PUBLIC INTEREST LITIGATION

(5TH PILLAR OF DEMOCRACY)

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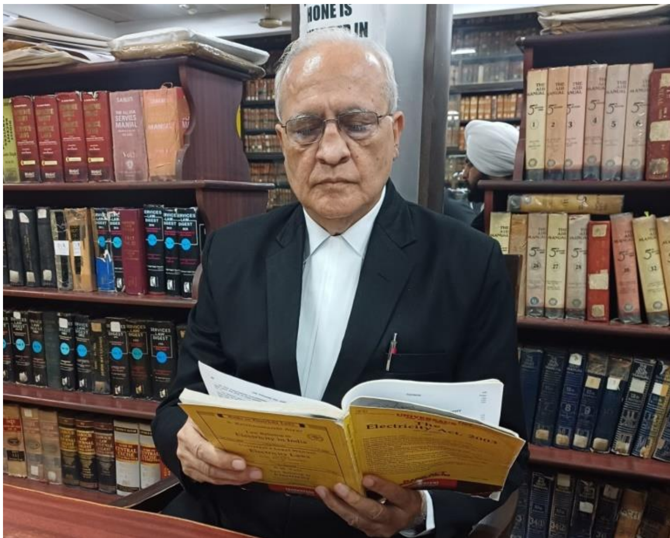

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Muskan Law House

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FOREWORD

PUBLIC INTEREST LITIGATION

(Fifth Pillar of Democracy)

(H.C. Arora, Advocate)

It is a popular concept that Indian democracy stands on three pillars, namely (i) Legislature; (ii) Executive; and (iii) Judiciary. It hardly needs be stated that ours is a secular, socialistic republic. It can also not be ignored that secularism is a concept, which is only on paper and in the speeches of the political leaders. The political executives are always trying to hijack the judiciary, to acquire more say in the appointment and transfer of Judges of The Hon'ble High Courts and The Hon'ble Supreme Court of India. Thus, there being no clear bifurcation of powers among the three pillars of democracy in India, many a times they are at logger heads with each other. However, with the passage of time, media emerged as 4th pillar of our democracy. It was widely believed that the media raises the issues, and brings to the notice of the general public, whenever any of the first two pillars of democracy tries to exceed its limits and powers. However, media has also lost its sheen as 4th pillar of democracy. Rightly or wrongly, many people are labeling media as "Pet Media", which shows their total disillusionment with the conduct of the media in the recent years.

In my considered view, it is the social activists, who indulge into filing of Public Interest Litigation (PIL) in the Hon'ble High Courts or for that matter in the Hon'ble Supreme Court of India, on various administrative and social causes, who deserve to be honoured for being "a vital pillar of democracy". Since, I do not want to degenerate the media as 4th pillar of democracy, I would therefore only label the "Public Interest Litigation" as the 5th pillar of the Indian democracy. The various misconceptions about Public Interest Litigation were removed by Hon'ble Justice P. N. Bhagwati in the case titled "People's Union for Democratic Rights and Others Versus Union of India and Others" wherein the Hon'ble Judge highlighted the gains of the Public Interest Litigation for the poor and downtrodden, the have-nots and the handicapped and the half hungry millions of our countrymen. The force of the Public Interest Litigation was also highlighted by Hon'ble Justice Madan B. Lokur, in the judgment titled "Re-Inhuman Conditions in 1382 Prisons". In the said judgment, Hon'ble Justice B. Lokur unhesitatingly observed that the Public Interest Litigation sometimes compels the Courts to consider the issues related to environment, social justice, violation of human rights and disregard for Article 21 of the Constitution of India, either because of an absence of

governance due to the failure of the State to faithfully and sincerely implement the laws enacted by the Parliament or due to mis-governance by the State, i.e., the Central Government, the State Government and the Union Territory administrations, leading to rampant illegalities. The failure of the State to take remedial steps to fill in the gaps when there is no operative law except that enshrined in the Constitution, more particularly Article 21, has resulted into Public Interest Litigation, and in some cases, where a treaty obligation should have been fulfilled.

It is a matter of pleasure that the role of Public Interest Litigation has been recognized by the Apex Court of the country, who has issued guidelines for purpose of entertaining Public Interest Litigation. The aforesaid example has been followed by various Hon'ble High Courts also, who have also framed Rules/Guidelines on Public Interest Litigation.

