2019 INSC 1007

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

MISCELLANEOUS APPLICATION NO. 2560 OF 2018
IN
WRIT PETITION (CIVIL) NO. 738 OF 2016

DR. ASHWANI KUMAR ..... APPLICANT(S)

VERSUS

UNION OF INDIA AND ANOTHER ..... RESPONDENT(S)

O R D E R

SANJIV KHANNA, J.

This order would dispose of Miscellaneous Application No. 2560 of 2018 filed by Dr. Ashwani Kumar, applicant in-person, who is a senior advocate and a former Law Minister and Member of Parliament, praying for the following relief:

> "In the aforesaid premises, it is therefore respectfully prayed that since no action has been taken by the Government pursuant to the statement of the Hon'ble Attorney General, the stand taken by the National Human Rights Commission and the Law Commission of India in its report of October 2017 and because the merit of the prayer is virtually admitted and conceded before this Hon'ble Court, the National Human Rights Commission, the Law Commission of India and by Select Committee of Parliament, as an integral constituent of the right to life with dignity under Article 21, this Hon'ble Court may be pleased to direct the Central Government to enact a suitable stand-alone,

> comprehensive legislation against custodial torture as it has directed in the case of mob violence/lynching vide its judgment 17th July 2018."

2. The applicant had filed the above-captioned Writ Petition (Civil) No. 738 of 2016 under Article 32 of the Constitution of India for an effective and purposive legislative framework/law based upon the 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' ("UN Convention", for short) adopted by the United Nations General Assembly and opened for signature, ratification and accession on 10th December 1984. India had signed the UN Convention on 14th October 1997. However, India has not ratified the UN Convention.

3. Writ Petition (Civil) No. 738 of 2016 was disposed of vide order dated 27th November 2017, which reads as under:

> "Mr. K.K. Venugopal, learned Attorney General for India submitted that the prayer made in the writ petition has been the subject matter of discussion in the Law Commission and the Law Commission has already made certain recommendations. He would further submit that the report is being seriously considered by the Government. In view of the aforesaid statement, we do not intend to keep this writ petition pending and it is accordingly disposed of. There shall be no order as to costs."

4. The applicant predicating his case on the right to life and liberty and judgments of this Court had argued that custodial torture being crime against humanity which directly infracts and violates Article 21 of the Constitution, this Court should invoke and exercise

jurisdiction under Articles 141 and 142 of the Constitution for the protection and advancement of human dignity, a core and non-negotiable constitutional right. In ***D.K. Basu*** v. ***State of West Bengal***[1] custodial torture and violence was described as a wound inflicted on the soul, so painful and paralysing that it engenders fear, rage, hatred and despair, and denigrates the individual. In ***Sunil Batra*** v. ***Delhi Administration and Others***[2], this Court had observed that the prisoners have enforceable liberties, though devalued but never demonetised and, therefore, it is within the jurisdictional reach and range of this Court's writ to deal with prison and police caprice and cruelty. Similarly, in ***Francis Coralie Mullin*** v. ***Administrator, Union Territory of Delhi and Others***[3], this Court had observed that torture in any form is inhuman, degrading and offensive to human dignity and constitutes an inroad into the right to life and is prohibited by Article 21 of the Constitution, for no law authorises and no procedure permits torture or cruelty, inhuman or degrading treatment. Reference was made to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights which prohibits torture in all forms in absolute terms. Recently, in ***K.S. Puttaswamy and Another*** v. ***Union of India and Others***[4] this

1 (1997) 1 SCC 416
2 (1978) 4 SCC 494
3 (1981) 1 SCC 608
4 (2017) 10 SCC 1

Court had once again emphased on the right to human dignity which, first and foremost, means the dignity of each human being 'as a human being'. When human dignity in a person's life is infringed and physical or mental welfare is negated and harmed, the Court would intervene to protect and safeguard constitutional values. Reference was also made to the decision in ***Romila Thapar and Others*** v. ***Union of India and Others***[5] claiming that despite existing law and repeated judicial decisions, custodial torture still remains rampant and widespread in India. Our attention was drawn to the report of Asian Centre for Human Rights which was based, *inter alia*, on the information and data furnished by the Government of India in Parliament, acknowledging 1674 custodial deaths, including 1530 deaths in judicial custody and 144 deaths in police custody during the period 1st April 2017 to 28th February 2018. India has consistently and unequivocally condemned and deprecated custodial torture at international forums and has signed the UN Convention but the Government's reluctance to ratify the UN Convention, which envisages a comprehensive and standalone legislation, it was argued, is baffling and unintelligible. Indian statutory law at present is not in harmony and falls short on several accounts, both procedurally and substantively, with the UN Convention and, thus, there is an urgent and immediate need for

[5] (2018) 10 SCC 753

an all-embracing standalone enactment based on the UN Convention. Articles 51(c) and 253 of the Constitution underscore the 'constitutional imperative' of aligning domestic laws with international law and obligations. The legislation as prayed, it was submitted, would fulfil the constitutional obligations of the Government of India and the constitutional goals which the Government ought to achieve. Accordingly, the directions as prayed for would not entrench upon Parliament's domain to enact laws as they directly relate to the protection and preservation of human rights. The directions are justified and necessary in view of the delay and inaction in enacting the law, notwithstanding the recommendations made by the National Human Rights Commission, report of the Law Commission of India in October 2017, and report of the Select Committee of Parliament dated 2th December 2010 and repeated commitments made by the Indian Government. Reference was made to ***Tehseen S. Poonawalla*** v. ***Union of India and Others***[6] wherein this Court had highlighted the need for enactment of a suitable legislation to deal with mob violence/lynching in the country. Reliance was placed on judgments of this Court in ***Vishaka and Others*** v. ***State of Rajasthan and Others***[7], ***Vineet Narain and Others*** v. ***Union of***

[6] (2018) 9 SCC 501
[7] (1997) 6 SCC 241

India and Another[8], ***Destruction of Public and Private Properties, In RE*** v. ***State of Andhra Pradesh and Others***[9], ***Lakshmi Kant Pandey*** v. ***Union of India***[10], ***State of West Bengal and Others*** v. ***Sampat Lal and Others***[11], ***K. Veeraswami*** v. ***Union of India and Others***[12] and ***Delhi Judicial Service Association, Tis Hazari Court, Delhi*** v. ***State of Gujarat and Others***[13]. While referring to ***Mahender Chawla and Others*** v. ***Union of India and Others***[14], and other decisions including ***Tehseen S. Poonawalla*** (supra), it was argued that this Court has not flinched from suggesting, recommending, advising, guiding and directing the Government of India with respect to statutory enactments. It was submitted that the delay and inaction in implementing the constitutional obligation relates back to the year 1997 when India had signed the UN Convention, but the Government has failed to enact a comprehensive legislation despite commitments and recommendations made and noticed above. This, it was submitted, reflects unreasonable and unacceptable conduct of the Government in shielding infringement of Article 21 and violates Article 14 of the Constitution of India. Thus, the Court may issue directions to the Union of India to enact

8 (1998) 1 SCC 226
9 (2009) 5 SCC 212
10 (1984) 2 SCC 244
11 (1985) 1 SCC 317
12 (1991) 3 SCC 655
13 (1991) 4 SCC 406
14 (2018) SCC Online 2679

a law dealing with custodial torture in terms of the U.N. Convention.

