proper exercise of discretion. Each case must depend upon 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 relief to the party on the grounds of laches or delay is denied is that the rights

which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable

explanation for the delay. 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. The test is not to physical running of time. Where the

circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in

Tilokchand case relied on is distinguishable on the facts of the present case. The levy if based on the net profits of the railway undertaking was

beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of

the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole

ground of delay. We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought

for.

(emphasis supplied)

28. In Ramchandra Shankar Deodhar v. State of Maharashtra, the Court overruled the objection of delay in filing of a petition involving challenge

to the seniority list of mamlatdars and observed: (SCC p. 327, para 10)

10. .....Moreover, it may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Article 16 is itself a

fundamental right guaranteed under Article 32 and this Court which has been assigned the role of a sentinel on the qui vive for protection of the

fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like.

29. In Shankara Co-operative Housing Society Limited v. M. Prabhakar, this Court considered the question whether the High Court should

entertain petition filed under Article 226 of the Constitution after long delay and laid down the following principles: (SCC pp. 629-30, para 54)

(1) There is no inviolable rule of law that whenever there is a delay, the Court must necessarily refuse to entertain the petition; it is a rule of practice

based on sound and proper exercise of discretion, and each case must be dealt with on its own facts.

(2) The principle on which the Court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the

petition should not be disturbed, unless there is a reasonable explanation for the delay, because Court should not harm innocent parties if their

rights had emerged by the delay on the part of the petitioners.

(3) The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief

elsewhere in a manner provided by law. If he runs after a remedy not provided in the statute or the statutory rules, it is not desirable for the High

Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy.

(4) No hard-and-fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts.

(5) That representations would not be adequate explanation to take care of the delay.

30. Another principle of law of which cognizance deserves to be taken is that in exercise of power under Article 136 of the Constitution, this Court

would be extremely slow to interfere with the discretion exercised by the High Court to entertain a belated petition under Article 226 of the

Constitution of India. Interference in such matters would be warranted only if it is found that the exercise of discretion by the High Court was

totally arbitrary or was based on irrelevant consideration. In Smt. Narayani Debi Khaitan v. State of Bihar, Gajendragadkar, C.J. speaking for the

Constitution Bench observed:

It is well-settled that under Article 226, the power of the High Court to issue an appropriate writ is discretionary. There can be no doubt that if a

citizen moves the High Court under Article 226 and contends that his fundamental rights have been contravened by any executive action, the High

Court would naturally like to give relief to him; but even in such a case, if the petitioner has been guilty of laches, and there are other relevant

circumstances which indicate that it would be inappropriate for the High Court to exercise its high prerogative jurisdiction in favour of the

petitioner, ends of justice may require that the High Court should refuse to issue a writ. There can be little doubt that if it is shown that a party

moving the High Court under Article 226 for a writ is, in substance, claiming a relief which under the law of limitation was barred at the time when

the writ petition was filed, the High Court would refuse to grant any relief in its writ jurisdiction. No hard and fast rule can be laid down as to when

the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches.

That is a matter which must be left to the discretion of the High Court and like all matters left to the discretion of the Court, in this matter too

discretion must be exercised judiciously and reasonably.

(emphasis supplied)

33. Now, by issuing the Circular dated 13.8.2008, the Act No. 18 of 1991 has been virtually given effect to and in consequence thereof, bunch of

writ petitions has been filed challenging the Circular dated 13.8.2008. The present dispute with regard to the power of State amendment may not

be thrown out since by the impugned Circular dated 13.8.2008, now the Government has become free to choose a counsels of its own choice

without recommendation of the District Judges of the district concerned. Whether the impugned amendment is hit by fundamental rights guaranteed

under Part-III of the Constitution or not, is a question which requires to be adjudicated by this Court under the process of judicial review also for

the reason that the LR Manual is the compilation of Government orders (supra) and the Government has no right to change its circulars and orders

from time to time ignoring the report of the Law Commission. Abuse of power in the absence of statutory provisions may be noticed from the facts

discussed, findings recorded in the leading Writ Petition No. 7851 (M/B) of 2008 and other connected writ petitions decided separately. In view

of the above, the present writ petition does not seem to be barred by delay and laches and requires adjudication on merit.

III-SOVEREIGNTY, SEPARATION OF

POWER AND ROLE OF COURT

34. During the course of argument, prerogative has been claimed by the State Government in the matter of appointment of District Government

Counsel under its sovereign power with the plea of separation of power asserting that the Courts are not concerned to whom the State

Government appoints as Government Counsel.

35. Sovereign function includes legislation, administration and dispensation of justice. All the three functions were vested in the King in the

Monarchical system of the Government. In democratic polity, three powers have been assigned to three parts of the Government, i.e. legislative,

executive and judiciary. Under the Constitution of United States of America or under the unwritten Constitution of England, there is strict

separation of power. But under the Indian Constitution, the separation of power is not in strict sense. There is overlapping.

36. The word, ""sovereignty"" is derived from the Latin word ""super"" (above) means the authority which controls the actions of every individual,

member of the community. The power of Government to make itself obeyed is called sovereignty, and the person or persons who have this power

are called the sovereign. According to Harold J Laski, sovereignty is the supreme coercive power and it is by possession of sovereignty that the

State is distinguished from all other forms of human association (The State in Theory & Practice by Harold J Laski).

37. In Constitutional Law, sovereignty is termed as the supreme Power of Legislation and Governance. However, Aristotle, a great Greek legal

philosopher said that in democratic States, peoples are sovereign. The supreme power of legislation and governance rests in the people. The

Parliamentary sovereignty is subsequent evolution. The original concept of sovereignty is of popular sovereignty and even the King or the monarch

was to obey the wishes of the people.

38. The Words and Pharases, Permanent Edition, Vol. 39B, defines the sovereignty as under:

The ""sovereign powers"" of a Government include all the powers necessary to accomplish its legitimate ends and purposes, Such powers must exist

in all practical Governments. They are the incidents of sovereignty, of which a state cannot divest itself. - Boggs v. Merced Mining Co., 14 Cal.

279, dismissed 70 U.S. 304, 3 Wall. 304, 18 L.Ed. 245.

39. In the same treatise (supra), while considering the sovereignty in American and European context, it has been further defined as under:

On this subject the errors and the mazes are endless and inexplicable. To enumerate all, therefore, will not be expected. To take notice of some

will be necessary to the full illustration of the present important cause. In one sense, the term ""sovereign"" has for its correlative ""subject"". In this

sense, term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but

no subjects. The term ""subject"" occurs, indeed, once in the instrument; but to mark the contrast strongly the epithet ""foreign"" is prefixed. In another

sense, according to some writers, every state which governs itself without any dependence on another power is a sovereign state. There is a third

sense in which the term ""sovereign"" is frequently used. In this sense, sovereignty is derived from a feudal source, and like many other parts of that

system, so degrading to man, still retains its influence over our sentiments and conduct, though the case by which that influence was produced

never extended to the American States. The accurate and well informed President Henault, in his excellent chronological abridgment of the History

of France, tells us that, about the end of the second race of kings, a new kind of possession was acquired under the name of ""fief."" The governors

of cities and provinces usurped equally the property of land and the administration of justice, and established themselves as proprietary seigniors

over those places in which they had been only civil magistrates or military officers. By this means there was introduced into the state a new kind of

authority, to which was assigned the appellation of ""sovereignty."" In process of time the feudal system was extended over France and almost all the

other nations of Europe, and every kingdom became in fact a large fief. Into England this system was introduced by the Conqueror, and to this era

we may probably refer the English maxim that the king or sovereign is the fountain of justice. But in the case of the king the sovereignty had a

double operation. While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him there was

no superior power, and consequently on feudal principles no right of jurisdiction. ""The law"", says Sir William Blackstone, ""ascribes to the king the

attribute of sovereignty. He is sovereign and independent within his own dominions, and owes no kind of subjection to any other potentate upon

earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no Court can have jurisdiction over him; for

all jurisdiction implies superiority of power."" The state of Georgia is not a sovereign power, in the sense that it is exempt from suit in the federal

Courts by a private citizen.

40. Accordingly in broader context, the Legislative, Executive and Judiciary jointly constitute sovereign powers with the division of work amongst

them under the constitutional framework. Since, India is governed by written Constitution, the sovereign function of the State should be looked into

keeping in view the spirit of written Constitution. However, the proposition that the sovereign function includes the function discharged by

Legislature, Executive and Judiciary seems to be correct approach than splitting the sovereign power and making them alien to each other. The

Western jurist ordinarily rely upon most celebrated treatise of Montesquieu, viz. Espirit des Lois: Spirit of Laws, published in 1748. Montesquieu

discussed and propagated federalism in democratic polity and opined for strict separation of power among legislature, executive and judiciary.

Though the larger Benches of Hon''ble Supreme Court of India had continuously ruled that in Indian context and keeping in view the constitutional

scheme, there is no strict separation of power and is overlapping but it appears that in some of the judgments decided by the Bench of lesser

number of Judges, Montesquieu has been relied upon as a ground not to interfere with the State action even if it causes public harm.

41. With profound respect, it appears that Montesquieu''s treatise ''Spirit of Laws'' has not been read as a whole by Hon''ble Judges who followed

Montesquieu blindly. The wholesale and overall reading and understanding of the treatise, ""'Spirit of Laws"" written by Montesquieu reveals that the

separation of power among three wings of the Government is theoretical and may be made applicable in an ""ideal State"" means where persons

holding offices in all three wings of the Government, i.e. legislature, judiciary and executive are honest, fair and learned. In case there are allegation

of corruption, casteism, nepotism or abuse of power against the members discharging sovereign function, then the Montesquieu''s doctrine shall not

only be impractical but may result in serious consequence in due course of time.

Thus, the peoples'' representatives seem to have failed to check infiltration of persons having criminal record in the legislative bodies.

42. In a celebrated book, ""Religion, Caste & Politics in India"", Christophe Jaffrelot who is a Research Director at Centre National de la Recherche

Scientifique (in short, CNRS), author of several books as Indian society and political system had considered corruption and criminalisation of

politics. Learned author noted that corruption has become all-pervasive phenomenon in contemporary India (page 621). He further took note of

the fact that the criminalisation of politics started long back in the country including Uttar Pradesh. The criminals or mafias developed direct nexus

with the politician of the State and helped them to be elected. Initially, the politicians availed the help of criminals in electoral matters but later on,

criminals entered into politics and get themselves elected in the Assemblies. It shall be appropriate to reproduce a portion from the book (supra)

with regard to criminalisation of politics in the State of U.P. and other States of the country. To quote:

The 1996 Legislative Assembly in Uttar Pradesh did not reverse but may have increased the 1993 trend. Not only did the BJP, the BSP, and the

SP give tickets to dozens of candidates against whom legal proceedings had been instituted (33, 18, and 22 respectively), but a certain number of

BJP, BSP, and Congress MLAs amongst them became ministers when the BJP formed the Government, first jointly with the BSP, then alone,

from October 1997. This was achieved by recruiting dozens of MLAs from the BSP and the Congress (and offering up to a few hundred thousand

rupees per MLA), with a ministerial post for each. Thus, the Uttar Pradesh cabinet comprised 92 members. The BJP Chief Minister, Kalyan

Singh, tried to project himself as clean and set up a Special Task Force (STF) in 1998 to capture or liquidate criminals. However, public enemy

number one, then, was Shri Prakash Shukla, who appeared to have colluded with at least eight ministers of Kalyan Singh''s Government; they

protected him, making the task of the STF more complicated (Mishra 1998: 52).

Uttar Pradesh is not the only state where the entry of the mafia into politics has accelerated in the last few years. Bihar is certainly as seriously

affected as U.P. In 2000, 31 Legislative Assembly candidates had cases registered against them for crimes ranging from murder to dacoity. Most

of them contested as ''Independents'', but there were BJP, Congress, RJD, and Samata candidates as well. Maharashtra is also suffering from the

same disease. During the municipal elections in 1997, 150, 72, and 50 candidates with past or present difficulties with the law (Godbole 1997)

were fielded from Mumbai, Nagpur, and Pune respectively. Andhra Pradesh is not lagging behind, since in 1999 an NGO called Lok Satta

Election Watch released a list of 46 candidates contesting elections to the Lock Sabha or the Legislative Assembly with, allegedly, some criminal

background (The Hindu, 3 September 1999: 5).

Delhi is also new in this circle of most criminalized states. In fact, Delhi is gradually taking over from Mumbai as the crime capital of India. This

city-state tops the list of number of crimes per head, with 527 in 1996 (against 121 in Bihar) and, in terms of percentage change, with +55 per cent

change in 1996 over the quinquennial average of 1991-5 (Swami 1998: 17). Out of 815 Legislative Assembly candidates in 1998, 120 had more

than two criminal cases registered against them, and out of 69 MLAs, 33 had criminals cases against them (The Hindustan Times, 26 October

1998; The Hindu, 23 November 1998).

It shall be unwise to think or infer that the politicians having criminal antecedent do not affect the decision making process, or the governance.

Whether in such a situation, in case the argument of the propagators with regard to strict separation of power is accepted, it is easy to understand

that the country may see doom''s day in due course of time.

43. While considering the anarchy and autocratic rule prevailing in some of the countries of the world because of committed bureaucracy and

judiciary and the trouble, pain and agony faced by the peoples of respective country, Bertrand Russell critically expressed his views as under:

Stalin could neither understand nor respect the point of view which led Churchill to allow himself to be peaceably dispossessed as a result of a

popular-vote. I am a firm believer in democratic representative Government as the best form for those who have the tolerance and self-restraint

that is required to make it workable. But its advocates make a mistake if they suppose that it can be at once introduced into countries where the

average citizen has hitherto lacked all training in the give-and-take that it requires. In a Balcan country, not so many years ago, a party which had

been beaten by a narrow margin in a general election retrieved its fortunes by shooting a sufficient number of the representatives of the other side to

give it a majority. People in the West thought this characteristic of the Balkans, forgetting that Cromwel and Robespierre had acted likewise. (UE)

(page 91 from Bertrand Russell''s Best Special Indian Edition)

Russell also took note of American legislators and Nazis under the democratic form of Government. To quote:

The American legislators who made the immigration laws consider the Nordics superior to Slavs or Latins or any other white men. But the Nazis,

under the stress of war, were led to the conclusion that there are hardly any true Nordics outside Germany; the Norwegians, except Quisling and

his few followers, had been corrupted by intermixture with Finns and Lapps and such. Thus politics are a clue to descent. The biologically pure

Nordics love Hitler, and if you did not love Hitler, that was proof of tainted blood. (UE)

(page 91-92 from Bertrand Russell''s Best Special Indian Edition).

44. Framers of Indian Constitution were wise enough to take care of such situation. With foresightedness while considering the process of judicial

review under Article 226 of the Constitution of India, they used the words, ""for other purposes"" and gave ample power to Hon''ble Supreme Court

to interfere under Article 32 in the event of violation of fundamental right of the citizens straightway. Conferment of such power to the High Courts

and Supreme Court by the constitutional framers belies the argument with regard to strict separation of power. Needless to say that in the event of

judicial overstepping or arbitrariness, legislators have got ample power to legislate law to dilute the effect of judgments of Courts.

In such a situation, remedy is to check and balance which has been provided in the Indian Constitution and affirmed by Hon''ble Supreme Court

from time to time holding that the separation of power is not applied under Indian Constitutional Scheme in strict sense.

45. Under Article 143 of the Constitution of India, the President of India, has been conferred power to seek opinion from Hon''ble Supreme

Court. Article 144 provides that all civil and judiciary authority shall act in aid of Hon''ble Supreme Court in discharge of its obligations. All matters

of inter-state disputes with regard to land and water, are adjudicated by the Tribunal constituted for the purpose. Thus, the Constitution does not

envisage strict separation of power.