If I were to argue on behalf of Public Interest Litigants for seeking recognition of Public Interest Litigation as 5th pillar of Democracy in our country, I may refer to scores of instances, where the letter and spirit of the Constitution or other statutory laws has been grossly violated by the political executives of the country. The gravest instance of violation of the Constitution (91st Amendment) Act, 2003, was committed by the various State Governments, who have been appointing Parliamentary Secretaries, although no such post of Parliamentary Secretaries existed in the Constitution of India nor it was permissible to be created under the State laws. It was the Public Interest Litigants, including Sh. Jagmohan Singh Bhatti, along with this author, who succeeded in challenging the appointment of Parliamentary Secretaries by the State of Punjab. Similarly, the activists have been struggling through the Public Interest Litigation for seeking the disqualification of Members of Parliaments or those of the Legislative Assembly, on their being convicted under the law of the land. They have succeeded in their endeavor to some extent in "Lily Thomas" case. The activists and the NGOs have also succeeded to some extent in ensuring the issuance of directions from the apex Court of the country to all the State Governments, for expediting the criminal cases against MP/MLAs. They have also succeeded in their challenge against the protection given to the senior bureaucrats by the Governments through "Single Directive" which protected the Senior Bureaucrats from being prosecuted without the permission of Central/State Government consent.

The latest achievement of the PIL petitioners is success in the Public Interest Litigation, which resulted into the Hon'ble Supreme Court of India issuing directions to the Central Government to adopt a transparent procedure for appointment of Chief Election Commissioner and the Election Commissioners, so that such appointments may inspire the confidence of the people of the country, and may generate a feeling amongst the electorate that elections shall be conducted in a free and fair

manner. Thus, the fifth pillar has scored a resounding victory over the second pillar (The Executive).

The readers are advised to go through all the contents of this book, in support of my proposition that “Public Interest Litigation”, is entitled to be treated as 5th pillar of the Indian Democracy. One would ask the question to himself as to whether the NGOs and the social activists, who are spending their valuable time and energy, and also risking their lives by filing Public Interest Litigations on various subjects in the Hon’ble Supreme Court of India or for that matter, in the various Hon’ble High Courts, are not entitled to be treated as “Fifth Pillar of Indian Democracy”. The people who are struggling for bringing transparency into procedure for appointment to the high constitutional posts, and for ensuring justice to the prisoners, other downtrodden and poor people, and also trying to get the corrupt officers prosecuted, are they entitled to be treated as the most vital pillar of democracy? It also needs be considered that most important decisions, where the political executive has lost face, were the result of Public Interest Litigations, and it was only the Public Interest Litigation, in the words of Hon’ble Justice Madan B. Lokur, which compelled the judiciary to consider those issues.

I am authoring this book at the stage of life, when I feel convinced that I should not idle away my time any longer, and should put in my entire experience and knowledge on the subject of Public Interest Litigation, in the shape of a book to be presented to my countrymen. Let them re-define the Pillars of our Democracy.

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CHAPTER - 1
MISCONCEPTIONS ABOUT PUBLIC INTEREST LITIGATION

Notwithstanding the fact that various NGOs (Non-Government Organizations) and prominent individuals are struggling hard for protecting the judicial system from the attempts made by various Governments, to capture the said system, and also for strengthening the democracy in our Country, by filing Public Interest Litigations (PILs) on the issues, where the existing statutory provisions are being misused by the State/Central Governments, in the matter of appointment of various individuals to the high statutory positions, like Director, Central Bureau of Investigation, Chief Vigilance Commissioner, Chief Election Commissioner and other Election Commissions, Chairman and Members of State Public Service Commissions, the Information Commissioners etc., Such Public Interest Litigations often draw a flak from political leaders and sometimes from the judiciary itself. This author will not give any rejoinder to the critics of Public Interest Litigations. However, the author would reproduce the observations made by the Supreme Court of India, in judgment dated 18.09.1982 rendered by a Bench of Supreme Court of India comprising Justice P.N. Bhagwati and Justice Baharul Islam, in the case titled "Peoples Union for Democratic Rights and Others versus Union of India and others, AIR 1982 SC 1473". In the 3rd para of the said judgment, the Supreme Court has made the following observations for clearing the misconception in the minds of someone lawyers and journalists and men in public life, in the following words:

> "3. There is a misconception in the minds of some lawyers, journalists and men in public life that public interest litigation is unnecessarily cluttering up the files of the Court and adding to the already staggering arrears of cases which are pending for long years and it should not therefore be encouraged by the court. This is to our mind, a totally perverse view smacking of elitist and status quoist approach. Those who are decrying public interest litigation do not seem to realize that courts are not meant only for the rich and the well-to-do, for the landlord and the gentry, for the business magnate and the industrial tycoon, but they exist also for the poor and the downtrodden, the have nots and the handicapped and the half-hungry millions of our countrymen. So far the courts have been used only for the purpose of vindicating the rights of the wealthy and the affluent. It is only these privileged classes which have been able to approach the courts for protecting their vested interests. It is only the moneyed who have so far had the golden key to unlock the doors of justice, But, now for the first time the portals of the court are being thrown open to the poor and the

downtrodden, the ignorant and the illiterate and their cases are coming before the courts through public interest litigation which has been made possible by the recent judgment delivered by this Court in Judges Appointment and Transfer cases. Millions of persons belonging to the deprived and vulnerable sections of humanity are looking to the courts for improving their life conditions and making basic human rights meaningful for them. They have been crying for justice but their cries have so far been in the wilderness. They have been suffering injustice silently with the patience of a rock, without the strength even to shed any tears. Mahatma Gandhi once said to Gurudev Tagore, "I have had the pain of watching birds who for want of strength could not be coaxed even into a flutter of their wings. The human bird under the Indian sky gets up weaker than when he pretended to retire, For millions it is an eternal vigil or an eternal trance." This is true of the 'human bird' in India even today after more than 30 years of independence. The legal aid movement and public interest litigation seek to bring justice to these forgotten specimens of humanity who constitute the bulk of the citizens of India and who are really and truly the "People of India", who gave to themselves this magnificent Constitution. It is true that there are large arrears pending in the courts but that cannot be any reason for denying access to justice to the poor and weaker sections of the community. No State has a right to tell its citizens that because a large number of cases of the rich and the well-to-do are pending in our courts, we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford is disposed of. The time has now come, when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel heartless society for generations. The realization must come to them that social justice is the signature tune of our Constitution, and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the realization of the constitutional goals. This new change has to come if the judicial system is to became an effective instrument of social Justice, for without it, it cannot survive for long. Fortunately this change is gradually taking place and public interest litigation is playing a large part in bringing about this change. It is through public interest litigation that the problems of the poor are now coming to the forefront and the entire theatre of the law is changing. It holds out great possibility for the future. This writ petition is one such instance of public interest litigation."

CHAPTER - 2
ORIGIN OF PUBLIC INTEREST LITIGATION

The Hon'ble Supreme Court of India in Criminal Appeals No. 304 to 311 of 1991, along with Writ Petition (Crl) No. 114 of 1991, decided on 28.08.1992 "Janta Dal vs. H.S. Chowdhary and Ors., AIR 1993 SC 892" has beautifully explained the basic features and evolution of PIL in the modern society. In para No. 49 of the aforesaid judgment, as published in "Law Finder", the Hon'ble Supreme Court observed as under:

> "49. It would be quite appropriate in the case on hand to analyze both the basic features and the evolution and profound transformation of the developing and growing PIL in modern society. Suffice it to say that the challenges facing this meliorate litigation are examined in the light of their social, economic, political and ideological causes; and that the solutions to be adopted by the legal system to meet those challenges are explored, since there is still an ocean of unmet needs. These challenges are; (1) The expanded role of Courts in the modern 'social' State and the new demands for judicial responsibility; (2) the rise and growth of varied systems of judicial review and the legitimacy of such development; (3) the emergence of the notion of' "access to justice" as a judicial answer to egalitarian ideals and demands for effectiveness, and the development of PIL, and (4) the role of Courts in promoting the legal system in the arena of PIL. The relentless efforts taken by Courts in meeting all those challenges, in fact, strive for an optimality in which the interest of the least advantaged is given an overriding priority. During the last three decades, judicial activism has opened up new dimension for the judicial process and has given a new hope to the justice starved millions. On the question of legitimacy of the PIL and the significant importance of its various aspects in the context of the present day felt needs, stimulated by the emergence of a variety of new social movements and societal exigencies, this Court has laid down a long line of decisions, outlining the evolution of PIL, its vital issues and problems relating to the focus, choice of relief methods, the means and the administrative strategy for litigation and the demand for distributive justice for resolving the complicity of social problems and creating genuine initiatives so that this new activism may be more meaningful social justice. Thus the concept of PIL which has been and is being fostered by judicial activism has become an increasingly important one setting up valuable and respectable records, especially in the arena of constitutional and legal treatment for 'the unrepresented and under-represented'."