5. It may be noted here that the applicant was the Chairperson of the Select Committee of the Rajya Sabha that had submitted the report on custodial torture depicting the need for a comprehensive standalone legislation.

6. Respondent No.1 – Union of India, in its response, has stated that the draft legislation prepared on the basis of the Law Commission's report is under active consideration and was referred to stakeholders, that is, the States and Union Territories for their inputs and suggestions. It was highlighted that the 'Criminal Laws' and the 'Criminal Procedure' fall in the Concurrent List of the Seventh Schedule to the Constitution of India and, therefore, comments and views of the State Governments/Union Territories were solicited on the recommendations made by the Law Commission of India. There may have been some delay as some States did not furnish their response, albeit the Union of India took steps by sending reminders on 27th June 2018, 27th November 2018 and 20th December 2018. Subsequent affidavit dated 12th February 2019 discloses that all States and Union Territories have filed their inputs/suggestions and that the question of enacting a legislation is under consideration. A legislation of this nature given

the nuances, niceties and spectrum of divergent views and choices is a complex and challenging task. Laws are legislated after due debate, deliberation and once the required consensus is formed. Any direction by this Court requiring the Parliament to frame a law or modify an enactment in a particular manner would violate doctrine of separation of powers, a basic feature of the Constitution. Parliament as an elected body representing the citizenry is bestowed with constitutional power to enact laws, which create rights, obligations and duties with attendant penalties. Existing municipal laws governing the field as interpreted by the Courts apply in matters of custodial torture.

7. We have in addition to Dr. Ashwani Kumar and Mr. K.K. Venugopal, learned Attorney General of India, heard Mr. Colin Gonsalves, senior advocate and *amicus curiae*, and Ms. Shobha Gupta, counsel for the National Human Rights Commission, the second respondent before us.

8. At the outset, we must clarify that by the present order, we would be deciding a very limited controversy, viz. the prayer of the applicant that this Court should direct Parliament to enact a standalone and comprehensive legislation against custodial torture based on the UN Convention. The prayer made requires the Court to examine and answer the question that whether within the

constitutional scheme, this Court can and should issue any direction to the Parliament to enact a new law based on the UN Convention.

9. Classical or pure theory of rigid separation of powers as advocated by Montesquieu which forms the bedrock of the American Constitution is clearly inapplicable to parliamentary form of democracy as it exists in India and Britain, for the executive and legislative wings in terms of the powers and functions they exercise are linked and overlap and the personnel they equip are to an extent common. However, unlike Britain, India has a written Constitution, which is supreme and adumbrates as well as divides powers, roles and functions of the three wings of the State – the legislature, the executive and the judiciary. These divisions are boundaries and limits fixed by the Constitution to check and prevent transgression by any one of the three branches into the powers, functions and tasks that fall within the domain of the other wing. The three branches have to respect the constitutional division and not disturb the allocation of roles and functions between the triad. Adherence to the constitutional scheme dividing the powers and functions is a guard and check against potential abuse of power and the rule of law is secured when each branch observes the constitutional limitations to their powers, functions and roles.

10. Modern theory of separation of powers does not accept that the three branches perform mutually isolated roles and functions and accepts a need for coordinated institutional effort for good governance, albeit emphasises on benefits of division of power and labour by accepting the three wings do have separate and distinct roles and functions that are defined by the Constitution. All the institutions must act within their own jurisdiction and not trespass into the jurisdiction of the other. Beyond this, each branch must support each other in the general interest of good governance. This separation ensures the rule of law in at least two ways. It gives constitutional and institutional legitimacy to the decisions by each branch, that is, enactments passed by the legislature, orders and policy decisions taken by the executive and adjudication and judgments pronounced by the judiciary in exercise of the power of judicial review on validity of legislation and governmental action. By segregating the powers and functions of the institutions, the Constitution ensures a structure where the institutions function as per their institutional strengths. Secondly, and somewhat paradoxically, it creates a system of checks and balances as the Constitution provides a degree of latitude for interference by each branch into the functions and tasks performed by the other branch.

It checks concentration of power in a particular branch or an institution.

11. The legislature as an elected and representative body enacts laws to give effect to and fulfil democratic aspirations of the people. The procedures applied are designed to give careful thought and consideration to wide and divergent interests, voices and all shades of opinion from different social and political groups. Legislature functions as a deliberative and representative body. It is directly accountable and answerable to the electorate and citizens of this country. This representativeness and principle of accountability is what gives legitimacy to the legislations and laws made by Parliament or the state legislatures. Article 245 of the Constitution empowers Parliament and the state legislatures to enact laws for the whole or a part of the territory of India, and for the whole or a part of the State respectively, after due debate and discussion in Parliament/ the state assembly.

12. The executive has the primary responsibility of formulating government policies and proposing legislations which when passed by the legislature become laws. By virtue of Articles 73 and 162 of the Constitution, the powers and functions of the executive are wide and expansive, as they cover matters in respect of which Parliament/state legislature can make laws and vests with the

executive the authority and jurisdiction exercisable by the Government of India or the State Government, as the case may be. As a delegate of the legislative bodies and subject to the terms of the legislation, the executive makes second stage laws known as 'subordinate or delegated legislation'. In fields where there is no legislation, the executive has the power to frame policies, schemes, etc., which is co-extensive with the power of Parliament or the state legislature to make laws. At the same time, the political executive is accountable to the legislature and holds office till they enjoy the support and confidence of the legislature. Thus, there is interdependence, interaction and even commonality of personnel/members of the legislature and the executive. The executive, therefore, performs multi-functional role and is not monolithic. Notwithstanding this multifunctional and pervasive role, the constitutional scheme ensures that within this interdependence, there is a degree of separation that acts as a mechanism to check interference and protect the non-political executive. Part XIV of the Constitution relates to "Services under the Union and the States", i.e., recruitment, tenure, terms and conditions of service, etc., of persons serving the Union or a State and accords them a substantial degree of protection. "Office of profit" bar, as applicable to legislators and prescribed vide Articles 102 and 191, is to ensure

separation and independence between the legislature and the executive.