46. In the case Delhi Law Act, 1912 in Re, In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C

States (Laws) Act, 1950, a seven Judges Special Bench of Hon''ble Supreme Court, has considered the doctrine of separation of power and ruled

that strictly speaking, it has no place in the system of governance in India nor at the present day under her own Constitution or which she had

during the British rule. Unlike the American and Australian Constitutions, the Indian Constitution does not expressly vest the different sets of

powers in the different organs of the State. Under Article 53 (1), the executive power is indeed vested in the President, but there is no similar

vesting provision regarding the legislative and the judicial powers. Our Constitution, though federal in its structure, is modelled on the British

Parliamentary system, the essential feature of which is the responsibility of the executive to the legislature. The President, as the head of the

executive, is to act on the advice of the Council of Ministers, and this Council of Ministers, like the British Cabinet is a ""hyphen which joins--a

buckle which fastens--the legislative part of the State to the executive part.

47. Again, in Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, a Constitution Bench of Hon''ble Supreme Court ruled that the

Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or

branch of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate

assumption, by one organ or part of the State, of functions that essentially belong to another. The executive can exercise the powers of

departmental or subordinate legislation when such powers are delegated to it by the legislature.

48. The aforesaid proposition has been reiterated by Hon''ble Supreme Court in the cases in Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and

Others, ; Chandra Mohan Vs. State of Uttar Pradesh and Others, ; Udai Ram Sharma and Others etc. Vs. Union of India (UOI) and Others, ;

Associated Cement Companies Ltd. Vs. P.N. Sharma and Another, ; His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala,

49. In Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, ; the Constitution Bench of Hon''ble Supreme Court of India, opined that

doctrine of separation of power is carried into effect in countries like America, Australia. In India, separation of powers is in a broader sense and

not unlike America and Australia where it is in strict sense. The constituent power is independent of the doctrine of separation of powers. The

constituent power is sovereign. It is the power which creates the organs and distributes the powers. The rigid separation of power as in American

or Australian Constitution, does not apply to India. Though the legislature is entitled to change with retrospective effect the law which forms the

basis of judicial decision, it is mot permissible to legislature to declare judgment of Court to be void or not binding. The Indian Constitution does

not recognise the rigid separation of power. The reason is that the concentration of powers in any one organ may, by upsetting that fine balance

between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged. In a federal system which

distributes powers between three co-ordinate branches of Government, though not rigidly, disputes regarding the limits of Constitutional power

have to be resolved by Courts and therefore, as observed by Paton, ""the distinction between judicial and other powers may be vital to the

maintenance of the Constitution itself"". No Constitution can survive without a conscious adherence to its fine checks and balances. The principle of

separation of powers is a principle of restraint which ""has in it the precept, innate in the prudence of self-preservation that discretion is the better

part of valour"".

50. In a case in S.P. Gupta Vs. President of India and Others, , Hon''ble Supreme Court held that independence of judiciary is the basic feature of

the Constitution. The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the

foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is

the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State

within the limits of the law and thereby making the rule of law meaningful and effective. The concept of independence of the judiciary is not limited

only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many

other pressures and prejudices. It has many dimensions, namely fearlessness of other power centers, economic or political, and freedom from

prejudices acquired and nourished by the class to which the Judges belong. Judges should be of stern stuff and tough fibre, unbending before

power, economic or political, and they must uphold the core principle of the rule of law which says ""Be you ever so high, the law is above you.

This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of

law as a dynamic concept and delivery of social justice to the vulnerable sections of the community.

51. Justice Fazal Ali (supra), while considering the independence of judiciary, opined that it comprises two fundamental and indispensable

elements, i.e., (1) independence of judiciary as an organ and as one of the three functionaries of the State, and secondly, the independence of the

individual Judge. Their lordships ruled that Constitution of India did not fully envisage complete separation of powers. The power of judicial review

has been conferred as a safeguard not only to ensure the independence of judiciary but also to prevent Judge from vagaries of executive. Their

lordship held that judiciary has to be inspired by the values enshrined in our Constitution. If rule of law is to run akin to rule of life and a feudal

society is to be transformed into an egalitarian society by the rule of law, an introduction of the element of reflection of popular will so as to make

judicial system more viable and effective as an instrument of change is inevitable and total aloofness of Judiciary is inconceivable.

52. In Asif Hameed and others Vs. State of Jammu and Kashmir and Others, , Hon''ble Supreme Court observed that although, the doctrine of

separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution-makers have meticulously defined

the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the

Constitution. No organ may usurp the functions assigned to another. Legislature and executive, the two facets of people''s will, have all the powers

including that of finance. Judiciary has no power over sword or the purse; nonetheless it has power to ensure that the aforesaid two main organs of

State function within the constitutional limits and if it is not so that Court must strike down the action. It is the sentinel of democracy. Judicial review

is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has

taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restrain,

the only check on Court''s own exercise of power is the self-imposed discipline of judicial restrain. While exercising power of judicial review of

administrative action, the Court is not an appellate authority. The Constitution does not permit the Court to direct or advise the executive in matters

of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities

do not transgress their constitutional limits or statutory powers. The principle of "broad separation of power" under the Constitution, has been

reiterated in Swamy Sharaddananda @ Murali Manohar Mishra Vs. State of Karnataka,

53. Hon"ble Supreme Court of India in a case in Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, while considering

sovereign power of the State held as under:

55.....But we must recognise the exercise of sovereign power which gives the States sufficient authority to enact any law subject

to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has power to legislate on all

branches except to the limitation as to the division of powers between the center and the States and also subject to the fundamental rights

guaranteed under the Constitution. The Indian State, between the center and the States has sovereign power. The sovereign power is plenary and

inherent in every sovereign Stare to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is

difficult to define. This power of sovereignty is, however, subject to Constitutional limitations. This power according to some constitutional

authority, is to the public what necessity is to the individual.

54. After the case of Synthetic Chemicals Ltd. (supra), Hon"ble Supreme Court reiterated the aforesaid principle with regard to broader

separation of power in the case in A.K. Roy and Others Vs. Union of India (UOI) and Others, ; State of Kerala Vs. Smt. A. Lakshmikutty and

others, ; State of U.P. v. Jeet S. Bisht, (2007) 6 SCC 586; Vishaka and others Vs. State of Rajasthan and Others, ; Vineet Narain and Others

Vs. Union of India (UOI) and Another, ; Fruit Commission Agents Association and Others Vs. Government of Andhra Pradesh and Others, and

Mahmadhusen Abdulrahim Kalota Shaikh Vs. Union of India (UOI) and Others,

55. In State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others, a Constitution Bench

of Hon"ble Supreme Court while upholding the right of higher judiciary with regard to enforcement of fundamental rights and direction to CBI to

hold inquiry in a given case, has not found it to be a encroachment over other"s jurisdiction. Hon"ble Supreme Court held that there is no strict

separation of power under Indian Constitution. Being the protectors of civil liberties of the citizens, the Hon"ble Supreme Court and the High

Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under

Article 21 of the Constitution in particular, zealously and vigilantly. In a federal constitution, the distribution of legislative powers between

Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than Parliament to

ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative

powers between Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the

words of Lord Steyn, judicial review is justified by combination of ""the principles of separation of powers, rule of law, the principle of

constitutionality and the reach of judicial review."" If the federal structure is violated by any legislative action, the Constitution takes care to protect

the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226,

whenever there is an attempted violation.

56. In Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi), a Constitution Bench reiterated the aforesaid proposition of law with regard

to separation of power and held that Constitution of India does not give unfettered power to any organ. All the three principal organs are expected

to work in harmony and in consonance with the spirit and essence of the Constitution.

57. In State of Madhya Pradesh Vs. Nerbudda Valley Refrigerated Products Company Pvt. Ltd. and Others, a two Judges Bench of Hon''ble

Supreme Court had reiterated the broader separation of powers among two wings of the Government.

58. In The University of Kerala Vs. The Council of Principals of College in Kerala and Others, a two Judges Bench of Hon''ble Supreme Court

(Justice Markandey Katju and Justice A.K. Ganguly), having divergent opinions as to the extent of powers of Hon''ble Supreme Court of India,

has referred the matter to the Constitution Bench to decide the issue with regard to separation of powers.

59. In Bhim Singh Vs. Union of India (UOI) and Others, a Constitution Bench of Hon''ble Supreme Court, after considering the case of His

Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, and in Shrimati Indira Nehru Gandhi Vs. Shri Raj Narain and Another, ruled

that in modem governance, the strict separation of power is neither possible nor desirable. The Indian Constitution does not prohibit overlap of

functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch

which results in wresting away of the regime of constitutional accountability. This is the test for violation of separation of powers. The constitutional

principle of separation of powers will only be violated if an essential function of one branch is taken over by another branch, leading to a removal

of checks and balances. Till the principle of accountability is preserved, there is no violation of separation of powers. Accordingly, the MPLAD

Scheme is not a violation of the concept of separation of powers. However, the Constitution Bench seems to have not taken into account the

observation made by larger Bench of seven Judges in the case of Delhi Law Act 1912 (supra) whereby, the Article 53 (1) has been interpreted

canvassing with regard to vetting of executive powers in the President. Whether executive functioning may be discharged by elected representative,

is a crucial question which has not been considered in the light of the observation of larger Bench of Hon''ble Supreme Court?

60. In S.D. Joshi and Others Vs. High Court of Judicature at Bombay and Others, a Bench of two Judges of Hon''ble Supreme Court has

reiterated the settled principle of law that there is no rigid separation of power under the Indian Constitution and ruled that judicial power can be

conferred by other authority also.

61. Learned Senior Counsel Sri Raghwendra Singh, vehemently argued that the Court should not interfere with the present controversy. While

relying upon the cases of Macdowel Company, Bihar Distillery, Public Service Tribunal Bar Association, Dharam Dutta, Government of Andhra

Pradesh (supra), learned counsel would submit, it is prerogative of the State to appoint a counsel of its choice and the Courts are not concerned

with it.

62. In the case of Macdowel Company (supra), their lordships of Hon''ble Supreme Court ruled that the Court may strike down any legislation on

two grounds i.e., lack of legislative competence and violation of any of fundamental right guaranteed under Part-III of the Constitution (Para-43).

The case of Macdowel Company (supra) has been followed in the subsequent judgment of Hon''ble Supreme Court in the case of Bihar Distillery

Ltd. (supra). Reiterating the aforesaid proposition, in the case of Bihar Distillery Ltd. (supra), Hon''ble Supreme Court held that approach of the

Court while examining the challenge to the constitutionality of an enactment is to start with presumption of constitutionality. Ordinarily, Court should

try to sustain its validity to the extent possible and it should strike down only in case enactment is not possible to sustain it. The unconstitutionality

should be emerging from the material on record. (para 17).

63. In the case of Public Service Tribunal and Dharam Dutta (supra), aforesaid proposition has been reiterated. The case of Government of

Andhra Pradesh (supra) is an elaborate judgment of Hon''ble Supreme Court on the question involved. Their lordship held that there should be

strict separation of power or ordinarily, the Court should not interfere with the legislative enactment. Hon''ble Supreme Court further held that an

Act may be declared unconstitutional in case it is evident so as to leave no room of doubt. However, Hon''ble Supreme Court while concluding the

opinion expressed the views as under:

88. In our opinion, therefore, while Judges should practice great restraint while dealing with economic statutes, they should be activist in defending

the civil liberties and fundamental rights of the citizens. This is necessary because though ordinarily the legislature represents the will of the people

and works for their welfare, there can be exceptional situations where the legislature, though elected by the people may violate the civil liberties and

rights of the people. It was because of this foresight that the Founding Fathers of the Constitution in their wisdom provided fundamental rights in

Part III of the Constitution which were modeled on the lines of the U.S. Bill of Rights of 1791 and the Declaration of the Rights of Man during the

Great French Revolution of 1789.

There appears to be no doubt over the proposition that the interference of the Court should be on the basis of legislative competent and in violation

of fundamental right contained in Part-III of the Constitution. Article 14 of the Constitution hits every State action when it suffers from the vice of

arbitrariness, manifest error of law or exceeding of jurisdiction or irrational.

64. In a case in GVK Inds. Ltd. and Another Vs. The Income Tax Officer and Another, their lordships of Hon''ble Supreme Court had considered

the principle of separation of power in Indian context and held that the power is overlapping. In appropriate case the higher judiciary may pass

appropriate order to secure public interest, to quote relevant portion of paras 35 and 36 of the judgment of GVK Industries Limited (supra), as

under:

35. Our Constitution charges the various organs of the State with affirmative responsibilities of protecting the interests of, the welfare of and the

security of the nation. Legislative powers are granted to enable the accomplishment of the goals of the nation. The powers of judicial review are

granted in order to ensure that legislative and executive powers are used within the bounds specified in the Constitution. Consequently, it is

imperative that the powers so granted to various organs of the State are not restricted impermissibly by judicial fiat such that it leads to inabilities of

the organs of the State in discharging their constitutional responsibilities.

36. Powers that have been granted, and implied by, and borne by the Constitutional text have to be perforce admitted. Nevertheless, the very

essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution. Walking

on that razors edge is the duty of the judiciary. Judicial restraint is necessary in dealing with the powers of another coordinate branch of the

Government; but restraint cannot imply abdication of the responsibility of walking on that edge.

65. This lordships have further proceeded to consider the constitutional philosophy in terms of Indian Constitution and rule that prime concern of

the course are to maintain rule of law and secure the public interest, to quote relevant portion of paras 113, 114 and 115 as under:

113. The path to modern constitutionalism, with notions of divided and checked powers, fundamental rights and affirmative duties of the State to

protect and enhance the interests of, welfare of, and security of the people, and a realization that ""comity amongst nations"" and international peace

were sine qua non for the welfare of the people was neither straight forward, nor inevitable. It took much suffering, bloodshed, toil, tears and

exploitation of the people by their own Governments and by foreign Governments, both in times of peace and in times of war, before humanity

began to arrive at the conclusion that unchecked power would sooner, rather than later, turn tyrannical against the very people who have granted

such power, and also harmful to the peaceful existence of other people in other territories. Imperial expansion, as a result of thirst for markets and

resources that the underlying economy demanded, with colonial exploitation as the inevitable result of that competition, and two horrific world wars

are but some of the more prominent markers along that pathway.

114. The most tendentious use of the word sovereignty, wherein the principles of self-determination were accepted within a nation-state but not

deemed to be available to others, was the rhetorical question raised by Adolf Hitler at the time of annexation of Austria in 1938: ""What can words

like "independence" or "sovereignty" mean for a state of only six million?

115. We must recognize the fact that history is replete with instances of sovereigns who, while exercising authority on behalf of even those people

who claimed to be masters of their own realm, contradictorily claimed the authority to exercise suzerain rights over another territory, its people and

its resources, inviting ultimately the ruin of large swaths of humanity and also the very people such sovereigns, whether a despot or a representative

organ, claimed to represent.

66. It has been consistent view of Hon"ble Supreme Court of India that the Indian Constitution does not envisage for strict separation of power

and in appropriate case, the higher judiciary may interfere and correct the error committed by other two wings of the Government to secure public

interest and there may be overlapping function to secure public good.

67. In view of above, it is evident why the principle of strict separation of power has not been accepted by Hon''ble Supreme Court in Indian

context.

68. An industrialist of the country, Azim Premji, who was the part of a group wrote a letter to the Prime Minister showing deep concern to mal-

administration in the country, remarked, ""The biggest concern now are governance issues and the complete absence of decision-making in the

Government, in the bureaucracy,"". Even if there is little truth in the allegation whether in such a situation, as canvassed by the learned counsel for

the State or a section of society, strict separation of power should be enforced leaving peoples in the state of uncertainty?

69. Apart from the aforesaid settled proposition of law by Hon''ble Supreme Court, there are certain other features which require higher judiciary

to ensure public good in case it is necessary by overlapping exercise of power to impart justice. Question cropped up is, whether substantial

number of representatives of peoples, possessing criminal antecedents, will be able to discharge their constitutional obligations faithfully to secure

over all public interest or interest of their constituency?

