VERDICTUM.IN

W.P. Nos. 12769/2020 &27731/2026

IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE
HON'BLE SHRI JUSTICE G. S. AHLUWALIA
&
HON'BLE SMT. JUSTICE ANURADHA SHUKLA

WRIT PETITION No. 12769 of 2020

CNR No.: MPHC030160212020

ROHAN SHARMA
Versus
THE STATE OF MADHYA PRADESH AND OTHERS

Appearance:

Shri Abhishek Singh Bhadauriya, Advocate for petitioner.
Shri D.P.Singh, Advocate for Intervener.
Shri Prabhakar Singh, Advocate for Intervener.
Shri Ankur Mody, Additional Advocate General for the State.

&

WRIT PETITION No. 27731 of 2026

CNR No.: MPHC030185562026

KARAN SHRIVASTAVA AND ANR
Versus
THE STATE OF MADHYA PRADESH AND ANR

Appearance:

Shri M.P.S. Raghuwanshi, Senior Advocate with Shri R.B.S. Tomar, Advocate for petitioners.

Shri Prashant Sharma, Advocate for Intervener.

VERDICTUM.IN

Shri Ankur Mody, Additional Advocate General for State.

Reserved on : 7/10/2026

Pronounced on : 29 /10 /2026

ORDER

Per*: *Justice Gurpal Singh Ahluwalia

By this common judgment, W.P. No. 12769/2020 and W.P. No. 27731/2026 shall be decided.

2. W.P. No. 12769/2020 has been filed seeking the following reliefs:

> "i) That, the impugned amendment Annexure P-1 may kindly be quashed and the promotional quota for Ministerial staff created for the ADPO be held illegal,
>
> ii) any other relief deemed fit in the facts and circumstances of the case doing justice in the matter including costs be also awarded."

3. W.P. No. 27731/2026 has been filed seeking the following reliefs:

> "7.1 That, the impugned amendment Annexure P-1 may kindly be quashed and the promotional quota for Ministerial staff created for the APPO be held illegal,

VERDICTUM.IN

ii) That, other relief doing justice including cost be ordered."

4. For the sake of convenience, the facts of W.P. No. 12769/2020 shall be considered.

5. Petitioner is a law graduate and a registered advocate practicing at Gwalior. It is the case of petitioner that he appeared in the M.P. ADPO examinations held in the years 2011 and 2015, but he could not get selected.

6. By this petition, petitioner has challenged the notification dated 14/10/2012 as *ultra vires* by which Schedule II and Schedule IV of the Madhya Pradesh Public Prosecution (Gazetted Services) Recruitment Rules, 1991 (in short "Rules, 1991") were amended and 10% promotional quota to the post of ADPO from the feeder post of Cr.P.C.Clerk/ Assistant Grade III/APCD Grade III was incorporated.

7. It is submitted by counsel for petitioners that the importance of ADPO in representing the State, primarily before the Court of Magistrate, is an important function, which has been highlighted by the Supreme Court in the case of ***Mahabir & Ors. v. State of Haryana***, decided on **29/01/2025** in **Criminal Appeal Nos. 5560-5561 of 2024**. The ADPOs are appointed under Section 25 of the Cr.P.C. and is a public post of Class-II cadre. As per the pre-amended provisions of Schedule II and Schedule IV of the Rules, 1991, recruitment to the post of ADPO was

VERDICTUM.IN

100% by direct recruitment. However, by the impugned amendment, a 10% quota has been provided for promotion from the post of Cr.P.C. Clerk/Assistant Grade-III/APCD Grade III. It is submitted by counsel for petitioner that the post of Cr.P.C. Clerk/Assistant Grade-III/APCD Grade III is a Class-III clerical cadre post which has to perform ministerial/clerical work only. They are not connected even remotely with the judicial dispensation system. They cannot appear before the court, they cannot examine or cross-examine witnesses, and they cannot conduct trials. It is further submitted that by the impugned amendment, two different promotional avenues have been provided for the post of Cr.P.C. Clerk/Assistant Grade-III/APCD Grade III. The post of Cr.P.C. Clerk/Assistant Grade-III/APCD Grade III is governed by the Madhya Pradesh Public Prosecution Class-III (Non-Gazetted) Service Recruitment Rules, 1998. There is already a promotional avenue for these posts, and Assistant Grade-III/Cr.P.C. Clerk is a feeder post for promotion to the post of Assistant Grade-II, and the post of APCD Grade III is a feeder post for promotion to the post of PCD. Similarly, Assistant Grade-II can be promoted to the post of Assistant Grade-I and Assistant Grade-I can be promoted to the post of Superintendent. All these posts are clerical posts of Class-III cadre, and by providing another promotional avenue directly to the post of ADPO, the State has opened a new floodgate for promotion directly from the post of Grade-III to Grade-II. It is further submitted that only those candidates who are working on the post of Cr.P.C. Clerk/Assistant Grade-III/APCD Grade III but are holding LL.B. degree

VERDICTUM.IN

or equivalent degree from a recognized university can be considered for promotion to the post of ADPO. Apart from the fact that the aforesaid employees are involved in ministerial work only, the State has also created another distinction between LL.B. graduate holding the post of Cr.P.C. Clerk/Assistant Grade-III/APCD Grade III and employees who are holding degrees other than an LL.B. degree. The minimum qualification for direct recruitment to the post of Assistant Grade-III/Cr.P.C. Clerk is Higher Secondary School Examination or High School Examination (10+2) passed from the Board of Secondary Education, Madhya Pradesh, Bhopal, or other institution recognized by any State, and Hindi typing examination passed from the Madhya Pradesh Board of Typing and Shorthand or any other institution recognized by the Government, and possessing knowledge of computer operation also, whereas for direct recruitment to the post of APCD Grade III, the minimum qualification is Higher Secondary Examination or High School Examination (10+2) passed from the Board of Secondary Education, Madhya Pradesh, Bhopal, or other State-recognized institute. It is submitted that although a qualification higher than what is prescribed for a particular post may not be a disqualification, but by providing a separate promotional avenue to persons holding an LL.B. degree, respondents have created a class within a class which is not based on intelligible differentia and has no reasonable nexus with the object sought to be achieved. It is further submitted that this act of the respondents is contrary to Articles 14, 16 and 21 of the Constitution of India. Two promotional avenues, i.e., one

VERDICTUM.IN

directly to Class-II cadre and another to Class-III cadre, cannot be provided for a single feeder post. It is further submitted that earlier the State of Chhattisgarh had also provided for 10% quota for promotion to the post of ADPO from the post of Cr.P.C. Clerk/Assistant Grade-III/APCD Grade III, but now, after realizing the difficulty, has withdrawn the 10% quota of promotion. It is further submitted that the Director of Prosecution, by letter dated 04/07/2019, had recommended to the State Government to withdraw the 10% promotional quota on the ground that it is violative of Section 49(1)(ag) of the Advocates Act and has also not yielded encouraging results. Accordingly, relied upon judgments passed by the Supreme Court in the cases of **K. Anbhazhagan v. Superintendent of Police**, reported in **AIR 2004 SC 524**, **S.B. Sahane v. State of Maharashtra**, reported in **AIR 1995 SC 1628**, **D.S. Nakara & Ors. v. Union of India**, reported in **AIR 1983 SC 130**, **E.P. Royappa v. State of Tamil Nadu & Ors.**, reported in **AIR 1974 SC 555**, **K.J. John & Ors. v. State of Kerala & Ors.**, reported in **AIR 1990 SC 1902**, **Maneka Gandhi v. Union of India (UOI) & Ors.**, reported in **AIR 1978 SC 597**, **Sathyavani Ponrani v. Samuel Raj & Ors.**, reported in **2010 (4) CTC 833**, **Shayara Bano & Ors. v. Union of India (UOI) & Ors.**, reported in **(2017) 9 SCC 1**, **State of U.P. & Ors. v. Johri Mal**, reported in **AIR 2004 SC 3800**, **The State of West Bengal v. Anwar Ali Sarkar**, reported in **1952 AIR(SC) 75**, **S.P. Gupta v. Union of India (UOI) & Ors.**, reported in **(1981) 1 SCC Supp 197**, **The State of J. & K. v. Triloki Nath Khosa & Ors.**, reported in **1974 AIR(SC) 1**, **Madhu**

VERDICTUM.IN

Kishwar & Ors. v. State of Bihar & Ors., reported in **1996 AIR(SC) 1864**, **Navtej Singh Johar & Ors. v. Union of India Thr. Secretary Ministry of Law and Justice**, reported in **AIR 2018 SC 4321**,

8. While arguing W.P. No. 27731/2026, it was submitted by Shri M.P.S. Raghuvanshi that in the entire country, there is no provision for promotion to the post of ADPO, which is the lowest post as per the provisions of the Rules, 1991.

9. It is not out of place to mention here that Shri M.P.S. Raghuvanshi, Senior Advocate, had appeared as an Additional Advocate General in W.P. No. 12769/2020. Whether after having appeared for the State of Madhya Pradesh, Shri Raghuvanshi should have argued against the State of Madhya Pradesh on behalf of the petitioner is a matter which is left to the wisdom of Shri M.P.S. Raghuvanshi, because it is not within the domain of this Court to decide the question as to whether such an act would amount to misconduct or not.

10. Shri Ankur Mody, Additional Advocate General, submitted that the return filed by the State in W.P. No. 12769/ 2020 is not very encouraging. No attempt has been made by the State authorities to justify the validity of the amendment by which Schedule II and Schedule IV of the Rules,1991 were amended. However, it is submitted that the constitutionality of a provision has to be presumed, and the burden heavily lies on the person who challenges the constitutionality of a provision. It is submitted that the

VERDICTUM.IN

arguments advanced by the counsel for petitioner are not sufficient to hold that the act of the State Government is violative of Articles 14, 16, and 21 of the Constitution of India. **However, it was fairly conceded by Shri Ankur Mody that there cannot be two promotional avenues for a single feeder post, i.e., one directly to Class-II cadre and another to Class-III cadre.** Counsel for the State also could not point out any intelligible differentia behind bifurcating the cadre of Cr.P.C. Clerk/Assistant Grade-III/APCD Grade III in two categories, i.e., (i) candidates holding LL.B. degree or equivalent degree from a recognized university, and (ii) candidates holding any other degree or the minimum qualification of Higher Secondary School Examination. Counsel for the State also could not justify as to how holding of an additional qualification, other than the minimum qualification prescribed for recruitment to the post of Assistant Grade-III/Cr.P.C. Clerk/APCD Grade III, will constitute a separate class requiring separate treatment for such candidates.

11. Shri D.P. Singh, counsel for the intervener, submitted that so far as the letter dated 04/07/2019 written by the Director, Prosecution is concerned, the same was rejected by the State Government by order dated 01/03/2021, and it was held that the observation made by the Director, Prosecution, that candidates who were promoted from the post of Cr.P.C. Clerk/Assistant Grade-III/APCD Grade III have not proved to be an efficient one is misconceived, because some of the promotee ADPOs were further promoted to the post of District Prosecution Officer. It is further

VERDICTUM.IN

submitted that the authority to provide for a promotional quota rests with the State Government, and if that source of authority has been utilized, then it cannot be said that the amendment brought by the State in Schedule II and Schedule IV of the Rules, 1991 is *ultra vires*. Furthermore, the validity of amendment in Schedule II and Schedule IV of the Rules, 1991 has been challenged after eighteen long years, and therefore the petition is also liable to be dismissed on the ground of delay and laches. Furthermore, the petitioner, after having failed twice in the recruitment for the post of ADPO, has no *locus standi* to challenge the validity of the amendment by which Schedule II and Schedule IV of the Rules, 1991 were amended. **However, counsel for the intervener also could not point out as to how a distinction can be drawn by bifurcating the clerical cadre of Assistant Grade-III/Cr.P.C. Clerk/APCD Grade III in two categories, i.e., one holding an LL.B. degree or equivalent degree from a recognized university, and another holding degrees other than an LL.B. degree or holding the minimum qualification**.

12. Shri Prabhakar Singh, counsel for another intervener, submitted that the constitutionality of a provision has to be presumed. As per Rule 6(4) of the M.P. Public Services (Promotion) Rules, 2002 (for short "Rules, 2002"), eligible employees are required to be considered through the prescribed promotion committee against the relevant vacancies. The recommendation made by the Directorate of Public Prosecution for withdrawal of the 10% promotional quota was rejected by the

VERDICTUM.IN

Government vide order dated 01/03/2021. So far as the contention of petitioners that the ministerial staff will be promoted to the post of ADPO is concerned, it is submitted that the promotional scheme itself prescribes the law qualification and requisite departmental experience before an employee can be considered for promotion. It is further submitted that if the amendment to Schedules II and IV is quashed, then it would abolish the promotional avenue available to the proposed interveners. Thirty departmental employees have already been promoted to the post of ADPO under the 10% quota up to the year 2016, and the petitioner has not challenged the individual promotion orders of those employees nor impleaded them in the present proceedings. It is further submitted that the right to be considered for promotion is a fundamental right under Article 16(1) of the Constitution of India.

13. Shri Prashant Sharma, counsel for another intervener, submitted that Rule 6 of the Rules, 1991 provides the method of recruitment, and promotion of members of the service as specified in Column 2 of Schedule IV. It is submitted that the validity of Rule 6 of the Rules, 1991 has not been challenged; therefore, the amendment introduced by the State in Schedules II and IV of Rules, 1991 cannot be challenged. The presumption of constitutionality has not been rebutted by the counsel for petitioners, and providing a 10% quota of promotion is within the legislative competence of the State. It is submitted that no separate class has been created; thus, there is no violation of Articles 14 and 16 of the Constitution of India. Merely because the Cr.P.C. Clerks/Assistant Grade-

VERDICTUM.IN

III/APCD Grade III are not required to compete in the examination conducted by the PSC cannot be a ground to declare the provision as *ultra vires*. It is further submitted that opening a promotional avenue is within the employer's power. So far as the letter dated 04/07/2019 written by the Director of Prosecution is concerned, it is submitted that merely because some provision failed to fetch desirable results cannot be a ground to declare it as *ultra vires*. However, it was fairly conceded by Shri Prashant Sharma that the failure to achieve the desirable result may be a ground for the State to withdraw such provision. It is further submitted that the power of judicial review in testing the validity of a rule lies in a very narrow compass, and prescription of a departmental quota is universal as provided under Articles 16 and 21 of the Constitution of India. Accordingly, Shri Sharma relied upon the judgments passed by the Supreme Court in the cases of **Public Services Tribunal Bar Association v. State of U.P.**, reported in **(2003) 4 SCC 104**, **State of Bihar v. Bihar Distillery Ltd.**, reported in **(1997) 2 SCC 453**, **Brijeshwar Singh Chahal (supra)**, **E.P. Royappa (supra)**, **Roshan Lal Tandon v. Union of India**, reported in **AIR 1967 SC 1889 (CB)**, **Paramjit Singh Sandhu v. Ram Rakha**, reported in **(1979) 3 SCC 478**, **Lt. Cdr. M. Ramesh v. Union of India**, reported in **(2018) 16 SCC 195**, **All India Judges' Assn. v. Union of India**, reported in **(2002) 4 SCC 247**, **P.U. Joshi v. Accountant General, Ahmedabad**, reported in **(2003) 2 SCC 632**, **Union of India v. Shivbachan Rai**, reported in **(2001) 9 SCC 356**, **Sanjay Kumar Manjul v. Chairman, UPSC**, reported in **(2006) 8 SCC 42**, **Bachhittar Singh v.**

VERDICTUM.IN

State of Punjab, reported in **AIR 1963 SC 395**, **Sethi Auto Service Station v. DDA**, reported in **(2009) 1 SCC 180**, **Union of India v. Pushpa Rani**, reported in **(2008) 9 SCC 242**, **Directorate of Film Festivals v. Gaurav Ashwin Jain**, reported in **(2007) 4 SCC 737**, **Associated Provincial Picture Houses v. Wednesbury Corporation**, reported in **[1948] 1 KB 223**, **Union of India v. G. Ganayutham**, reported in **(1997) 7 SCC 463**, and **Shayara (supra)**.

14. As has already been pointed out, Shri Ankur Mody, Additional Advocate General, conceded that the reasons and objects for introducing the amendment in Schedules II and IV of Rules, 1991 have not been placed on record. Even during the course of arguments, no attempt was made either by the State counsel or by the counsel for the interveners to place those reasons and objects on record. It was fairly conceded by Shri Ankur Mody that he has nothing on record to show intelligible differentia or reasonable nexus with the object sought to be achieved.

However, in view of the fact that the Court must always presume the constitutionality of a provision, therefore, merely because the State has failed to provide the basic record cannot be the sole ground for declaring the amendment in Schedules II and IV of the Rules, 1991 as unconstitutional. The Court has to assess the validity of the provision in accordance with law, irrespective of fact as to whether sufficient material has been provided by the State or not, for the simple reason that it is for

VERDICTUM.IN

the petitioner to prove that the provision is unconstitutional and not otherwise.