13. The most significant impact of the doctrine of separation of powers is seen and felt in terms of the institutional independence of the judiciary from other organs of the State. Judiciary, in terms of personnel, the Judges, is independent. Judges unlike members of the legislature represent no one, strictly speaking not even the citizens. Judges are not accountable and answerable as the political executive is to the legislature and the elected representatives are to the electorate. This independence ensures that the judges perform the constitutional function of safeguarding the supremacy of the Constitution while exercising the power of judicial review in a fair and even-handed manner without pressure and favours. As an interpreter, guardian and protector of the Constitution, the judiciary checks and curbs violation of the Constitution by the Government when they overstep their constitutional limits, violate the basic structure of the Constitution, infringe fundamental rights or act contrary to law. Power of judicial review has expanded taking within its ambit the concept of social and economic justice. Yet, while exercising this power of judicial review, the courts do not encroach upon the field marked by the Constitution for the legislature and the executive, as the courts

examine legality and validity of the legislation or the governmental action, and not the wisdom behind the legislative measure or relative merits or demerits of the governmental action. Neither does the Constitution permit the courts to direct, advise or sermonise others in the spheres reserved for them by the Constitution, provided the legislature or the executive do not transgress their constitutional limits or statutory conditions. Referring to the phrase "all power is of an encroaching nature", which the judiciary checks while exercising the power of judicial review, it has been observed[15] that the judiciary must be on guard against encroaching beyond its bounds since the only restraint upon it is the self-imposed discipline of self-restraint. Independence and adherence to constitutional accountability and limits while exercising the power of judicial review gives constitutional legitimacy to the court decisions. This is essence of the power and function of judicial review that strengthens and promotes the rule of law.

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[15] *Asif Hameed & Others v. State of Jammu & Kashmir & Others,* 1989 Supp. (2) SCC 364 quoting with approval dissenting opinion of Frankfurter J. in *Trop v. Dulles*. Frankfurter J. had observed:

> "Rigorous observance of the difference between limits of power and wise exercise of power — between questions of authority and questions of prudence — requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do."

14. Constitutional Bench judgments in ***His Holiness Kesavananda Bharati Sripadagalvaru*** v. ***State of Kerala and Another***[16] , ***State of Rajasthan and Others*** v. ***Union of India and Others***[17]***, I.R. Coelho (Dead) by LRs.*** v. ***State of Tamil Nadu***[18] and ***State of Tamil Nadu v. State of Kerala***[19] have uniformly ruled that the doctrine of separation of powers, though not specifically engrafted, is constitutionally entrenched and forms part of the basic structure as its sweep, operation and visibility are apparent. Constitution has made demarcation, without drawing formal lines, amongst the three organs with the duty of the judiciary to scrutinise the limits and whether or not the limits have been transgressed. These judgments refer to the constitutional scheme incorporating checks and balances. As a sequitur, the doctrine restrains the legislature from declaring the judgment of a court to be void and of no effect, while the legislature still possesses the legislative competence of enacting a validating law which remedies the defect pointed out in the judgment.[20] However, this does not ordain and permit the legislature to declare a judgment as invalid by enacting a law, but permits the legislature to take away the basis of the judgment by fundamentally altering the basis on which it was pronounced.

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16 (1973) 4 SCC 225
17 (1977) 3 SCC 592
18 (2007) 2 SCC 1
19 (2014) 12 SCC 696

20 *Shri Prithvi Cotton Mills Ltd. and Another* v. *Broach Borough Municipality and Others*, (1969) 2 SCC 283

Therefore, while exercising all important checks and balances function, each wing should be conscious of the enormous responsibility that rests on them to ensure that institutional respect and comity is maintained.

15. In ***Binoy Viswam*** v. ***Union of India and Others***[21], this Court referring to the Constitution had observed that the powers to be exercised by the three wings of the State have an avowed purpose and each branch is constitutionally mandated to act within its sphere and to have mutual institutional respect to realise the constitutional goal and to ensure that there is no constitutional transgression. It is the Constitution which has created the three wings of the State and, thus, each branch must oblige the other by not stepping beyond its territory.

16. In ***Kalpana Mehta and Others*** v. ***Union of India and Others***[22], Mr. Justice Dipak Misra, the then Chief Justice of India, under the headings *'Supremacy of the Constitution', 'Power of judicial review'* and *'Doctrine of separation of powers'*, has held that the Constitution is a supreme fundamental law which requires that all laws, actions and decisions of the three organs should be in consonance and in accord with the constitutional limits, for the

21 (2017) 7 SCC 59
22 (2018) 7 SCC 1

legislature, the executive and the judiciary derive their authority and jurisdiction from the Constitution. Legislature stands vested with an exclusive authority to make laws thereby giving it a supremacy in the field of legislation and law-making, yet this power is distinct from and not at par with the supremacy of the Constitution, as:

> "41. This Court has the constitutional power and the authority to interpret the constitutional provisions as well as the statutory provisions. The conferment of the power of judicial review has a great sanctity as the constitutional court has the power to declare any law as unconstitutional if there is lack of competence of the legislature keeping in view the field of legislation as provided in the Constitution or if a provision contravenes or runs counter to any of the fundamental rights or any constitutional provision or if a provision is manifestly arbitrary."

17. Having said so, Dipak Misra, CJ went on to observe:

> "42. When we speak about judicial review, it is also necessary to be alive to the concept of judicial restraint. The duty of judicial review which the Constitution has bestowed upon the judiciary is not unfettered; it comes within the conception of judicial restraint. The principle of judicial restraint requires that Judges ought to decide cases while being within their defined limits of power. Judges are expected to interpret any law or any provision of the Constitution as per the limits laid down by the Constitution."

Earlier, Dipak Misra, CJ had observed:

> "39. From the above authorities, it is quite vivid that the concept of constitutional limitation is a facet of the doctrine of separation of powers. At this stage, we may clearly state that there can really be no straitjacket approach in the sphere of separation of powers when issues involve democracy, the essential morality that

> flows from the Constitution, interest of the citizens in certain spheres like environment, sustenance of social interest, etc. and empowering the populace with the right to information or right to know in matters relating to candidates contesting election. There can be many an example where this Court has issued directions to the executive and also formulated guidelines for facilitation and in furtherance of fundamental rights and sometimes for the actualisation and fructification of statutory rights."

18. D.Y. Chandrachud, J., in his separate and concurring judgment for himself and A.K. Sikri, J. in ***Kalpana Mehta*** (supra) had referred to the nuanced 'doctrine of functional separation' that finds articulation in the articles/books by *Peter A. Gerangelos* in his work titled *'The Separation of Powers and Legislative Interference in Judicial Process, Constitutional Principles and Limitations'*[23], *M.J.C. Vile*'s book titled *'Constitutionalism and the Separation of Powers'*[24], *Aileen Kavanagh* in her work *'The Constitutional Separation of Powers'*[25] and *Eoin Carolan* in his book titled *'The New Separation of Powers – A Theory for the Modern State'*[26]. These authors in the context of modern administrative State have reconstructed the doctrine as consisting of two components: 'division of labour' and 'checks and balances', instead of isolated compartmentalisation, by highlighting the need of interaction and interdependence amongst the three organs in a way that each branch is in cooperative

[23] Hart Publishing, 2009
[24] Oxford University Press, 1967
[25] David Dyzenhaus and Malcolm Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016)
[26] Oxford University Press, 2009

engagement but at the same time acts, when necessary, to check on the other and that no single group of people are able to control the machinery of the State. Independent judiciary acts as a restraining influence on the arbitrary exercise of power.