70. Jeffrey Goldsworthy, working in Faculty of Law at Monash University in Melbourne, Australia, in his book, ""Parliamentary Sovereignty"", has

considered this aspect of the matter. According to Goldsworthy, to quote:

The once popular idea of legislative sovereignty has been in decline throughout the world for some time. ''From France to South Africa to Israel,

parliamentary sovereignty has faded away.'' A dwindling number of political and constitutional theorists continue to resist the ''rights revolution'' that

is sweeping the globe, by refusing to accept that judicial enforcement of a constitutionally entrenched Bill of Rights is necessarily desirable....

For what it is worth, my opinion is that constitutional entrenchment might be highly desirable, or even essential, for the preservation of democracy,

the rule of law and human rights in some countries, but not in others. In much of the world, a culture of entrenched corruption, populism,

authoritarianism, or bitter religious, ethnic or class conflicts, may make judicially enforceable bills of rights desirable. Much depends on culture,

social structure and political organisation.

What explains the loss of faith in the old democratic ideal? I am aware of possible ''agency problems'': failures of elected representatives faithfully

to represent the interests of their constituents. In many countries this is a major problem. But I suspect that in countries such as Britain, Canada,

Australia and New Zealand, the real reason for this loss of faith lies elsewhere. There, a substantial number of influential members of the highly

educated, professional, upper-middle class have lost faith in the ability of their fellow citizens to form opinions about important matters of public

policy in a sufficiently intelligent, well-informed, dispassionate, impartial and carefully reasoned manner. Even though the upper-middle class

dominates the political process in any event, the force of public opinion still makes itself felt through the ballot box, and cannot be ignored by

elected politicians no matter how enlightened and progressive they might be.

71. Learned author while considering the judicial encroachment of constitutional right in some of the countries, opined that shifting power to

Judges, amounts to return of mixed Government in the political process to check the ignorance, prejudice and passion of the mob. Learned author

proceeded to observe as under, to quote:

If I am right, the main attraction of judicial enforcement of constitutional rights in these countries is that it shifts power to people (judges) who are

representative members of the highly educated, professional, upper-middle class, and whose superior education, intelligence, habits of thought, and

professional ethos are thought more likely to produce enlightened decisions. I think it is reasonable to describe this as a return to the ancient

principle of "mixed Government", by reinserting an "aristocratic" element into the political process to check the ignorance, prejudice and passion of

the "mob". By "aristocratic", I mean an element supposedly distinguished by superior education, intellectual refinement, thoughtfulness and

reasonability, rather than by heredity or inherited wealth.

72. Author opined that, recent challenges in judicial innovation, may require new theories and may constitute a challenge to doctrine of

parliamentary sovereignty. But they cast very little light on the nature of parliamentary authority in the past. Author proceeded to observe that

defenders of parliamentary sovereignty cannot ignore constitutional change. Constitutional arrangements and understandings today are in many

respects very different from those of the past. But the doctrine of parliamentary sovereignty has survived centuries of change, and has the capacity

to survive many more. The recent constitutional developments discussed by its critics are compatible with the doctrine. The author noted a passage

from Constitutional and Administrative Law in New Zealand (3rd Edn.) pp. 543-5), to quote as under:

Throughout English constitutional history, Parliament and the Courts have exercised co-ordinate, constitutive authority... Theirs is a symbiotic

relationship founded in political realities. Parliament and the political executive must look to the Courts for judicial recognition of legislative power,

and the Courts must look to Parliament and the political executive for recognition of judicial independence.

73. Needless to say that to ensure public good now it has become collective effort of all the three wings of the Government with overlapping

actions to some extent but keeping in view the judicial independence, from other two posts of the Governments.

74. The higher judiciary of India has been slow in interfering with the State actions. Limited enactments have been set aside. The consequence is

manifold increase of corruption in the system of Governance including the criminalisation of polities and huge misappropriation of public fund and

stashing away of the public fund to abroad.

75. In a journal, ""The American Journal of Comparative Law"", while writing an article, Prof. Jiunn-Rong Yeh, College of Law, National Taiwan

University, and Associate Prof. Wen-Chen Chang, National Taiwan University, have considered the extensive interference by South Korean ad

Taiwan Constitutional Court, to quote:

South Korea underwent successful democratization in 1987, culminating in an extensively revised Constitution and a new Constitutional Court. In

the two decades since, Government power has shifted to the opposition and back, swinging among various political parties. Most impressive has

been the performance of the South Korean Constitutional Court. In its decisions involving the constitutionality of statutes or Government actions, it

has ruled against the Government about one third of the time.

Similarly, Taiwan also began an incremental democratization process in the late 1980s. Since then, the 1947 Constitution, that was originally

adopted in mainland China, has been amended seven times. Governmental power was peacefully passed to the long-term opposition party in 2000

and then swung back again to the former ruling party in 2008. The Constitutional Court of Taiwan, despite being an old institution established in

1948, began exhibiting greater vibrancy since the 1990s and produced a record in which about thirty to forty percent of challenged legislative or

administrative acts were ruled unconstitutional.

76. How adversely affected system of Governance, caused mental pain, agony and persecution of peoples of various countries, may be seen from

agitation in different part of the world. Fatima Bhutto in her most celebrated book, ""Songs of Blood and Sword"", discussed fallacy if it in the trial of

Bhutto, to reproduce relevant extracts as under:

After reviewing the case files and documents pertaining to Bhutto''s trial at the hands of the military regime the jurists issued a statement that would

be released to the international press. They agreed that Bhutto''s trial clearly failed to meet several necessary standards of justice in ''at least'' the

six follow ways; maintaining a distinct bias in regard to the trial judges and lawyers, the failure of the junta to hold an open trial, the failure of the

Courts to maintain an accurate record of Bhutto''s trial, the failure to institute a proper trial structure, and the Court''s decision in moving ahead with

clear evidentiary improprieties and insufficiencies. Lastly, the jurists noted that Bhutto''s physical maltreatment at the hands of the state was

ominous and a cause for international concern. (Page 168).

77. Anatol Lieven, a journalist, who had worked in Pakistan and conducted extensive research and also visited India, had written a book,

Pakistan a Hard Country"". While writing the book, learned author noted how the South Asia particularly, Pakistan and India are likely to suffer a

lot because of blindly following the British legacy in dispensation of justice. In Pakistan, how extra constitutional pockets and extra constitutional

nucleus power has been created affecting dispensation of justice is eye opener. This happens since higher judiciary could not evolve new principle

of law to match the political evils. Now after sixty years, Chief Justice of Pakistan is striving to regenerate the democracy to establish rule of law

but now seems to be too late. Learned author Anatol Lieven observed, to quote:

A visit to the Mohmand Tribal Agency in September 2008 (described further in Chapter 11) summed up for me the attitudes of most ordinary

Pakistanis to the official judicial system, and how the Pakistani Taleban have been able to exploit this to their advantage. As Tazmir Khan, a

farmer, told me, to the approval of the other local men sitting with him.

Taleban justice is better than that of the Pakistani state. If you have any problem, you can go to the Taleban and they will solve it without you

having to pay anything--not like the Courts and police, who will take your money and do nothing.

The author further proceeded to observe as under:

...Even clearer was the entire local population''s absolute loathing for the state judicial system; and this was an attitude which I found among

ordinary people across Pakistan.

However, it would be wrong to see the Pakistani population simply as innocent victims of a vicious judicial system run from above for the benefit of

the elites. Rather, justice in Pakistan is an extension of politics by other means, and everyone with the slightest power to do so tries to corrupt and

twist the judicial system to their advantage in every way possible.

Thus cases brought before the state judicial system are key weapons in the hands of individuals and groups fighting for national and local power;

and in both the state and the traditional systems of justice, outcomes are determined largely by political considerations. That means kinship, wealth,

influence and armed force, but also sometimes and to some extent the ability to win over public opinion in general. The means to do this have

changed over time, with the modern media now playing an important role in some cases.

78. The author (supra) further in very strong words, proceeded to observe, to quote:

It would be quite wrong, however, to see the Pakistan masses faced with the state justice system as simply the passive, sheep-like victims of

predatory lawyers, judges, policemen and political elites. This is true, but it is also true that the vast majority of Pakistanis (and Indians) with even

the most limited power to do so have contributed to the wreckage of the state judicial system by their constant efforts to twist it to their own

individual or group purposes. One reason for this is the continual struggles for power which permeate Pakistani society--struggles in which politics

and property are often inextricably mixed. In turn, these struggles generate and are generated by the lack of mutual trust the permeates Pakistani

society, between but also within kinship groups.

79. In the aforesaid book, the author has cited several instances, how gradually the judiciary lost its significance, how the judiciary has become

weaker and weaker day by day making people dischanted with the system. Judiciary has become an instrument to persecute the weaker in the

hands of mighty people.

80. Poverty, illiteracy, lack of basic amenities, poor governance, are the prime concern not only for the citizens of the State of U.P., but for whole

of India. According to Human Development Report, 2011, prepared by the ""Institute of Applied Manpower Research Planning Commission

Government of India"", published by Oxford University Press, though per capita income has grown but still, it is lower than several other States, to

quote:

Over the years, the gap between the per capita income of the state and the national average has grown considerably. In 1950-1, the per capita

income of Uttar Pradesh was 7 per cent lower than the national average. This difference had grown to 40 per cent in 2000-1 (Uttar Pradesh

Human Development Report 2003). In recent years (2002-3 to 2007-8), the average annual growth rate of NSDP was 5.6 per cent as against the

national average of 7.9 per cent, while the growth rate of the per capita SDP was 3.6 per cent compared to the national average of 6.4 per cent.

81. In the field of health also, the State of U.P., is worse than the national average, to quote:

In terms of health indicators, the state''s performance was worse than the national average (Figure 3, 4 and 5). The proportion, of women with

BMI<18.5, underweight children and the U5MR are higher in the state as compared to the national average. The Scs and Sts are worse off

compared to the state average and their community''s respective national averages for all the health indicators.

Although the state made significant efforts in building healthcare infrastructure, it has failed to keep pace with the increasing demand. The state''s

performance in providing health infrastructure was lover than the national average. The shortage of medical personnel and their absenteeism,

particularly in the rural areas, the shortage of medicines, and lack of accountability in the public health system have seriously affected the healthcare

system. There was a vast network of private health providers, who were expensive and often beyond the reach of the poor. The State Human

Development Report further noted that the state had one of the lowest health expenditures in India by both Indian and international standards.

Despite that, the bulk of the expenditure was allocated for the payment of salaries.

82. With regard to literacy rate, again Uttar Pradesh is lower than the national average, to quote:

The literacy rate in Uttar Pradesh was lower than the national average. According to latest estimates of Census (2011), Uttar Pradesh has a

literacy rate of 70 per cent as compared to the 74 per cent national literacy rate in 2011. As per NSS (2007-8), all the social groups including Scs

and Sts have a literacy rate lower than the state average and also lower than the literacy rate of their communities at the national level (Figure 6).

Among the various programmes undertaken, Uttar Pradesh Basic Education Project (UPBEP 1 and 2) initiated in select districts of the state in

1993 and 2000, respectively, and DPEP (Centrally sponsored) resulted in a notable improvement in enrolment and a decline in dropout rates in

the districts where these programmes were implemented. During the period 1996-7 to 1999-2000, enrolment in UPBEP districts increased by 68

per cent as against 37 per cent in non-UPBEP districts (Uttar Pradesh Human Development Report 2003). Poor infrastructure alongwith

inadequate financial allocation were the major hindrances in achieving higher educational targets. The state allocation on education increased from

0.5 per cent of the SDP in 1950-1 to 3.2 per cent in 2007-8, but it is still very low compared to the demand.

83. With regard to Basic household amenities again, Uttar Pradesh is marginally below the national average in terms of improved drinking water

facilities to quote:

In terms of basic household amenities, the performance of the state is marginally below the national average in terms of improved drinking water

facilities. However, it is one of the rare states where the average for the SC and ST households was better than the state average and also than the

national average for their respective communities in terms of access to improved sources of drinking water (Figure 7). In the case of sanitation, the

state average is slightly better than the all India average (Figure 8). However, only 16 per cent of SC households have access to toilet facilities vis-

a-vis 35 per cent of SC households at the all India level.

In such a situation it is not easy for the citizens to avail justice from the Government. There shall always be disparity in public dealing and peoples

may suffer for one or the other cause because of poor governance system.

84. Mahatma Gandhi Ji compared the governance system of European countries and India and expressed his views, to quote from ""Mahatma

Gandhi Essays & Reflections"" by Sarvepalli Radhakrishnan (page 18-19):

In my humble opinion the ordinary method of agitating by way of petitions, deputations, and the like is no remedy for moving to repentance a

Government so hopelessly indifferent to the welfare of its charge as the Government of India has proved to be. In European countries,

condemnation of such grievous wrongs as the Khilafat and the Punjab would have resulted in a bloody revolution by the people. They would have

resisted, at all cost, national emasculation. Half of India is too weak to offer violent resistance, and the other half is unwilling to do so. I have

therefore ventured to suggest the remedy of non-co-operation, which enables those who wish to dissociate themselves from Government, and

which, if unattended by violence and undertaken in an ordered manner, must compel it to retrace its steps and undo the wrongs committed; but

whilst I pursue the policy of non-co-operation, in so far as I can carry the people with me, I shall not lose hope that you will yet see your way to

do justice.

While he maintains that British rule in its present form has made India ""poorer in wealth, in manliness, in godliness and in her sons" power to defend

themselves.

85. He was firmed that no improvement in Indian situation was possible so long as the British adopted an unnatural attitudes of patronage and

superiority. Things not changed, even after independence, men in power are stashing Indian currency to foreign countries. Be the bureaucracy or

the peoples representatives, the malpractices, maladministration, misappropriation of Government fund, or discriminatory treatments, all parts of

Indian governance system and it has become part of life with full of scams. In such a situation, strict separation of power shall neither be feasible or

appropriate for India in its national and social interest.

86. It may be noted that according to the report (Hindustan Times dated 9.8.2011), amongst 395 members of the legislative assembly of the State

of U.P. against 138 members (34%), criminal cases are pending. Out of 138, against 72 members of the Legislative Assembly (18%), cases with

regard to heinous crime like murder, kidnapping, robbery, dacoity, extortion, rape and sale of minors etc are pending.

87. According to an Article published in ""Times of India"" dated September 2, 2011, written by Dipankar Gupta, the record of 15th Lok Sabha is

also not encouraging; rather it is a matter of deep concern for the civilised society. In 15th Lok Sabha, as many as 153 (162 according to author

report) MPs have criminal records, out of which, 74 of them are charged with serious offences like murder, abduction, misappropriation of public

fund etc.

Thus, the peoples'' representatives seem to have failed to check infiltration of persons having criminal record in the legislative bodies.

88. Coming to second limb of governance, the bureaucracy, where also things are not too good. It is of common knowledge that substantial

number of bureaucrats succumb to political pressure and do not tender correct advice to the Government resulting in loss of revenue,

misappropriation of public fund and abuse of power. Shri Bhaskar Ghose, an I.A.S. Officer who served for 36 years in the cadre has shown his

deep concern with regard to falling standards among the bureaucracy. He has written his autobiography in the name and title, ""SERVICE OF THE

STATE, THE IAS RECONSIDERED. Learned author observed as under:

A number of IAS officers have been charged with, even arrested for, corruption; and many, many more have taken to ways that are not, strictly

speaking, illegal but are repellent nonetheless-the ways of nepotism, of intrigue, of lobbying and cultivating the politically powerful to worm their

way up the administrative ladder. Krishnan and Somanathan have reported wryly on a ''formulation'' to which another officer, K. Ashok Vardhan

Shetty, has, according to the two, made a contribution. I cannot resist reproducing it in full:

In a sense, the IAS can be divided into three groups - the ''vives'' (those who are attached to one party), the ''nuns'' (officers who remain

unattached to any party), and the ''prostitutes'' (who attach themselves to whichever party is in power and switch when there is a change of

Government). The authors have been at pains to clarify that these terms are used metaphorically, to make an analytical point and should not be

misconstrued or misquoted, out of context.

Point taken, and the quotation is very much in context and has not been misconstrued; in case anyone has any doubts the metaphorical nature of

the terms is emphasized; after all, whoever heard of an IAS officer actually being a prostitute?