15. Heard learned counsel for parties.

16. The un-amended Schedule II and IV of Rules, 1991 reads as under :

Schedule II

Name of Deptt.	Name of Service	Name of Post	Number of Posts	Percentage of the number of the duty posts to be filled		
1	2	3	4	5	6	7
Home Deptt.	Madhya Pradesh Public Prosecution (Gazetted) Service	Director Joint Director Deputy Director of Prosecution Deputy Director (HQ), Additional Public Prosecutors, District Public Prosecution Officer/Additional District Public Prosecution Officer/Asstt. Director **Assistant District Public**	1 1 17 58 **330**	 **100 %**	100% 100% 100% 100%	If no suitable officer is available in the cadre then on deputa-tion from IAS/IPS/ Higher Judicial Service ----

VERDICTUM.IN

		Prosecution Officer				

Schedule IV

Name of Deptt	Name of Service	Name of the post from which promotion is to be made	Minimum Experience for being qualified for promotion	Name of the post to which promotion is to be made	Name of Members of the Departmental Promotion Committee
1	2	3	4	5	6
Home Deptt	Madhya Pradesh Prosecution (Gazetted) Service	Director Joint Director Deputy Director of Prosecution Deputy Director (HQ), Additional Public Prosecutors Class- I	4 years	Joint Director Class I	1. Chairman of Madhya Pradesh Public Service Commission by him-Chairman 2. Principal Secretary Home Department – Member 3. Principal Secretary/Secretary Law Department (or the member nominated by him-member

VERDICTUM.IN

					4. Director of prosecution – member
		Assistant Director/ District Public Prosecution Officer/Additional District Public Prosecution Officer- Class II	5 years	Deputy Director prosecution (HQ) Additional Public Prosecutor Class I	-do-
		Assistant District Public Prosecution Officer-Class II	**6 years**	**Assistant Director/ District Public Prosecution officer/ Add. District Public Prosecution Officer Class II**	**do-**

17. Amendment in both the Schedules was carried out in the year 2002 and now the existing Schedule II and IV of Rules, 1991 read as under :

Schedule II

Name of	Name of Service	Name of Post	Number of	Percentage of the number of the duty posts to be filled

VERDICTUM.IN

Deptt			Posts			
1	2	3	4	5	6	7
Home Department	Madhya Pradesh Public Prosecution (Gazetted) Service	Director Joint Director Deputy Director of Prosecution Deputy Director (HQ), Additional Public Prosecutors, District Public Prosecution Officer/Additional District Public Prosecution Officer/Asstt. Director **Assistant District Public Prosecution Officer**	1 1 17 58 **330**	 **90 %**	100% 100% 100% 100% **10%, If LL.B. passed candidate is not available, then to be filled by direct**	If no suitable officer is available in the cadre then on deputation from IAS/IPS/ Higher Judicial Service ---- **CrPC clerk/ Asstt. Grade III and APCD Grade III cadre candidates would be eligible for promotion**

VERDICTUM.IN

					recruit ment	**to the post of ADPO who are holding :** **1. LL.B. or equivalent degree from recognized University** **2. At least 7 years experience as CrPC Clerk/ Asstt. Grade III or APCD Grade III Cadre without any break** **3. Should not be more than 40 years of age.**

Schedule IV

Name	Name of	Name of the	Minimum	Name of	Name of

VERDICTUM.IN

of Deptt	Service	post from which promotion is to be made	Experience for being qualified for promotion	the post to which promotion is to be made	Members of the Departmental Promotion Committee
1	2	3	4	5	6
Home Deptt	Madhya Pradesh Prosecution (Gazetted) Service	Director Joint Director Deputy Director of Prosecution Deputy Director (HQ), Additional Public Prosecutors Class- I Assistant Director/ District Public Prosecution	4 years 5 years	Joint Director Class I Deputy Director prosecution (HQ) Additional	1. Chairman of Madhya Pradesh Public Service Commission by him- Chairman 2. Principal Secretary Home Department – Member 3. Principal Secretary/Secretary Law Department (or the member nominated by him-member 4. Director of prosecution – member -do-

VERDICTUM.IN

		Officer/Additional District Public Prosecution Officer-Class II		Public Prosecutor Class I	
		Assistant District Public Prosecution Officer-Class II	6 years	Assistant Director/ District Public Prosecution officer/ Add. District Public Prosecution Officer Class II	-do-
		CrPC Clerk/Asstt. Grade III and APCD Grade III	**7 years and other conditions which are mentioned in Schedule II**	**Asstt District Public Prosecution Officer-Class II**	**-do-**

18. Thus, it is clear that prior to 2002, 100% posts of ADPO were to be filled by direct recruitment and now after 2002, 90% posts are to be filled

VERDICTUM.IN

by direct recruitment and 10% posts are to be filled by promotion and the Feeder post is CrPC clerk/Asstt. Grade III or APCD Grade III.

19. Before considering the submissions raised by Counsel for the parties, this Court would like to consider the law governing the field of adjudicating the question of validity.

20. The Supreme Court in the case of **Sukanya Shantha v. Union of India, reported in (2024) 15 SCC 535** has held as under :

> **V. *The contours of Article 14***
>
> **32.** Article 14 guarantees that the "State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Equality is a crucial aspect of the constitutional vision. Immediately after the adoption of the Constitution, this Court laid down the standard to test the validity of laws against Article 14. In a Constitution Bench decision in *Charanjit Lal Chowdhury* v. *Union of India*, B.K. Mukherjea, J. articulated that a classification under Article 14 "should never be arbitrary". It was held that such classification must always "rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made". If a classification is "made without any substantial basis", it should be "regarded as invalid". The principle of classification was reiterated in a subsequent Constitution Bench decision in *State of Bombay* v. *F.N. Balsara*.
>
> **33.** Later, a seven-Judge Bench decision in *State of W.B.* v. *Anwar Ali Sarkar* solidified the requirement of the twin test under Article 14. Speaking for the Court, S.R. Das, J. held: (SCC p. 62, para 85)
>
> "*85.* … In order to pass the test, two conditions must be fulfilled, namely: (*1*) that the classification must be founded on an intelligible differentia which distinguishes those that are

VERDICTUM.IN

grouped together from others, and (*2*) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia, which is the basis of the classification, and the object of the Act are distinct things, and what is necessary is that there must be a nexus between them. In short, . while the article forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense I have just explained."

34. Adding to the above principles, S.R. Das, J., in *Ram Krishna Dalmia* v. *S.R. Tendolkar*, held that the classification "may be founded on different bases, namely, geographical, or according to objects or occupations or the like", but it needs to have a reasonable nexus with the object of the statute. It was held that "Article 14 condemns discrimination not only by a substantive law but also by a law of procedure". Furthermore, the Court "may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation". The Court further reiterated that: (SCC OnLine SC para 12)

"*12.* … (*ii*) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination, …"

35. Subsequently, in *E.P. Royappa* v. *State of T.N.*, a Constitution Bench of this Court added a crucial principle of non-arbitrariness to the discourse of equality under Article 14.

VERDICTUM.IN

The Court was adjudicating the validity of an administrative order. The Court held that: (SCC p. 38, para 85)

"*85*. … Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, …"

36. The principle of non-arbitrariness and reasonableness was then emphasised in the seven-Judge Bench decision in *Maneka Gandhi* v. *Union of India*. It was held: (SCC pp. 283-84, para 7)

"*7*. … Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

37. To test the validity of laws, the twin test of intelligible differentia and reasonable nexus held ground. Whether the test of arbitrariness is a valid principle under Article 14 led to a conflicting set of decisions. In *Shayara Bano* v. *Union of India*, in testing the validity of Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 which validates the triple talaq, R.F. Nariman, J. endorsed the test of manifest arbitrariness. It was held: (SCC p. 99, para 101)

"*101*. … The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate

VERDICTUM.IN

legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

38. A formalistic understanding of the classification test was then critiqued by this Court in *Navtej Singh Johar* v. *Union of India*. The Court was dealing with a challenge to the constitutionality of Section 377 of the Penal Act, 1860, to the extent that it criminalised consensual sexual conduct between adults. In his concurring opinion, one of us (D.Y. Chandrachud, J.) held: (SCC p. 209, para 409)

"*409*. Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism buries the life-giving forces of the Constitution under a mere mantra. What it ignores is that Article 14 contains a powerful statement of values—of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard against arbitrariness in State action. As our constitutional jurisprudence has evolved towards recognising the substantive content of liberty and equality, the core of Article 14 has emerged out of the shadows of classification. Article 14 has a substantive content on which,

VERDICTUM.IN

together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that avatar, it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence."

The Judges declared that Section 377 is manifestly arbitrary. The doctrine of manifest arbitrariness was also adopted in the Constitution Bench decision in *Joseph Shine* v. *Union of India*.

39. Referring to the decisions in *Shayara Bano*, *Navtej Singh Johar* and *Joseph Shine*, a Constitution Bench in *Assn. for Democratic Reforms (Electoral Bond Scheme)* v. *Union of India* (hereinafter "*ADR*") summarised the doctrine of manifest arbitrariness in the following words: (*ADR case*, SCC pp. 149-50, para 200)

"*200*. … Courts while testing the validity of a law on the ground of manifest arbitrariness have to determine if the statute is capricious, irrational and without adequate determining principle, or something which is excessive and disproportionate. This Court has applied the standard of "manifest arbitrariness" in the following manner:

200.1. A provision lacks an "adequate determining principle" if the purpose is not in consonance with constitutional values. In applying this standard, courts must make a distinction between the "ostensible purpose", that is, the purpose which is claimed by the State and the "real purpose", the purpose identified by courts based on the available material such as a reading of the provision; and

200.2. A provision is manifestly arbitrary even if the provision does not make a classification."

40. The Constitution Bench further elucidated the standards of manifest arbitrariness to test the validity of a plenary legislation with those of subordinate legislation: (*ADR case*, SCC p. 152, para 204)

"*204*. The above discussion shows that manifest arbitrariness of a subordinate legislation has to be primarily tested vis-à-vis its conformity with the parent statute. Therefore, in situations

VERDICTUM.IN

where a subordinate legislation is challenged on the ground of manifest arbitrariness, this Court will proceed to determine whether the delegate has failed 'to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution.' In contrast, application of manifest arbitrariness to a plenary legislation passed by a competent legislation requires the Court to adopt a different standard because it carries greater immunity than a subordinate legislation. We concur with *Shayara Bano* that a legislative action can also be tested for being manifestly arbitrary. However, we wish to clarify that there is, and ought to be, a distinction between plenary legislation and subordinate legislation when they are challenged for being manifestly arbitrary."

41. The Court recently in *State of Punjab* v. *Davinder Singh* dealt with whether sub-classification among the Scheduled Castes is permissible under Article 14. The seven-Judge Bench reiterated that the State is allowed to classify in a manner that is not discriminatory. The Court summarised the twin-test of classification as follows: (SCC pp. 116-17, para 85)

"*85*. The Constitution permits valid classification if two conditions are fulfilled. *First*, there must be an intelligible differentia which distinguishes persons grouped together from others left out of the group. The phrase "intelligible differentia" means difference capable of being understood. The difference is capable of being understood when there is a yardstick to differentiate the class included and others excluded from the group. In the absence of the yardstick, the differentiation would be without a basis and hence, unreasonable. The basis of classification must be deducible from the provisions of the statute; surrounding circumstances or matters of common knowledge. In making the classification, the State is free to recognise degrees of harm. Though the classification need not be mathematical in precision, there must be some difference between the persons grouped and the persons left out, and the difference must be real and pertinent. The classification is

VERDICTUM.IN

unreasonable if there is "little or no difference". *Second*, the differentia must have a rational relation to the object sought to be achieved by the law, that is, the basis of classification must have a nexus with the object of the classification."

42. The constitutional standards laid down by the Court under Article 14 can be summarised as follows. First, the Constitution permits classification if there is intelligible differentia and reasonable nexus with the object sought. Second, the classification test cannot be merely applied as a mathematical formula to reach a conclusion. A challenge under Article 14 has to take into account the substantive content of equality which mandates fair treatment of an individual. Third, in undertaking classification, a legislation or subordinate legislation cannot be manifestly arbitrary i.e. courts must adjudicate whether the legislature or executive acted capriciously, irrationally and/or without adequate determining principle, or did something which is excessive and disproportionate. In applying this constitutional standard, courts must identify the "real purpose" of the statute rather than the "ostensible purpose" presented by the State, as summarised in *ADR*. Fourth, a provision can be found manifestly arbitrary even if it does not make a classification. Fifth, different constitutional standards have to be applied when testing the validity of legislation as compared to subordinate legislation.

21. The Supreme Court in the case of **Public Services Tribunal Bar Association (Supra)** has held as under :

28. In *State of Bihar* v. *Bihar Distillery Ltd.* this Court indicated the approach which the Court should adopt while examining the validity/constitutionality of a legislation. It would be useful to remind ourselves of the principles laid down which read: (SCC p. 466, para 17)

"The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the

VERDICTUM.IN

presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application."

In the same para the Court further observed as follows:

"The court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution recognizes and gives effect to the concept of equality between the three wings of the State and the concept of 'checks and balances' inherent in such scheme."

22. The Supreme Court n the case of **Noel Harper v. Union of India,** reported in **(2023) 3 SCC 544** has held as under :

83……It is rightly urged by the respondents that whenever the challenge is to the amended provisions, the scope of enquiry, inter alia, ought to be as to whether the same is in consonance with the principal Act, achieve the object and purpose of the principal Act and are otherwise just, rational and reasonable. Further, there is no fundamental right vested in anyone to receive foreign contribution (donation) or foreign exchange; and that the purport of the principal Act and the impugned

VERDICTUM.IN

amendments are only to provide a regulatory framework and not one of complete prohibition.

* * * *

121. We need to bear in mind that there is presumption that Parliament understands and reacts to the needs of its own people as per the exigencies and experience gained in the implementation of the law. Mere plea of inconvenience is not enough to attract the constitutional inhibition. The courts ought not to adopt a doctrinaire approach in construing the amended provisions and undermine the legislative intent of strengthening the regulatory mechanism concerning foreign contribution. The legislature enjoys considerable latitude while exercising its wisdom on the basis of inputs collated from different quarters…….

23. The Supreme Court in the case of **State of J&K v. Triloki Nath Khosa,** reported in **(1974) 1 SCC 19** has held as under :

18. This submission is erroneous in its formulation of a legal proposition governing onus of proof and it is unjustified in the charge that the record discloses no evidence to show the necessity of the new Rule. There is always a presumption in favour of the constitutionality of an enactment and the burden upon him who attacks it to show that there has been a clear transgression of the constitutional principles. A rule cannot be struck down as discriminatory on any *a priori* reasoning. "That where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the Rules offend Act. 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration." The burden thus is on the respondents to set out facts necessary to sustain the plea of discrimination and to adduce "cogent and convincing evidence" to prove those facts for "there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification". In *G.D. Kelkar* v. *Chief Controller of Imports and Exports* Subba Rao, C.J., speaking for

VERDICTUM.IN

the Court has cited three other decisions of the Court in support of the proposition that "unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by pleading the necessary material before the Court that the said classification is unreasonable and violative of Article 16 of the Constitution".

* * * *

31. Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

32. Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permisible it would be open to the Courts to substitute their own judgment for that of the legislature or the Rule-making authority on the need to classify or the desirability of achieving a particular object.

24. The Supreme Court in the case of **Om Kumar v. Union of India, reported in (2001) 2 SCC 386 has held as under:**

58. Initially, our courts, while testing legislation as well as administrative action which was challenged as being discriminatory under Article 14, were examining whether the classification was discriminatory, in the sense whether the criteria for differentiation were intelligible and whether there

VERDICTUM.IN

was a rational relation between the classification and the object sought to be achieved by the classification. It is not necessary to give citation of cases decided by this Court where administrative action was struck down as being discriminative. There are numerous.

(ii) *Arbitrariness test under Article 14*

59. But, in *E.P. Royappa* v. *State of T.N.* Bhagwati, J laid down another test for purposes of Article 14. It was stated that if the administrative action was "arbitrary", it could be struck down under Article 14. This principle is now uniformly followed in all courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

(*b*) *If, under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary, Wednesbury applies and it is secondary review*

60. We have now reached the crucial aspect directly arising in the case. This aspect was left open for discussion in future in *Ganayutham* but as the question of "arbitrariness" (and not of discriminatory classification) arises here, we wish to make the legal position clear.

61. When does the court apply, under Article 14, the proportionality test as a primary reviewing authority and when does the court apply the *Wednesbury* rule as a secondary reviewing authority? From the earlier review of basic principles, the answer becomes simple. In fact, we have further guidance in this behalf.

62. In the European Court, it appears that administrative action can be challenged under Article 14 of the Convention (corresponding to Article 14 of our Constitution) as being discriminatory and be tested by applying the principle of "proportionality". Prof. Craig refers to the judgment of the European Court under Article 14 in *Lithgow* v. *UK* as follows:

VERDICTUM.IN

"The differential treatment must not only pursue a legitimate aim. It had to be proportionate. There had to be relationship of proportionality between the means employed and the aim sought to be realised"

63. Similarly, in the European law, in relation to discrimination on ground of sex, the principle of proportionality has been applied and it has been held that the State has to justify its action. In *EU Law and Human Rights* by Lammy Betten and Nicholas Grief, (1998 at p. 98), it is stated:

"If indirect discrimination were established, the Government would have to show 'very weighty reasons' by way of objective justification, bearing in mind that derogations from fundamental rights must be construed strictly and in accordance with the principle of *proportionality*." [*Johnston* v. *Chief Constable of the RUC* ECR (para 38.51)].

64. In the context of Article 14 of the English Act, 1998, (which is similar to our Article 14) Prof. Craig refers to the above principle. (See *Administrative Law*, Craig 4th Edn. 1999, p. 652.) Thus, it would appear that under Article 14 of the European Convention, principle of proportionality is invoked where questions of discrimination are involved and the court is a primary reviewing authority. According to Prof. Craig, this is likely to be the position under Article 14 of the English Act, 1998.

65. In the U.S., in the matter of discrimination, tests of "intermediate scrutiny" and "strict scrutiny" have been laid down. In cases of affirmative action, the U.S. Courts have hitherto been applying the "intermediate scrutiny test". See the discussion in *Indra Sawhney* v. *Union of India* (SCC at pp. 684-85) by Jeevan Reddy, J. But recently, however, in 1995, the U.S. Supreme Court has shifted, in matters of affirmative action, from the "intermediate scrutiny" test to the "strict scrutiny" test. See *Adarand Constructors Inc* v. *Pena* referred to by the Constitution Bench recently in *Ajit Singh* (*II*) v. *State of Punjab* (SCC at p. 232).

VERDICTUM.IN

66. It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here the court deals with the merits of the balancing action of the administrator and is, in essence, applying "proportionality" and is a primary reviewing authority

67. But where an administrative action is challenged as "arbitrary" under Article 14 on the basis of *Royappa* (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the *Wednesbury* test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. [In *G.B. Mahajan* v. *Jalgaon Municipal Council* (SCC at p. 111).] Venkatachaliah, J. (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of *Wednesbury* rules. In *Tata Cellular* v. *Union of India* (SCC at pp. 679-80), *Indian Express Newspapers Bombay (P) Ltd.* v. *Union of India* (SCC at p. 691), *Supreme Court Employees' Welfare Assn.* v. *Union of India* (SCC at p. 241) and *U.P. Financial Corpn.* v. *Gem Cap (India) (P). Ltd.* (SCC at p. 307) while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a *Wednesbury* review always.