Again while referring to the emergence of the concept of PIL in the Indian legal system, in para No. 51 of the judgment (as published in "Law Finder" also) the following valuable observations have been made:

> "51.The emergence of the concept of PIL, in the Indian legal system has been succinctly explained by P.N. Bhagwati J. (as he then was) in one of his articles contributed under the caption 'Social Act, ion Litigation: The Indian Experience' thus:
>
> "The judicially has to play a vital and important role not only in preventing and remedying abuse and misuse of power but also in eliminating exploitation and injustice. For this purpose it is necessary to make procedural innovations in order to meet the challenges posed by this new role of an active and committed judiciary. The summit judiciary in India, keenly alive to its social responsibility and accountability to the people of the country, has liberated itself from the shackles of Western thought, made innovative use of the power of judicial review, forged new tools, devised new methods and fashioned new strategies for the purpose of bringing justice for socially and economically disadvantaged groups.
>
> During the last four or five years however, judicial activism has opened up a new dimension for the judicial process and has given new hope to the justice starved millions of India."
>
> (vide 'Role of the judiciary in Plural Societies' published in 1987)"

Again in para No. 53 of the judgment, a detailed reference has been made about the seed of PIL, initially sown in India by Hon'ble Justice Krishna Iyer, in the following words:

> 53. The seed of the concept of PIL was initially sown in India by Krishna Iyer, J. in 1976 (without assigning the terminology) in Mumbai Kamgar Sabha v. Abdulbhai, (1976)3 SCC 832, he while disposing an industrial dispute in regard to the payment of bonus, has observed:
>
> "Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical mis-descriptions and deficiencies in drafting pleadings and setting out the cause-title create a secret weapon to non-suit a party. Where foul play is -absent, and fairness is not faulted, latitude is a grace of processual justice, Test litigations, representative actions, pro bono publico and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on

the merits by suspect reliance on peripheral procedural short comings. Even Article 226, viewed on wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, backed by precedents has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher Courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law."

After the germination of the seeds of the concept of PIL in the soil of our judicial system, this rule of PIL was nourished, nurtured and developed by the Apex Court of this land by a series of outstanding decisions.

Similarly, in para No. 54 of the aforesaid judgment, the concept of "Public Interest Litigation" has been further explained as under:

"54. In Fertilizer Corporation Kamgar Union v. Union of India, (1981)2 SCR 52, the terminology "public interest litigation" was used. In that decision, Krishna Iyer, J. delivering his opinion for Bhagwati, J. (as the learned Chief Justice then was) and himself used expression "epistolary" jurisdiction. However, this rule on gaining momentum day by day, burgeoned more and more expanding its branches in the cosmos of' PIL and took its root firmly in the Indian Judiciary and fully blossomed with fragrant smell in S.P. Gupta v. Union of India, AIR 1982 Supreme Court 149."

Again in para No. 55 to 59 of the aforesaid judgement, the "Locust Standi" to file PIL has been explained in the following manner:

"55. Though it is imperative to lay down clear guidelines and propositions; and outline the correct parameters for entertaining a Public Interest Litigation particularly on the issue of locus standi yet no hard and fast rules have yet been formulated and no comprehensive guidelines have been evolved. There is also one view that such adumberation is not possible and it would not be expedient to lay down any general rule which would govern all cases under all circumstances.

56. Be that as it is may, it needless to emphasise that the requirement of locus standi of a party to a litigation is mandatory; because the legal capacity of the party to any litigation whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold.

57. The traditional syntax of law in regard to locus standi for a specific judicial redress, sought by an individual person or determinate class or identifiable group of persons, is available only to that person or class or group of persons who has or have suffered a legal injury by reasons of violation of his or their legal right or a right legally protected, the invasion of which gives rise to action ability within the categories of law. In a private action, the litigation is bipolar; two opposed parties are locked in a confrontational controversy which pertains to the determination of the legal consequences of past events unlike in public action. The character of such litigation is essentially that of vindicating private rights, proceedings being brought by the persons in whom the right personally inhere or their legally constituted representatives who are thus obviously most competent to commence the litigation.