But this study, and others like it, have made the enquiry into the service and its relevance in the twenty-first century not just relevant, but urgent. If

India is to take its place in the world as an economic superpower it cannot be burdened with an administrative system that is controlled by one

group of officers, some of whom have been exposed as corrupt and many more known to be Courtiers and arch intriguers and lobbyists.

89. Learned author which concluding the book had placed on record his opinion with pain and sorrow. To quote:

It is true that there are a number of corrupt officers in the IAS, more than one would like to see, and it makes me-and I''m sure many, many other

IAS officers-ashamed and disgusted. One hopes they will be punished and driven out of the service. Apart from corruption, there are others who

openly practice nepotism, who manoeuvre to get themselves coveted postings, who cultivate people who they think will be useful to them in some

way at some time.

90. Another I.A.S. Officer Shri Radhey Shyam Agarwal while writing his autobiography, titled ""Inside Story of....Bureaucracy"" has given glimpse

of state of affairs of bureaucracy in U.P., in the following words:

As a matter of fact the new Minister wanted to shift the responsibilities on to me and would not like to be bothered by others. I had a lot of

difficulty in dealing with the union leaders who always had been putting forth their demands of promotion and transfer. Whenever they went to meet

the director, he always referred them to me. The actual fact was rather different. He would say something to me and would do something

otherwise.

91. Learned author (supra) while incapsuling his experience suggested to adopt remedial measures to maintain the intellectual integrity of political

bosses as well as that of the bureaucracy in the following words:

This is high time that one should give serious thoughts on how to maintain the intellectual integrity of political bosses as well as that of the

bureaucracy. It is for the political parties in the interest of the country, not to create a vicious circle by exploiting the bureaucracy in their own

interest. Let the bureaucracy work with impartial mind and if anybody amongst them is found corrupt or having a partisan attitude such a

bureaucrat must be given punishment. At the same time the members of the Legislative Assembly and Members of the Parliament should not be

allowed to interfere in the affairs of transfers and postings and day-to-day administration. Since we have not been able to implement the policies of

Government in the true sense, nor have we developed a proper work culture, there is an adjustment gap which needs to be filled in a reasonable

way.

92. Shri Vinod Rai, Comptroller and Auditor General of India while giving a lecture on 11th October, 2011 at Sardar Vallabhbhai Patel National

Police Academy in Hyderabad had shown his deep concern to the succumbing bureaucracy indulged in corruption in different forms of

malpractices giving way to political system to be more corrupt and whimsical. It shall be appropriate to quote relevant portion of the opinion

expressed by Shri Vinod Rai, Comptroller and Auditor General of India as published in the newspaper, ""Hindu"" of 13th October, 2011:

That governance is at its lowest ebb. That the morale of the civil servants is low. That credibility of the Government is at its lowest. That decision-

making has become a casualty. Second: That this situation is deleterious for the nation. That too much is at stake for too many in such a situation.

Third: On you and officers of the All India Services, among others, rests the onus to remedy the situation.....

Today, we are facing a testing time in the history of our nation. The quality of governance is below par. There has been an erosion of people''s faith

in Government. Their confidence in public institutions has declined. National trust in the bureaucracy, including the police force has collapsed. The

integrity and professionalism of civil servants are being questioned. This has brought the credibility of the Government to the lowest since

Independence.

.....Most of us would not be able to convince ourselves that we are capable of being part of a legacy which provided this nation the

foundations on which the edifice of good governance stood. And that is where the greatest challenge to the police force lies today, when the moral

fabric of the nation seems to be tearing apart in the absence of an optimal governance system, characterised by a near total absence of

accountability; where loyalty takes precedence over the sense of one''s duty, and where national interests are often, and with impunity, subjugated

to individual gains.

93. While discussing the fall of political system and bureaucracy, the Times of India, Lucknow dated 17.10.2011 remarked, ""The steel framework

is cracking - bending under the weight of people''s expectations and being pulled down by the political class. The IAS and IPS officers themselves

are caught in a debilitating dilemma as governance, in the words of Vinod Rai, ""touches a new low"".

94. After considering number of instances with regard to evil or persecuted bureaucracy, the reporter (supra) considering the plight of certain

honest upright officers observed, to quote:

It''s an evil throughout the country. Ruling parties do post people arbitrarily, without merit. It''s done to subjugate the bureaucracy into toeing a

certain line,: says TSR Subramanian, former cabinet secretary of India. But, says Subramanian, the bureaucrats should voice their concerns within

the bounds of service rules. ""Done in that manner, the service rules protect you and provide immense immunity.

But others blame bureaucrats themselves for their plight as they have not learnt to say ""no"" to their political masters. ""The message should be loud

and clear that reshufflings would not help matters,"" says a Maharashtra cadre IPS officer, giving the example of a fiercely independent cadre-mate,

then Nasik IG B D Mishra, who had to be reinstated because of public pressure after he was shunted out for acting against some local

heavyweights.

The reporter while considering the plight of honest officers quoted the comments of some bureaucrats and remarked, to quote:

While an officer may lower his own expectations, he may not always have the luxury of ignoring people''s expectations. Nor can he afford to

antagonize the political class. To maintain that difficult balance, while some seek central deputation, others go on unending sabbaticals. Yet others,

like a 1985-batch Bihar-cadre IPS officer, plead to the Government that instead of all the harassment they just be declared insane.

(Extract from The Times of India, Lucknow, Monday, October 17, 2011).

95. India is a multi-lingual country with thousands of castes, communities and sects. In such a scenario strict enforcement of constitutional spirit and

law is necessary to secure the public good. A little gallery may result with unfortunate consequences in due course of time. Supreme Court of India

has noted in the case of Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, how the prosecuting agency abused and

misused its powers during the course of trial to save the culprits involved in Gujarat riot. One instance is sufficient to secure the intent and purpose

of Section 25A of CrPC and international convention. The prosecution branch must be independent and thus, the opinion of District Judge in the

matters of District Government Counsels, seems to be and is inevitable. The opinion of District Judge must continue with primacy over the opinion

of District Magistrate and executive.

IV- HISTORICAL BACKGROUND AND

LAW COMMISSION REPORTS AND ITS

IMPORTANCE

96. India attained freedom with the advent of new Constitution from 26.1.1950. Right from the beginning, Indian law framers, different law

commissions and higher judiciary as well as the members of bars were in effective discussion to streamline the criminal prosecution by independent

prosecuting agency. The law Commission as first constituted, presented its report on 26.9.1958. In the 14th Report of Law Commission (1958), it

has been suggested as under:

Suggested remedial measure--We therefore, suggest that as a first step towards improvement, the prosecuting agency should be completely

separated from the Police Department. In every district, a separate Prosecution Department may be constituted and placed in charge of an official

who may be called a ''Director of Public Prosecutors''. The entire prosecution machinery in the District should be under his control. In order to

ensure that he is not regarded as a part of the Police Department, he should be an independent official directly responsible to the State

Government. The departments of the machinery of criminal justice, namely, the Investigation Department and the Prosecuting Department should

thus be completely separated from each other.

There have also been recommendations by the National Police commission in its 4th Report and also in the 154th Report of the Law Commission

(1996) that there should be a prosecution system under the control of an independent Director of Prosecution.

97. The Law Commission recommended for independent prosecuting agency. The Commission was asked by the Central Government to

undertake the detail examination of the Code of Criminal Procedure, 1898. Thereafter the Law Commission submitted a very comprehensive

report on 19.2.1968 on Section 1 to 176 of the Code, The Commission was again reconstituted in 1968 and undergone detail study of Code of

Criminal Procedure. The Commission made a detailed study of the Code, met judges and representative of the various Bar Associations in

different parts of the country, received opinions. The Law Commission submitted its detailed 41st Report in September, 1969. After considering

the exhaustive report of Law Commission, the draft Bill, Bill No. XLI of 1970 was introduced and finally it has seen the light of the day in the form

of Criminal Procedure Code, 1973.

98. While submitting 41st Report, the Law Commission of India considered Section 492 of Code of Criminal Procedure as existing under the old

provisions of Code of Criminal Procedure. The Law Commission opined that appointment of Public Prosecutors should be made after obtaining

the recommendation from the High Court. Chapter 38 of 41st Report of Law Commission relates to appointment of Public Prosecutors. It shall be

appropriate to reproduce the Paras 38.2 and 38.3 of the Report as under:

38.2. Existing prosecuting agency in the district--In practice, however, there is in every district an officer appointed by the State Government who

is designated the Public Prosecutor and who, with the assistance of one or more additional Public Prosecutors, conducts all prosecutions on behalf

of the Government in the Court of Sessions. These senior Public Prosecutors are under the general control of the District Magistrate. Prosecution

in the magisterial Courts is, generally speaking, in the hands of either the police officers or of persons recruited from the bar and styled Police

Prosecutors or Assistant Public Prosecutors all of whom work under the directions of the Police Department.

38.3 Section 492--In an earlier Chapter 1, we have recommended that in every district a separate prosecution department should be constituted

and placed in charge of a Director of Public Prosecutions, or, if this is not considered feasible, of the Public Prosecutor of the district who should

be given a greater authority, a higher status and a wider range of functions than he has at present, and approximating to those envisaged for the

Director. Now, section 492 provides for the appointment of several Public Prosecutors in a district all of whom can apparently function at the

same time. No qualifications are laid down in the law for a Public Prosecutor and the Government is empowered to appoint any one it likes to be a

Public Prosecutor. We think that the Code should provide a better frame-work for organising the prosecuting agencies in the district in a

systematic way, and for this purpose, we propose the following two sections in place of section 492:

[1. See paras 18.24 and 18.25 above)]

492. Appointment of Public Prosecutor.--(1) For every district the State Government shall appoint a Public Prosecutor. It may also appoint one or

more additional Public Prosecutors for the district.

(2) A person shall only be eligible to be appointed a Public Prosecutor or Additional Public Prosecutor under sub-section (1) if he has been for not

less than seven years an advocate and is recommended by a High Court for appointment. 2

[2. (Cf. Article 233 (2) of the Constitution)]

(3) The Central Government or the State Government may appoint, for the purpose of any case or class of cases, an advocate of not less than ten

years" standing as a Special Public Prosecutor.

492A. Appointment of Assistant Public Prosecutors.--(1) The State Government shall appoint in every district one or more Assistant Public

Prosecutors for conducting prosecution in the Courts of Magistrates.

(2) No police-officer shall be eligible to be appointed as Assistant Public Prosecutor under sub-section (1).

(3) Where no Assistant Public Prosecutor appointed under sub-section (1) is available for the purposes of any particular case, the District

Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

Provided that a police-officer shall not be so appointed--

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector.

The Public Prosecutors appointed u/s 492 will ordinarily conduct cases on behalf of Government in the Sessions Court, while the Assistant Public

Prosecutors appointed u/s 492A will be for conducting cases in the Courts of Magistrates. Although it is not expressly provided in the latter section

that Assistant Public Prosecutors should be legally qualified, we have no doubt that the present trend of appointment, as far as possible, qualified

legal practitioners as Assistant Public Prosecutors or Police Prosecutors or Police Prosecutors will be maintained in all States and the provision

made in sub-section (3) above (corresponding to sub-section (2) of section 492) will be restored to less and less in future years.

99. It appears that the Parliament to its wisdom has substituted District Judge in place of High Court while enacting Section 24 of the code of

Criminal Procedure. The Law commission of India in its 154th Report on Code of Criminal Procedure, 1973 (in Chapter III, para 15) relied upon

the judgment of Kerala High Court in Babu Vs. State of Kerala, and held that prosecutors have duties to the State, to the public, to the Court and

to the accused and, therefore, they have to be fair and objective while discharging their duties. To quote, relevant portion of the report of the Law

Commission:

Public Prosecutors are really Ministers of Justice whose job is none other than assisting the State in the administration of justice. They are not

representatives of any party. Their job is to assist the Court by placing before the Court all relevant aspects of the case. They are not there to see

the innocent sent to the gallows; they are also not there to see the culprits escape conviction.

''Public Prosecutor'' is defined in some countries as a ""public authority who, on behalf of society and in the public interest, ensures the application

of the law where the breach of the law carries a criminal sanction and who takes into account both the rights of the individual and the necessary

effectiveness of the criminal justice system.

Prosecutors have duties to the State, to the public, to the Court and to the accused and, therefore, they have to be fair and objective while

discharging their duties.

100. The Law Commission (supra) also observed that the Government should en-sure that the Public Prosecutors are independent of the

executive, to reproduce relevant portion:

Public Prosecutor must act on his own independent of Executive influence.

The Government should ensure that public prosecutors are independent of the executive, and are able to perform their professional duties and

responsibilities without interference or unjustified exposure to civil, penal or other liability. However, the public prosecutor should account

periodically and publicly for his official activities as a whole. Public Prosecutors must be in a position to prosecute without influence or obstruction

by the executive or public officials for offences committed by such persons, particularly corruption, misuse of power, violations of human rights etc.

Even in regard to withdrawal of prosecutions u/s 321 of the code of Criminal Procedure, 1973, the Supreme Court has pointed out in Balwant

Singh and Others Vs. State of Bihar, that it is the statutory responsibility of the public prosecutor alone to apply his mind and decide about

withdrawal of prosecution and this power is non-negotiable and cannot be bartered away in favour of those who may be above him on the

administrative side. In Subhash Chander Vs. State (Chandigarh Administration) and Others, the Supreme Court stated that it is the public

prosecutor alone and not any other executive authority that decide withdrawal of prosecution. Consent will be given by the Public Prosecutor only

if public justice in the larger sense is promoted rather than subverted by such withdrawal. In doing so, he acts as a limb of the judicial process, and

not as an extension of the executive. He has to decide about withdrawal by himself, even where displeasure may affect his continuance in office.

None can compel him to withdraw a case. The public prosecutor is an officer of the Court and is responsible to the Court. These principles were

reaffirmed by the Constitution Bench in the second case going by the citation, Sheonandan Paswan Vs. State of Bihar and Others, .

101. While sending the report with regard to public prosecutors, the Law Commission of India in its 197th Report, summarized its

recommendation in the following words, to quote:

Summary

Therefore, the Public Prosecutor has to be independent of the executive and all external influences, also independent of the police and the

investigation process. He cannot advice the police in the matters relating to investigation. He is independent of Executive interference. He is

independent from the Court but has duties to the Court. He is in charge of the trial, appeal and other processes in Court. He is, in fact, a limb of

the judicial process, officer of Court and a minister of justice assisting the Court. He has duties not only to the State and to the public to bring

criminals to justice according to the rule of law but also duties to the accused so that innocent persons are not convicted.

Therefore, any scheme of appointment Pps/Addl. Pps, as well as Asstt. Pps, must result in the creation of an independent body of prosecuting

officers, free from the executive and all external influences, free from police and must be able to enforce the rule of law without fear or favour,

advance public interest in punishing the guilty and protecting the innocent.

102. Not only the Law Commission of India but the Law Commission of U.P. has also shown its deep concern to the falling standard of

prosecuting branch of State of U.P. The observation made by the Law commission of U.P., shows the mental pain and agony of a judge against

arbitrary use of power by the State Government in appointing the District Government Counsels. The Law Commission of U.P. noted that how the

Government under the garb of LR manual, works under the political compulsion to appoint the District Government Counsels for political

consideration. It shall be appropriate to reproduce the relevant portion of 12th Report of Law Commission of U.P., submitted in December, 2001

as under:

.....Reference may also be made to the series of Ordinances, each called the U.P. Government Litigation (Engagement of Counsel) Ordinance.

The Ordinances which were promulgated between 10th January, 1991 and 18th May, 1992 were as follows, each succeeding Ordinance

replacing the previous one:

These Ordinances related to appointment of counsel engaged to represent the State Government or any of its officers in any litigation before the

Supreme Court, High Court or any other Court, Civil or Criminal. They all provided that the Government will be engaging counsel on professional

basis. The engagement would be purely of trust and confidence and a person engaged will not be deemed to be holder of any civil post or office.