19. Referring to the functional doctrine, D.Y. Chandrachud, J., had cited the following judgements:

> "249. In *State of U.P.* v. *Jeet S. Bisht*, the Court held that the doctrine of separation of powers limits the "active jurisdiction" of each branch of Government. However, even when the active jurisdiction of an organ of the State is not challenged, the doctrine allows for methods to be used to prod and communicate to an institution either its shortfalls or excesses in discharging its duty. The Court recognised that fundamentally, the purpose of the doctrine is to act as a scheme of checks and balances over the activities of other organs. The Court noted that the modern concept of separation of powers subscribes to the understanding that it should not only demarcate the area of functioning of various organs of the State, but should also, to some extent, define the minimum content in that delineated area of functioning. S.B. Sinha, J. addressed the need for the doctrine to evolve, as administrative bodies are involved in the dispensation of socio-economic entitlements: (SCC p. 619, para 83)
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> > "*83*. If we notice the evolution of separation of powers doctrine, traditionally the *checks and balances* dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable *social and economic* entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of *checks and balances* to include governmental inaction. Otherwise we

> envisage the country getting transformed into a *state of repose*. Social engineering as well as institutional engineering therefore forms part of this obligation."
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> (emphasis in original)
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> 251. In *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, Madan B. Lokur, J. observed that separation of powers does not envisage that each of the three organs of the State — the legislature, executive and judiciary — work in a silo. The learned Judge held: (SCC p. 583, para 678)
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> > "*678*. There is quite clearly an entire host of parliamentary and legislative checks placed on the judiciary whereby its administrative functioning can be and is controlled, but these do not necessarily violate the theory of separation of powers or infringe the independence of the judiciary as far as decision-making is concerned. As has been repeatedly held, the theory of separation of powers is not rigidly implemented in our Constitution, but if there is an overlap in the form of a check with reference to an essential or a basic function or element of one organ of State as against another, a constitutional issue does arise. It is in this context that the 99th Constitution Amendment Act has to be viewed—whether it impacts on a basic or an essential element of the independence of the judiciary, namely, its decisional independence."

20. Thereafter, D.Y. Chandrachud, J. had observed:

> "254. While assessing the impact of the separation of powers upon the present controversy, certain precepts must be formulated. Separation of powers between the legislature, the executive and the judiciary is a basic feature of the Constitution. As a foundational principle which is comprised within the basic structure, it lies beyond the reach of the constituent power to amend. It cannot be substituted or abrogated. While recognising this position, decided cases indicate that the Indian

Constitution does not adopt a separation of powers in the strict sense. Textbook examples of exceptions to the doctrine include the power of the executive to frame subordinate legislation, the power of the legislature to punish for contempt of its privileges and the authority entrusted to the Supreme Court and the High Courts to regulate their own procedures by framing rules. In making subordinate legislation, the executive is entrusted by the legislature to make delegated legislation, subject to its control. The rule-making power of the higher judiciary has trappings of a legislative character. The power of the legislature to punish for contempt of its privileges has a judicial character. These exceptions indicate that the separation doctrine has not been adopted in the strict form in our Constitution. But the importance of the doctrine lies in its postulate that the essential functions entrusted to one organ of the State cannot be exercised by the other. By standing against the usurpation of constitutional powers entrusted to other organs, separation of powers supports the rule of law and guards against authoritarian excesses.

255. Parliament and the State Legislatures legislate. The executive frames policies and administers the law. The judiciary decides and adjudicates upon disputes in the course of which facts are proved and the law is applied. The distinction between the legislative function and judicial functions is enhanced by the basic structure doctrine. The legislature is constitutionally entrusted with the power to legislate. Courts are not entrusted with the power to enact law. Yet, in a constitutional democracy which is founded on the supremacy of the Constitution, it is an accepted principle of jurisprudence that the judiciary has the authority to test the validity of legislation. Legislation can be invalidated where the enacting legislature lacks legislative competence or where there is a violation of fundamental rights. A law which is constitutionally ultra vires can be declared to be so in the exercise of the power of judicial review. Judicial review is indeed also a part of the basic features of the Constitution. Entrustment to the judiciary of the power to test the validity of law is an established constitutional principle which co-exists with the separation of powers. Where a law is held to be ultra vires there is no breach of parliamentary privileges for the simple reason that all

> institutions created by the Constitution are subject to constitutional limitations. The legislature, it is well settled, cannot simply declare that the judgment of a court is invalid or that it stands nullified. If the legislature were permitted to do so, it would travel beyond the boundaries of constitutional entrustment. While the separation of powers prevents the legislature from issuing a mere declaration that a judgment is erroneous or invalid, the law-making body is entitled to enact a law which remedies the defects which have been pointed out by the court. Enactment of a law which takes away the basis of the judgment (as opposed to merely invalidating it) is permissible and does not constitute a violation of the separation doctrine. That indeed is the basis on which validating legislation is permitted.
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> 256. This discussion leads to the conclusion that while the separation of powers, as a principle, constitutes the cornerstone of our democratic Constitution, its application in the actual governance of the polity is nuanced. The nuances of the doctrine recognise that while the essential functions of one organ of the State cannot be taken over by the other and that a sense of institutional comity must guide the work of the legislature, executive and judiciary, the practical problems which arise in the unfolding of democracy can be resolved through robust constitutional cultures and mechanisms. The separation doctrine cannot be reduced to its descriptive content, bereft of its normative features. Evidently, it has both normative and descriptive features. In applying it to the Indian Constitution, the significant precept to be borne in mind is that no institution of governance lies above the Constitution. No entrustment of power is absolute."

21. Having elucidated the doctrinal basis of separation of powers and mutual interaction between the three organs of the State in the democratic set-up, it would be important to draw clear distinction between interpretation and adjudication by the courts on one hand and the power to enact legislation by the legislature on the other.