58. In contrast, the strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives the right of locus standi to any member of the public acting bonafide and having sufficient interest in instituting an action for redressal of public wrong or public injury, but who is not a mere busy body or a meddlesome interloper; since the dominant object of PIL is to ensure observance of the provisions of the Constitution or the law which can be best achieved to advance the cause of community or disadvantaged groups and individuals or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration but acting bonafide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in; motion like action. popular is of Roman Law whereby any citizen could bring such an action in respect of a public delict."

59. It will be befitting to recall the observation of this Court in People's Union for Democratic Rights v. Union of India, (1982)3 SCC 235, which reads thus:

> "But the traditional rule of standing which confines access to the judicial process only to those to whom legal injury is caused or legal wrong is done has now been jettisoned by this Court and the narrow confines within which the rule of standing was imprisoned for long years as a result of inheritance of the Anglo Saxon system of jurisprudence have been broken and a new dimension has been given to the doctrine of locus standi which has revolutionized the whole concept of access to justice in a way 'not known before to the western system of jurisprudence....
>
> it is therefore necessary to evolve a new strategy by relaxing this traditional rule of standing in order that justice may/become easily available to the lowly and the lost".

As regards the locus standi to file PIL, the following further observations have been made in Para No. 61 and 62 of the aforesaid judgement:

> 61. M.N. Venkatachaliah, J. speaking tor the Bench in Sheela Barse V. Union of India, (1988) 4 SCC 226, has brought out the distinction between private litigation and public interest litigation in the following words:
>
> "In a public interest litigation, unlike traditional dispute resolution mechanism, there is no determination or adjudication of individual rights. While in the ordinary conventional adjudications the party structure is merely bi-polar and the controversy pertains to the determination of the legal consequences of past events and the remedy is essentially linked to and limited by the logic of the array of the parties, in a public interest action the proceedings, cut across and transcend these traditional forms and inhibitions. The compulsion for the judicial innovation of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher in an egalitarian social order and a welfare State. The dispute is not comparable to one between private parties with the result there is no recognition of the status of a dominus litis for any individual or group of individuals to determine the course or destination of the proceedings, except to the extent recognised and permitted by the Court. The rights of those who bring the action on behalf of the others must necessarily be subordinate to the "interests" of those for whose benefit the action is brought. The grievance in a public interest action, generally speaking, is about the content and conduct of Government action in relation to the constitutional or statutory rights of segments of society and in certain circumstances the conduct of Government policies. Necessarily, both the party structure and the matters in controversy are sprawling and amorphous, to be defined and adjusted or readjusted as the case may be, ad hoc, according as the exigencies of the emerging situations. The proceedings do not partake of predetermined private law litigation models but are exo-genously determined by variations of the theme."
>
> 62. Though we have, in our country, recognised a departure from the strict rule of locus standi as applicable to a person in private action and broadened and liberalised the rule of standing and thereby permitted a member of the public, having no personal gain or oblique motive to approach the Court for enforcement of the constitutional or legal rights of socially or economically disadvantaged persons who on account of their poverty or total ignorance of their fundamental rights are unable to enter the portals of the Courts for judicial redress, yet no precise and inflexible working definition has been evolved in respect of locus

> standi of an individual seeking judicial remedy and various activities in the field of PIL. Probably, some reservation and diversity of approach to the philosophy of PIL among some of the Judges of this Court as reflected from the various decisions of this Court, is one of the reasons for this Court finding it difficult to evolve a consistent jurisprudence in the field of PIL. True, in defining the rule of locus standi no 'rigid litmus test' can be applied since the broad contours of PIL are still developing apace seemingly with divergent views on several aspects of the concept of this newly developed law and discovered Jurisdiction leading to a rapid transformation of judicial activism with a far-reaching change both in the nature and form of the judicial, process."