The engagement shall ordinarily be for a term not exceeding three years but may be terminated at any time by one month''s notice on either side or

on payment of an amount equal to the retainer fee for one month. The Government will be free to engage such number of counsel as it may

consider necessary. The Ordinance will override any judgment, decree, writ or order of any Court or rules, notification or executive instruction

passed or made before January 18, 1991. In other words the Legal Remembrancer''s Manual was to stand over-ridden, and the effect of the

judgment of the Supreme Court in Shrilekha Vidyarthi''s case was to be indirectly nullified.

These successive Ordinances had to be issued because none of them could be replaced by an Act of Legislature within the time frame laid down in

Article 213 of the Constitution. Ultimately the last of them also lapsed and could never be replaced by an Act due to intervention of the President''s

rule in December, 1992.

Although these Ordinances were allowed to lapse their object was achieved by U.P. Act No. 18 of 1991, the Code of Criminal Procedure (U.P.

Amendment) Act, by which section 24 was amended. Under these amendments the requirement, in sub-section (1), of consultation with the High

Court for appointment of Government Advocates and Addl. Govt. Advocates in the High Court was dispensed with. Similarly sub-sections (4),

(5) and (6) were deleted, with the result that neither the District Magistrate nor the Sessions Judge need be involved in the process of selection of

District Govt. Counsel (Crl) and Addl. D.G.C. (Cr.). Thus Vidyarthi"s case stands effectively nullified, and the ruling in State of U.P. and others

Vs. U.P. State Law Officers Association and others, supra, should apply to all such appointments as well as, giving legal sanction to the ""Spoils

System.

According to a newspaper report dated 1. December, 2000 (vide Hindi daily Jagaran dated 2.12.2000) a public interest litigation filed in the High

Court before a Bench consisting of Hon"ble Justices Raza and Nigam questions the justification for excessive appointments of State counsel.

According to the petitioner the number of State counsel at present attached to the Lucknow Behch of the High Court is as follows:

It is further stated that the Advocate General was not consulted in making these appointments and the appointments were decided upon in a

meeting comprising only the Principal Legal Remembrancer and the Chief Standing Counsel. Even sufficient place is not available for seating these

State lawyers in the High Court. Nor do they have any adequate staff to assist them. The report further states that according to the counsel for

Government it was purely discretionary with the State Government whether to consult the Advocate General in making these appointments or not

and that the matter of appointment was wholly in the discretion of the Government and that the writ petition was not maintainable.

We are not concerned here with what the Hon"ble Court decides on this PIL Writ petition. What is noteworthy here is the plethora of lawyers

appointed for the Lucknow Bench. The total comes to 109 lawyers for a Bench having only fifteen Court rooms.

Every time a new Ministry is formed there is pressures for change of Government lawyers. It is not only when the new Ministry belongs to a

different political party. Often, even within the same Council of Ministers a change of portfolios leads to change of lawyers or appointment of extra

lawyers.

These facts are only illustrative of the increasing politicisation of appointments of public prosecutors and other State counsel. For this state of affairs

no single political party can be blamed. Actually, it is the continuing political instability which compels the Ministers to try to appease the maximum

number of Legislators, necessitating distribution of favours in the shape of such appointments. (Another area of special interest to legislators is the

transfers and postings of police officers and district magistrates, which is another cause for the deteriorating law and order situation). It is inevitable

in such circumstances that quality and merit will be sacrificed, the Spoils System having full play. This factor also adds to insecurity of tenure.

Such being the ground realities, the situation can be remedied only by Central Legislation as any suggestion at the level of this Commission is bound

to be rejected by the State Government. Even if there is no Central legislation then possibly the Supreme Court or the High Court may try to

remedy the situation through PIL directives as was done in the case of appointments to the posts of Director, CBI and the Chief Vigilance

Commissioner at the Centre. Accordingly this Commission is not making any recommendation in regard to the amendment of sections 24 and 25

and will prefer to leave the matter to the Government of India or to the judiciary for taking steps for suitably streamlining the public prosecutions

system.

103. In view of the above, it is obvious that the impugned amendment has been done contrary to the original ground reasons and report of Laws

Commission to incorporate the impugned provisions contained in Section 24 of Code of Criminal Procedure, 1973. The provisions contained in

Section 24 was in conformity with the report of Law Commission to make prosecuting branch independent. While submitting 197th Report, the

ham Commission, of India has taken note of earlier judgment of Hon''ble Supreme Court in Union of India (UOI) and Others Vs. Sushil Kumar

Modi and Others, ; whereby, their lordship of Hon''ble Supreme Court held that the prosecutors should be independent of the executive and they

should not be subjected to orders of Secretary of the State. The executive cannot be permitted to step into the jurisdiction of prosecuting agency

as it is for the prosecuting agency to decide who is to be prosecuted and who is not Law Commission further taken note of the judgment of

Hon''ble Supreme Court in R. Sarala Vs. T.S. Velu and Others, ; whereby, their lordship ruled that role of Public Prosecutor inside the Court and

role of investigation outside the Court, Public Prosecutor is the officer of the Court and cannot be involved in investigation. Law Commission

opined that consultation with the District Judge is a must in the matter of preparation of panel of lawyers, to quote, relevant portion:

Law regarding appointment of Public Prosecutor will violate Article 14 if it permits arbitrary appointment without proper checks.

The provision in section 24 (4) that the District Magistrate must consult the Sessions Judge in the matter of preparation of a panel of lawyers for

appointment as Public Prosecutors or Addl. Public Prosecutors is an essential check on arbitrary appointments. The Sessions Judge who has

knowledge of the caliber, experience and character of lawyers practising in the Sessions Courts is well suited to suggest the best names of lawyers

so that the interests of prosecution, the interests of the accused are fully taken care of. This being the logic behind the provision for consultation,

any amendment by the States deleting the check on arbitrary appointments of Public Prosecutors, will be violative of Article 14 of the Constitution.

The fundamental point--which has to be remembered--is that any law made by the Centre or State Legislature in regard to appointment of Public

Prosecutors must conform to the principles governing administration of criminal justice in which the Public Prosecutor has an independent and

special role as stated in Chapter II. Inasmuch as the Public Prosecutor is a ''limb of the judicial process'' and ''an officer of Court'' as stated by the

Supreme Court (see Chapter II), any method of appointment which sacrifices the quality of the prosecution or which enables State Governments

to make appointments at their choice without proper screening, proper assessment of the qualifications, experience or integrity of the individuals,

be they the Public Prosecutors selected from the Bar or appointed from among the Prosecuting Officers, will not stand the test of non-arbitrariness

under Article 14 of the Constitution of India. The scheme must provide for appointing Public Prosecutors who shall bear all the qualities mentioned

in Chapter II.

As pointed by the Supreme Court, Public Prosecutor''s functions are inside the Criminal Courts, Pps/Addl. Pps deal with the cases of highest

importance in the Sessions Courts which try persons accused of murder and other serious offences. The Judiciary--namely the Sessions Court and

the High Court--have a stake in the appointment of these officers. Inefficiency or lack of integrity on the part of the Public Prosecutors not only

affects society but may also reflect sadly on the judicial system. That is why, in the matter of appointment of these officers from the Bar as well as

appointments from the Cadre, there must be adequate safeguards precluding arbitrary appointments by the Executive. Any scheme which permits

arbitrary appointments without checks will be in violation of Article 14 of the Constitution.

104. Law Commission of India further taken note of judgment of Hon''ble Supreme Court in S.B. Shahane and others Vs. State of Maharashtra

and another, ; whereby, Hon''ble Supreme Court held that Assistant Prosecuting Officers could not be allowed to function under the control of

Head of Police Department. Thus, the consistent opinion of Law Commission followed by Judgment of Hon''ble Supreme Court is that the State

Government cannot be given unfettered discretion to make appointment on the post of District Government Counsels.

105. In view of above impugned amendment is contrary to the report of Law Commission submit to Government from time to time.

V-IMPORTANCE OF LAW COMMISSION

REPORT

106. Law Commission Reports have been vehemently relied upon by the learned counsel for the petitioners to support their contention that the

State Amendment of 1991 is against the aims and object of the 1973 Act and the report of the Law Commission. It is further submitted that the

Law Commission has also recommended to restore the earlier provision and make it compulsory to obtain the opinion of the District Judge for

appointment on the post of District Government Counsel. Attention has also been invited to the report of the State Law Commission observing the

State action to substitute Section 24 by Amending Act as arbitrary exercise of power. The question cropped up whether the Law Commission

Reports may be relied upon while recording a finding with regard to the controversy in question.

107. Hon''ble Supreme Court in a case in Mobarik Ali Ahmed Vs. The State of Bombay, held that through the report of the Law Commission will

be valuable as a matter of history but it may not be legitimate guide for construction of a statutory provision. The construction may be based on the

meaning of the words used to be gathered accordingly to ordinary rules of interpretation and in consonance with the generally accepted principle.

108. In Bachan Singh Vs. State of Punjab, ; their Lordships of Hon''ble Supreme Court while considering the validity of death penalty in India

considered the report of the Law Commission of India and while considering the 35th Report of 1967 submitted by the Law Commission of India

upheld the validity of the death penalty.

109. In a case in S.P. Gupta Vs. President of India and Others, ; their Lordships held that the report of the Committee of the Law Commission are

entitled to great respect as they are prepared by experienced persons after taking into consideration all relevant aspects and sometime the evidence

collected by them from several sources. The reports of the Law Commission can be looked into to understand the history of the legislation, the

object with which certain legal provisions were enacted and what advantage may be derived by adopting a particular policy. The Report of the

Law Commission has been used by the Supreme Court to understand the history of legislation which was under consideration and the object with

which it was passed.

110. In a case in Mithilesh Kumar and Another Vs. Prem Behari Khare, Hon''ble supreme Court held that where particular enactment or

amendment is the result of the recommendation of the Law Commission of India, it may be permissible to refer to relevant report. Their Lordships

relied upon the earlier judgment in Santa Singh Vs. The State of Punjab, where Hon''ble Supreme Court of India relied upon the Law Commission

Reports with regard to Benami transactions. It was in pursuance to the report of the Law Commission that Benami Transactions (Prohibition of

Right to Recover Property) Ordinance, 1988 was promulgated. Their Lordships of Hon''ble Supreme Court held that the Report of the Law

Commission may be referred to as external aid to construction of the statutory provisions. To quote:

15.....Is it permissible to refer to the Law Commission''s Report to ascertain the legislative intent behind the provision? We are of the

view that where a particular enactment or amendment is the result of recommendation of the Law Commission of India, it may be permissible to

refer to the relevant report as in this case. What importance can be given to it will depend on the facts and circumstances of each case.

19.....Law Commission''s Reports may be referred to as external aid to construction of the provisions.....

111. In a case in R.K. Jain Vs. Union of India and Others, ; their Lordships of Hon''ble Supreme Court held that a sound justice delivery system is

a sine qua non for the efficient governance of a country wedded to the rule of law. An independent and impartial justice delivery system in which

the litigating public has faith and confidence alone can deliver the goods. Hon''ble Supreme Court requested the Law Commission to undertake for

a comprehensive look to improve the functioning of the tribunals.

112. In a case in All India Judges'' Association and Others Vs. Union of India and Others, ; their Lordships of Hon''ble Supreme Court has taken

with pain that the Law Commission Recommendation of 1958 has not been implemented with regard to services of subordinate judiciary with

regard to pay-scale and streamline service conditions. Hon''ble Supreme Court held that the Court has ample power to issue directions to

implement the Law Commission Reports in the event of failure on the part of the executive legislatures to fulfil their obligation. Their Lordships

turned down the argument of the State that such direction bypassed the constitutionally permissible modes for change in the law. To quote relevant

portion:

12. However, it cannot be contended that pending such essential reforms, the overdue demands, of the judiciary can be overlooked. As early as in

1958, the Law Commission of India in its Fourteenth Report on the System of Judicial Administration in this country made certain

recommendations to improve the system. The Commission lamented that ""though we have been pouring money into a number of activities, the

administration of justice has not seemed to be of enough importance to deserve more financial assistance. On the contrary, in a number of States

not only had the administration of justice been starved so as to affect its efficiency, but it has also been made to yield revenue to the State."" The

report made recommendations in respect of various aspects of the service conditions of the judicial officers and also emphasised that there was no

connection between the service conditions of the judiciary and those of the other services. The report further pointed out the salient features of the

distinct work of the judges and emphasised the need among others, to increase the salaries and the superannuation age of the Judges as well as to

improve the other facilities available to them including the provision for official residential accommodation.

13. These recommendations were made to improve the system of justice and thereby to improve the content and quality of justice administered by

the Courts. The recommendations were made in the year 1958. Over the years the circumstances which impelled the said recommendations have

undergone a metamorphosis. Instead of improving, they have deteriorated making it necessary to update and better them to meet the need of the

present times.

14. Although the report made the recommendations in question to further the implementation of the Constitutional mandate to make proper justice

available to the people, the mandate has been consistently ignored both by the executive and the legislature by neglecting to improve the service

conditions. By giving the directions in question, this Court has only called upon the executive and the legislature to implement their imperative

duties. The Courts do issue directions to the authorities to perform their obligatory duties whenever there is a failure on their part to discharge

them. The power to issue such mandates in proper cases belongs to the Courts. As has been pointed out in the judgment under review, this Court

was impelled to issue the said directions firstly because the executive and the legislature had failed in their obligations in that behalf. Secondly, the

judiciary in this country is a unified institution judicially though not administratively. Hence uniform designations and hierarchy, with uniform service

conditions are unavoidable necessary consequences. The further direction given, therefore, should not be looked upon as an encroachment on the

powers of the executive and the legislature to determine the service conditions of the judiciary. They are directions to perform the along overdue

obligatory duties.

15. The contention that the directions of this Court supplant and by-pass the constitutionally permissible modes for change in law, we thinks, wears

thin if the true nature and character of the directions are realised. The directions are essentially for the evolvement of an appropriate national policy

by the Government in regard to the judiciary''s condition. The directions issued are mere aids and incidental to and supplemental of the main

direction and as a transitional measure till a comprehensive national policy is evolved. These directions, to the extent they go, are both reasonable

and necessary.

113. The aforesaid proposition has been reiterated by Hon''ble Supreme Court in the case in Supreme Court Advocates on Supreme Court

Advocates-on-Record Association and another Vs. Union of India,

114. In the case in Rameshwar Prasad and Others Vs. Union of India (UOI) and Another, while considering the matter with regard to appointment

of Governor, their Lordships of Hon''ble Supreme Court noted the factual position that Raj Bhawans are increasingly turning into extensions of

party offices and the Governors are behaving like party functionaries of a particular party. Hon''ble Supreme Court relied upon the Sarkariya

Commission''s Report and noted that the Governors were not displaying the qualities of impartiality expected of them. Their Lordships held that it

has become imperative and necessary that right persons are chosen as Governor for the maintenance of sanctity of post. Hon''ble Supreme Court

has taken into account the opinion expressed by Sarkaria Commission and National Commission to review working of the Constitution in the

matter of appointment of Governors while expressing its views.

115. In a case in U.P. Cooperative Federation Ltd. Vs. Three Circles, , Hon''ble Supreme Court has relied upon the 55th Report of the Law

Commission, 1973 and held that in a lengthy litigation proceeding, there is no infirmity in awarding interest on costs while awarding damages for

wrongful retention of money.

116. In a case in Centrotrade Minerals and Metal Inc. Vs. Hindustan Copper Limited, , Hon''ble Supreme Court relied upon 176th Report of the

Law Commission of India while considering the autonomy with regard to arbitration under Arbitration Act.

117. In G. Sekar Vs. Geetha and Others, Hon''ble Supreme Court relied upon the 174th Report of the Law Commission and the statement of

object and reasons while considering the validity of Hindu Succession (Amendment) Act, 2005, meant for removal of discrimination and conferring

an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family by removing the bar u/s 23 of the Hindu

Succession Act, 1956.