Adjudication results in what is often described as *judge made law*, but the interpretation of the statutes and the rights in accordance with the provisions of Articles 14, 19 and 21 in the course of adjudication is not an attempt or an act of legislation by the judges. Reference in this regard can be made to the opinion expressed by F.M. Ibrahim Kalifulla, J. in ***Union of India*** v. ***V. Sriharan alias Murugan and Others***[27] who had, in the context of capital punishment for offences under Section 302 of the Indian Penal Code ("IPC", for short), held that the lawmakers have entrusted the task of weighing and measuring the gravity of the offence with the institution of judiciary by reposing a very high amount of confidence and trust. It requires a judge to apply his judicial mind after weighing the pros and cons of the crime committed in the golden scales to ensure that the justice is delivered. In a way, therefore, the legislature itself entrusts the judiciary to lay down parameters in the form of precedents which is oft-spoken as *judge made law*. This is true of many a legislations. Such law, even if made by the judiciary, would not infringe the doctrine of separation of powers and is in conformity with the constitutional functions. This distinction between the two has been aptly expressed by *Aileen Kavanagh* in the following words:

[27] (2016) 7 SCC 1

> "In general, the ability and power of the courts to make new law is generally more limited than that of the legislators, since courts typically make law by filling in gaps in existing legal frameworks, extending existing doctrines incrementally on a case-by-case basis, adjusting them to changing circumstances, etc. Judicial lawmaking powers tend to be piecemeal and incremental and the courts must reason according to law, even when developing it. By contrast, legislators have the power to make radical, broad-ranging changes in the law, which are not based on existing legal norms...."

22. Seven Judges of this Court in ***P. Ramachandra Rao*** v. ***State of Karnataka***[28] had, while interpreting Articles 21, 32, 141 and 142 of the Constitution, held that prescribing period at which criminal trial would terminate resulting in acquittal or discharge of the accused, or making such directions applicable to all cases in present or in future, would amount to judicial law-making and cannot be done by judicial directives. It was observed that the courts can declare the law, interpret the law, remove obvious lacuna and fill up the gaps, but they cannot entrench upon the field of legislation. The courts can issue appropriate and binding directions for enforcing the laws, lay down time limits or chalk out a calendar for the proceeding to follow to redeem the injustice and for taking care of the rights violated in the given case or set of cases depending on the facts brought to the notice of the court, but cannot lay down and enact the provisions akin to or on the lines of Chapter XXXVI of the Code

[28] (2002) 4 SCC 578

of Criminal Procedure, 1973. Drawing distinction between legislation as the source of law which consists of declaration of legal rules by a competent authority and judicial decisions pronounced by the judges laying down principles of general application, reference was made to *Salmond on Principles of Jurisprudence* (12th Edition) which says:

> "we must distinguish law-making by legislators from law-making by the courts. Legislators can lay down rules purely for the future and without reference to any actual dispute; the courts, insofar as they create law, can do so only in application to the cases before them and only insofar as is necessary for their solution. Judicial law-making is incidental to the solving of legal disputes; legislative law-making is the central function of the legislator."

Reference was also made to *Professor S. P Sathe's* work on "*Judicial Activism in India — Transgressing Borders and Enforcing Limits*," evaluating the legitimacy of judicial activism, wherein it was observed:

> "Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court." (p.242)
>
> "In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists

> nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law ... through directions ... is not a legitimate judicial function." (p.250)

23. From the above, it is apparent that law-making within certain limits is a legitimate element of a judge's role, if not inevitable.[29] A judge has to adjudicate and decide on the basis of legal provisions, which when indeterminate on a particular issue require elucidation and explanation.[30] This requires a judge to interpret the provisions to decide the case and, in this process, he may take recourse and rely upon fundamental rights, including the right to life, but even then he does not legislate a law while interpreting such provisions. Such interpretation is called *'judge made law'* but not legislation. *Aileen Kavanagh,* in explaining the aforesaid position, had observed:

> "...If there has not been a case in point and the judge has to decide on the basis of legal provisions which may be indeterminate on the issue, then the judge cannot decide the case without making new law...This is because Parliament has formulated the Act in broad terms, which inevitably require elaboration by the courts in order to apply it to the circumstances of each new case. Second, even in cases where judges apply

[29] Lord Irvine: *'Activism and Restraint: Human Rights and Interpretative Process',* (1999) 4 EHRLR 350

[30] Aileen Kavanagh: 'The *Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998'* (2004) 24 Oxford Journal of Legal Studies, 259–285

> existing law, they cannot avoid facing the question of whether to change and improve it.... Interpretation has an applicative and creative aspect."

Legislating or law-making involves a choice to prioritise certain political, moral and social values over the others from a wide range of choices that exist before the legislature. It is a balancing and integrating exercise to give expression/meaning to diverse and alternative values and blend it in a manner that it is representative of several viewpoints so that it garners support from other elected representatives to pass institutional muster and acceptance. Legislation, in the form of an enactment or laws, lays down broad and general principles. It is the source of law which the judges are called upon to apply. Judges, when they apply the law, are constrained by the rules of language and by well identified background presumptions as to the manner in which the legislature intended the law to be read. Application of law by the judges is not synonymous with the enactment of law by the legislature. Judges have the power to spell out how precisely the statute would apply in a particular case. In this manner, they complete the law formulated by the legislature by applying it. This power of interpretation or the power of judicial review is exercised post the enactment of law, which is then made subject matter of interpretation or challenge before the courts.

24. Legislature, as an institution and a wing of the Government, is a microcosm of the bigger social community possessing qualities of a democratic institution in terms of composition, diversity and accountability. Legislature uses in-built procedures carefully designed and adopted to bring a plenitude of representations and resources as they have access to information, skills, expertise and knowledge of the people working within the institution and outside in the form of executive.[31] Process and method of legislation and judicial adjudication are entirely distinct. Judicial adjudication involves applying rules of interpretation and law of precedents and notwithstanding deep understanding, knowledge and wisdom of an individual judge or the bench, it cannot be equated with law making in a democratic society by legislators given their wider and broader diverse polity. The Constitution states that legislature is supreme and has a final say in matters of legislation when it reflects on alternatives and choices with inputs from different quarters, with a check in the form of democratic accountability and a further check by the courts which exercise the power of judicial review. It is not for the judges to seek to develop new all-embracing principles of law in a way that reflects the stance and opinion of the individual judges when the society/legislators as a whole are unclear and

[31] D. Kyritsis, *Constitutional Review in a Representative Democracy* (2012) 32 Oxford Journal of Legal Studies

substantially divided on the relevant issues[32]. In ***Bhim Singh* v. *Union of India***[33], while observing that the Constitution does not strictly prohibit overlapping of functions as this is inevitable in the modern parliamentary democracy, the Constitution prohibits exercise of functions of another branch which results in wresting away of the regime of constitutional accountability. Only when accountability is preserved, there will be no violation of principle of separation of powers. Constitution not only requires and mandates that there should be right decisions that govern us, but equal care has to be taken that the right decisions are made by the right body and the institution. This is what gives legitimacy, be it a legislation, a policy decision or a court adjudication.