The rule of locus standi which gave birth to a flexible public interest litigation system has been extensively liberalized. A powerful thrust to public interest litigation was given by a seven-judge bench in the case of S.P. Gupta v. Union of India, AIR 1982 SC 149: 1981 (Supp.)SCC 87 (at page210). The judgment recognized the locus standi of bar associations to file writs by way of public interest litigation. In this particular case, it was accepted that they had a legitimate interest in questioning the executive's policy of arbitrarily transferring High Court judges, which threatened the independence of the judiciary. Explaining the liberalization of the concept of locus standi, the court opined:

> "It must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke the assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him."

CHAPTER - 3
POWER OF PUBLIC INTEREST LITIGATION

Power of Public Interest Litigation cannot be described in better words that what has done by the Hon'ble Supreme Court of India in the case captioned "Re-Inhuman Conditions in 1382 Prisons". This was a case where a letter received from a former Chief Justice of India on the issue of plight of prisoners, was treated as a Public Interest Litigation in the teeth of opposition from the State. Describing the development of concept of Public Interest Litigation, in the opening paragraph of the judgment dated 25.09.2018, rendered in Writ Petition (Civil) No-406 of 2013, Hon'ble Justice Madan B. Lokur explained the developing concept of Public Interest Litigation in the following words:

> "Over the years, public interest litigation has brought immense social change through interventions made and directions issued by this Court. Public interest litigation has been initiated, very rarely, by suo motu exercise of jurisdiction by this Court. On most occasions, it has been initiated through a writ petition filed by activist individuals or organizations. Again, quite infrequently, it has been initiated on the basis of a communication received by this Court."

The Hon'ble Judge further explained about the reasons for which Public Interest Litigations are being entertained by the Hon'ble Courts, in the following words:-

> "During the last several decades, public interest litigation has compelled this Court to consider issues relating to the environment, social justice, violation of human rights and disregard for Article 21 of the Constitution; either because of an absence of governance due to the failure of the State to faithfully and sincerely implement laws enacted by Parliament or due to mis-governance by the State, that is, the Central Government, the State Governments and Union Territory Administrations leading to rampant illegalities. The failure of the State to take remedial steps to fill in the gap when there is no operative law except that enshrined in the Constitution, more particularly Article 21 has resulted in public interest litigation and at least two cases where a treaty obligation ought to be fulfilled."

Further, as regards the attitude of the State Governments for blind opposition to the Public Interest Litigation, the Hon'ble Justice Madan B. Lokur made the following scathing observations:

> “In recent times, usually and regrettably, the State has chosen to challenge the idea of public interest litigation or denigrate it by chanting the mantra of judicial activism or separation of powers. In most cases, these mantras are nothing but a fig leaf to cover the failure of the State to recognize the existence of the rule of law and the need for providing social justice to the people of the country, as stated in the Preamble to our Constitution. There must be a realization that public interest litigation has given a voice to millions of marginalized sections of society, women and children. Public interest litigation is one of the more important contributions of India to jurisprudence. In fact, the Indian experience has encouraged some other countries to introduce public interest litigation in their jurisprudence.”

However, Hon’ble Justice Madan B. Lokur while speaking on behalf of Bench did not rule out the misuse of Public Interest Litigation, but asserted that once the Court entertains Public Interest Litigation, it cannot be alleged that interest of the public has not been served. In the words of Hon’ble Justice Madan B. Lokur:

> “4 This is not to suggest that public interest litigation has not been misused or that occasionally this Court has not exceeded its jurisdiction, but it must be emphasized that wherever this Court might have exceeded its jurisdiction, it has always been in the interest of the people of the country prompted by administrative mis-governance or absence of governance. There are, therefore, occasional transgressions on both sides, but that cannot take away from the significance of public interest litigation as a non-adversarial source of righting some wrongs and encouraging social change through accountability and, in cases, transparency.”

With the aforesaid preface, the Hon’ble Supreme Court of India adverted to the plight of the prisoners, and issued appropriate directions for constituting a Supreme Court Committee on the prison reforms comprising (i) Hon’ble Justice Amitava Roy, former Judge of the Hon’ble Supreme Court as its Chairman; (ii) Inspector General of Police, Bureau of Police Research and Development, as its Member; (iii) Director General (Prisons), Tihar Jail, New Delhi as its Member. The Committee was requested to give its recommendations by treating the various issues mentioned in the said judgment, as its terms of reference.

CHAPTER - 4
SUPREME COURT GUIDELINES ON PUBLIC INTEREST LITIGATION

COMPILATION OF GUIDELINES TO BE FOLLOWED FOR ENTERTAINING LETTERS/PETITIONS RECEIVED

IN THIS COURT AS PUBLIC INTEREST LITIGATION.