118. Thus, from the catena of judgments (supra), there appears to be no dispute that the Law Commission Reports are not only persuasive but we

may take into account while interpreting statutory provisions or considering the validity of the Act or the amendment done therein and in

appropriate case, in larger public interest, the Court may pass appropriate order or direction and may also declare a law as unconstitutional and

invalid at the touch stone of Articles 14, 16 and 21 of the Constitution of India.

VI- OBJECT AND REASONS

119. U.P. Act No. 18 of 1991 by which the impugned amendment has been made deleting sub-sections (4), (5) and (6) of Section 24 of Code of

Criminal Procedure as well as the consultation process with High Court given in sub-section (1), provides that the impugned amendment was done

to avoid delay in appointment of Public Prosecutors and Additional Public Prosecutors and to select a person of choice, to reproduce relevant

portion as under:

An Act further to amend the Code of Criminal Procedure, 1973 in its application to Uttar Pradesh.

It is hereby enacted in the Forty-second Year of the Republic of India as follows:

Prefatory Note--Statement of Objects and Reasons--With a view to avoiding delay in the appointment of Public Prosecutor and Additional Public

Prosecutors in the High Court and in the Session Courts of various district in the State and enabling the State Government to appoint such Public

Prosecutors of its choice, it was decided to amend Section 24 of the Code of Criminal Procedure, 1973 in its application to Uttar Pradesh to

delete the necessity of consultation with the High Court for the appointment of Public Prosecutor in the High Court and preparation of panel of

names by the District Magistrates for appointment of Public Prosecutors and Additional Public Prosecutors in the Districts.

2. It was also decided to amend Section 321 of the said Code to make it obligatory for the Public Prosecutor to obtain the written permission of

the State Government before moving an application for withdrawal of a criminal case.

3. Since the State Legislature was not in session and immediate legislative action in the matter was necessary, the Code of Criminal Procedure

(Uttar Pradesh Amendment) Ordinance, 1991 (U.P. Ordinance No. 18 of 1991), was promulgated by the Governor on February 16, 1991, after

obtaining the instructions of the President.

4. This Bill is introduced to replace the aforesaid Ordinance.

120. To keep pace with time, higher judiciary of various democratic countries of the world, are evolving new principles to enforce constitutionalism

and rule of law in their respective countries. One of the recent principle of law is not only the Constitution but law or statutory law is also organic

body.

121. In the book ""Statutory Interpretation"" by Benian, it has been dealt with and held that in case legislators do not make amendment in the

statutory provisions causing stagnation and making the law redundant and detrimental to public good, then Court has got ample powers to interpret

the statute in such a way necessary to meet the requirement of time. The principle has been applied by the Division Bench of this Court (of which

one of us Hon''ble Mr. Justice Devi Prasad Singh) was a member) in the case in Vishwanath Chaturvedi Vs. Union of India (UOI) and Others,

122. Now, according to newspaper report dated 24.11.2011 in Times of India, the political party in power, has legislators in substantial number,

involved in serious crime like rape, dacoity etc., to quote relevant portion from news item published in Times of India dated 24.11.2011:

Maurya is the tenth BSP MLA to be slapped with charges of rape in the present regime. Twelve other BSP MLAs and ministers facing charges of

land grabbing, murder, attempted murder and disproportionate assets.

123. Subject to hereinabove Prefatory Note containing the statement of Code and reason, Section 2 of amended sub-sections (4), (5) and (6),

from sub-section (1) the consultation with High Court has been omitted alongwith sub-sections (4), (5), (6). From sub-section (7) word, ""all sub-

section (6)"", has also been omitted.

124. Sri Manoj Goyal, learned Senior Counsel has vehemently argued that the aims and object of the amending Act is based on unfounded

ground. Hence, consequential amendment done, suffers from void of arbitrariness and hit by Article 14 of the Constitution of India.

125. Question with regard to aims and object, and prefatory note appended with the amending Act, has been held to be relevant for the purpose

of adjudicating the related controversy.

126. Privy Council in Emperor v. Benoari Lal, 1913 PC 36, held that the history of legislation and the facts which give rise to the enactment may

usefully be employed to interpret the meaning of the statute, though they do not afford a conclusive argument.

127. In a case in M.K. Ranganathan and Another Vs. Government of Madras and Others, Hon''ble Supreme Court observed that though the

Statement of Objects and Reasons is not admissible as an aid to the construction of a statute but it can be referred to for the limited purpose of

ascertaining the conditions prevailing at the time which actuated the sponsor of the bill to introduce the same and the extent and urgency of the evil

which he sought to remedy.

128. In Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others, , their Lordships of Hon''ble Supreme Court

held that when the terms of statute are ambiguous or vague, the statement of Objects and reasons may be resorted for the purpose of arriving at

true intention of the legislature.

129. In S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others, Hon''ble Supreme Court

held that the Statement of Objects and Reasons may be referred for the purpose of ascertaining the circumstances which led to the legislation in

order to find out what was the mischief which the legislation sought to remove is aimed at.

130. In State of West Bengal Vs. Union of India, Hon''ble Supreme Court observed that the statement of Objects and Reasons may be used for

limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation.

131. Same principle has been reiterated in A.C. Sharma Vs. Delhi Administration, .

132. In Kameshwar Singh Srivastava Vs. IV Addl. District Judge, Lucknow and Others, Hon''ble Supreme Court has widened the scope of

object and reasons and observed that the Court may strive to so interpret the statute as to protect and advance the object and purpose of the

enactment. Any narrow or technical interpretation of the provisions would defeat the legislative policy. The Courts must therefore, keep the

legislative policy in mind in applying the provisions of the Act to the facts of the case.

133. In R.S. Nayak Vs. A.R. Antulay, , while considering the purpose of Prevention of Corruption Act, 1947 and mode of construing a provision

of the Act, their Lordships observed that the purpose of Act is to make more effective provisions for prevention of bribery and corruption. To

quote:

18. The 1947 Act was enacted, as its long title shows, to make more effective provision for the prevention of bribery and corruption. Indisputably,

therefore, the provisions of the Act must receive such construction at the hands of the Court as would advance the object and purpose underlying

the Act and at any rate not defeat it..... The question of construction arises only in the event of an ambiguity or the plain meaning of the words

used in the statute would be self-defeating. The Court is entitled to ascertain the intention of the legislature to remove the ambiguity by construing

the provision of the statute as a whole keeping in view what was the mischief when the statute was enacted and to remove which the legislature

enacted the statute. This rule of construction is so universally accepted that it need not be supported by precedents. Adopting this rule of

construction, whenever a question of construction arises upon ambiguity or where two views are possible of 47 a provision, it would be the duty of

the Court to adopt that construction which would advance the object underlying the Act, namely, to make effective provision for the prevention of

bribery and corruption and at any rate not defeat it.

134. In a case in Girdhari Lal and Sons Vs. Balbir Nath Mathur and Others, , Hon''ble Supreme Court observed that while interpreting the

statutory provisions, the Court has to ascertain the intention of the legislature, actual or imputed and the Court must strive to interpret the statute as

to promote and advance the object and purpose of the enactment. To reproduce relevant portion, to quote:

9. So we see that the primary and foremost task of a Court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed.

Having ascertained the intention, the Court must then strive to so interpret the statute as to promote or advance the object and purpose of the

enactment. For this purpose, where necessary the Court may even depart from the rule that plain words should be interpreted according to their

plain meaning. There need be no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to

avoid invalidation of a law, the Court would be well justified in departing from the so-called golden rule of construction so as to give effect to the

object and purpose of the enactment by supplementing, the written word if necessary.

135. Hon''ble Supreme Court in a case in State v. Govindan Thampi Bhaskaran Thampi, AIR 1957 SC 29, observed that resort to the history of

the legislation to construe the meaning of any provisions therein is more often taken exception to than not. At the same time it is common

knowledge that when the words of a statute are ambiguous, attempts are not infrequently made to ascertain their true meaning by reference to the

state of the law at the time the statute was passed, the mischief sought to be avoided and the stages through which the concerned legislation

passed.

136. Allahabad High Court in a case Kunwar Murli Manohar Vs. State of Uttar Pradesh and Others, observed that in the interpretation of a

statute, the history of the legislation and the surrounding circumstances which existed at the time and demanded a change of law or the enactment

of a new one, can all be taken into consideration.

137. A Full Bench of Patna High Court in a case in 1993 CriLJ 3246 on a reference made by Ravinandan Sahai, Sessions Judge, Patna held that

while interpreting the Prevention of Corruption Act, 1988, the legislative history of object and reasons though do not contain meaning of any

expression used in the statute but can be used for interpreting the meaning of the statute.

138. As stated by the petitioner''s counsel, the question cropped up whether the impugned amendment is based on nonexistence, unreal and

imaginary purpose and whether the power conferred on the State Government to make amendment under Article 246 of the constitution of India

has been exercised in the present context, arbitrary for imaginary purpose?

139. Hon''ble Supreme Court in the case in Indian Council of Legal Aid and Advice, etc. etc. Vs. Bar Council of India and another, ruled that the

cut off date fixed for registration of Advocate is without any reliable statistical or without material and, therefore, bad in law.

140. In the case in Sube Singh and Others Vs. State of Haryana and Others, their lordships ruled that classification of land in different categories

for the purpose of classification Act exemption found to be based on no material hence suffers from vice of arbitrariness.

141. In Kailash Chand Sharma Vs. State of Rajasthan and Others, Hon''ble Supreme Court ruled that preferential treatment given to rural

candidates for the post of teachers without there being any study or survey for the purpose, is unconstitutional.

142. In Dr. K. R. Lakshmanan Vs. State of Tamil Nadu and another, their lordships of Hon''ble Supreme Court found that object and reason and

preamble of the impugned Act was to provide for classification for the public purpose and approval of undertaking of Madras Race Club and for

matters connect therewith are incidental thereto. Their lordships found that Club does not contain or own any resource of the Committee and even

does not have any income from betting money except 5% commission hence the aims and object was imaginary and based on unfounded fact.

There is no nexus with the provisions of the Act connect with the object contained therein. Hence Hon''ble Supreme Court reversed the judgment

of High Court and restored the allotment of land.

143. In the case in Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc., the question cropped up before a Constitution

Bench of Hon''ble Supreme Court whereby the action of taking over the management of the three cotton Mills, was upheld. High Court declared

the acquisition unconstitutional. Their lordships held that legislature in modern State is actuated with some policy to curb some public evils or to

effectuate some public benefit. Their lordships relied upon the case of Madras Race Club (supra) and reaffirmed the proposition with regard to

supporting the material for object and reason while enacting a statute. It is different thing that in the said case material was found supporting the

aims and object, to quote relevant portion of Para 14 as under:

14. The Legislation in a modern State is actuated with some policy to curb some public evils or to effectuate some public benefit. The Legislation is

primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed

by use of general words to cover similar problems arising in future. But from the very nature of things, it is impossible to anticipate fully, the varied

situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite

reference are bound to be in many cases, lacking in clarity and precision, and thus giving rise to the controversial question of construction. Bearing

in mind the aforesaid general principles, let us now examine the five questions formulated earlier.

144. In Sarbananda Sonowal Vs. Union of India (UOI) and Another, Hon''ble Supreme Court had reiterated the settled proposition of law that

there must be a nexus with the objects sought to be achieved. If geographical consideration becomes the sole criterion completely overlooking the

other aspect of ""rational nexus with the policy and object of the Act"" [from Para 70 of Sarbananda Sonowal [Supra]].

145. Keeping in view the aforementioned broader principle with regard to aims and object, in case the impugned amendment is referred weighing

its constitutional validity, it seems to suffer from unconstitutionality.

146. In the case of Shyam Sunder (supra), their lordships of Hon''ble Supreme Court, has considered the importance of object and reasons and

held that the object and reason appended to the Bill, may not be admissible to the aid of construing the provisions contained therein, but it can be

used for ascertaining the conditions which prevail at the time which necessitated the making of law and the extent and urgency of the Bill which is

sought to remedy, to quote:

52. The Statement of Objects and Reasons appended to the Bill is not admissible as an aid to the construction of the Act to be passed, but it can

be used for limited purpose for ascertaining the conditions which prevailed at that time which necessitated the making of the law, and the extent and

urgency of the evil, which it sought to remedy. The Statement of Objects and Reasons may be relevant to find out what is the objective of any

given statute passed by the legislature. It may provide for the reasons which induced the legislature to enact the statute. ""For, the purpose of

deciphering the objects and purport of the Act, the Court can look to the Statement of Objects and Reasons thereof"". (Vide: Kavalappara

Kottarathil Kochuni and Others Vs. The State of Madras and Others, and Tata Power Company Ltd. and Another Vs. Reliance Energy Ltd. and

Others,

53. In A. Manjula Bhashini and others (Supra), this Court held as under:

The proposition which can be culled out from the aforementioned judgments is that although the Statement of Objects and Reasons contained in

the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same can be

referred to for understanding the background, the antecedent state of affairs and the mischief sought to be remedied by the statute. The Statement

of Objects and Reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be

achieved by enactment of the particular Act or for judging reasonableness of the classification made by such Act.

54. Thus, in view of the above, the Statement of Objects and Reasons of any enactment spells out the core reason for which the enactment is

brought and it can be looked into for appreciating the true intent of the legislature or to find out the object sought to be achieved by enactment of

the particular Act or even for judging the reasonableness of the classifications made by such Act.

147. Thus, even in view of the recent judgment in the case of K. Shyam Sunder (supra), the object and reason of the Statutes are spelled out for

the co-reason for which enactment is brought and it may be looked into to the intend of the Legislation or to find out the object sought to be

achieved by enacting the particular act or even of judging reasonableness or classification made by said Act.

148. In the present case, nothing has been brought on record as to how the consultation of the District Judge causes delay and how the State is

deprived to choose a counsel of its choice. Under the L.R. Manual or even under the unamended Code of Criminal Procedure, the State is the

final authority to appoint a Government Counsel. It has right to reject the recommendation of the District Judge and District magistrate both, by

assigning reason and choose its own person inviting fresh panel. Otherwise also, under sub-section (8) of Section 24 of Code of Criminal

Procedure, it is always open to State to appoint Special Counsel of its choice and for that, no opinion is required either from the District Judge or

from the High Court.

Thus, entire object and reason is based on unfounded facts having no nexus with the object sought to be achieved. Hence suffers from

unreasonableness and hit by Article 14 of the Constitution of India.

149. So far as delay in making appointment is concerned, in case opinion of District Judge is sought, there appears to be no material on record to

establish the fact that delay causes because of involvement of District Judge. The burden was on the State Government to substantiate with the

requisite material to establish the aims and object of the amending Act as contained in prefatory note (supra). There is no pleading on record as to

how and under what circumstances, summoning of opinion from the District Judge, shall cause delay. On the other hand, the State Government

itself with regard to appointment of Assistant Public Prosecutors u/s 25 of the Act, framed Rules and appointments are done with the consultation

of Public Service Commission. Substantially, almost on all the posts of Class-2 and above the State Government, and some of the posts under

Class-III, are appointed in pursuance of recommendation of the Public Service Commission which take years in finalizing the matter.

150. The attention of Court has not been invited to any material that the District Judges kept the matter pending for inordinate period while sending

their recommendations.

151. The Government has failed to discharge its obligation to establish that the consultation with the District Judge causes delay. Merely advancing

the argument in the Court by the learned Senior Counsel representing the State, shall not suffice unless some instances are brought on record.

Some inquiry should have been held collecting material with regard to delay caused because of the consultation with the District Judge but the same

does not seem to be done. Hence the ground with regard to delay, contained in the aims and object, seems to be based on unfounded fact.

152. The other argument of the learned counsel for the State is with regard to choice to engage a counsel. Perhaps this argument is also based on

unfounded facts. While amending the Act, the State has not taken note of the observations of Hon''ble Supreme Court in the case of Shrilekha

Vidyarthi (supra) whereby, the case of Mundrika Prasad Sinha (supra), has been followed and reiterated. It was incumbent on the State

Government while asserting the choice part, should have collected the material and pointed out how and under what circumstances the State has

been deprived to engage the counsel of its choice. Under the LR Manual also, subject to regulatory process, State is the final authority to elect a

person. In case State finds that name of incompetent person has been recommended by the District Magistrate or District Judge, or both of them,

the State has option to choose a person on its own, by assigning reason.