68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review

VERDICTUM.IN

is for the courts by applying proportionality. However, where administrative action is questioned as "arbitrary" under Article 14, the principle of secondary review based on *Wednesbury* principles applies.

Proportionality and punishments in service law

69. The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of "arbitrariness" of the order of punishment is questioned under Article 14.

70. In this context, we shall only refer to these cases. In *Ranjit Thakur* v. *Union of India* this Court referred to "proportionality" in the quantum of punishment but the Court observed that the punishment was "shockingly" disproportionate to the misconduct proved. In *B.C. Chaturvedi* v. *Union of India* this Court stated that the court will not interfere unless the punishment awarded was one which shocked the conscience of the court. Even then, the court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the court could award an alternative penalty. It was also so stated in *Ganayutham*.

71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to *Wednesbury* principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that *Wednesbury* principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment.

VERDICTUM.IN

25. The Supreme Court in the case of **Shayara Bano v. Union of India,** reported in **(2017) 9 SCC 1** has held as under :

> **62.** Article 14 of the Constitution of India is a facet of equality of status and opportunity spoken of in the Preamble to the Constitution. The Article naturally divides itself into two parts—(1) equality before the law, and (2) the equal protection of the law. Judgments of this Court have referred to the fact that the equality before law concept has been derived from the law in the UK, and the equal protection of the laws has been borrowed from the 14th Amendment to the Constitution of the United States of America. In a revealing judgment, Subba Rao, J., dissenting, in *State of U.P.* v. *Deoman Upadhyaya*, AIR p. 1134 para 26 : SCR at p. 34 further went on to state that whereas equality before law is a negative concept, the equal protection of the law has positive content. The early judgments of this Court referred to the "discrimination" aspect of Article 14, and evolved a rule by which subjects could be classified. If the classification was "intelligible" having regard to the object sought to be achieved, it would pass muster under Article 14's anti-discrimination aspect. Again, Subba Rao, J., dissenting, in *Lachhman Dass* v. *State of Punjab*, SCR at p. 395, warned that: (AIR p. 240, para 50)
>
> "*50*. … Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the Article of its glorious content."
>
> He referred to the doctrine of classification as a "subsidiary rule" evolved by courts to give practical content to the said Article.
>
> **63.** In the pre-1974 era, the judgments of this Court did refer to the "rule of law" or "positive" aspect of Article 14, the concomitant of which is that if an action is found to be arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in Article 14 and would be

VERDICTUM.IN

struck down on this ground. In *S.G. Jaisinghani* v. *Union of India*, this Court held: (SCR pp. 718-19 : AIR p. 1434, para 14)

"*14.* In this context it is important to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey—"*Law of the Constitution*"—10th Edn., Introduction cx.) "Law has reached its finest moments", stated Douglas, J. in *United States* v. *Wunderlich*: (SCC OnLine US SC para 9)

'*9.* … when it has freed man from the unlimited discretion of some ruler…. Where discretion, is absolute, man has always suffered.'

It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in *John Wilkes*, Burr at p. 2539: (ER p. 334)

'… means sound discretion guided by law. It must be governed by rule, not by humour : it must not be arbitrary, vague, and fanciful….' "

This was in the context of service rules being seniority rules, which applied to the Income Tax Department, being held to be violative of Article 14 of the Constitution of India.

64. Similarly, again in the context of an Article 14 challenge to service rules, this Court held in *State of Mysore* v. *S.R. Jayaram* as follows: (SCR pp. 353-54 : AIR p. 349, para 6)

"*6.* The principle of recruitment by open competition aims at ensuring equality of opportunity in the matter of employment and obtaining the services of the most meritorious candidates.

VERDICTUM.IN

Rules 1 to 8, 9(1) and the first part of Rule 9(2) seek to achieve this aim. The last part of Rule 9(2) subverts and destroys the basic objectives of the preceding rules. It vests in the Government an arbitrary power of patronage. Though Rule 9(1) requires the appointment of successful candidates to Class I posts in the order of merit and thereafter to Class II posts in the order of merit, Rule 9(1) is subject to Rule 9(2), and under the cover of Rule 9(2) the Government can even arrogate to itself the power of assigning a Class I post to a less meritorious and a Class II post to a more meritorious candidate. We hold that the last part of Rule 9(2) gives the Government an arbitrary power of ignoring the just claims of successful candidates for recruitment to offices under the State. It is violative of Articles 14 and 16(1) of the Constitution and must be struck down."

65. In the celebrated *Indira Nehru Gandhi* v. *Raj Narain* judgment, Article 329-A clauses (4) and (5) were struck down by a Constitution Bench of this Court. Applying the newly evolved basic structure doctrine laid down in *Kesavananda Bharati* v. *State of Kerala*, Ray, C.J. struck down the said amendment thus: (*Indira Nehru Gandhi case*, SCC p. 44, para 59)

"*59*. Clause (4) suffers from these infirmities. First, the forum might be changed but another forum has to be created. If the constituent power became itself the forum to decide the disputes the constituent power by repealing the law in relation to election petitions and matters connected therewith did not have any petition to seize upon to deal with the same. Secondly, any decision is to be made in accordance with law. Parliament has power to create law and apply the same. In the present case, the constituent power did not have any law to apply to the case, because the previous law did not apply and no other law was applied by clause (4). The validation of the election in the present case is, therefore, not by applying any law and it, therefore, offends rule of law."

This passage is of great significance in that the amendment was said to be bad because the constituent power did not have any

VERDICTUM.IN

law to apply to the case, and this being so, the rule of law contained in the Constitution would be violated. This rule of law has an obvious reference to Article 14 of the Constitution, in that it would be wholly arbitrary to decide the case without applying any law, and would thus violate the rule of law contained in the said Article.

66. Chandrachud, J., was a little more explicit in that he expressly referred to Article 14 and stated that Article 329-A is an outright negation of the right of equality conferred by Article 14. This was the case because the law would be discriminatory in that certain high personages would be put above the law in the absence of a differentia reasonably related to the object of the law. He went on to add: (*Indira Nehru Gandhi case*, SCC p. 258, para 681)

"*681*. It follows that clauses (4) and (5) of Article 329-A are arbitrary and are calculated to damage or destroy the rule of law. Imperfections of language hinder a precise definition of the rule of law as of the definition of "law" itself. And the constitutional law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English law at Oxford, which were published in 1885 under the title, "*Introduction to the Study of the Law of the Constitution*". But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of Government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts. The second meaning grew out of Dicey's unsound dislike of the French Droit Administratif which he regarded "as a misfortune inflicted upon the benighted folk across the Channel". [See *S.A. de Smith: Judicial Review of*

VERDICTUM.IN

Administrative Action, (1968) p. 5.] Indeed, so great was his influence on the thought of the day that as recently as in 1935 Lord Hewart, the Lord Chief Justice of England, dismissed the term "administrative law" as "continental jargon". The third meaning is hardly apposite in the context of our written Constitution for, in India, the Constitution is the source of all rights and obligations. We may not therefore rely wholly on Dicey's exposition of the rule of law but ever since the Second World War, the rule has come to acquire a positive content in all democratic countries. [See *Wade and Phillips: Constitutional Law* (6th Edn., pp. 70-73).] The International Commission of Jurists, which has a consultative status under the United Nations, held its Congress in Delhi in 1959 where lawyers, Judges and law teachers representing fifty-three countries affirmed that the rule of law is a dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society. One of the committees of that Congress emphasised that no law should subject any individual to discriminatory treatment. These principles must vary from country to country depending upon the provisions of its Constitution and indeed upon whether there exists a written Constitution. As it has been said in a lighter vein, to show the supremacy of the Parliament, the charm of the English Constitution is that "it does not exist". Our Constitution exists and must continue to exist. It guarantees equality before law and the equal protection of laws to everyone. The denial of such equality, as modified by the judicially evolved theory of classification, is the very negation of rule of law."

This paragraph is an early application of the doctrine of arbitrariness which follows from the rule of law contained in Article 14. It is of some significance that Dicey's formulation of the rule of law was referred to, which contains both absence of arbitrary power and equality before the law, as being of the essence of the rule of law.

67. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct

VERDICTUM.IN

doctrine on which State action may be struck down as being violative of the rule of law contained in Article 14. In a significant passage, Bhagwati, J., in *E.P. Royappa* v. *State of T.N.* stated: (SCC p. 38, para 85)

"*85*. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. *From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law*

VERDICTUM.IN

and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

(emphasis supplied)

68. This was further fleshed out in *Maneka Gandhi* v. *Union of India*, where, after stating that various fundamental rights must be read together and must overlap and fertilise each other, Bhagwati, J., further amplified this doctrine as follows: (SCC pp. 283-84, para 7)

"*The nature and requirement of the procedure under Article 21*

7. Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in

VERDICTUM.IN

E.P. Royappa v. *State of T.N.*, namely, that: (SCC p. 38, para 85)

'*85*. … From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14….'

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. *The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14*. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

(emphasis supplied)

69. This was further clarified in *A.L. Kalra* v. *Project and Equipment Corpn.*, following *Royappa* and holding that arbitrariness is a doctrine distinct from discrimination. It was held: (*A.L. Kalra case*, SCC p. 328, para 19)

"*19*. … It thus appears well settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (sic) protection by law. The Constitution Bench pertinently observed in *Ajay Hasia case* and put the matter beyond controversy when it said: (SCC p. 741, para 16)

VERDICTUM.IN

'*16*. … Wherever therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action.'

This view was further elaborated and affirmed in *D.S. Nakara* v. *Union of India*. In *Maneka Gandhi* v. *Union of India* it was observed that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of Article 14."

The same view was reiterated in *Babita Prasad* v. *State of Bihar*, SCC at p. 285, para 31.

70. That the arbitrariness doctrine contained in Article 14 would apply to negate legislation, subordinate legislation and executive action is clear from a celebrated passage in *Ajay Hasia* v. *Khalid Mujib Sehravardi*: (SCC pp. 740-41, para 16)

"*16*. … The true scope and ambit of Article 14 has been the subject-matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (*i*) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (*ii*) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in *E.P. Royappa* v. *State of T.N.*[48] that this Court laid bare a new dimension of Article 14 and pointed out that that article has highly activist magnitude and it embodies a guarantee against

VERDICTUM.IN

arbitrariness. This Court speaking through one of us (Bhagwati, J.) said: (SCC p. 38, para 85)

'*85*. … The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.'

This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in *Royappa case* and it was reaffirmed and elaborated by this Court in *Maneka Gandhi* v. *Union of India* where this Court again speaking through one of us (Bhagwati, J.) observed: (SCC pp. 283-84, para 7)

'*7*. Now the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt

VERDICTUM.IN

should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. … Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence….'

This was again reiterated by this Court in *International Airport Authority case*, SCR at p. 1042 (SCC p. 511) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. *Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution*."

(emphasis supplied)

71. In this view of the law, a three-Judge Bench of this Court in *K.R. Lakshmanan* v. *State of T.N.* struck down a 1986 Tamil Nadu Act on the ground that it was arbitrary and, therefore, violative of Article 14. Two separate arguments were addressed under Article 14. One was that the Act in question was

VERDICTUM.IN

discriminatory and, therefore, violative of Article 14. The other was that in any case the Act was arbitrary and for that reason would also violate a separate facet of Article 14. This is clear from para 45 of the said judgment. The judgment went on to accept both these arguments. Insofar as the discrimination aspect is concerned, this Court struck down the 1986 Act on the ground that it was discriminatory in paras 46 and 47. Paras 48 to 50 are important, in that this Court struck down the 1986 Act for being arbitrary, separately, as follows: (SCC pp. 256-57)

"*48*. We see considerable force in the contention of Mr Parasaran that the acquisition and transfer of the undertaking of the Club is arbitrary. The two Acts were amended by the 1949 Act and the definition of "gaming" was amended. The object of the amendment was to include horse-racing in the definition of "gaming". The provisions of the 1949 Act were, however, not enforced till the 1974 Act was enacted and enforced with effect from 31-3-1975. The 1974 Act was enacted with a view to provide for the abolition of wagering or betting on horse-races in the State of Tamil Nadu. It is thus obvious that the consistent policy of the State Government, as projected through various legislations from 1949 onwards, has been to declare horse-racing as gambling and as such prohibited under the two Acts. The operation of the 1974 Act was stayed by this Court and as a consequence the horse-races are continuing under the orders of this Court. The policy of the State Government as projected in all the enactments on the subject prior to 1986 shows that the State Government considered horse-racing as gambling and as such prohibited under the law. The 1986 Act on the other hand declares horse-racing as a public purpose and in the interest of the general public. There is apparent contradiction in the two stands. We do not agree with the contention of Mr Parasaran that the 1986 Act is a colourable piece of legislation, but at the same time we are of the view that no public purpose is being served by acquisition and transfer of the undertaking of the Club by the Government. We fail to understand how the State Government can acquire and take over the functioning of the

VERDICTUM.IN

race-club when it has already enacted the 1974 Act with the avowed object of declaring horse-racing as gambling? Having enacted a law to abolish betting on horse-racing and stoutly defending the same before this Court in the name of public good and public morality, it is not open to the State Government to acquire the undertaking of horse-racing again in the name of public good and public purpose. *It is ex facie irrational to invoke "public good and public purpose" for declaring horse-racing as gambling and as such prohibited under law, and at the same time speak of "public purpose and public good" for acquiring the race-club and conducting the horse-racing by the Government itself. Arbitrariness is writ large on the face of the provisions of the 1986 Act*.

49. We, therefore, hold that the provisions of the 1986 Act are discriminatory *and arbitrary* and as such violate and infract the right to equality enshrined under Article 14 of the Constitution.

50. Since we have struck down the 1986 Act on the ground that it violates Article 14 of the Constitution, it is not necessary for us to go into the question of its validity on the ground of Article 19 of the Constitution."

(emphasis supplied)

72. Close upon the heels of this judgment, a discordant note was struck in *State of A.P.* v. *McDowell & Co.* Another three-Judge Bench, in repelling an argument based on the arbitrariness facet of Article 14, held: (SCC pp. 737-39, para 43)

"*43*. Shri Rohinton Nariman submitted that inasmuch as a large number of persons falling within the exempted categories are allowed to consume intoxicating liquors in the State of Andhra Pradesh, the total prohibition of manufacture and production of these liquors is "arbitrary" and the amending Act is liable to be struck down on this ground alone. Support for this proposition is sought from a judgment of this Court in *State of T.N.* v. *Ananthi Ammal*. Before, however, we refer to the holding in the said decision, it would be appropriate to remind ourselves of certain basic propositions in this behalf. In the United Kingdom,

VERDICTUM.IN

Parliament is supreme. There are no limitations upon the power of Parliament. No court in the United Kingdom can strike down an Act made by Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways viz. the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (1) lack of legislative competence, and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness—concepts inspired by the decisions of the United States Supreme Court. Even in USA, these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by sub-clauses (*a*) to (*g*) of Article 19(1), it can be struck down only if it is found not saved by any of clauses (2) to (6) of Article 19 and so on. No enactment can be

VERDICTUM.IN

struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds viz. (*i*) unreasonableness, which can more appropriately be called irrationality, (*ii*) illegality and (*iii*) procedural impropriety (see *Council of Civil Service Unions* v. *Minister for Civil Service* which decision has been accepted by this Court as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in *R.* v. *Secy. of State for Home Deptt., ex p Brind*, AC at pp. 766-67 and 762.) It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted."

73. This judgment in *McDowell & Co. case* failed to notice at least two binding precedents, first, the judgment of a Constitution Bench in *Ajay Hasia* and second, the judgment of a coordinate three-Judge Bench in *Lakshmanan*. Apart from this, the reasoning contained as to why arbitrariness cannot be used to strike down legislation as opposed to both executive action and subordinate legislation was as follows.

74. According to the Bench in *McDowell*, substantive due process is not something accepted by either the American courts or our courts and, therefore, this being a reiteration of

VERDICTUM.IN

substantive due process being read into Article 14 cannot be applied. A Constitution Bench in *Mohd. Arif* v. *Supreme Court of India* has held, following the celebrated *Maneka Gandhi*, as follows: (*Mohd. Arif case*, SCC pp. 755-56, para 27-28)

"*27*. The stage was now set for the judgment in *Maneka Gandhi*. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [*See* at SCR pp. 646-48 : SCC pp. 393-95, paras 198-204 per Beg, C.J., at SCR pp. 669, 671-74 & 687 : SCC pp. 279-84 & 296-97, paras 5-7 & 18 per Bhagwati, J. and at SCR pp. 720-23 : SCC pp. 335-39, paras 74-85 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus: (SCR p. 723: SCC pp. 338-39, para 85)

'*85*. To sum up, "procedure" in Article 21 means fair, not formal procedure. "Law" is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses.'

28. Close on the heels of *Maneka Gandhi case* came *Mithu* v. *State of Punjab*, in which case the Court noted as follows: (SCC pp. 283-84, para 6)

'*6*. … In *Sunil Batra* v. *Delhi Admn.* while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer, J. said that though our Constitution did not have a "due process" clause as in the

VERDICTUM.IN

American Constitution; the same consequence ensued after the decisions in *Bank Nationalisation case* and *Maneka Gandhi case*….

In *Bachan Singh* which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in *Maneka Gandhi*, it will read to say that: (SCC p. 730, para 136)

"*136*. 'No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.' " '

The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty."

75. Clearly, therefore, the three-Judge Bench in *McDowell case* has not noticed *Maneka Gandhi* cited in *Mohd. Arif* to show that the wheel has turned full circle and substantive due process is part of Article 21 as it is to be read with Articles 14 and 19.