25. It is sometimes contended with force that unpopular and difficult decisions are more easily grasped and taken by the judges rather than by the other two wings. Indeed, such suggestions were indirectly made. This reasoning is predicated on the belief that the judges are not directly accountable to the electorate and, therefore, enjoy the relative freedom from questions of the moment, which enables them to take a detached, fair and just view.[34] The position that judges are not elected and accountable is correct, but this

[32] Lord Browne-Wilkinson in *Airedale NHS Trust* v. *Bland* [1993] AC 789 (p. 879-880)
[33] (2010) 5 SCC 538
[34] See observations of Lord Neuberger in *Regina (Nicklinson) and Another v. Ministry of Justice and Others* [2014] UKSC 38

would not justify an order by a court in the nature of judicial legislation for it will run afoul of the constitutional supremacy and invalidate and subvert the democratic process by which legislations are enacted. For the reasons stated above, this reasoning is constitutionally unacceptable and untenable.

26. Dipak Misra, CJ in ***Kalpana Mehta's*** case, under the heading *'Power of judicial review'* had examined several judgments of this Court to reflect upon the impressive expanse of judicial power in the superior courts that requires and demands exercise of tremendous responsibility by the courts. Thus, while exercising the interpretative power, the courts can draw strength from the spirit and propelling elements underlying the Constitution to realise the constitutional values but must remain alive to the concept of judicial restraint which requires the judges to decide cases within defined limits of power. Thus, the courts would not accept submissions and pass orders purely on a matter of policy or formulate judicial legislation which is for the executive or elected representatives of the people to enact. Reference was made to some judgments of this Court in the following words:

> "43. In *S.C. Chandra* v. *State of Jharkhand*, it has been ruled that the judiciary should exercise restraint and ordinarily should not encroach into the legislative domain. In this regard, a reference to a three-Judge Bench decision in *Suresh Seth* v. *Indore Municipal Corpn.* is quite instructive. In the said case, a prayer

> was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956. Repelling the submission, the Court held that it is purely a matter of policy which is for the elected representatives of the people to decide and no directions can be issued by the Court in this regard. The Court further observed that this Court cannot issue directions to the legislature to make any particular kind of enactment. In this context, the Court held that under our constitutional scheme, Parliament and Legislative Assemblies exercise sovereign power to enact law and no outside power or authority can issue a direction to enact a particular kind of legislation. While so holding, the Court referred to the decision in *Supreme Court Employees' Welfare Assn.* v. *Union of India* wherein it was held that no court can direct a legislature to enact a particular law and similarly when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated authority."

27. It can be argued that there have been occasions when this Court has 'legislated' beyond what can be strictly construed as pure interpretation or judicial review but this has been in cases where the constitutional courts, on the legitimate path of interpreting fundamental rights, have acted benevolently with an object to infuse and ardently guard the rights of individuals so that no person or citizen is wronged, as has been observed in paragraph 46 of the judgment of Dipak Misra, CJ in ***Kalpana Mehta's*** case. Secondly, these directions were given subject to the legislature enacting the law and merely to fill the vacuum until the legislative takes upon it to legislate. These judgments were based upon gross violations of

fundamental rights which were noticed and in view of the vacuum or absence of law/guidelines. The directions were interim in nature and had to be applied till Parliament or the state legislature would enact and were a mere stop-gap arrangement. These guidelines and directions in some cases as in the case of ***Vishaka*** (supra) had continued for long till the enactment of *'The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013'* because the legislature (it would also include the executive) impliedly and tacitly had accepted the need for the said legislation even if made by the judiciary without enacting the law. Such law when enacted by Parliament or the state legislature, even if assumably contrary to the directions or guidelines issued by the Court, cannot be struck down by reason of the directions/guidelines; it can be struck down only if it violates the fundamental rights or the right to equality under Article 14 of the Constitution. These are extraordinary cases where notwithstanding the institutional reasons and the division of power, this Court has laid down general rules/guidelines when there has been a clear, substantive and gross human rights violation, which significantly outweighed and dwarfed any legitimising concerns based upon separation of powers, lack of expertise and uncertainty of the

consequences.[35] Same is the position in cases of gross environmental degradation and pollution. However, a mere allegation of violation of human rights or a plea raising environmental concerns cannot be the 'bright-line' to hold that self-restraint must give way to judicial legislation. Where and when court directions should be issued are questions and issues involving constitutional dilemmas that mandate a larger debate and discussion (see observations of Frankfurter J. as quoted in *Asif Hameed & Others v. State of Jammu & Kashmir & Others* in foot note 15 supra).

28. Such directions must be issued with great care and circumspection and certainly not when the matter is already pending consideration and debate with the executive or Parliament. This is not a case which requires Court's intervention to give a suggestion for need to frame a law as the matter is already pending active consideration. Any direction at this stage would be interpreted as judicial participation in the enactment of law. This Court in ***Supreme Court Employees' Welfare Association*** v. ***Union of India and Another***[36] had directed that no court can direct the legislature to enact a particular law. Similarly, when an executive authority

[35] See Aileen Kavanagh, *Judicial Restraint in the Pursuit of Justice* (2009) University of Oxford Legal Research Paper Series

[36](1989) 4 SCC 187

exercises the legislative power by way of subordinate legislation pursuant to delegatory authority of the legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under delegated authority. Again, we would quote from Dipak Misra, CJ in ***Kalpana Mehta's*** case, in which it was observed:

> "44. Recently, in *Census Commr.* v. *R. Krishnamurthy*, the Court, after referring to *Premium Granites* v. *State of T.N.*, *M.P. Oil Extraction* v. *State of M.P.*, *State of M.P.* v. *Narmada Bachao Andolan* and *State of Punjab* v. *Ram Lubhaya Bagga*, held: (*R. Krishnamurthy case*, SCC p. 809, para 33)
>
> > "*33*. From the aforesaid pronouncement of law, it is clear as noonday that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions (*sic*) but the court is not expected to sit as an appellate authority on an opinion."

29. In ***V.K. Naswa*** v. ***Home Secretary, Union of India and Others***[37], this Court in clear and categoric terms had observed that we do not issue directions to the legislature directly or indirectly and any such directions if issued would be improper. It is outside the power of judicial review to issue directions to the legislature to enact a law in

[37](2012) 2 SCC 542

a particular manner, for the Constitution does not permit the courts to direct and advice the executive in matters of policy. Parliament, as the legislature, exercises this power to enact a law and no outside authority can issue a particular piece of legislation. It is only in exceptional cases where there is a vacuum and non-existing position that the judiciary, in exercise of its constitutional power, steps in and provides a solution till the legislature comes forward to perform its role.