153. In democratic polity, no one has got unfettered discretion while discharging duty. The State must work for public good, and the public good

shall be subserve by engaging best talent from the Bar, as held in Shrilekha Vidyarthi (supra) and other cases.

154. Apart from the above, as is evident from Section 25A of CrPC and keeping in view the amendment done to make the prosecuting agency

independent, it shall always be obligatory on the part of the State to make selection process more independent than enforcing the spoil system for

the recruitment of District Government Counsels.

155. The letter and spirit of Section 25A reveals that Parliament to its wisdom provides that Directorate of Prosecution shall be established and

appointment of Director of Prosecution shall be with the concurrence of Chief Justice. Thus, it is evident that the intention of Parliament is to make

the prosecuting agency more independent than what we possess.

156. In Johri Mal''s case (supra) their lordships rightly held that age old tradition with regard to consultation with District Judge in the case of

District Government Counsel and with the concurrence of Chief Justice in the case of appointment of Prosecuting Officer in the High Court, must

continue and State should not do anything which may go contrary to the constitutional spirit.

157. No material has been placed by the State Government as to how the State has been deprived of engaging the counsel of his own choice.

158. It may be noted that not only in this Court but even in the Hon''ble Supreme Court, and trial Courts Special Counsels including senior

counsels are engaged from time to time by the State of U.P. by investing millions of rupees. Even in the present case, Special Counsel has been

engaged to argue the case. Accordingly, the second limb of argument with regard to aims and object, also seems to be without substance.

159. In view of the above, the impugned amendment seems to have no nexus with the object sought to be achieved. Only purpose which has born

out from the rival argument is that the State Government wants unfettered discretion in the matter of appointment of District Government Counsel.

How the unfettered discretion shall be sub-serving to constitutional goal, may be noticed from the Apex Court judgment in the case of Zahira

Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, , where Hon''ble Supreme Court noted how the prosecuting agency failed in

Gujarat to put the culprit to task by prosecuting them in Court fairly and vigorously. The dilution of merit in the appointment of District Government

Counsels who mainly deals with criminal trial and also important civil matters shall deprive the Courts from able assistance and ultimate sufferer

shall be public at large eroding the peoples'' faith in administration of justice and being paid from public exchequer. The Government does not have

got unfettered discretion to make appointment on the post of District Government Counsel ignoring the meritorious members of bar. The post of

District Government Counsel emanates from Cr.P.C. and U.P. Z.A. & L.R. Act and Code of Civil Procedure. They are statutory in nature.

District Government Counsels are paid from public exchequer to secure public interest and not the political interest.

160. We have already dealt with the subject while deciding bunch of Writ Petition No. 7851 (M/B) of 2008, and connected petitions, vide

judgment and order dated 6.1.2012, and calls for no repetition.

VII-WHETHER AMENDING ACT CAN

BE CONTRARY TO THE OBJECT OF

THE SCHEME OF THE PRINCIPAL

ACT?

161. While enacting the Code of Criminal Procedure, 1973, the Government of India has taken into account the Law Commission Reports and

opinion of different sections of society and Governmental organisations with regard to Sections 24 and 25 of CrPC, opinion of bar as well as

different pronouncements of Hon''ble Supreme Court. In case the impugned amendment is held to be valid, then at the face of record, it shall be

against various reports including the Law Commission Reports and aims and objection of the Principal Act.

162. Hon''ble Supreme Court in the case in Rattan Arya and Others Vs. State of Tamil Nadu and Another, ruled that the original scheme and

structure, the policy and plan of Principal Act are relevant. Ordinarily, no provision can be made against original aims and object and classification

made contrary to Principal Act, shall not be sustainable.

163. In the case in State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, whereby, the Amending Act a section of employees

were pushed out of Government services and denied the status of Government servants and consequential benefits that too, against the spirit of

Principal Act, Hon''ble Supreme Court struck down the provisions and allowed the writ petition with costs of Rs. 15,000/-. In view of the above,

the impugned amendment being contrary to aims and object of the Principal Act, (Cr P.C., 1973) seems to suffer from unconstitutionality and vice

of arbitrariness.

VIII-OMISSION AND ARBITRARINESS

164. A perusal of the aims and object further reveals that the Legislature of State while promulgating the impugned amending Act, State has not

taken into account the observations made by Hon''ble Supreme Court in the case of Km. Shrilekha Vidyarthi (supra) where, their lordship of

Hon''ble Supreme Court have held that consultation with the District Judge is necessary to make the prosecution body independent in discharging

their obligations. We have already dealt with the importance of prosecuting officers in a democratic polity to enable them to discharge their

obligation independently without being influenced by the Government or political parties. The L.R. Manual also envisages that the prosecutors

should be independent while assisting the Court.

165. Hon''ble Supreme Court in the case of Venugopal (supra), has held (in para 31) as under:

31. It may not be out of place to mention that the SLP of the respondent indicates that the term of office of five years of the writ petitioner as

Director was not really in dispute. In the Statement of Objects and Reasons of the Act introducing the impugned proviso, it is stated that the same

is being introduced with a view to comply with the direction of the High Court in the judgment and order dated 29th of March, 2007. It, however,

appears that the Division Bench of the Delhi High Court has determined the question of tenure of the writ petitioner to be five years and there are

writs in the nature of Mandamus and Prohibition issued by the Delhi High Court directing the right of the writ petitioner indicated in the respective

orders. As in Madan Mohan Pathak''s case (para 8), as quoted herein above, in the instant case also the Parliament does not seem to have been

apprised about the pendency of the proceedings before the Delhi High Court and this Court and declaration made and directions issued by the

Delhi High Court at different stages. In the impugned amendment, there is no non-obstante clause. The impugned amendment introducing the

proviso, therefore, cannot be treated to be a validating Act.

166. In view of the above, since the State Legislation has not considered the judgment of Km. Shrilekha Vidyarthi (supra) and recorded their

dissent, as to why they wish to overrule it by Legislation, the impugned amending Act seems to suffer from vice of arbitrariness that too, when the

aims and object, is also held to be based on unfounded facts.

IX-SECTION 25A OF CrPC AND REPUGNANCY

167. Section 25A inserted by Act No. 25 of 2005, has been given effect from 23.6.2006. It provides that the State Government shall establish a

Directorate of Prosecution consisting of a Director of Prosecution and Deputy Director of Prosecution. The Director of Prosecution shall be

appointed with the concurrence of Chief Justice of High Court who shall have administrative control over the Directorate. The Deputy Director of

Prosecution shall be subordinate to Director of Prosecution and every Prosecutor, Additional Public Prosecutor and Special Public Prosecutor

appointed u/s 24 shall be subordinate to Director of Prosecution. Thus, the Parliament had regulated the appointment of prosecuting branch

making it almost independent and out of the purview of the Government. The concurrence of Chief Justice in filling of vacancy of Director of

Prosecution is an effort to make prosecution independent.

168. Proviso of Clause (2) of Article 254 empowers the Parliament to legislate the law on a subject-matter already occupied by the State

Government under List-III of Seventh Schedule. To the extent of repugnancy, the State Law shall be deemed to be modified, invalid or void.

169. Parliament has inserted Section 25A (supra) to make the Prosecution Branch more independent than earlier was. Under sub-section (8) of

Section 24 of CrPC, power was conferred on the State Government to appoint special counsel that too, without obtaining opinion from the District

Judge or even the District Magistrate. Meaning thereby, special counsel were under the direct command and control of the State Government with

regard to employment and discharge of duty.

By inserting Section 25A, Parliament provided that even special counsel shall discharge their obligation under the Directorate of Prosecution.

Though, the power of State Government to appoint special counsel has been maintained but he/she shall fall within the administrative control of

Director of Prosecution. Thus, in case the special counsel is different class than the District Government Counsel appointed under sub-sections (4),

(5) and (6) of Section 25 of Code of Criminal Procedure. Hence, so far as the supervisory or statutory control is concerned, by inserting Section

25A, Parliament removed the difference between the counsel appointed on the recommendation of the District Judge and District Magistrate and a

special counsel appointed by the Government straight away in a particular case. Accordingly, in case impugned amendment is sustained, then it

shall be in derogation of letter and spirit of Section 25A of CrPC and shall be repugnant to Central Act in view of proviso to Clause (2) of Article

254 of the Constitution. Both cannot stand together.

170. In Zaverbhai Amaidas Vs. The State of Bombay, their lordships held that on a question under Article 254 (1) whether an Act of Parliament

prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the

subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the

later enactment, will be equally applicable to a question under Article 254 (2) where the further legislation by Parliament is in respect of the same

matter as that of the State law. In Deep Chand Vs. The State of Uttar Pradesh and Others, their lordships have reiterated the aforesaid principle

(para 25, 28) and Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, ; Sir Fazalbhoy Currimbhoy and Others Vs. Official

Trustee of Maharashtra and Others,

171. A Constitution Bench of Hon''ble Supreme Court in the case in M. Karunanidhi Vs. Union of India and Another, , has considered the

repugnancy test under Article 254 between the law made by the State and the Parliament, had taken into account the various pronouncements of

Hon''ble Supreme Court and foreign Courts and observed as under:

35. On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions,

so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming

into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of

repugnancy arises and both the statutes continue to operate in the same field.

172. In T. Barai Vs. Henry Ah Hoe and Another, Hon''ble Supreme Court has considered the question with regard to repugnancy and taken in to

account all previous decisions of Hon''ble Supreme Court and held that clause (2) of Article 254 empowers the Parliament to repeal, amend in

repugnant State Law even if it has become valid by virtue of Presidential Assent. Their lordships held that even State Law has not been repelled, it

becomes void as soon as subsequent law of Parliament making repugnant. For convenience, relevant portion of para 15 is reproduced as under:

15. ..... The proviso to Article 254 (2) empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid

by virtue of the President''s assent. Parliament may repeal or amend the repugnant State law, either directly, or by itself enacting a law repugnant to

the State law with respect to the ''same matter''. Even though the subsequent law made by Parliament does not expressly repeal a State law, even

then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to

the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and

the two cannot possibly stand together, e.g., where both prescribe punishment for the same offence but the punishment differs in degree or kind or

in the procedure prescribed. In all such cases, the law made by Parliament shall prevail over the State law under Article 254 (1).

173. The aforesaid proposition has been elaborately dealt with by their lordships in paras 17, 22, 25 and 26 of the judgment of T. Bari''s case

(supra) and has been reiterated in the case in National Engineering Industries Ltd. Vs. Shri Kishan Bhageria and Others, ; Govt. of A.P. and

Another Vs. J.B. Educational Society and Another etc., ; Dharappa Vs. Bijapur Co-operative Milk Producers Societies Union Ltd., In the case of

Dharappa (supra), Hon''ble Supreme Court held (in para-12) as under, to quote relevant portion of para-12:

12. ... What is stated above with reference to an existing law, is also the position with reference to a law made by the Parliament. Repugnancy is

said to arise when: (i) there is clear and direct inconsistency between the Central and the State Act; (ii) such inconsistency is irreconcilable, or

brings the State Act in direct collision with the Central Act or brings about a situation where obeying one would lead to disobeying the other. If the

State Legislature, while making or amending a law relating to co-operative societies, makes a provision relating to labour disputes falling under the

Concurrent List, then Article 254 will be attracted...

174. In view of the aforesaid settled proposition of law, in case the impugned amendment is considered simultaneously alongwith Section 25A of

CrPC or given effect to, then there appears to be inconsistency which is irreconcilable. In case said amendment is given effect to, it would lead to

disobeying the provisions of Section 25A. The letter and spirit of Section 25A is to make Prosecution Branch independent. That is why, the

Parliament provided that Director of Prosecution, shall be appointed with concurrence of the Chief Justice of High Court and the Public Prosecutor

appointed to the High Court, shall be subordinate to the Director of Prosecution whereas, the Public Prosecutor, Additional Public Prosecutor and

Special Public Prosecutor appointed under sub-section (3) or sub-section (8) or Section 24, shall conduct cases before the Court and every

Special Public Prosecutor appointed u/s 25, shall work under the Deputy Director of Prosecution. There appears to be no dispute that the District

Government Counsels are appointed in pursuance of the statutory provisions contained in sub-section (3) of Section 24 of CrPC. The Deputy

Director of Prosecution has to work under the Director of Prosecution.

175. By lapse of time and after insertion of Section 25A of CrPC, the impugned amending Act seems to be repugnant to the letter and spirit of

Section 25A of CrPC.

176. Renewal of petitioner working as Additional District Government Counsel (Criminal) Badaun, was rejected by the State Government by an

order dated 22.3.2011 keeping in view the report of District Magistrate. Though there appears variation in the mater of performance but it appears

that in the case of petitioner Sadhna Sharma, Additional District & Sessions Judge, Court No. 9, in whose Court the petitioner was discharging her

duty had also given his opinion stating that the work and conduct of petitioner is not satisfactory, hence she should be removed.

177. Thus, in the case of petitioner, the opinion of both District Judge and District Magistrate seem to be not satisfactory. The Principal Secretary,

Law while filing counter-affidavit stated that the question with regard to petitioner"s renewal was pending since 19.5.2003 and he resumed duty

only on 1st June, 2010 but his predecessors has not informed him as to why no decision was taken at an early date. It has further been brought on

record that the District Magistrate, Badaun by an order dated 20.5.2010 has issued warning to the petitioner for her negligence in duty and also

warned not to pay salary of 10.5.2010. Though the respondents took plea that the Additional District & Sessions Judge, Court No. 9, Badaun

had given report against the petitioner but from the certificate filed with the writ petition as Annexure 24, it reveals that the petitioner''s work and

conduct has been recorded to be satisfactory by Additional District & Sessions Judge, Court No. 5. Through the certificate issued on 28.3.2008

and other certificate issued on 2.4.2011 by Additional District & Sessions Judge, Court No. 4 and one is 30.3.2011 by Special Judge (E.C.) Act,

the pleading contained in paras 42, 43 and 44 of the writ petition has not been denied by Shri K.K. Sharma, Principal Secretary, Law while filing

counter-affidavit.

178. The petitioner also pleaded that the respondents had declined to renew the services because of the fact that he has approached the criminal

revision in which local MLA Yogendra Sagar was involved. Specific pleading contained in the writ petition to the effect that no opinion was

obtained from the District Magistrate while rejecting the petitioner''s renewal has not been denied. In the absence of categorical denial with regard

to malafide and factual controversy while filing counter-affidavit, the averments contained in the writ petition shall be deemed to be correct.

179. It is settled law that what cannot be done directly, it cannot be done indirectly vide Dayal Singh and Others Vs. Union of India (UOI) and

Others, .

180. Much argument has been advanced by the learned Senior Counsel appearing for the State. The word, "may", used in Section 25A of Code

of Criminal Procedure, is not mandatory. The argument advanced by the learned counsel, seems to be not correct. Section 25A was added by the

Parliament within the presumption that entire Section 24 is in operation without taking into account the deletion made by the State Government.

181. Sub-section (8) of Section 24 confers power on State Government to appoint Special Counsel of its choice and for that, no opinion is

required from the District Judge or the High Court. Thus, under L.R. Manual also, subject to assigning reason, State is final authority to appoint

Government Counsel. Under sub-section (8) of Section 24, State has been given separate additional power to make appoint of a Government

Counsel of its choice without seeking any opinion from the District Judge or the High Court. Thus, power conferred on the Government under sub-

sections (4), (5) and (6) of Section 24 is different power constituting different cadre of Government Counsel than one appointed under sub-section

(8) of Section 24.

182. What the Parliament has done by enacting Section 25A, the independent power conferred on the State Government to appoint Special

Counsel, u/s 24 (8) of the CrPC has been diluted to some extent that now, though the Government may appoint Special Counsel but the counsel

so appointed, shall discharge his/her obligation under the Directorate of Prosecution constituted u/s 25A of the Code of Criminal Procedure. The

provisions seems to have been made to check abuse of power by the State Government while dealing with the cases pending in the subordinate

Courts while prosecuting or defending the cases by the State through the counsel appointed by it.