26. The Supreme Court in the case of **D.S. Nakara v. Union of India,** reported in **(1983) 1 SCC 305** has held as under :

12. After an exhaustive review of almost all decisions bearing on the question of Article 14, this Court speaking through Chandrachud, C.J. in *In re Special Courts Bill*, 1978 restated the settled propositions which emerged from the judgments of this Court undoubtedly insofar as they were relevant to the decision on the points arising for consideration in that matter. Four of them are apt and relevant for the present purpose and may be extracted. They are: (SCC pp. 424-25, para 72)

* * *

(3)The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on

VERDICTUM.IN

delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4)The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

* * *

(6)The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

* * *

13. The other facet of Article 14 which must be remembered is that it eschews arbitrariness in any form. Article 14 has, therefore, not to be held identical with the doctrine of classification. As was noticed in *Maneka Gandhi case*[1] in the earliest stages of evolution of the constitutional law, Article 14

VERDICTUM.IN

came to be identified with the doctrine of classification because the view taken was that Article 14 forbids discrimination and there will be no discrimination where the classification making the differentia fulfils the aforementioned two conditions. However, in *E.P. Royappa* v. *State of T.N.* it was held that the basic principle which informs both Article 14 and 16 is equality and inhibition against discrimination. This Court further observed as under: (SCC p. 38, para 85)

"From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

14. Justice Iyer has in his inimitable style dissected Article 14 in *Maneka Gandhi case* as under at SCR p. 728: (SCC p. 342, para 94)

"That article has a pervasive processual potency and versatile quality, egalitarian in its soul and allergic to discriminatory diktats. Equality is the antithesis of arbitrariness and ex cathedra ipse dixit is the ally of demagogic authoritarianism. Only knight-errants of 'executive excesses' — if we may use current cliche — can fall in love with the Dame of despotism, legislative or administrative. If this Court gives in here it gives up the ghost. And so it is that I insist on the dynamics of limitations on fundamental freedoms as implying the rule of law: Be you ever so high, the law is above you."

Affirming and explaining this view, the Constitution Bench in *Ajay Hasia* v. *Khalid Mujib Sehravardi* held that it must, therefore, now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary must necessarily involve negation of equality. The Court made it

VERDICTUM.IN

> explicit that where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14. After a review of large number of decisions bearing on the subject, in *Air India* v. *Nergesh Meerza* the Court formulated propositions emerging from an analysis and examination of earlier decisions. One such proposition held well established is that Article 14 is certainly attracted where equals are treated differently without any reasonable basis.
>
> **15.** Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question.

Whether amendment of 2002 has created an additional class within class ; if yes, then whether it can be said to be an intelligible differentia having reasonable nexus with object sought to be achieved?

27. CrPC clerk/Asstt. Grade III are class III posts and as per Rules, 1998, these two posts are feeder post for promotion to Asstt. Grade II, which is again a Class III post. Similarly, APCD Grade III is a Class III post and is a feeder post for promotion to the post of PCD which too is a Class III post. At the cost of repetition, there is no amendment in Rules 1998 and even today, the post of CrPC Clerk/Asstt. Grade III posts are feeder post for promotion to the post of Asstt. Grade II and post of APCD Grade III is a feeder post for promotion to PCD.

VERDICTUM.IN

28. However, by amendment brought in the year 2002, a new category of CrPC clerk/Asstt. Grade III/APCD Grade III has been created i.e., those who are holding LL.B. or equivalent degrees from recognized University by separating them from those who holding other degrees.

29. In view of amendment of 2002, the CrPC clerk/Asstt. Grade III/APCD Grade III holding LL.B. degree would be entitled for their consideration for promotion to the post of ADPO which is class II post and persons who are not holding LL.B. or equivalent post will be eligible for promotion to another Class III post only i.e., either Asstt. Grade II or PCD as the case may be.

30. There may be another instance i.e., if 6 persons holding LL.B. or equivalent degree are working as CrPC clerk/Asstt. Grade III/APCD Grade III but only 4 posts of ADPO are available, then only 4 out of 6 would be considered for promotion to the post of ADPO which is a class II post and other 2 persons holding the same qualification will get promotion to another class III post i.e., either Asstt. Grade II or PCD.

31. It is true that fundamental rights are not absolute rights and are subject to reasonable classification which should pass the test of intelligible differentia and reasonable nexus with object sought to be achieved.

32. When Shri Ankur Mody, Additional Advocate General was directed to satisfy the aforesaid distinction, then it was submitted by Counsel for State that the initial burden to prove that the provision is bad in law and is

VERDICTUM.IN

not based on intelligible differentia having no reasonable nexus with object sought to be achieved is on the Petitioner. This submission made by Counsel for the State cannot be accepted for the reason that distinction drawn by the State between CrPC clerk/Asstt. Grade III/APCD Grade III holding LL.B or equivalent degree prima facie appears to be without any due application of mind. Since, the State did not come forward with the object sought to be achieved by it, therefore, this Court was unable to consider as to whether there was any reasonable nexus with object sought to be achieved or not?

33. It was fairly conceded by Shri Mody that the State in its return has not pointed the reasons and objects behind bringing the amendment in Schedule II and Schedule IV of Rules 1991.

34. How the State can treat CrPC clerks/Asstt. Grade III/APCD Grade III holding LL.B. degree or equivalent degree differently from CrPC clerks/Asstt. Grade III/APCD Grade III holding LL.B. degree or equivalent degree not holding LL.B. or equivalent degree has not been explained, specifically when the minimum qualification for appointment to the post of CrPC clerk/Asstt. Grade III/APCD Grade III is the same.

35. By introducing amendment in Schedule II and IV of Rules, 1991, the State has provided two promotional channels i.e., one directly to class II post and another to class III post. Accordingly, Shri Ankur Mody was directed to explain the aforesaid anomaly and reasonable nexus with object sought to be achieved. Except by submitting that in fact the State

VERDICTUM.IN

wanted to provide another and separate promotional avenue to the persons holding the post of CrPC clerks/Asstt. Grade III/APCD Grade III with LL.B. degree or equivalent degree, nothing else was explained.

36. At the cost of repetition, it is once again clarified that nothing has been placed by the State to suggest as to what prompted the State to introduce such separate promotional channel directly to the post of ADPO which is a Grade II post?

37. Since, there is a presumption regarding constitutionality of an enactment or Rule, therefore, whether the State has pointed out intelligible differentia or reasonable nexus with object sought to be achieved or not, cannot be a sole criteria to declare the provision unconstitutional or ultra vires.

Thus, it would be appropriate for this Court to consider the duties of Public Prosecutors and CrPC clerks/Asstt. Grade III/APCD Grade III and whether two different promotional channels can be provided for same feeder post or not, if yes, then whether amendment in Rule 1991 would satisfy the requirement without there being any amendment in Rules, 1998?

38. The Supreme Court in the case of **State of Punjab v. Brijeshwar Singh Chahal,** reported in **(2016) 6 SCC 1** has held as under :

> **28.** In *Shrilekha Vidyarthi* v. *State of U.P.*, which happens to be the first of these decisions, this Court had an occasion to examine whether Government Counsel in the districts are

VERDICTUM.IN

holders of an "*office or post*" or such appointments are no more than professional engagements like the one between a private client and his lawyer. That case arose out of a challenge mounted by Government Counsel who were engaged throughout the State of Uttar Pradesh to handle civil, revenue or criminal cases and whose services were en masse terminated by the State only to be replaced by fresh appointments on the basis of a new panel prepared for that purpose and communicated to the District Magistrates concerned. On behalf of the State, it was argued that the engagement of Government Counsel was nothing but a professional engagement between a client and his lawyer with no public element attached to it.

29. Rejecting that contention, this Court held that the appointment of the District Government Counsel by the State Government was not merely a professional engagement but had a public element attached to it. This Court noted that Government Counsel were paid remuneration out of the public exchequer and that having regard to Sections 24, 25 and 321 of the Code of Criminal Procedure, the Public Prosecutors were entrusted the responsibility of acting only in the interest of administration of justice. In the case of Public Prosecutors, declared this Court, the additional public element flowing from the statutory provisions in the Code of Criminal Procedure, clothed the Public Prosecutors with the attribute of the holders of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attached to it. This was according to this Court, sufficient to attract Article 14 and bring the question of validity of the impugned circular within the scope of judicial review.

30. The decision in *Shrilekha case* is noteworthy for the additional reason that the same held judicial review of State action permissible even when the engagement of the Government Counsel may be contractual in nature. This Court observed: (SCC p. 237, para 24)

VERDICTUM.IN

"*24*. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterise all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."

31. Relying upon the decisions of this Court in *Ramana Dayaram Shetty* v. *International Airport Authority of India*, *Kasturi Lal Lakshmi Reddy* v. *State of J&K*, *Dwarkadas Marfatia and Sons* v. *Port of Bombay* and *Mahabir Auto Stores* v. *Indian Oil Corpn.*, this Court held that the power of judicial review and the sweep of Article 14 was wide enough to take within its fold the impugned circular issued by the State in exercise of its executive powers irrespective of the precise nature of appointment of the Government Counsel in the districts or the rights, contractual or statutory, which the appointees may have. This Court reiterated the well-settled principle that State action can survive only if it does not suffer

VERDICTUM.IN

from the vice of arbitrariness which is the very essence of Article 14 of the Constitution and Rule of Law. This Court observed: (*Shrilekha case*, SCC p. 243, para 35)

"*35*. It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind."

32. Applying the above principle to the circular under challenge, this Court held that arbitrariness was writ large on the same as it gave an impression as if the State action was taken under a mistaken belief of applicability of "spoils system" under our Constitution. This Court held that even though in the case of State, public interest should be the guiding consideration while considering the suitability of the appointees yet the impugned State action appeared to have been taken with the sole object of terminating all existing appointments irrespective of the subsistence or expiry of the tenure or the suitability of the incumbents. The following passage from the judgment sums up the trend of the judicial pronouncements which increasingly favour State activity even in contractual matter being brought within the purview of judicial review: (*Shrilekha case*, SCC p. 248, para 48)

"*48*. In our view, bringing the State activity in contractual matters also within the purview of judicial review is inevitable and is a logical corollary to the stage already reached in the decisions of this Court so far. Having fortunately reached this point, we should not now turn back or take a turn in a different direction or merely stop there. In our opinion, two recent decisions in *Dwarkadas Marfatia and Sons* and *Mahabir Auto Stores* also lead in the same direction without saying so in clear

VERDICTUM.IN

terms. This appears to be also the trend of the recent English decisions. It is in consonance with our commitment to openness which implies scrutiny of every State action to provide an effective check against arbitrariness and abuse of power. We would much rather be wrong in saying so rather than be wrong in not saying so. *Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power*."

(emphasis supplied)

33. In *State of U.P.* v. *U.P. State Law Officers' Assn.* also Law Officers were removed by the State Government, aggrieved whereof, the affected officers approached the High Court contending, inter alia, that their removal was against the principles of natural justice and that they could be removed from their offices only for valid reasons. The High Court agreed with that contention, allowed the petition and quashed the orders of removal. The State assailed that order before this Court in which this Court examined the issue from three different dimensions viz. (*i*) *the nature of the legal profession*; (*ii*) *the interest of public*; and (*iii*) *the modes of appointment and removal*.

34. While dealing with the *nature of the legal profession*, this Court observed in *U.P. State Law Officers' Assn. case* that legal profession was essentially a service-oriented profession and that the relationship between the lawyer and his client is one of trust and confidence. As a responsible officer of the court and an important adjunct of the administration of justice, the lawyer also owes a duty to the court as well as to the opposite side. He has to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client. Having said that, this Court noted the changed profile of the legal profession because of the expansion of public sector activities necessitating maintenance of a common panel of lawyers, some of whom are

VERDICTUM.IN

in full-time employment of the Government or public institutions as their Law Officers.

35. On the question of *public interest involved in the appointment of lawyers*, this Court in *U.P. State Law Officers' Assn. case* unequivocally declared that the Government or the public body represents public interest and whoever is in charge of running their affairs is no more than a trustee or a custodian of public interest. Protection of public interests in the best possible manner is their primary duty. It follows that public bodies are under an obligation to the society to take the best possible steps to safeguard such interests. That obligation in turn casts on them the duty to engage the most competent servants, agents, advisers, etc. Even in the matter of selection of lawyers, those who are running the Government or the public bodies are under an obligation to make earnest efforts to select the best from the available lot. This is more so because the claims made by and/or against the public bodies are monetarily substantial and socially crucial with far-reaching consequences.

36. This Court while dealing with the third dimension touching the mode of *appointment of lawyers* declared that in conformity with the obligation cast upon them those handling the affairs of the State are duty-bound to select the most meritorious, whatever the method adopted for such selection and appointment may be. It must be shown that a search for the meritorious was undertaken and that appointments were made only on the basis of the merit and not for any other consideration. The following passage is in this regard apposite: (*U.P. State Law Officers' case*, SCC p. 217, para 18)

"*18*. The mode of appointment of lawyers for the public bodies, *therefore, has to be in conformity with the obligation cast on them to select the most meritorious. An open invitation to the lawyers to compete for the posts is by* far the best mode of such selection. But sometimes the best may not compete or a competent candidate may not be available from among the competitors. In such circumstances, the public bodies may resort to other methods such as inviting and appointing the best

VERDICTUM.IN

available, although he may not have applied for the post. *Whatever the method adopted, it must be shown that the search for the meritorious was undertaken and the appointments were made only on the basis of the merit and not for any other consideration*."

(emphasis supplied)

37. In *State of U.P.* v. *Johri Mal* a three-Judge Bench of this Court had an occasion to deal with somewhat similar question that arose once again in relation to appointment of the government lawyers in the State of U.P. This Court reviewed the decisions earlier delivered and ruled that public interest would be safeguarded only when good and competent counsel are appointed by the State. No such appointments should, declared this Court, be made for pursuing a political purpose or for giving some undue advantage to any particular section. The State should replace an efficient, honest and competent lawyer only when it is in a position to appoint a more competent lawyer in his place, observed this Court. The following passage is apposite in this regard: (SCC p. 736, para 44)

"*44*. Only when good and competent counsel are appointed by the State, the public interest would be safeguarded. The State while appointing the Public Prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is imperative which in turn would have a direct impact on sustenance of democracy. *No appointment of Public Prosecutors or District Counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of the people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, inter alia, when it is in a position to appoint a more competent lawyer*. In such an event, even a good performance by a lawyer may not be of much importance."

(emphasis supplied)

VERDICTUM.IN

> **38.** While dealing with the nature of office the Government Counsel hold, this Court in *Johri Mal case* declared that the State Government Counsel holds an office of great importance. They are not only officers of the court but also the representatives of the State and that courts repose a great deal of confidence in them. They are supposed to render independent, fearless and non-partisan views before the court irrespective of the result of litigation which may ensue. So also the Public Prosecutors have great responsibility. They are required to perform statutory duties independently having regard to various provisions contained in the Code of Criminal Procedure. The State Government Counsel represents the State and thereby the interest of the general public before a court of law. This requires that Government Counsel have character, competence, sufficient experience as also standing at the Bar. The need for employing meritorious and competent persons to maintain the standard of the high office cannot be minimised, observed the Court, particularly, when the holders of the post have a public duty to perform. The Court also expressed anguish over the fact that in certain cases the recommendations are made by the District Magistrate having regard to the political affinity of the lawyers to the party in power and that State is not expected to rescind the appointments with the change in the Government because a new party has taken over charge of the Government. This Court also recognised the age-old tradition of appointing the District Government Counsel on the basis of the recommendations of the District Collector in consultation with the District Judge. The fact that the District Judge, who is consulted while making such appointment knows the merit, competence and capability of the lawyer concerned, was also recognised by the Court.

39. The Supreme Court in the case of **State of U.P. v. Johri Mal, reported in (2004) 4 SCC 714** has held as under :

> **74.** The District Government Counsel represent the State. They, thus, represent the interest of the general public before a court of

VERDICTUM.IN

law. The Public Prosecutors while presenting the prosecution case have a duty to see that innocent persons may not be convicted as well as an accused guilty of commission of crime does not go unpunished. Maintenance of law and order in the society and, thus, to some extent maintenance of rule of law which is the basic fibre for upholding the rule of democracy lies in their hands. The Government Counsel, thus, must have character, competence, sufficient experience as also standing at the Bar. The need for employing meritorious and competent persons to keep the standard of the high offices cannot be minimised. The holders of the post have a public duty to perform. Public element is, thus, involved therein.

75. In the matter of engagement of a District Government Counsel, however, a concept of public office does not come into play. However, it is true that in the matter of counsel, the choice is that of the Government and none can claim a right to be appointed. That must necessarily be so because it is a position of great trust and confidence. The provision of Article 14, however, will be attracted to a limited extent as the functionaries named in the Code of Criminal Procedure are public functionaries. They also have a public duty to perform. If the State fails to discharge its public duty or acts in defiance, deviation and departure of the principles of law, the court may interfere. The court may also interfere when the legal policy laid down by the Government for the purpose of such appointments is departed from or mandatory provisions of law are not complied with. Judicial review can also be resorted to, if a holder of a public office is sought to be removed for reason dehors the statute.

76. The appointment in such a post must not be a political one. The Manual states that a political activity by the District Government Counsel shall be a disqualification to hold the post.

40. The Supreme Court in the case of **Mahabir (Supra)** has held as under :

VERDICTUM.IN

67. In the case at hand, not only proper contradictions were not brought on record in the oral evidence of the hostile witnesses, but even those few that were brought on record, were not proved through the evidence of the Investigating Officer. Does the State expect Section 106 of the Evidence Act to come to its aid in every criminal prosecution. At times, such procedural lapses may lead to a very serious crime going unpunished. Any crime committed against an individual is a crime against the entire society. In such circumstances, neither the public prosecutor nor the presiding officer of the trial court can afford to remain remiss or lackadaisical in any manner. Time and again, this Court has, through its judgments, said that there should not be any element of political consideration in the matters like appointment to the post of public prosecutor, etc. The only consideration for the Government should be the merit of the person. The person should be not only competent, but he should also be a man of impeccable character and integrity. He should be a person who should be able to work independently without any reservations, dictates or other constraints. The relations between the Public Prosecution Service and the judiciary are the very cornerstone of the criminal justice system. The public prosecutors who are responsible for conducting prosecutions and may appeal against the court decisions, are one of judges' natural counterparts in the trial proceedings and also in the broader context of management of the system of criminal law.

68. A criminal case is built upon the edifice of evidence (whether it is direct evidence or circumstantial evidence) that is admissible in law. Free and fair trial is the very foundation of the criminal jurisprudence. There is a reasonable apprehension in the mind of the public at large that the criminal trial is neither free nor fair with the Prosecutor appointed by the State Government conducting the trial in a manner where frequently the prosecution witnesses turn hostile.