30. In ***State of Himachal Pradesh and Others*** v. ***Satpal Saini***[38], this Court had overturned the directions given by the High Court to amend provisions of the state enactment after what was described as the plight of large population of non-agriculturist *himachalis*. Reference was made to ***Supreme Court Employees' Welfare Association*** (supra) that no writ of mandamus can be issued to the legislature to enact a particular legislation nor can such direction be issued to the executive which exercises the powers to make rules in the nature of subordinate legislation. Reference was also made to ***V.K. Naswa*** (supra) wherein several earlier judgments were considered and it was held that the courts have a very limited role and, in its exercise, it is not open to make judicial legislation. Further, the courts do not have competence to issue

[38](2017) 11 SCC 42

directions to the legislature to enact a law in a particular manner. Reference was also made to the constitutional bench judgment in ***Manoj Narula*** v. ***Union of India***[39] in which a discordant note struck by two judges in ***Gainda Ram and Others*** v. ***Municipal Corporation of Delhi and Others***[40] was held to be contrary to the Constitution by observing that the decision whether or not Section 8 of the Representation of the People Act, 1951 should be amended is solely within the domain of Parliament and, therefore, no directions can be issued by this Court. It was observed:

> "6. The grievance, in our view, has a sound constitutional foundation. The High Court has while issuing the above directions acted in a manner contrary to settled limitations on the power of judicial review under Article 226 of the Constitution. A direction, it is well settled, cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power which is vested in Parliament and the State Legislatures under Articles 245 and 246 of the Constitution. The legislature as the repository of the sovereign legislative power is vested with the authority to determine whether a law should be enacted. The doctrine of separation of powers entrusts to the court the constitutional function of deciding upon the validity of a law enacted by the legislature, where a challenge is brought before the High Court under Article 226 (or this Court under Article 32) on the ground that the law lacks in legislative competence or has been enacted in violation of a constitutional provision. But judicial review cannot encroach upon the basic constitutional function which is entrusted to the legislature to determine whether a law should be enacted. Whether a provision of law as enacted subserves the object of the law or should be amended is a matter of legislative policy. The court cannot direct the legislature either to

[39](2014) 9 SCC 1
[40](2010) 10 SCC 715

enact a law or to amend a law which it has enacted for the simple reason that this constitutional function lies in the exclusive domain of the legislature. For the Court to mandate an amendment of a law — as did the Himachal Pradesh High Court — is a plain usurpation of a power entrusted to another arm of the State. There can be no manner of doubt that the High Court has transgressed the limitations imposed upon the power of judicial review under Article 226 by issuing the above directions to the State Legislature to amend the law. The Government owes a collective responsibility to the State Legislature. The State Legislature is comprised of elected representatives. The law enacting body is entrusted with the power to enact such legislation as it considers necessary to deal with the problems faced by society and to resolve issues of concern. The courts do not sit in judgment over legislative expediency or upon legislative policy. This position is well settled. Since the High Court has failed to notice it, we will briefly recapitulate the principles which emerge from the precedent on the subject.

7. In *Mallikarjuna Rao* v. *State of A.P.* and in *V.K. Sood* v. *Deptt. of Civil Aviation* this Court held that the court under Article 226 has no power to direct the executive to exercise its law-making power.

8. In *State of H.P.* v. *Parent of a Student of Medical College* this Court deprecated the practice of issuing directions to the legislature to enact a law: (SCC p. 174, para 4)

> "*4*. … The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging…."

The same principle was followed in *Asif Hameed* v. *State of J&K* where this Court observed that: (SCC p. 374, para 19)

> "*19*. … The Constitution does not permit the court to direct or advise the executive in matter of policy or to sermonise qua any matter which under the Constitution lies

> within the sphere of the legislature or executive…."

In *Union of India* v. *Assn. for Democratic Reforms* this Court observed that: (SCC p. 309, para 19)

> "*19*. … it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules."

xx xx xx

> 12. The judiciary is one amongst the three branches of the State; the other two being the executive and the legislature. Each of the three branches is co-equal. Each has specified and enumerated constitutional powers. The judiciary is assigned with the function of ensuring that executive actions accord with the law and that laws and executive decisions accord with the Constitution. The courts do not frame policy or mandate that a particular policy should be followed. The duty to formulate policies is entrusted to the executive whose accountability is to the legislature and, through it, to the people. The peril of adopting an incorrect policy lies in democratic accountability to the people. This is the basis and rationale for holding that the court does not have the power or function to direct the executive to adopt a particular policy or the legislature to convert it into enacted law. It is wise to remind us of these limits and wiser still to enforce them without exception."

31. Even more direct on the facts of the present case would be judgement by one of us, (Mr. Justice Ranjan Gogoi, the Chief Justice), in ***Common Cause: A Registered Society*** v. ***Union of India***[41] to the following effect:

> "18. There can be no manner of doubt that the parliamentary wisdom of seeking changes in an existing law by means of an amendment lies within the exclusive domain of the legislature and it is not the

[41](2017) 7 SCC 158

> province of the Court to express any opinion on the exercise of the legislative prerogative in this regard. The framing of the Amendment Bill; reference of the same to the Parliamentary Standing Committee; the consideration thereof by the said Committee; the report prepared along with further steps that are required to be taken and the time-frame thereof are essential legislative functions which should not be ordinarily subjected to interference or intervention of the Court. The constitutional doctrine of separation of powers and the demarcation of the respective jurisdiction of the Executive, the Legislature and the Judiciary under the constitutional framework would lead the Court to the conclusion that the exercise of the amendment of the Act, which is presently underway, must be allowed to be completed without any intervention of the Court. Any other view and any interference, at this juncture, would negate the basic constitutional principle that the legislature is supreme in the sphere of law-making. Reading down a statute to make it workable in a situation where an exercise of amendment of the law is pending, will not be justified either. A perception, however strong, of the imminent need of the law engrafted in the Act and its beneficial effects on the citizenry of a democratic country, by itself, will not permit the Court to overstep its jurisdiction. Judicial discipline must caution the Court against such an approach."

32. When the matter is already pending consideration and is being examined for the purpose of legislation, it would not be appropriate for this Court to enforce its opinion, be it in the form of a direction or even a request, for it would clearly undermine and conflict with the role assigned to the judiciary under the Constitution. In this connection, we may refer to the observation of Lord Bingham in ***Regina (Countryside Alliance) and Others*** v. ***Attorney General***

and Another[42], though made in a different context, to the following effect:

> "...The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament."

33. Confronted with the present situation, Mr. Colin Gonsalves, learned *amicus curiae*, had submitted that directions can be given to the executive to ratify the UN Convention. We do not think that any such direction can be issued for it would virtually amount to issuing directions to enact laws in conformity with the UN Convention, a power which we do not 'possess', while exercising power of judicial review.