183. In a recent judgment in State of Tamil Nadu and Others Vs. K. Shyam Sunder and Others, , Hon''ble Supreme Court summarised the law

with regard to legislative arbitrariness as under:

35. In Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, , this Court held that Article 14 strikes at arbitrariness because an action

that is arbitrary, must necessarily involve negation of equality. Whenever therefore, there is arbitrariness in State action, whether it be of the

legislature or of the executive, Article 14 immediately springs into action and strikes down such State action. (See also: E.P. Royappa Vs. State of

Tamil Nadu and Another, ; and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, .

36. In M/s. Sharma Transport rep. by Sharma Transport Rep. by D.P. Sharma Vs. Government of Andhra Pradesh and Others, this Court

defined arbitrariness observing that party has to satisfy that the action was not reasonable and was manifestly arbitrary. The expression ''arbitrarily''

means; act done in an unreasonable manner, as fixed or done capriciously or at pleasure without adequate determining principle, not 3 founded in

the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

37. In Bombay Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Others, this Court held that arbitrariness on the part of

the legislature so as to make the legislation violative of Article 14 of the Constitution should ordinarily be manifest arbitrariness.

184. Legislative arbitrariness seems to be established on the ground that the object and reason is based on unfounded facts. Different reports of

Law Commission while promulgating the Code of Criminal Procedure, 1974 and judgment of Hon''ble Supreme Court on the point, have not been

considered.

X-LEGISLATIVE ARBITRARINESS

185. Whether the impugned amendment is an instance of legislative arbitrariness, is a question which cropped up during the course of hearing.

Whether, the Legislature of the State has deleted the impugned provisions from Section 24 arbitrarily without taking into account, the relevant

material which is necessary for the purpose?

186. Black''s Law Dictionary, 9th Edn. By Bryan A. Garner, Editor-in-Chief, defines the word, ''arbitrary'' as under:

arbitrary, adj. (15c) 1. Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a

judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is often termed arbitrary and capricious.

Cf. CAPRICIOUS.

Volume 3B of ""Words and Phrases"" Permanent Edn., defines the word, ''arbitrary'', ''arbitrariness'' and ''arbitrary act'', has been defined as under:

Arbitrary

Ala. Crim. App. 1979 Term ""arbitrary,"" as used in context of a Fourteenth Amendment challenge, means wilful and unreasoning action, without

consideration and regard for facts and circumstances presented U.S.C.A. Const. Amend. 14--Hubbard v. State, 382, So. 2d 577, affirmed Ex

parte Hubbard, 382 So. 2d 597, set aside 405 So. 2d 695, on remand 405 So. 2d 695, appeal after remand 500 So. 2d 1204, affirmed 500 So.

2d 1231, post-conviction relief denied 584 So. 2d 895, certiorari denied 112 S. Cr. 896, 502 U.S. 1041, 116 L. Ed. 2d 798, certiorari denied

107 S. Cr. 1591, 480 U.S. 940, 94 L. Ed. 2d 780 denial of habeas corpus affirmed 317 F. 3d 1245, rehearing and rehearing denied 62 Fed.

Appx. 923, certiorari denied 124 S. Cr. 390, 540 U.S. 951--Const Law 251.3.

[Pg. 528.]

Ga. 1908. The word ""arbitrarily"" means in an arbitrary manner, and ""arbitrary,"" as defined by the Standard Dictionary, means, ""Fixed or done

capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; not done or acting according

to reason or judgment; depending on the will alone; absolutely in power; capriciously, tyrannical; despotic.""--Central of Georgia Rv. Co. v. Mote,

62 S. E. 164, 131 Ga. 166.

[Pg. 530]

Ky. 1948. Whatever is contrary to democratic ideals, customs and maxims, essentially unjust and unequal, or in excess of people''s reasonable and

legitimate interest is ""arbitrary"" within constitutional provision that arbitrary power over freemen''s lives, liberty and property exists nowhere in a

republic, not even in largest majority. Const. Ã¯Â¿Â½ 2.--Sanitation Dist No. 1 of Jefferson County v. City of Louisville, 213 S. W. 2d 995, 308 Ky.

368.--Const. Law 82 (1).

[Pg. 531]

Arbitrariness

Cal. App. 3 Dist. 1969. Action of state highway engineer in respect to disputed highway construction contract items is ""arbitrary"" when it is based

on no more than will or desire of decision maker and is not supported by fair or substantial reason, and his decision is characterized by

arbitrariness"" when it lacks substantial support in evidence.-- Clack v. State, Dept. of Public Works, Division of Highways, 80 Cal. Rptr. 274,

275 Cal. App. 2D 743.-- High 113 (4).

[Pg. 520]

Utah 1948. ""Arbitrariness"" is action or ruling not based on reasonable grounds and usually occurs without personal bias against a litigant or his

cause, but arbitrariness surrounded by other circumstances may show bias disqualifying judge. Utah Code 1943, 20-6-1; Const. Article 8, Ã¯Â¿Â½

13.--Haslam v. Morrison, 190 P. 2d 520, 113 Utah 14.--Judges 49 (1).

[Pg. 520]

Arbitrary act

Cal. App. 2 Dist. 1989. An ""arbitrary act"" is one done without any apparent reason therefor.--Verdugo Hills Hospital, Inc. v. Department of

Health, 152 Cal. Rptr. 263, 88 Cal. App. 3D 957.--Const Law 2513.

[Pg. 541]

Cal. App. 2 Dist. 1947. An ""arbitrary act"" or decision is one that is arrived at through the exercise of will or by caprice, one supported by mere

option or discretion and not by a fair or substantial reason.--Bedford Inv. Co. v. Foib, 180 P. 2d 361, 79 Cal. App. 2d 363.

[Pg. 542]

187. In view of the aforesaid definition, the impugned amendment seems to be irrational, capricious and is not done in consonance with the settled

proposition of law, rules and procedure, or reasons rather than reasons and facts unfounded, hence shall be deemed to be arbitrary. Amendment

has been done without adequate determining principle and at pleasure.

188. In Km. Shrilekha Vidyarthi (supra), Hon''ble Supreme Court while defining the word ''arbitrariness'', ruled that the meaning and true import of

arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be

answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle

emerging from the impugned act and if so, does it satisfy the test of reasonableness.

189. In the case in Sharma Transport Rep. by D.P. Sharma Vs. Government of Andhra Pradesh and Others, the expression ""arbitrarily"" means: in

an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things,

non-rational, not done or acting according to reason or judgment, depending on the will alone to quote relevant portion (para-25):

25. It has been pleaded as noted above that withdrawal is without any rational or relevant consideration. In this context, it has to be noted that the

operators in the State of Andhra Pradesh are required to pay the same tax as those registered in other states. Therefore, there cannot be any

question of irrationality. The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to

strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it

must be shown that it was not reasonable and manifestly arbitrary. The expression ""arbitrarily"" means: in an unreasonable manner, as fixed or done

capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according

to reason or judgment, depending on the will alone. In the present cases all persons who are similarly situated are similarly affected by the change.

That being so, there is no question of any discrimination. That plea also fails.

190. Coming to present case, we have noted that the aims and object of the impugned amendment is based on unfounded facts. It is also against

the original scheme, object and reason of Code of Criminal Procedure, 1974. The amendment has also been done in contravention of

recommendation made by the different Law Commissions which were the basis of promulgating the new Code of Criminal Procedure, 1974. The

observation made by Hon''ble Supreme Court in Km. Shrilekha Vidyarthi (supra), has also not been considered. There appears to be no nexus

with the object sought to be achieved. Hence, impugned amendment suffers from voice of arbitrariness, and it is irrational and hit by Article 14 of

the Constitution.

191. In the case of K. Shyam Sunder (supra), Hon''ble Supreme Court ruled that a statute may be declared unconstitutional, in case it violates

fundamental rights enshrined in Part-III of the Constitution. In case it is declared unconstitutional, then it shall be still born and void, to quote

relevant portion as under:

25. In Behram Khurshed Pesikaka Vs. The State of Bombay, ; and Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, this Court

held that in case a statute violates any of the fundamental rights enshrined in Part III of the Constitution of India, such statute remains still-born;

void; ineffectual and nugatory, without having legal force and effect in view of the provisions of Article 13(2) of the Constitution. The effect of the

declaration of a statute as unconstitutional amounts to as if it has never been in existence. Rights cannot be built up under it; contracts which

depend upon it for their consideration are void. The unconstitutional act is not the law. It confers no right and imposes no duties. More so, it does

not uphold any protection nor create any office. In legal contemplation it remains not operative as it has never been passed. In case the statute had

been declared unconstitutional, the effect being just to ignore or disregard.

192. In the same judgment of K. Shyam Sunder (supra), Hon''ble Supreme Court further ruled that in case the amending Act is declared

unconstitutional, then there may be revival of old Act, to quote relevant portion:

42. Thus, undoubtedly, submission made by learned senior counsel on behalf of the respondents that once the Act stands repealed and the

amending Act is struck down by the Court being invalid and ultra vires/unconstitutional on the ground of legislative incompetence, the repealed Act

will automatically revive is preponderous and needs no further consideration.

This very Bench in State of U.P. and Others Vs. Hirendra Pal Singh etc., , after placing reliance upon a large number of earlier judgments

particularly in Ameer-un-Nissa Begum and Others Vs. Mahboob Begum and Others, ; B.N. Tiwari Vs. Union of India (UOI) and Others, ; India

Tobacco Co. Ltd. Vs. The Commercial Tax Officer, Bhavanipore and Others, ; Indian Express Newspapers (Bombay) Private Ltd. and Others

Vs. Union of India and Others, ; West Uttar Pradesh Sugar Mills Association and Others Vs. State of Uttar Pradesh and Others, ; Zile Singh Vs.

State of Haryana and Others, ; State of Kerala and Another Vs. Peoples Union for civil Liberties, Kerala State Unit and Others, ; and Firm

A.T.B. Mehtab Majid and Co. (supra) reached the same conclusion.

43. There is another limb of this legal proposition, that is, where the Act is struck down by the Court being invalid, on the ground of arbitrariness in

view of the provisions of Article 14 of the Constitution or being violative of fundamental rights enshrined in Part-III of the Constitution, such Act

can be described as void ab-initio meaning thereby unconstitutional, still born or having no existence at all. In such a situation, the Act which stood

repealed, stands revived automatically. (See: Behram Khurshid Pesikaka (Supra); and Mahendra Lal Jaini (Supra)

44. In Harbilas Rai Bansal Vs. State of Punjab and another, while dealing with the similar situation, this Court struck down the Amending Act

being violative of Article 14 of the Constitution. The Court further directed as under:

We declare the abovesaid provision of the amendment as constitutionally invalid and as a consequence restore the original provisions of the Act

which were operating before coming into force of the Amendment Act.

(Emphasis added)

45. Thus, the law on the issues stands crystallised that in case the Amending Act is struck down by the Court for want of legislative competence or

is violative of any of the fundamental rights enshrined in Part III of the Constitution, it would be unenforceable in view of the provision under Article

13(2) of the Constitution and in such circumstances the old Act would revive, but not otherwise. This proposition of law is, however, not

applicable so far as subordinate legislation is concerned.

193. In the present case, since we are of the view that the impugned amendment is hit by Article 14 and is unconstitutional, there shall be revival of

old one which makes the consultation with District Judge, mandatory.

XI-FINDINGS

194. Subject to discussion and finding recorded hereinabove in the preceding paragraphs, the impugned amendment seems to be ultra vires and

not sustainable and we sum up the finding as under:

(1) There is no strict separation of power under the Indian Constitution. Accordingly, the consultation of the district Judge, as ruled by Hon''ble

Supreme Court (supra), seems to not suffer for want of jurisdiction or authority under the principle of ""Separation of Power"".

(2) The post of the District Government Counsel cannot be compared with the post of Advocate General/Attorney General and other

constitutional posts. The post of the District Government Counsel is the statutory post and keeping in view the observations of Hon''ble Supreme

Court in the case of Zahira Habibulla (supra), read with Section 25A of CrPC, the impugned amendment in case sustained, shall subversive to the

Administration of justice.

(3) The special counsel is different class than the District Government Counsel appointed under sub-sections (4), (5) and (6) of Section 24 of

Code of Criminal Procedure. Thus, so far as the supervisory or statutory control is concerned by inserting Section 25A, Parliament removed the

difference between the counsel appointed on the recommendation of the District Judge and District Magistrate and a special counsel appointed by

the Government straightway in a particular case. Accordingly, in case impugned amendment is sustained, then it shall be in derogation of letter and

spirit of Section 25A of CrPC and shall be repugnant to Central Act in view of proviso to Clause (2) of Article 254 of the Constitution. Both

cannot stand together.

(4) While amending the Act, the State Government has not taken into account the reports of different Law Commissions hence impugned

amendment suffers from non-application of mind.

(5) Aims and objects are based on unfounded facts. Hence also, the impugned amendment is against the settled proposition of law and is an

instance of arbitrary exercise of power, hence hit by Article 14 of the Constitution.

(6) The impugned amendment is contrary to the object and scheme of the Code of Criminal Procedure, 1973. Hence also, it suffers from vice of

arbitrariness.

(7) The impugned amendment is hit by the proviso of Clause (2) of Article 254 of the Constitution of India and repugnant to Section 25A of

CrPC. Both cannot stand together inasmuch as, following one, will make the other ineffective.

(8) The purpose of Section 25A of CrPC is to make prosecuting branch independent from the Government to optimum level. That is why even

Special Counsel appointed under sub-section (8) of Section 24 has been placed under the Directorate of Prosecution.

(9) The impugned amendment is also not sustainable being enacted without taking into account the judgment of Hon"ble Supreme Court in the case

of Km. Shrilekha Vidyarthi (supra) which was necessary in the light of the law laid down by Hon"ble Supreme Court in the case of P. Venugopal

Vs. Union of India (UOI),

(10) Reliance placed by the Government on the report of an Additional District Sessions Judge ignoring the report of two other Additional District

& Sessions Judges seems to be exceeding of jurisdiction. While rejecting the renewal, opinion should have been obtained from the District Judge,

and no reliance could have been placed on report of Additional District & Sessions Judge who is incompetent under the L. R. Manual. Rejection

of application of renewal suffers from vice of arbitrariness.

(11) Impugned Government order amending L. R. Manual suffers from vice of arbitrariness as held while deciding W.P. No. 7851 (M/B) of 2008

and connected petitions decided by the judgment and order dated 6.1.2012, requires no fresh adjudication.

(12) The entire object and reason of the amending Act is based on unfounded grounds having no nexus with the object sought to be achieved.

Hence suffers from unreasonableness and is irrational hence hit by Article 14 of the Constitution of India.

XII-ORDER

In view of the above, the writ petitions are allowed as under:

(i) Code of Criminal Procedure (U.P. Amendment) Act, 1991 (Act No. 18 of 1991) (Section 2) is declared ultra vires, unconstitutional, void and

illegal restoring the original provision with natural consequences to the extent it relates to amendment done in Section 24 of the Code of Criminal

Procedure, 1973.

(ii) A writ in the nature of certiorari is issued quashing the order dated 22.3.2011 passed by the State Government communicated to the petitioner

vide letter dated 28.3.2011 as well as order dated 30.3.2011, passed by the District Magistrate, Badaun contained in Annexure 1 and 2 to the

W.P. No. 4097 (M/B) of 2011, with consequential benefits with liberty to proceed afresh with due consultation with the District Judge and District

Magistrate.

(ii) A writ in the nature of mandamus is issued commanding the respondents to reconsider the petitioner''s case in the light of observations made in

the body of judgment, expeditiously and in the meantime, the petitioner shall be permitted to discharge duty in accordance with Rules.

(iv) A writ in the nature of mandamus is issued commanding the State of U.P. to consider for amendment in the L.R. Manual keeping in view the

finding recorded and observations made in the body of judgment expeditiously say, within three months.

(v) No orders as to costs.