VERDICTUM.IN

69. Over a period of time, we have noticed, while hearing criminal appeals, that there is practically no effective and meaningful cross-examination by the Public Prosecutor of a hostile witness. All that the Public Prosecutor would do is to confront the hostile witness with his/her police statement recorded under Section 161 of the Cr. P.C. and contradict him/her with the same.

The only thing that the Public Prosecutor would do is to bring the contradictions on record and thereafter prove such contradictions through the evidence of the Investigating Officer. This is not sufficient. The object of the cross-examination is to impeach the accuracy, credibility and general value of the evidence given in- chief; to sift the facts already stated by the witness; to detect and expose the discrepancy or to elicit the suppressed facts which will support the case of the cross-examining party. What we are trying to convey is that it is the duty of the Public Prosecutor to cross- examine a hostile witness in detail and try to elucidate the truth & also establish that the witness is speaking lie and has deliberately resiled from his police statement recorded under Section 161 of the Cr. P.C. A good, seasoned and experienced Public Prosecutor will not only bring the contradictions on record, but will also cross-examine the hostile witness at length to establish that he or she had actually witnessed the incident as narrated in his/her police statement." *(Emphasis supplied)*

* * *

93. Time and again this Court has observed in so many of its decisions that such appointments be it in the High Court or in the district judiciary should be only taking into consideration the merit of the candidate and no other consideration should weigh in such appointments.

94. Public Prosecutor holds a "Public Office". The primacy given to him under the Scheme of CrPC has a "special purpose".

VERDICTUM.IN

Certain professional, official obligations and privileges are attached to his office. His office may also be termed as an office of profit as he remains disqualified to contest the election so long he holds the office though permanency is attached to the office and not to the term of his office. His duties are of public nature. He has an "independent and responsible character". He holds the public office within the scope of a "quo warranto proceedings". Prosecutor is not a part of investigating agency but is an "independent statutory authority". He performs statutory duties and functions. He holds an office of responsibility as he has been enclothed with the power to withdraw the prosecution of a case on the directions of the State Government.

95. The Criminal law enforcement system investigates crimes and prosecutes offenders. It must also protect valued rights and freedoms, and convict only the guilty. The prosecutor must recognize these different and competing interests. He should strike a fair balance between the competing interests of convicting the guilty, protecting citizens' rights and freedoms and protecting the public from criminals. Prosecutors should ensure that prosecutions are conducted in a diligent, competent and fair manner. The importance of the office of the Public Prosecutor cannot be overemphasized. The Public Prosecutor must be a person of high merit, fair and objective, because upon him depends to a large extent the administration of criminal justice. The office of the Public Prosecutor is a public office and the incumbent has to discharge statutory duties. The person appointed as Public Prosecutor must, therefore, be one who is not only able and efficient, but also enjoys a reputation and prestige which satisfy his appointment as a Public Prosecutor. The duty of the prosecutor is to assist the Court in reaching a proper conclusion in regard to the case which is brought before it for trial. The prosecutor has to be fair in the presentation of the prosecution case. He must not suppress or keep back from the court evidence relevant to the determination of the guilt or

VERDICTUM.IN

innocence of the accused. He must present the complete picture, and not a one sided picture. He must not be partial to the prosecution or to the accused. He has to be fair to both sides in the presentation of the case.

96. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts of the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court to the investigation agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the court or defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the Court, if it comes to his knowledge.

97. Law Officers are one of the important wheels of the chariot, driven by the Judges to attain the cherished goal of human being to secure justice against the wrong doers. The main object of the State is to curb the crime, investigate and prosecute the offenders and punish them, with a view to maintain law and order, amity and harmony, tranquillity and peace. The various provisions of the CrPC and the Rules provide the manner and procedure by which the Public Prosecutor should be appointed and provide assistance to the Courts. The object of the CrPC and the Rules is to appoint the best among the lawyers as the Public Prosecutor to provide assistance to the Court. The people have the vital interest in the matter.

41. The Supreme Court in the case of **K.J. John, Asstt. Public Prosecutor v. State of Kerala ,** reported in **(1990) 4 SCC 191** has held as under :

VERDICTUM.IN

18. The main controversy hinges on the scope of sub-section (6) of Section 24 and specially the words "regular cadre of Prosecuting Officers" existing in this provision. Prior to coming into force of the Code of Criminal Procedure, 1973, the Prosecuting Officers were under the control of Police Department. It was not necessary at that time that the Public Prosecutor or Additional Public Prosecutor should have any experience as an advocate. In order to remove such unsatisfactory state of affairs, the legislature made an elaborate provision under Section 24 for the appointment of Public Prosecutors and Additional Public Prosecutors in the Criminal Procedure Code, 1973. Under this provision it was laid down that practice as an advocate for not less than seven years was necessary for appointment of Public Prosecutor and Additional Public Prosecutor. After some time, it was considered by the legislature that the above provision does not take into consideration the working experience of Prosecuting Officers and pleaders for eligibility for appointment as Public Prosecutor and Additional Public Prosecutor. The legislature as such substituted a new Section 24 by the Criminal Procedure Code (Amendment) Act, 1978 brought into force w.e.f December 18, 1978. Under sub-section (9) of this new Section 24 it was provided that the period during which a person has been in practice as a Pleader, or has rendered 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. This provision thus granted benefit of the period of service to the persons mentioned in the above provision and by a deeming fiction such period of service was considered as the period in practice as an advocate. Thus the above provision made the Prosecuting Officers such as Public Prosecutor, Additional Public Prosecutor, Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, also eligible for being included in the panel to be prepared by the District Magistrate in consultation with the

VERDICTUM.IN

Sessions Judge fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

19. In this background we have to understand the scope of sub-section (6) of Section 24 which gives a clear mandate to appoint a Public Prosecutor or an Additional Public Prosecutor only from amongst the persons constituting a regular cadre of Prosecuting Officers. According to this provision any person from the advocates or from any other source cannot be appointed as a Public Prosecutor or an Additional Public Prosecutor if there already exists a regular cadre of Prosecuting Officers in a State. So far as the proviso to sub-section (6) of Section 24 is concerned it would not apply in the normal circumstances and would only be attracted where in the opinion of the State Government no suitable person is available in such regular cadre of Prosecuting Officers for appointment as Public Prosecutor or Additional Public Prosecutor. Admittedly the regular cadre of Prosecuting Officers in the State of Kerala as well as in the State of U.P. does not include Public Prosecutors or Additional Public Prosecutors. The case of the appellants is that Assistant Public Prosecutors Grade I and Grade II together constitute a cadre of Prosecuting Officers so as to attract the applicability of sub-section (6) of Section 24 of the Code. It has been contended on their behalf that unless the government formed the requisite opinion that no suitable person is available in the said cadre for appointment as Public Prosecutor or Additional Public Prosecutor, the appointments to the posts of Public Prosecutor, and Additional Public Prosecutor can be made only from amongst persons holding the posts of Assistant Public Prosecutors Grade I and Grade II.

42. The Supreme Court in the case of **Centre for Public Interest Litigation v. Union of India ,** reported in **(2012) 3 SCC 117** has held as under :

VERDICTUM.IN

21. The expression "under" occurring in Section 46(2) of the said Act must be reasonably construed in a manner which is consistent with the dignity of the office of Public Prosecutor. A Public Prosecutor cannot be equated with a person who is holding an office under the State. He cannot be treated as a government employee. It may be that he should be a lawyer on the government panel. However, the independence of the Public Prosecutor from any governmental control is the hallmark of this high office.

22. Reference in this connection may be made to the decision of this Court in *Shrilekha Vidyarthi* v. *State of U.P.* wherein the following observations have been made: (SCC p. 233, para 14)

"*14.*… [The] function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interest of administration of justice. In the case of Public Prosecutors, this additional public element flowing from statutory provisions in CrPC, undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it."

23. The role of a Public Prosecutor in a criminal justice system has been very aptly put in the following words: [*Christmas Humphreys*: *1955 Criminal Law Review* (pp. 740-41)]*

"The Prosecutor has a duty to the State, to the accused and to the court. The Prosecutor is at all times a minister of justice, though seldom so described. It is *not* the duty of the prosecuting counsel to secure a conviction, nor should any prosecutor even feel pride or satisfaction in the mere fact of success."

24. A Public Prosecutor is really a minister of justice and his job is none other than assisting the State in the administration of justice and in fact he is not a representative of any party. (See *Babu* v. *State of Kerala*.) The same view has also been expressed in *R.* v. *Banks*_wherein it has been said that the Public Prosecutor: (Cr App Rep p. 76)

VERDICTUM.IN

> "… throughout a case ought not to struggle for the verdict against a prisoner but … ought to bear themselves rather in the character of minister of justice assisting in the administration of justice."
>
> **25.** This Court has also expressed the same opinion in *Manu Sharma* v. *State (NCT of Delhi)*, where this Court held that a Public Prosecutor must observe a wider set of duties than to merely ensure that the accused is punished. His job is to ensure fair play in all proceedings. (Paras 185-88.) In the Constitution Bench decision of this Court in *Sheonandan Paswan* v. *State of Bihar*, this Court held that a Public Prosecutor is not a representative of any ordinary party to a controversy but of the sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.
>
> **26.** Therefore, there is a public element in such an appointment.

43. Thus, it is clear that the post of a Public Prosecutor is not like any other Govt. Job and it has multiple onerous duties. The person appointed as Public Prosecutor must be efficient and trustworthy person with impeccable character. The independence of Public Prosecutor is the hallmark. The job of a Public Prosecutor is that of assisting the State in the administration of Justice and is not a representative of any party. His job is to ensure fair play. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court, to the investigation agencies but to the accused as well. Public Prosecutor should strike a fair balance between the competing interests of convicting the guilty, protecting citizens' rights and freedoms and protecting the public from criminals. Prosecutors should ensure that prosecutions are conducted in a diligent, competent and fair manner.

VERDICTUM.IN

Prosecutor is not a part of investigating agency but is an "independent statutory authority". He performs statutory duties and functions. He holds an office of responsibility as he has been enclothed with the power to withdraw the prosecution of a case on the directions of the State Government. They, thus, represent the interest of the general public before a court of law. The Public Prosecutors while presenting the prosecution case have a duty to see that innocent persons may not be convicted as well as an accused guilty of commission of crime does not go unpunished. The public interest would be safeguarded only when good and competent counsel are appointed by the State. The appointment of the District Government Counsel by the State Government was not merely a professional engagement but had a public element attached to it. Public Prosecutors/ Government Counsel are paid remuneration out of the public exchequer and that having regard to Sections 24, 25 and 321 of the Code of Criminal Procedure, the Public Prosecutors were entrusted the responsibility of acting only in the interest of administration of justice.

44. Admittedly, the persons holding posts of CrPC Clerk/Asstt. Grade III/APCD Grade III have no experience of appearing before the Court or examining or cross examining the witnesses. The failure of the Public Prosecutors in effectively cross examining the hostile witnesses or conducting the Trial has been highlighted by the Supreme Court in the case of **Mahabir (Supra)** and the in same judgment, the Supreme Court has also highlighted that the Public Prosecutors should not only be well

VERDICTUM.IN

conversant with law but should be of impeccable character, honest as he is performing statutory duties as they represent the general public.

45. The posts of CrPC clerk/Asstt. Grade III/APCD Grade III are Ministerial posts and are only required to do office work. Merely because they hold LL.B. or equivalent degree, would not constitute a separate class requiring separate treatment by providing separate promotional avenues directly to class II from Class III whereas the other CrPC clerks/Asstt. Grade III/APCD Grade III who are not holding LL.B. or equivalent degree will get promotion to another class III post i.e., Asstt. Grade II.

46. The Supreme Court in the case of **Tapasmita Sutar Vs. Union of India and others decided on 6-10-2026 in W.P.(c) No. 1224/2026 has held as under :**

> 15. Second, and in any event, service as a Bench Clerk in the District Judiciary is substantially different from service as a Law Clerk in this Court or the High Courts. A Law Clerk works closely with a Judge, undertaking comprehensive legal research, analysis of pending matters, and some drafting. It is this close association with the process of adjudication that led this Court, in the Judgment dated 20.05.2025, to count experience as a Law Clerk towards the period of practice. By contrast, the duties of a Bench Clerk, though indispensable to the functioning of any court, are more ministerial in nature and do not involve such close contact with judicial decision-making. The Petitioner apprehends that she is being excluded merely on the basis of 10 the nomenclature of her post. We hasten to clarify that such is not the case. The distinction lies in the nature and substance of

VERDICTUM.IN

the duties discharged and, examined on that very touchstone, her service cannot be equated with that of a Law Clerk.

47. If the duties assigned to the posts of CrPC clerk/Asstt. Grade III/APCD Grade III are considered, then they are purely ministerial/clerical in nature having no contact either closely or distantly with Judicial decision making. By order dated 1-10-2018 (relied upon by the respondents), the Director, Prosecution has assigned duties to Asstt. Grade III, which reads as under :

जिला अभियोजन कार्यालय व तहसील स्तर के अभियोजन कार्यालयों मे पदस्थ सभी (एक को छोडकर) सहायक ग्रेड के कर्मचारियों को रीडर धोषित किया जाता है। सिर्फ एक कर्मचारी जिला स्तर पर कार्यालय लिपिक का कार्य देखेगा । तहसील स्तर पर दोनो कार्य कार्यालय लिपिक व रीडर, सहायक ग्रेड द्वारा संपादित किये जायेंगे।

रीडर के कार्य एवं दायित्व निम्नानुसार होंगे :

रीडर के दायित्व :– रीडर के रूप में पदाविहित कर्मचारियों द्वारा निम्न दायित्वों का निर्वहन किया जाएगा

01 वह अभियोजन अधिकारी के न्यायालयीन कार्यो के दायित्व के निर्वहन के दौरान आवश्यक लिपिकीय कार्य मे सहयोग प्रदान करेंगे।

02 रीडर का दायित्व होगा के वह केस की फाईल एवं अभिलेख को अद्यतन रखें

03 केसों की संपूर्ण सूची व्यवस्थित कर अद्यतन रखना

04 संबंधित अधिकारी के समक्ष अगले दिवस नियत होने वाले प्रकरणों की सूची प्रस्तुत करना

05 प्रकरण की प्रगति एवं आगामी कार्यवाही के संबंध मे सुसंगत रजिस्टर / फाइल मे इन्द्राज करना

VERDICTUM.IN

06 प्रकरणों मे लगने वाले आवेदन, लिखित बहस, अपील / पुनरीक्षण आदि तैयार करने मे सहयोग करना

07 संबंधित अधिकारी के निर्देश पर न्यायालयीन फाइल से कोई जानकारी प्राप्त करनो हो तो कोर्ट मोहरिर के माध्यम से जानकारी प्राप्त करना

08 अन्य कोई कार्य जो संबंधित अधिकारी अथवा वरिष्ठ अधिकारी द्वारा निर्देशित किया जाए।

48. From plain reading of work distribution done by the Director Prosecution, it is clear that the job of the Asstt. Grade III is purely of Ministerial in nature having no exposure to Judicial decision-making process.

49. Similarly, earlier the CrPC clerks were to prepare the copies of Police Charge Sheet for the presentation before Trial Court, however, now with introduction of Photocopies, the said work is performed by a police constable posted in the office of Police Superintendent. It was submitted by Counsel for Petitioner that now recruitment to the post of CrPC Clerks are not taking place.

50. Similarly the duty of Asstt. Previous Conviction Detective (APCD Grade III) is to assist the Previous Conviction Detective (PCD) who has to discharge the duties as prescribed in police regulation 525 and 526. According to the Counsel for Petitioner, the designation PCD has been redesignated as sub-inspector etc. Be that whatever it may be.

51. One thing is clear that the job of Asstt. Grade III/CrPC clerk/APCD Grade III is purely Ministerial/clerical in nature.

VERDICTUM.IN

52. So far as the duties of ADPO are concerned, the same may be summarized as under :

1. To conduct Trial before the Court of Magistrate
2. To examine and cross examine the witnesses, to assist the Magistrate in preparing the accused statement
3. To send a proposal for challenging the judgments passed by the Magistrate Court
4. To give legal advice as sought by investigating agency ;
5. To conduct Trial as Add. Public Prosecutor after completing 7 years of service and to conduct Trial as Special Public Prosecutor after completing 10 years of service.

53. Furthermore, the Law and Legislative Department of State of Madhya Pradesh by Gazette Notification No. 2277-21-B(2) 2019 dated 1-5-2019 has appointed “Asstt. District Public Prosecution Officers” having 7 years of service or more as “Special Public Prosecutors” also. Similarly by Notification No. 1/12321-B(2)/2022 dated 18-1-2022 has appointed “Additional District Public Prosecution Officers” having service of 7 years or more as “Special Public Prosecutor” under Section 32 of POCSO Act, 2012 and under Section 15 of SC/ST (Prevention of Atrocities) Act. By Gazette Notification No. 3703-3329-2022-B-4-2 dated 16-11-2022, the Home Department has appointed “Assistant District Public Prosecution Officers” having 7 year of more service experience as “Special Public Prosecutor” to conduct prosecution before Special Courts, of concerned

VERDICTUM.IN

District under Section 11 read with Section 22 of National Investigation Agency Act. By notification dated 4150/21-B(2)/2022 dated 13-12-2022 has appointed "Asstt. District Public Prosecution Officers" having 10 years or more service experience as "Special Prosecutors" to conduct Sessions Trial arising out of investigations done by Special Units, ATS, Cyber Cell of Police and C.I.D.

54. Thus, it is clear that now a days, the Asstt. District Public Prosecution Officers are not only representing the State before the Magistrate Courts but have also been appointed as Special Public Prosecutors to conduct Sessions Trial.

55. Furthermore as per Schedule 3 of Rules 1998, the minimum qualification for recruitment to the post of Asstt. Grade III/CrPC clerk is Higher Secondary Examination or High School Examination (10+2) passed from Board of Secondary Education, Madhya Pradesh Bhopal or other Institute recognized by any State and Hindi Typing Examination passed from Madhya Pradesh Board of Typing and Shorthand or any other Institution recognized by the Government and possess knowledge of Computer Operation also. Similarly, minimum qualification for recruitment to the post of APCD Grade III is Higher Secondary Examination or High School Examination (10+2) passed from Board of Secondary Education, Madhya Pradesh Bhopal or other State recognized Institute. There is nothing in Rules 1998 to the effect that any additional educational qualification will make the employee entitled for different

VERDICTUM.IN

treatment in the form of promotion directly to the post of ADPO which is Cadre II post. Merely because incidentally an employee is holding a degree of LL.B. or equivalent degree would not make him a separate class.