34. Mr. K.K. Venugopal, learned Attorney General, in his submissions has rightly urged that Article 253 of the Constitution which deals with the legislation for giving effect to international agreements, confers power on Parliament to make laws for the whole or any part of the territory of India for implementing any treaty, agreement or convention, notwithstanding anything contained in the foregoing provisions of Chapter XI of the Constitution. Thus, notwithstanding Articles 245 and 246 of the Constitution, Parliament has the supreme power to make laws for implementing any treaty or

[42](2008) 1 AC 719

convention which may even encroach upon the exclusive legislative competence of the States. The executive action under Article 73 of signing and ratifying the convention can be implemented without any violation of the State's right when the legislation is passed by the Parliament under Article 253. 'Police' and 'Prisons' are State subjects. Ratification of the UN Convention would require enactment of laws under Article 253 of the Constitution, for mere ratification would not affect and undo the existing laws or result in the enactment of new laws. Ratification, as is well recognised, is a political act and would require consultation with the State Governments/Union Territories and subsequent deliberation of their comments by the Union of India. Union of India has pointed out that they have a reservation on Article 20 of the UN Convention. Reference is also made to the Vienna Convention on the Law of Treaties, 1969, to which India is not a party but which provisions are reflected in the Standard Operating Procedure issued by the Ministry of External Affairs in respect of Memorandum of Understanding/Agreement with foreign countries. The Standard Operating Procedure, clause (iv) under Heading D – Treaty Making Formalities which relates to ratification, states that where a treaty does not provide for its entry into force only upon its signature and makes it subject to ratification, the

treaty requires ratification. In order to ensure that India is in a position to efficiently discharge all obligations emanating from treaties/ agreements, such ratification should be undertaken only after relevant domestic clauses have been amended and the enabling legislations enacted when there is absence of domestic law on the subject. On the issue that the treaty making power is a political act, reference has been made to the following decisions: ***Union of India and Another*** v. ***Azadi Bachao Andolan and Another***[43]; ***Rosiline George*** v. ***Union of India and Others***[44]; ***Sakshi*** v. ***Union of India and Others***[45]; and ***P.B. Samant and Others*** v. ***Union of India and Others***[46].

35. However, this is not to state that the courts would not step in, when required, to protect fundamental rights. It is indisputable that the right to life and the right to liberty are of foremost importance in a democratic state and, therefore, any form of torture would violate the right to life and is prohibited by Article 21 of the Constitution. Such action would be unconstitutional under Article 21 and would fail the test of non-arbitrariness under Article 14 of the Constitution. Indeed, the courts have been at the forefront in protecting and safeguarding individual rights. In 1982, on the basis of a letter

[43](2004) 10 SCC 1
[44](1994) 2 SCC 80
[45](2004) 5 SCC 518
[46]AIR 1994 Bom 323

written by a journalist complaining of custodial violence suffered by women prisoners in police lock-ups in the city of Bombay, this Court in ***Sheela Barse v. State of Maharashtra***[47] had issued the guidelines to safeguard the rights of arrested persons including female prisoners to afford them protection in police lock-ups from possible torture or ill-treatment. A person detained in a prison is entitled to live with human dignity and his detention in prison should be regulated by a procedure established by law which must be reasonable, fair and just. This can be done by applying, elucidating and even creatively expanding existing laws and principles on case to case basis. Judiciary while exercising its jurisdiction in this manner is not enacting or legislating but applying the Constitution and protecting fundamental rights under Article 21 of the Constitution.

36. This human right aspect was again highlighted in ***Nilabati Behera (Smt) alias Lalita Behera (Through the Supreme Court Legal Aid Committee)*** *v.* ***State of Orissa and Others***[48] to state that the convicts, prisoners or under-trials must not be denuded of their fundamental rights under Article 21 and only such restrictions as are permitted by law can be imposed. It is the responsibility of the prison authority and the police to ensure that the person in custody

[47](1983) 2 SCC 96
[48](1993) 2 SCC 746

is not deprived of his right to life, even if his liberty is circumscribed by the fact that the person is in confinement. Even limited liberty is precious and it is the duty of the State to ensure that even a person in custody is dealt with in accordance with the procedure established by law. In the ***State of Madhya Pradesh*** v. ***Shyamsunder Trivedi and Others***[49] this Court had highlighted that a sensitive and realistic rather than a narrow technical approach is required while dealing with cases of custodial crime. The court must act within its powers and as far as possible try that the guilty should not escape to ensure that the rule of law prevails.

37. We would take note of the judgment of this Court in ***D.K. Basu*** (supra) wherein the following directions/ guidelines with respect to rights/custodial torture were issued:

> "(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
>
> **(2)** That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by atleast one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

[49](1995) 4 SCC 262

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

38. The law in this regard is also laid down in Sections 330 and 331 of the IPC which relate to 'voluntarily causing hurt to extort confession or to compel restoration of property' and 'voluntarily causing grievous hurt to extort confession or to compel restoration of property' respectively.

39. In terms of the aforesaid edicts, legal jurisprudence has developed for providing compensation for the unconstitutional deprivation of fundamental right to life and liberty as a public remedy in addition to claims in private law for damages by tortuous acts of public servants. In ***D.K. Basu*** (supra) the public law remedy for award of compensation was elucidated as arising from indefeasible rights guaranteed under Article 21 and justified on the ground that the purpose of public law is not only to civilise public power but also to ensure that the citizens live under a legal system where their rights

and interests are protected and preserved. For the grant of compensation, therefore, proceedings under Article 32 or 226 of the Constitution are entertained when violation of the fundamental rights granted under Article 21 is established. In such cases, claims of a citizen are tried on the principle of strict liability where defence of sovereignty may not be available. In ***S. Nambi Narayanan*** v. ***Siby Mathews and Others***[50] where criminal proceedings were initiated against Nambi Narayanan but it was found that the prosecution story was a sham, compensation of Rs. 50 lakhs was awarded for the anxiety suffered and maltreatment meted out to him.

40. We have no hesitation in observing that notwithstanding the aforesaid directions in ***D.K. Basu*** (supra) and the principles of law laid down in ***Prithipal Singh and Others*** v. ***State of Punjab and Another***[51] and ***S. Nambi Narayanan*** (supra), this Court can, in an appropriate matter and on the basis of pleadings and factual matrix before it, issue appropriate guidelines/directions to elucidate, add and improve upon the directions issued in ***D.K. Basu*** (supra) and other cases when conditions stated in paragraph 27 supra are satisfied. However, this is not what is urged and prayed by the applicant. The contention of the applicant is that this Court must

[50](2018) 10 SCC 804
[51](2012) 1 SCC 10

direct the legislature, that is, Parliament, to enact a suitable standalone comprehensive legislation based on the UN Convention and this direction, if issued, would be in consonance with the Constitution of India. This prayer must be rejected in light of the aforesaid discussion.

41. Notwithstanding rejection of the prayer made by the applicant, we would in terms of the above discussion clarify that this would not in any way affect the jurisdiction of the courts to deal with individual cases of alleged custodial torture and pass appropriate orders and directions in accordance with law.

.....CJI.
(RANJAN GOGOI)

.....J.
(DINESH MAHESHWARI)

.....J.
(SANJIV KHANNA)

NEW DELHI;
SEPTEMBER 05, 2019.