56. The Supreme Court in the case of **Jomon KK Vs. Shajimon P. and others** decided on **2-4-2025** in **SLP (c) No. 7930-31/2020** has held as under :

> 27. There is one other important aspect which also cannot be lightly overlooked. We shall assume for a moment that though the process was commenced for appointment on vacant posts of Lascar, there was no illegality in persons having Syrang's licence being permitted to participate. Of course, there could be aspirants holding Lascar's licence in sufficient numbers who might not have the higher qualifications necessary for even appearing for a viva voce to aim at possessing a certificate of competency as Syrang. Those aspirants, holding a Lascar's licence, might not also be so capable and/or competent for obtaining a Syrang's licence. After all, all individuals are not blessed with the same level of intelligence, human abilities and intellect. The distribution of innate abilities and intellectual prowess being far from uniform, resulting in a diverse spectrum of human potential, it is axiomatic that aspirants having only a Lascar's licence can never be considered for direct recruitment on any post in Class III of the Subordinate Service other than a Lascar. It is quite but natural that in the matter of observation, perception and memorisation of details of principles of navigation, and skill in respect of seamanship, there would be significant differences in the faculties of different individuals. If persons holding Syrang's licence - who are obviously better equipped than persons holding Lascar's licence - are allowed to apply and participate in the process for appointment on the post of Lascar, the probability of the persons holding Lascar's licence

VERDICTUM.IN

being outperformed by the persons holding Syrang's licence would be quite high. It could also be a distinct possibility where all the vacant posts of Lascar are filled up by persons having Syrang's licence but not having a current Lascar's licence as per the statutory requirement. That would pose a real difficulty for persons not so fortunate and lacking in higher intelligence, abilities and intellect, for, they would cease to have a level playing field of competing with other similarly qualified candidates, and left to compete with candidates having higher qualifications despite the zone of consideration having been specially carved out for holders of current Lascar's licence. It is not that the holders of Syrang's licence are left in the lurch. Those having Syrang's licence could well compete for appointment on the post of Syrang in the 50% direct recruitment quota along with others having current Syrang's licence. If, in case, all the vacant posts of Lascar are filled up by persons having Syrang's licence and such holders of Syrang's licence do not participate in the process for direct recruitment to the post of Syrang, it is fairly likely that the persons holding Lascar's licence would never secure any public employment. That could not have been the intention of a welfare State.

28. Also, it cannot be gainsaid that not only the qualifications but the nature of duties required to be performed and the nature of service to be rendered by a Lascar and a Syrang are different. Merely because the post of Lascar is a feeder post for promotion to the post of Syrang does not per se make the holder of a Syrang's licence qualified for the job of a Lascar. Thus, nothing much turns on it.

* * *

36. We hasten to add that whether or not the action of the employer to exclude an aspirant from the process of selection (on the ground that either he is over qualified for a particular post or has qualifications which, being over and above what is ordained

VERDICTUM.IN

by statutory rules or rules framed under the proviso to Rule 309 of the Constitution, does not match the qualification specifically required) is justified has to be decided considering the rules governing the selection, the qualifications prescribed, the nature of duty to be performed, the nature of service to be rendered and a host of other factors. It has to be remembered that, at times, the employer's need to have the right people at the right place, and not always the higher qualified, has to be conceded. We know of decisions holding that over-qualification cannot be a disqualification since such an approach amounts to discouraging the acquisition of qualifications on the one hand and on the other, such an approach could be seen as arbitrary, discriminatory and not in national interest. However, this principle cannot be put in a straitjacket imposing rigid or inflexible rules or norms. Lack of public employment opportunities in sufficient numbers may force even a Master degree holder to apply for the job of a peon but, if he is appointed upon his application being favourably considered, what happens to the aspirants who have not had the means of pursuing study beyond the 12th standard? Do they remain unemployed for ever, if all or majority of the posts of peon are filled up by such degree holders? What happens if the Master degree holder, in pursuit of greener pastures, leaves the post of Peon for a better and secured higher job commensurate with his qualifications after a couple of years? Does it not, in such a case, burden the public exchequer by requiring the employer to initiate a fresh selection process? Is not the State, as a model employer, obliged to ensure that the posts of peon are filled up only by those having the basic qualification, and not by over qualified candidates, for sub-serving the common good? Does not the State have the obligation to strive to ensure that all citizens have adequate means of livelihood? These are questions which no Court can afford to ignore. We end by saying that each case that comes before the Court has to be decided on its own peculiar facts and the problem that it presents for resolution and that there can be no universally accepted rule that every time, a higher qualified

VERDICTUM.IN

candidate is to be preferred to a candidate who matches the essential qualification required for the post.

57. If CrPC clerks/Asstt. Grade III/APCD Grade III who are having LL.B. degree are given different treatment by providing a separate promotional avenue directly to class II post, then it would result in creating a short cut for appointment to the post of ADPO. A person fails to pass recruitment test conducted by PSC as required under Article 309 of Constitution, would get another opportunity to get appointed to the Class II post of ADPO by adopting another method i.e., by serving the Prosecution Office as CrPC clerk or Asstt. Grade III or APCD Grade III for 7 years. If this method is allowed, then it would amount to backdoor entry to Class II cadre without clearing PSC examination. Furthermore, merely because a person is holding a higher qualification in comparison to a person who is holding only the minimum qualification or any other qualification, then he cannot be put in an advantageous position.

58. Therefore, the classification done by the State i.e., CrPC clerks/Asstt. Grade III/APCD Grade III having LL.B. or equivalent degree and CrPC clerks/Asstt. Grade III/APCD Grade III having only minimum qualification or any other higher qualification other than LL.B. or equivalent degree cannot be held to an intelligible differentia. Further more, this Court has already referred to various judgments pronounced by Supreme Court regarding the duties of Public Prosecutors, and since, the job of CrPC clerks/Asstt. Grade III/APCD Grade III is only Ministerial in nature, therefore, in the light of judgment passed by Supreme Court in the

VERDICTUM.IN

case of **Tapasmita Sutar (Supra),** it cannot be held that the impugned amendment was introduced with some reasonable nexus with object sought to be achieved.

Whether the letter dated 4-7-2019 and 12-1-2021 for withdrawal of 10% quota for promotion to the post of ADPO can be said to be a good ground for declaring the provision ultra vires ?

59. Although the Counsel for the Petitioner referred to the letter of Director, Prosecution to submit that since, the ADPOs who were promoted from the post of CrPC Clerk/Asstt. Grade III/APCD Grade III have not proved to be efficient, therefore, the amendment of Schedule II and Schedule IV of Rules 1991 be declared as ultra vires but, the said submission cannot be accepted. However, the letter of the Director, Prosecution can be looked into to find out as to whether the ADPOs who were promoted from the post of CrPC Clerk/Asstt. Grade III/APCD Grade III are capable to fulfilling the expectations from ADPOs or not.

60. It is the stand of the respondents that the recommendation made by Director, Prosecution to withdraw 10% quota of promotion was rejected by the State Govt. by its letter dated 1-3-2021.

61. Considered the submissions made by Counsel for the parties.

62. The moot question for consideration is that whether the failure of a provision to fetch good result would make the provision ultra vires or not?

63. The question is no more *res integra*.

VERDICTUM.IN

64. The Supreme Court in the case of **Pannalal Binjraj (Firm) v. Union of India,** reported in **(1956) 2 SCC 865** has held as under :

> **29.** This presumption, however, cannot be stretched too far and cannot be carried to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory treatment (vide *Gulf, Colorado & Santa Fe Railway Co.* v. *W.H. Ellis*). There may be cases where improper execution of power will result in injustice to the parties. As has been observed, however, the possibility of such discriminatory treatment cannot necessarily invalidate the legislation and where there is an abuse of such power, the parties aggrieved are not without ample remedies under the law (vide *Dinabandhu Sahu* v. *Jadumoni Mangaraj*). What will be struck down in such cases will not be the provision which invests the authorities with such power but the abuse of the power itself.

65. Therefore, it is held that amendment of Schedule II and IV of Rules 1991 cannot be held to be ultra vires for the reason that it could not fetch good results but the same can be a ground for the State Govt. to withdraw the quota of 10%. From the letter of Director, Prosecution, it is clear that ADPOs promoted from the post of CrPC clerk/Asstt. Grade III/APCD Grade III could not prove to be an effective one. Therefore, if such promotees have failed to discharge the duties of Public Prosecutor, then this letter of Director, Prosecution can always be taken into consideration to find out as to whether the 10% promotion quota had any reasonable nexus with object sought to be achieved or not.

VERDICTUM.IN

66. So far as the question of rejection of recommendation by Director, Prosecution is concerned, the same cannot be said to be conclusive and authoritative decision based on sound principles of law. From the letter dated 1-3-2021, it is clear that the State Govt. had adopted an evasive method of dealing with a very crucial question raised by Director, Prosecution. Merely because some persons were further promoted to District Public Prosecution Officer cannot be a criteria to justify the amendment. The criteria for promotion from class II post to another class II Post is Seniority cum merit basis. If a person is Senior and is fulfilling the benchmark, then he cannot be denied promotion. Therefore, merely because some of the Promotee ADPO's were further promoted to the post of District Public Prosecution Officer which is also of Class II Post and the criteria for promotion is Seniority cum Merit basis, cannot be said to be sufficient and proper reason to reject the recommendation made by the Director, Prosecution to withdraw 10% quota of promotion to the post of ADPO's.

67. Thus, it is held that the letter dated 4-7-2019 written by Director, Prosecution regarding poor performance of ADPO's promoted from the post of CrPC clerk/Asstt. Grade III/APCD Grade III, is an authoritative proof that the promotion quota of 10% introduced by amendment in Schedule II and IV of Rules, 1991 has no reasonable nexus with object sought to be achieved.

VERDICTUM.IN

Whether a person without getting himself enrolled with Bar Council and without passing All India Bar Examination can appear before the Court in the capacity of ADPO.

68. The first question for consideration is that whether the person holding the post of ADPO or Public Prosecutor can be treated as an Advocate or not?

69. The Supreme Court in the case of **Sushma Suri Vs. Govt. of National Capital Territory of Delhi,** reported in **(1999) 1 SCC 330** has held as under :

> **4.** We have to ascertain the meaning of the expression "advocate or a pleader" used in Article 233(2) of the Constitution and to do so we may use the Advocates Act and the Rules framed by the Bar Council. Under Section 2(*a*) of the Advocates Act, "advocate" means advocate entered in any roll under the provisions of the Act.
>
> **5.** Rule 49 framed by the Bar Council reads as follows:
>
> "An advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern, so long as he continues to practise and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an advocate so long as he continues in such employment.
>
> Nothing in this Rule shall apply to a law officer of the Central Government or of a State or of any public corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under Section 28(2)(*d*) read with Section 24(1)(*e*) of the Act *despite his being a full-time salaried employee*.
>
> Law officer for the purpose of this Rule means a person who is so designated by the term of his appointment and who, by the said term, is required to act and/or plead in courts on behalf of his employer."

VERDICTUM.IN

6. If a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any corporate body or person practises before a court as an advocate for and on behalf of such Government, corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case.

7. This Court in *All India Judges' Assn.* v. *Union of India* decided on 10-5-1995 held that:

"There is no doubt in our minds that what was intended by the provision was that a candidate for appointment to judicial office should be a person who had three years' experience of practice as an advocate. He must be a lawyer in the sense that he regularly practises before a court or tribunal, who appears for his clients before the court or tribunal. It may be that in a given case he may do so only for a client who is his employer."

8. For purposes of the Advocates Act and the Rules framed thereunder the law officer (Public Prosecutor or Government Counsel) will continue to be an advocate. The intention of the relevant Rules is that a candidate eligible for appointment to the Higher Judicial Service should be a person who regularly practises before the court or tribunal appearing for a client.

9. In *Oma Shanker Sharma case* the Delhi High Court approached the matter in too pedantic a manner losing sight of the object of recruitment under Article 233(2) of the Constitution. Whenever any recruitment is conducted to fill up any post, the area of recruitment must be as broad-based as the Rules permit. To restrict it to advocates who are not engaged in the manner stated by us earlier in this order is too narrow a view, for the object of recruitment is to get persons of necessary qualification, experience and knowledge of life. A Government Counsel may be a Public Prosecutor or Government Advocate or a Government Pleader. He too gets experience in handling

VERDICTUM.IN

various types of cases apart from dealing with the officers of the Government. Experience gained by such persons who fall in this description cannot be stated to be irrelevant nor detrimental to selection to the posts of the Higher Judicial Service. The expression "members of the Bar" in the relevant Rule would only mean that particular class of persons who are actually practising in courts of law as pleaders or advocates. In a very general sense an advocate is a person who acts or pleads for another in a court and if a Public Prosecutor or a Government Counsel is on the rolls of the Bar Council and is entitled to practise under the Act, he answers the description of an advocate.

10. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practise as long as he is in such employment. However, an exception is made in such cases of law officers of the Government and corporate bodies despite his being a full-time salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does — whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not

VERDICTUM.IN

have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression "advocate" as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate.

70. Section 24 of Advocates Act, requires registration with Bar Council. Section 24 of Advocates Act read as under :

24. Persons who may be admitted as advocates on a State roll.—(1) Subject to the provisions of this Act, and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfils the following conditions, namely:—

(a) he is a citizen of India:

Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practise law in that other country;

(b) he has completed the age of twenty-one years;

(c) he has obtained a degree in law—

(i) before the 12th day of March, 1967, from any University in the territory of India; or

(ii) before the 15th day of August, 1947, from any University in any area which was comprised before that date within India as defined by the Government of India Act, 1935; or

(iii) after the 12th day of March, 1967, save as provided in sub-clause (iii-a), after undergoing a three-year course of study in law from any University in India which is recognised for the purposes of this Act by the Bar Council of India; or

(iii-a) after undergoing a course of study in law, the duration of which is not less than two academic years commencing from the academic year 1967-68, or any earlier academic year from any

VERDICTUM.IN

University in India which is recognised for the purposes of this Act by the Bar Council of India; or

(iv) in any other case, from any University outside the territory of India, if the degree is recognised for the purposes of this Act by the Bar Council of India; or

he is a barrister and is called to the Bar on or before the 31st day of December, 1976; or has passed the articled clerk's examination or any other examination specified by the High Court at Bombay or Calcutta for enrolment as an attorney of that High Court;] or has obtained such other foreign qualification in law as is recognised by the Bar Council of India for the purpose of admission as an advocate under this Act];

(d) * * *

(e) he fulfils such other conditions as may be specified in the rules made by the State Bar Council under this Chapter;

(f) he has paid, in respect of the enrolment, stamp duty, if any, chargeable under the Indian Stamp Act, 1899 (2 of 1899), and an enrolment fee payable to the State Bar Council of six hundred rupees and to the Bar Council of India, one hundred and fifty rupees by way of a bank draft drawn in favour of that Council:

Provided that where such person is a member of the Scheduled Castes or the Scheduled Tribes and produces a certificate to that effect from such authority as may be prescribed, the enrolment fee payable by him to the State Bar Council shall be one hundred rupees and to the Bar Council of India, twenty-five rupees.

Explanation.—For the purposes of this sub-section, a person shall be deemed to have obtained a degree in law from a University in India on the date on which the results of the examination for that degree are published by the University on its notice-board or otherwise declaring him to have passed that examination.

(2) Notwithstanding anything contained in sub-section (1), a vakil or a pleader who is a law graduate] may be admitted as an advocate on a State roll if he—

VERDICTUM.IN

(a) makes an application for such enrolment in accordance with the provisions of this Act, not later than two years from the appointed day; and

(b) fulfils the conditions specified in clauses (a), (b), (e) and (f) of sub-section (1).

(3) Notwithstanding anything contained in sub-section (1), a person who—

(a) * * * has, for at least three years, been a vakil or a pleader or a mukhtar, or was entitled at any time to be enrolled under any law as an advocate of a High Court (including a High Court of a former Part B State) or of a Court of Judicial Commissioner in any Union territory; or

(aa) before the 1st day of December, 1961, was entitled otherwise than as an advocate to practise the profession of law (whether by way of pleading or acting or both) by virtue of the provisions of any law, or who would have been so entitled had he not been in public service on the said date; or

(b) * * *

(c) before the 1st day of April, 1937, has been an advocate of any High Court in any area which was comprised within Burma as defined in the Government of India Act, 1935; or

(d) is entitled to be enrolled as an advocate under any rule made by the Bar Council of India in this behalf,

may be admitted as an advocate on a State roll if he—

(i) makes an application for such enrolment in accordance with the provisions of this Act; and

(ii) fulfils the conditions specified in clauses (a), (b), (e) and (f) of sub-section (1).

71. Thus, Section 24 of Advocates Act, mandates enrolment as an advocate on a State roll. An Assistant District Prosecution Officer is responsible for handling both types of work i.e. legal and administrative. The job role includes representing the government in criminal cases, case

VERDICTUM.IN

& evidence study, maintaining and preparing the legal documents and working in coordination with the police and investigation teams. ADPO also represents himself in arguments in court and ensures that all the legal procedures are properly followed. The ADPO is primarily responsible for conducting trial before the Magistrate Courts. Further for recruitment to the post of ADPO, preference is also given to those candidates who have two years practice.

72. Further passing of All India Bar Examination is essential to appear as an Advocate before the Court. The Supreme Court in the case of **Bar Council of India Vs Bonnie Foi Law College** reported in **(2017) 11 SCC 185**, doubted the correctness of judgment passed in the case of **V. Sundeer Vs. Bar Council of India** reported in **(1999) 3 SCC 176** and referred the matter to larger Bench.

73. Answering the reference, Supreme Court in the case of **Bar Council of India v. Bonnie Foi Law College,** reported in **(2023) 7 SCC 756** has held as under :

> **6.** The original dispute between the Bar Council of India and Bonnie Foi Law College, the respondent College herein, arose on account of the application of the said College for affiliation to carry on a legal study course. This Court appointed an inspection team on 29-6-2009[1], which visited the respondent College and gave a comprehensive report pointing out shortcomings in the infrastructure and functioning of the College. On 24-8-2009, the Court laid down certain conditions to be followed by the respondent College which the College claimed to have fulfilled later.

VERDICTUM.IN

7. During the course of this matter, a larger question of diminishing standards of legal education provided at various law colleges in India came to be noticed vide the order dated 29-6-2009[1], which resulted in a Committee being appointed comprising Mr Gopal Subramanium, then Solicitor General of India as its Chairman; Mr M.N. Krishnamani, then President of the Supreme Court Bar Association; and Mr S.N.P. Sinha, then Chairman of the Bar Council of India. The said Committee was requested to examine issues relating to affiliation and recognition of law colleges, to identify areas requiring redressal and to address factors impeding the implementation of existing norms. A report was submitted to this Court on 6-10-2009 (hereinafter referred to as "the Report").

8. The Report recognised two significant aspects as imperative for improving standards of legal profession i.e. firstly, introduction of a Bar Examination and, secondly, compulsory requirement of apprenticeship under a senior lawyer prior to admission to the Bar. It made the following observations:

8.1. *Bar Examination in India* : A Bar Examination is a precondition for admission to the Bar in most Commonwealth countries.

8.2. *Pre-enrolment training* : The requirement of training with a senior member of the Bar was present even before the enactment of the said Act, wherein a prospective lawyer was required to "train" in the chambers for a period of one year, and then appear in an examination comprising the subjects of Civil and Criminal Procedure. Thereafter, Section 24(1)(*d*) of the said Act continued the requirement of apprenticeship for graduate law students. However, this provision was omitted by Amending Act 60 of 1973 (hereinafter referred to as "the 1973 Act"), thereby discontinuing the practice.

9. The Report also recorded that the 1973 Amendment omitted Section 28(2)(*b*) of the said Act, which enabled the State Bar Councils to frame rules regarding training and Bar Examination. In 1994, a High-Powered Committee on Legal Education

VERDICTUM.IN

recommended the reintroduction of the requirement for apprenticeship and Bar Examination and thus, the Bar Council of India (Training) Rules, 1995 (hereinafter referred to as "the 1995 Rules") were framed by the Bar Council of India in furtherance of the mandate of the High-Powered Committee. However, the 1995 Rules were struck down by this Court in the judgment of *V. Sudeer* v. *Bar Council of India*, opining that once express provisions on Sections 24(1)(*d*) and 28(2)(*b*) had been omitted by the statutory amendment, the requirement could not be reintroduced. The Report also suggested that the Bar Council of India's role as the primary body for regulating standards of professional legal education should be reaffirmed.

10. On 14-12-2009, Mr Gopal Subramanium submitted that the first All India Bar Examination will be conducted in July-August, 2010, by a specially constituted independent body consisting of experts of various disciplines of national stature. The Court directed[3] the Central Government to ensure that the entire programme framed by the Committee headed by Mr Gopal Subramanium was operationalised and further directed institutions concerned to fully cooperate with the Bar Council of India.

11. On the proceedings taking the aforesaid course, vide order dated 18-3-2016 (hereinafter referred to as "the reference order"), a three-Judge Bench of the Court opined that the questions which fall for determination in the present matter are of considerable importance affecting the legal profession in general and need to be authoritatively answered by a Constitution Bench. The reference order provided for three questions to be answered by this Court, as under : (SCC pp. 192-93, para 27)

"*27. … 27.1.* (*i*) Whether pre-enrolment training in terms of the Bar Council of India Training Rules, 1995 framed under Section 24(3)(*d*) of the Advocates Act, 1961 could be validly prescribed by the Bar Council of India and if so whether the decision of this Court in *V. Sudeer* v. *Bar Council of India* requires reconsideration?

VERDICTUM.IN

27.2. (*ii*) Whether a pre-enrolment examination can be prescribed by the Bar Council of India under the Advocates Act, 1961?

27.3. (*iii*) In case Questions 1 and 2 are answered in the negative, whether a post-enrolment examination can be validly prescribed by the Bar Council of India in terms of Section 49(1)(*ah*) of the Advocates Act, 1961."

* * *

37. Section 49(1)(*ag*) reads as under:

"**49. *General power of the Bar Council of to make rules***.—[(1)] The Bar Council of may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe—

* * *

(*ag*) the class or category of persons entitled to be enrolled as advocates;"

38. Thus, the learned Senior Counsel contended that the meaning of entitlement, would indicate that the Bar Council of India could prescribe such conditions, which would give the right or claim to a person to be enrolled as an advocate and the power of Bar Council of India prior to enrolment cannot be ousted. Further, the significance of Section 24(1) has to be read with other provisions of the said Act and the Rules made thereunder including the "notwithstanding clause" at the beginning of sub-section (3) of Section 24.

39. In the aforesaid context, we believe that we have to read the powers of the State Bar Councils and the Bar Council of India in the context of their respective statutory provisions. The powers are not in pari materia. The Bar Council of India has much larger powers and authority as submitted and discussed aforesaid including in the submissions of the learned Amicus Curiae.

40. We are unable to agree with the reasoning in *V. Sudeer* that because the State Bar Councils' power for providing training or for holding examination was taken away by the 1973 Amendment, it ipso facto amounts to taking away such powers

VERDICTUM.IN

if they so vested with the Bar Council of India. The legislative object was clear i.e. not to confer such powers on the State Bar Councils. However, that could not affect the position of the power of the Bar Council of India, and naturally such a power existed. If the Bar Council of India never had such a power, then the same could not be read by implication. But, if the Bar Council of India had sufficient powers, then the 1973 Amendment would not take away those powers of the Bar Council of India as the said amendment did not deal with the aspect of the powers of the Bar Council of India.

41. In addition, the learned Judges in *V. Sudeer* opined that if such a power has to be conferred, it should be conferred legislatively. While in principle, there can be no disagreement with the broad proposition, the issue is whether such a power is already existing with the Bar Council of India under the statutory provisions. The functions of the Bar Council of India, as specified under Section 7, inter alia prescribe an exercise of general supervision and control over the State Bar Councils under clause (*g*) of sub-section (1) of Section 7. Further, under clause (*l*), the Bar Council of India has the power to perform all other functions conferred on it by or under the said Act and under clause (*m*) to do all other things necessary for discharging the aforesaid functions. The powers are, thus, wide and extensive as conferred by the legislature. Thus, when under Section 24(1), the Bar Council of India has the statutory power of prescribing rules subject to which a person may be treated as qualified to be admitted as an advocate in the State Roll, then we believe that the Bar Council of India is not devoid of its jurisdiction in undertaking a pre-enrolment training course or examination prescribed by the Bar Council of India.

42. In case of any subsisting doubt, we must refer to Section 49(1)(*ag*) of the said Act, which while dealing with the general powers of the Bar Council of to make rules, specifically stipulates that the class or category of person entitled to be enrolled as advocates, is an aspect for which all powers have been conferred on the Bar Council of India. Thus, the provision

VERDICTUM.IN

for an examination for enrolment of advocates by the Bar Council of India can hardly be doubted. We had specified at the inception itself that quality control of entry into the Bar is the need of the hour.

43. The objective of the legislature while giving wide powers to the Bar Council of India under Section 49, which gives it the powers to make rules, read with Section 24(3)(*d*), which gives it the powers to prescribe the norms for entitlement to be enrolled as an advocate under the Rules of the Bar Council of India, leads us to the conclusion that these are adequate powers with the Bar Council of India under the said Act to provide such norms and Rules.

44. We are, thus, of the view that while considering the questions referred to us, the only conclusion which can be laid is that the interdict placed by the judgment of this Court in *V. Sudeer* on the powers of the Bar Council of India cannot be sustained and we cannot hold that *V. Sudeer* lays down the correct position of law.

45. The effect of the view expressed by us would be that it has to be left to the Bar Council of India as to at what stage the All India Bar Examination has to be held — pre or post. There are consequences especially in respect of the interregnum period which would arise in holding the All India Bar Examination in either scenario, and it is not for this Court to delve into them but it would be appropriate to leave it to the Bar Council of India to look to the niceties of both situations. However, in view of larger ramifications we do consider it appropriate to delve into some, though not all of the aspects which may get involved in holding the All India Bar Examination, especially in view of some suggestions made by the Amicus Curiae.

46. We may take note of the fact that the All India Bar Examination is scheduled to be held twice in a year. It is necessary that this schedule should be strictly followed as otherwise the students with Law degrees would be left idling their time.

VERDICTUM.IN

> **47.** One of the questions which arose was whether only on passing the examination from a law university/college or obtaining such a degree should a person be eligible to take the All India Bar Examination? In India, the various recognised institutions providing Law degrees often declare results at different times. The concern is that a person on account of non-declaration of result may lose out on the opportunity to appear in the All India Bar Examination leading to a fairly long hiatus period of time without having the opportunity to work in court proceedings.
>
> **48.** We are inclined to accept the suggestion from the learned Amicus Curiae that students who have cleared all examinations to be eligible to pursue the final semester of the final year course of Law, on production of proof of the same, could be allowed to take the All India Bar Examination. The result of the All India Bar Examination would be subject to the person passing all the components required under the course of study of the university/college. This would be subject to the All India Bar Examination results being valid for a specified period of time.

74. Thus, it is clear that a Public Prosecutor or even Asstt. District Public Prosecution Officer are Advocates and therefore, they must fulfil the requirement of the provisions of Section 24 of Advocates Act and Rule 49 of Bar Council of India Rules.

75. But unfortunately, the State has not prescribed enrolment with Bar Council as per Section 24 of Advocates Act and passing of AIBE as minimum qualification. The State has provided that candidates having 2 years experience of practice as Advocate will be given preference. Since, Schedule II of Rules 1991 by which minimum qualification for recruitment to the post of ADPO has been provided is not under

VERDICTUM.IN

challenge, therefore, the requirement of enrolment with Bar Council and passing of AIBE as minimum qualification for the post of ADPO shall be considered in some other appropriate case. It is for the State to consider as to whether the enrolment with Bar Council as required under Section 24 of Advocates Act and passing of AIBE should be made minimum qualification for recruitment to the post of ADPO or not? However, it is clear that for appearing before a Magistrate Court as ADPO, the candidate must have been enrolled as an Advocate and must have passed AIBE.

76. However, in view of proviso to Rule 49 of Bar Council of India Rules, such law officer is exempted from the applicability of Rule 49 of Bar Council of India Rules.

77. If a CrPC clerk/Asstt. Grade III/APCD Grade III holding the degree of LL.B. or equivalent from any recognized University are promoted to the post of ADPO who has to be an Advocate, then it would not only be contrary to the provisions of Section 24 of Advocates Act, but would also be bypassing the requirement of passing AIBE.

78. Furthermore, Rule 49 of Bar Council of India prohibits the registration of a person as an Advocate who is in full time Govt. job. Rule 49 of Bar Council of India Rules reads as under :

> 49. An advocate shall not be a full-time salaried employee of any
> person, government, firm, corporation or concern, so long as he continues to practise, and shall, on taking up any such employment,

VERDICTUM.IN

> intimate the fact to the Bar Council on whose roll his name appears
> and shall thereupon cease to practise as an advocate so long as he
> continues in such employment.

79. Therefore, a Govt. employee so long he is in Govt. job cannot get himself enrolled with Bar Council and therefore, he cannot be promoted to the post of ADPO whose primary duty is to represent the State Govt. before the Court of Law.

Whether two promotional avenues can be prescribed for single Feeder Post?

80. It was next contended by Shri Prashant Sharma, Advocate that opening a promotional avenue is within the employer's authority and relied upon the judgment passed by Supreme Court in the case of **P.U. Joshi (Supra)** in which it was held as under :

> 10……Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service

VERDICTUM.IN

> and alter or amend and vary by addition/substraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service.

81. Considered the submissions made by Counsel for intervener.

82. It is not the case of State or the interveners that there was no promotional avenues for CrPC clerks/Asstt. Grade III/APCD Grade III. As per Rules, 1998, the post of Assistant Grade III/CrPC clerk was the feeder post for promotion to the post of Assistant Grade II and the post of APCD Grade III is the Feeder post of PCD. Similarly, the post of Asstt. Grade II and PCD are the Feeder posts for promotion to the post of Asstt. Grade I. Post of Grade I is Feeder post for promotion to Superintendent. All the posts are of Clerical Cadre of Class III. Therefore, there was no need for opening a second promotional avenue for the posts of CrPC clerks/Asstt. Grade III/APCD Grade III directly to the post of ADPO

VERDICTUM.IN

which is Class II post and that too by drawing distinction between the employees having LL.B degree and employees having degrees other than LL.B. degree.

Whether the State could have placed the post of CrPC Clerk/Asstt. Grade III/APCD Grade III in Rules 1991 or not?

83. As already pointed out, all the three posts i.e., CrPC clerk/Asstt. Grade III/APCD Grade III are class III posts and are the junior most posts in clerical cadre provided under Rules 1998. The promotional avenue from these posts is already provided under Rules 1998 which have already been referred in previous paragraph. However, the State deliberately did not make any amendment in Rules, 1998. Accordingly, the Counsel for the State was directed to explain that whether the State could have placed CrPC Clerk/Asstt. Grade III/APCD Grade III as the lowest post in Schedule II and IV of Rules 1991 or not, if yes, then how a Grade III post can be placed in Rules, 1991? The Counsel for the State fairly conceded that a Grade III post cannot be placed in Schedule II and IV of Rules, 1991 and in fact amendment if any, should have been made in Rules, 1998.

84. The State deliberately did not introduce any amendment in Rules, 1998 for the simple reason, that otherwise, it would have been clear as noon day that two different promotional avenues are being provided for the same feeder post i.e., one directly to Cadre II post and another to Cadre III post, and according to the State Counsel also, the same cannot be done.

VERDICTUM.IN

Whether challenge to Constitutional Validity of a provision can be dismissed on the ground of delay and laches

85. The Contention raised by Counsel for the interveners that by filing writ petition in the year 2020, the petitioner has challenged the amendment which was incorporated in the year 2002, therefore, filing of writ petition after 18 year of amendment must be held to be bad on the ground of delay and laches, cannot be accepted.

86. The period of limitation doesnot apply to proceedings under Article 226 of Constitution of India, however, the petition can be dismissed on the ground of delay and laches.

87. So far as the validity of a provision is concerned, it gives rise to fresh cause of action on every day. It is a continuous cause of action. If a provision is found to be ultra vires, then challenge to the said provision cannot be non suited on the ground of delay and laches. Furthermore, it has already been contended by Counsel for one of the interveners that after 2016, no steps were taken by State to fill up the promotional quota.

88. The petitioner has not sought the quashment of promotion orders which have already been passed prior to filing of writ petition. Therefore, the writ petition cannot be dismissed on the ground of delay and laches. The Supreme Court in the case of **Noida Toll Bridge Co. Ltd. v. Federation of Noida Residents Welfare Assn.,** reported in **(2025) 6 SCC 717** has held as under :

G.1.2. ***Delay and laches***

VERDICTUM.IN

26. NTBCL contended that there was an inordinate delay on the part of the respondent Association in filing the writ petition before the High Court. NTBCL argued that the DND Flyway had been operational since 2001, with the MoU and concession agreement having been executed as far back as 1992 and 1997, respectively. Given this, the writ petition was filed by Respondent 1 only in 2012 — nearly 20 years after the execution of the MoU and 15 years after the concession agreement. NTBCL asserted that this substantial delay should have been sufficient grounds for the High Court to dismiss the writ petition at the outset.

27. This contention, in our considered opinion is wholly misconceived and misdirected. We say so for the reason that *firstly*, writ proceedings under Articles 32 or 226 are not guided by the provisions of the Limitation Act, 1963, but instead, by the doctrine of delay and laches. Without adverting much into its pith and substance, it is ubiquitous that the doctrine of delay and laches cannot be applied stricto sensu to writ petitions invoking public interest jurisdiction, unless the Court is satisfied that the party has not approached it with clean hands. It is now well established that while delay is a material factor, there is no fixed period of limitation for invoking jurisdiction under Article 226 and that each case should be considered on its own facts and circumstances, thus allowing for a more liberal approach when applying this doctrine. It is indeed beyond any doubt that the doctrine is not a rigid rule but is rather a practice that is founded on the exercise of sound judicial discretion.

28. In a much more rudimentary sense, it must also be borne in mind that the cause of action in these set of circumstances could have arisen and perhaps actually arose only after expiry of a reasonable period, within which the cost of the Project was expected to be recovered. The filing of the writ petition immediately after the concession agreement and other supporting agreements were entered into, would have been highly premature and ill-advised, without giving a reasonable

VERDICTUM.IN

time to the Project proponent to recover the actual cost of the Project.

29. In this vein, the High Court rightly observed that the plea of delay lacks substance, as the commuters, including Respondent 1, were justified in trusting that Noida would protect their interests. However, in 2012, after learning that they were being misled and subjected to an illegal toll based on an audit report from NTBCL's Auditor and Chartered Accountant—indicating that as of 31-5-2012, Rs 2340 crores were still to be recovered from the public, and the recovery period had extended from 30 years to 100 years—they were prompted to immediately approach the High Court.

30. Furthermore, it must be acknowledged that the levying of user fees or tolls by NTBCL constituted a continuing cause of action, which was challenged by the Association of affected commuters. An established exception to the defence of delay is the presence of a continuous injury stemming from an ongoing wrong. The plea of delay and laches cannot be raised in a case of a continuing cause of action.

31. In our considered view, the challenge laid by Respondent 1 before the High Court, regarding the levying of toll or user fees, being rooted in public interest and involving *en masse* potential violations of fundamental rights of citizenry, warrants thorough examination. Given that NTBCL's actions represented a continuing cause of action, we concur with the High Court in rejecting the hypertechnical objection of delay and laches.

(Underline supplied)

89. The Supreme Court in the case of **Union of India v. Tarsem Singh,** reported in **(2008) 8 SCC 648** has held as under :

4. The principles underlying continuing wrongs and recurring/successive wrongs have been applied to service law disputes. A "continuing wrong" refers to a single wrongful act which causes a continuing injury. "Recurring/successive

VERDICTUM.IN

wrongs" are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court in *Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan* explained the concept of continuing wrong (in the context of Section 23 of the Limitation Act, 1908 corresponding to Section 22 of the Limitation Act, 1963): (AIR p. 807, para 31)

"*31.* … It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury."

5. In *M.R. Gupta* v. *Union of India* the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1-8-1978. The claim was rejected as it was raised after 11 years. This Court applied the principles of continuing wrong and recurring wrongs and reversed the decision. This Court held: (SCC pp. 629-30, para 5)

"*5.* … The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for

VERDICTUM.IN

recovery of arrears calculated on the basis of difference in the pay which has become time-barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion, etc., would also be subject to the defence of laches, etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1-8-1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time-barred…."

6. In *Shiv Dass* v. *Union of India* this Court held: (SCC p. 277, paras 8 & 10)

"*8*. … The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third-party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

* * *

10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. … If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years."

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is

VERDICTUM.IN

> sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

90. Accordingly, it is held that the Writ Petition cannot be dismissed on the question of delay and laches because otherwise, it would amount to perpetuating the illegality.

Whether Petitioner has Locus Standi to challenge the Constitutional validity of amendment in Schedule II and IV of Rules, 1991

91. The Question of Locus Standi was decided by Supreme Court in the case of **S.P. Gupta v. Union of India,** reported in **1981 Supp SCC 87** in which it has been held as under :

VERDICTUM.IN

17. It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. Where the weaker sections of the community are concerned, such as under trial prisoners languishing in jails without a trial, inmates of the Protective Home in Agra, or Harijan workers engaged in road construction in the district of Ajmer, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be filed by the public-spirited individual espousing their cause and seeking relief for them. This Court will readily respond even to a letter addressed by such individual acting pro bono publico. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Article 32 and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the

VERDICTUM.IN

public-minded individual as a writ petition and act upon it. Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public-spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. It is in this spirit that the court has been entertaining letters for judicial redress and treating them as writ petitions and we hope and trust that the High Courts of the country will also adopt this pro-active, goal-oriented approach. But we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be activised at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in court. We may also point out that as a matter of prudence and not as a rule of law, the court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal-aid organisation which can take care of such cases.

VERDICTUM.IN

18. The types of cases which we have dealt with so far for the purpose of considering the question of locus standi are those where there is a specific legal injury either to the applicant or to some other person or persons for whose benefit the action is brought, arising from violation of some constitutional or legal right or legally protected interest. What is complained of in these cases is a specific legal injury suffered by a person or a *determinate* class or group of persons. But there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury. Who would have standing to complain against such act or omission of the State or public authority? Can any member of the public sue for judicial redress? Or is the standing limited only to a certain class of persons? Or is there no one who can complain and the public injury must go unredressed? To answer these questions it is first of all necessary to understand what is the true purpose of the judicial function. This is what Prof. Thio states in his book on *Locus Standi and Judicial Review*:

"Is the judicial function primarily aimed at preserving legal order by confining the legislative and executive organs of Government within their powers in the interest of the public (jurisdiction de droit objectif) or is it mainly directed towards the protection of private individuals by preventing illegal encroachments on their individual rights (jurisdiction de droit subjectif)? The first contention rests on the theory that courts are the final arbiters of what is legal and illegal…. Requirements of locus standi are therefore unnecessary in this case since they merely impede the purpose of the function as conceived here. On the other hand, where the prime aim of the judicial process is to protect individual rights, its concern with the regularity of law and administration is limited to the extent that individual rights are infringed."

VERDICTUM.IN

We would regard the first proposition as correctly setting out the nature and purpose of the judicial function, as it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law. If the State or any public authority acts beyond the scope of its power and thereby causes a specific legal injury to a person or to a determinate class or group of persons, it would be a case of private injury actionable in the manner discussed in the preceding paragraphs. So also if the duty is owed by the State or any public authority to a person or to a determinate class or group of persons, it would give rise to a corresponding right in such person or determinate class or group of persons and they would be entitled to maintain an action for judicial redress. But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule

VERDICTUM.IN

is evolved which gives standing to any member of the public who is not a mere busy body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and care thereby improving the administration of justice. Lord Diplock rightly said in *Rex* v. *Inland Revenue Commissioners*:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.... It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of Central Government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."

This broadening of the Rule of locus standi has been largely responsible for the development of public law, because it is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality. It is only by liberalising the Rule of locus standi that it is possible to effectively police the corridors of power and prevent violations of law. It was pointed out by Schwartz and H.W.R. Wade in their book on *Legal Control of Government* at p. 354:

"Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently

VERDICTUM.IN

affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged?"

It is also necessary to point out that if no one can have standing to maintain an action for judicial redress in respect of a public wrong or public injury, not only will the cause of legality suffer but the people not having any judicial remedy to redress such public wrong or public injury may turn to the street and in that process, the rule of law will be seriously impaired. It is absolutely essential that the rule of law must wean the people away from the lawless street and win them for the court of law.

19. There is also another reason why the Rule of locus standi needs to be liberalised. Today we find that law is being increasingly used as a device of organised social action for the purpose of bringing about socio-economic change. The task of national reconstruction upon which we are engaged has brought about enormous increase in developmental activities and law is being utilised for the purpose of development, social and economic. It is creating more and more a new category of rights in favour of large sections of people and imposing a new category of duties on the State and the public officials with a view to reaching social justice to the common man. Individual rights and duties are giving place to meta-individual, collective, social rights and duties of classes or groups of persons. This is not to say that individual rights have ceased to have a vital place in our society but it is recognised that these rights are practicably meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all. The new social and economic rights which are sought to be created in pursuance of the Directive Principles of State Policy essentially require active intervention of the State and other public authorities. Amongst these social and economic rights are freedom from indigency, ignorance and discrimination

VERDICTUM.IN

as well as the right to a healthy environment, to social security and to protection from financial, commercial, corporate or even governmental oppression. More and more frequently the conferment of these socio-economic rights and imposition of public duties on the State and other authorities for taking positive action generates situations in which a single human action can be beneficial or prejudicial to a large number of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. For example, the discharge of effluent in a lake or river may harm all who want to enjoy its clean water; emission of noxious gas may cause injury to large numbers of people who inhale it along with the air; defective or unhealthy packaging may cause damage to all consumers of goods and so also illegal raising of railway or bus fares may affect the entire public which wants to use the railway or bus as a means of transport. In cases of this kind it would not be possible to say that any specific legal injury is caused to an individual or to a determinate class or group of individuals. What results in such cases is public injury and it is one of the characteristics of public injury that the act or acts complained of cannot necessarily be shown to affect the rights of determinate or identifiable class or group of persons : public injury is an injury to an indeterminate class of persons. In these cases the duty which is breached giving rise to the injury is owed by the State or a public authority not to any specific or determinate class or group of persons, but to the general public. In other words, the duty is one which is not correlative to any individual rights. Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law. It would also open the door for corruption and inefficiency because there would be no check on exercise of public power except what may be provided by the political machinery, which at best would be able to

VERDICTUM.IN

exercise only a limited control and at worst, might become a participant in misuse or abuse of power. It would also make the new social collective rights and interests created for the benefit of the deprived sections of the community meaningless and ineffectual.

20. Now, as pointed out by Cappelletti in Vol. III of his classic work on *Access to Justice* at p. 520, "The traditional doctrine of standing (*legitimatio ad causam*) attributes the right to sue either to the private individual who 'holds' the right which is in need of judicial protection or in case of public rights, to the State itself, which sues in courts through its organs." The principle underlying the traditional rule of standing is that only the holder of the right can sue and it is therefore, held in many jurisdictions that since the State representing the public is the holder of the public rights, it alone can sue for redress of public injury or vindication of public interest. It is on this principle that in the United Kingdom, the Attorney-General is entrusted with the function of enforcing due observance of the law. The Attorney-General represents the public interest in its entirety and as pointed out by S.A. de Smith in *Judicial Review of Administrative Action* (3rd Edn.) at p. 403, "the general public has an interest in seeing that the law is obeyed and for this purpose, the Attorney-General represents the public". There is, therefore, a machinery in the United Kingdom for judicial redress for public injury and protection of social, collective, what Cappelletti calls "diffuse" rights and interests. We have no such machinery here. We have undoubtedly an Attorney-General as also Advocates General in the States, but they do not represent the public interest generally. They do so in a very limited field; see Sections 91 and 92 of the Civil Procedure Code. But, even if we had a provision empowering the Attorney-General or the Advocate-General to take action for vindicating public interest, I doubt very much whether it would be effective. The Attorney-General or the Advocate-General would be too dependent upon the political branches of Government to act as an advocate against abuses which are

VERDICTUM.IN

frequently generated or at least tolerated by political and administrative bodies. Be that as it may, the fact remains that we have no such institution in our country and we have therefore to liberalise the Rule of standing in order to provide judicial redress for public injury arising from breach of public duty or from other violation of the Constitution or the law. If public duties are to be enforced and social collective "diffused" rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though, they may not be directly injured in their own rights. It is for this reason that in public interest litigation — litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, "diffused" rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing. What is sufficient interest to give standing to a member of the public would have to be determined by the court in each individual case. It is not possible for the court to lay down any hard and fast rule or any straitjacket formula for the purpose of defining or delimiting "sufficient interest". It has necessarily to be left to the discretion of the court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable sections of the people by creating new social, collective "diffuse" rights and interests and imposing new public duties on the State and other public authorities, infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the court in a particular case has sufficient interest to initiate the action.

VERDICTUM.IN

21. It is interesting to note that the concept of public interest litigation had its origin in the United States and over the years, it has passed through various vicissitudes in the country of its origin. We do not propose to enumerate or examine various decisions given by the Supreme Court of the United States from time to time in regard to standing in public interest litigation, for no useful purpose would be served by such exercise. Suffice it to state that in that country, the strict requirement of legal interest has been watered down. Justice Douglas said in *Data Processing Service* v. *Camp* that "the legal interest test goes to the merits. The question of standing is different". Similarly Justice Brennan, citing *Flast*, observed that "the question is whether the person whose standing is challenged is *a proper party to request an adjudication of a particular issue and not ... whether the plaintiff had a legally protected interest which the defendant's action invaded*" (emphasis supplied). This view also found expression in *Office of Communication of United Church of Christ* v. *FCC* wherein the standing of television viewers was upheld with the following observations : Since the concept of standing is "one designed to assure that only one with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience". *Vide* article on "*Evolving Trends in Locus Standi : Models for Social Justice Dispensation*" by D.Y. Chandrachud. But of late, there has been a slight regression in this dynamic approach. See *U.S.* v. *Richardson*_ and *Worth* v. *Seldin* where the Supreme Court of United States seems to have recoiled a little against expansion of its judicial power.

22. So far as the United Kingdom is concerned, there have been remarkable developments in this area in recent times largely due to the dynamic activism of Lord Denning. The *McWhirter case* and the three well known *Blackburn cases* clearly establish that any member of the public having sufficient interest can maintain an action for enforcing a public duty against a statutory or public authority. We need not make a detailed reference to all these

VERDICTUM.IN

cases but it will be sufficient if we refer to the *McWhirter case* and one of the three *Blackburn cases*. The *McWhirter case* is reported in *Attorney-General* v. *Independent Broadcasting Authority*. This was an action by McWhirter for injunction against the Broadcasting Authority which was threatening to show a film which did not comply with the statutory requirements and the showing of which would therefore be illegal. Lord Denning considered the question whether McWhirter had locus standi to bring the action when leave to bring a relator action was refused by the Attorney-General, and answering this question in the affirmative, he said:

"We live in an age when Parliament has placed statutory duties on government departments and public authorities — for the benefit of the public — but has provided no remedy for the breach of them. If a government department or a public authority transgresses the law laid down by Parliament, or threatens to transgress it, can a member of the public come to the court and draw the matter to its attention?... I am of the opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, *who has sufficient interest*, can himself apply to the court itself."

Lord Denning held that McWhirter had sufficient interest to bring the action since he had a television set for which he had paid licence fee and his susceptibility would be offended like that of many others watching television if the film was shown in breach of the statutory requirements. It may be noticed that in this case the duty which was sought to be enforced against the Broadcasting Authority was one which the Broadcasting Authority owed to the general public and not to any specific individual or class or group of individuals. The same principle was applied by Lord Denning in *Rex* v. *Greater London Council, Ex parte Blackburn* to accord standing to Blackburn to maintain an action for an order of prohibition preventing the Greater London Council from allowing, contrary to law, the

VERDICTUM.IN

exhibition of pornographic films. Here again the duty owed by the Greater London Council was to the general public and not to any specific or determinate class or group of persons and there was no one who could claim that a specific legal injury was caused to him by the exhibition of pornographic films. But even so Lord Denning held that Blackburn was entitled to maintain an action because he had sufficient interest; he was a citizen of London, his wife was a ratepayer and he had children who might be harmed by the exhibition of pornographic films. The learned Master of the Rolls emphasised that if Blackburn had no sufficient interest, no other citizen had, and in that event no one would be able to bring an action for enforcing the law and the transgression of the law would continue unabated. The principle on which the learned Master of the Rolls proceeded was formulated by him in these words:

"I regard it as a matter of high constitutional principle that, if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of His Majesty's subjects, then anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."

The House of Lords, of course, in *Gouriet* v. *Union of Post Office Workers* took the view that the Attorney-General alone can sue for enforcing the observance of the law and if he refuses to give his consent to a relator action, such refusal was not reviewable by the courts and without such consent, a member of the public could not maintain his action. We do not think it necessary to examine this decision because it has no binding effect upon us. But we may point out that this decision has been severely criticised by jurists in England and elsewhere. It is clearly erroneous and shows the high watermark of abdication of judicial power which is likely to stultify the development of public law in the United Kingdom. There is however one distinguishing feature which we must point out, namely, that the

VERDICTUM.IN

action in that case was a relator action and not an application for a writ.

23. We would, therefore, hold that any member of the public having *sufficient interest* can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objectives. "Law", as pointed out by Justice Krishna Iyer in *Fertilizer Corporation Kamgar Union (Regd.)* v. *Union of India* "is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction" (SCC p. 585). A fear is sometimes expressed that if we keep the door wide open for any member of the public to enter the portals of the court to enforce public duty or to vindicate public interest, the court will be flooded with litigation. But this fear is totally unfounded and the argument based upon it is answered completely by the Australian Law Reforms Commission in the following words : (SCC p. 587, para 43)

"The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom. [Prof.K.E. Scott : *Standing in the Supreme Court* : *A Functional Analysis* (1973), p. 86]

A major expressed reason for limiting standing rights is fear of a spate of actions brought by busybodies which will unduly extend the resources of the courts. No argument is easier put, none more difficult to rebut. Even if the fear be justified it does not follow that present restrictions should remain. If proper claims exist it may be necessary to provide resources for their determination. However, the issue must be considered.

… Over recent years successive decisions of the United States Supreme Court have liberalised standing so as to afford a hearing to any person with a real interest in the relevant

VERDICTUM.IN

> controversy. Surveying the result in 1973 Professor Scott commented : (Op. cit, p. 673)
>
> When the floodgates of litigation are opened to some new class of controversy by a decision it is notable how rarely one can discern the flood that the dissenters feared.
>
> Professor Scott went on to point out that the liberalised standing rules had caused no significant increase in the number of actions brought, arguing that parties will not litigate at considerable personal cost unless they have a real interest in a matter."
>
> We wholly endorse these remarks of the Australian Law Reforms Commission. We may add, with Justice Krishna Iyer (SCC p. 585):"In a society where freedoms suffer from atrophy and activism is essential for participative public justice, some risks have to be taken and more opportunities opened for the public-minded citizen to rely on the legal process and not be repelled from it by narrow pedantry now surrounding locus standi." It is also interesting to note that in India, as in other Commonwealth countries, the strict rule of standing does not apply to a writ of quo warranto or a ratepayer's action against a municipality, but there is no evidence that this has let loose the floodgates of litigation in these areas. The time, money and other inconveniences involved in litigating a case act as sufficient deterrents for most of us to take recourse to legal action, vide article of Dr S.N. Jain on *Standing and Public Interest Litigation*.

92. The Petitioner is a practising Lawyer and is also aspiring to be appointed as ADPO. When the validity of a Statutory Provision is under challenge, then the question of Locus Standi becomes secondary. Therefore, it is held that the petitioner has locus standi to challenge the impugned amendment carried in Schedule II and IV of Rules, 1991.

Whether the impugned amendment is arbitrary in nature

VERDICTUM.IN

93. This Court has elaborately dealt with the arguments advanced by Counsel for the Parties. The State has failed to prove intelligible differentia having reasonable nexus with object sought to be achieved. Even otherwise, the posts of CrPC Clerk/ Asstt. Grade III/APCD Grade III are Ministerial and Clerical cadre posts having its independent channel of Promotion and have no direct or indirect contact with Justice Dispensation System. They are not required to adjudicate the rights of the parties. They are not Advocates. Under these circumstances, it is held that the amendment introduced in the year 2002 by which the Schedule II and IV of Rules, 1991 were amended suffers from arbitrariness. Furthermore, the State is the custodian and guardian of its citizens/residents. It is the duty of the State to protect the life and liberty of its citizens/residents. Not only the State functionaries are required to act in accordance with law, but at the same time the Public Prosecutor/Govt. Advocate should be an efficient and intelligible one having experience of practising law as an Advocate so that the rights of citizens/residents, as well as, the action of the State can be protected and justified effectively in the Court of law. Therefore, the appointment of persons from Ministerial/clerical cadre of Grade III to the post of ADPO by promotion, will also be violative of Article 21 of Constitution of India.

Conclusion

94. For the reasons mentioned above, it is held that the amendment done by State in Schedule II and IV of Rules, 1991 by Notification No. F-3-68-99-B-3-2 dated 14-10-2002 published in Official Gazette on 18-10-

VERDICTUM.IN

2002 **is *ultra vires* of Articles 14, 16 and 21 of Constitution of India.** However, it is also held that since, the persons who were already granted promotion by virtue of impugned amendment were neither made a party nor their promotions have been challenged, therefore, this judgment would not adversely effect the promotion which have already taken place prior to filing of this petition. However, no further promotions to the post of ADPO shall take place.

95. Accordingly the petitions succeed and are hereby allowed. No order as to costs.

(G. S. AHLUWALIA)
JUDGE

(ANURADHA SHUKLA)
JUDGE