(Based on full Court decision dated 1.12.1988 and subsequent modifications).

No petition involving individual/ personal matter shall be entertained as a PIL matter except as indicated hereinafter.

Letter-petitions falling under the following categories alone will ordinarily be entertained as Public Interest Litigation: -

(1) Bonded Labour matters.
(2) Neglected Children.
(3) Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).
(4) Petitions from jails complaining of harassment, for (pre-mature release) and seeking release after having completed 14 years in jail, death in jail, transfer, release on personal bond, speedy trial as a fundamental right.

NOTE: Petitions for premature release, parole etc. are not matters which deserve to be treated as petitions u/Article 32 as they can effectively be dealt with by the concerned High Court. To save time Registry may simultaneously call for remarks of the jail Superintendent and ask him to forward the same to High Court. The main petition may be forwarded to the concerned High Court for disposal in accordance with law.

Even in regard to petitions containing allegations against Jail Authorities there is no reason why it cannot be dealt with by the High Court. But petitions complaining of torture, custody death and the like may be entertained by this Court directly if the allegations are of a serious nature.

(5) Petitions against police for refusing to register a case, harassment by police and death in police custody.
(6) Petitions against atrocities on women, in particular harassment of bride, bride- burning, rape, murder, kidnapping etc.

In such cases where office calls for police report if letter petitioner asks for copy the same may be supplied, only after obtaining permission of the Hon'ble Judge nominated by the Hon'ble Chief Justice of India for PIL matters.

(7) Petitions complaining of harassment or torture of villagers by co-villagers or by police from persons belonging to Scheduled Caste and Scheduled Tribes and economically backward classes.

(8) Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance.

(9) Petitions from riot -victims.

(10) Family Pension.

All letter-petitions received in the PIL Cell will first be screened in the Cell and only such petitions as are covered by the above-mentioned categories will be placed before a Judge to be nominated by Hon'ble the Chief Justice of India for directions after which the case will be listed before the Bench concerned.

If a letter-petition is to be lodged, the orders to that effect should be passed by Registrar (Judicial) (or any Registrar nominated by the Hon'ble Chief Justice of India), instead of Additional Registrar, or any junior officer.

To begin with only one Hon'ble Judge may be assigned this work and number increased to two or three later depending on the workload.

*Submission Notes be put up before an Hon'ble Judge nominated for such periods as may be decided by the Hon'ble Chief Justice of India from time to time.

**If on scrutiny of a letter petition, it is found that the same is not covered under the PIL guidelines and no public interest is involved, then the same may be lodged only after the approval from the Registrar nominated by the Hon'ble the Chief Justice of India.

***It may be worthwhile to require an affidavit to be filed in support of the statements contained in the petition whenever it is not too onerous a requirement.

****The matters which can be dealt with by the High Court or any other authority may be sent to them without any comment whatsoever instead of all such matters being heard judicially in this Court only.

Cases falling under the following categories will not be entertained as Public Interest Litigation and these may be returned to the petitioners or filed in the PIL Cell, as the case may be:

(1) Landlord-Tenant matters.
(2) Service matter and those pertaining to Pension and Gratuity.
(3) Complaints against Central/ State Government Departments and Local Bodies accept those relating to item Nos. (1) to (10) above.
(4) Admission to medical and other educational institution.
(5) Petitions for early hearing of cases pending in High Courts and Subordinate Courts.

In regard to the petitions concerning maintenance of wife, children and parents, the petitioners may be asked to file a Petition under sec. 125 of Cr. P.C. Or a Suit in the Court of competent jurisdiction and for that purpose to approach the nearest Legal Aid Committee for legal aid and advice.

A perusal of the aforesaid PIL guidelines evolved by the Hon'ble Supreme Court of India would show that while enumerating the issues on which the Public Interest Litigation may be entertained, the Hon'ble Supreme Court of India has used the word "ordinarily". Thus, the aforesaid list of topics on which Public Interest Litigation may be entertained, is not exhaustive. This is only enumerative. It is for this reason that Public Interest Litigation on issues of vital and eminent public interest, which do not fall in the aforesaid categories, are also being entertained by the Hon'ble Supreme Court of India by way of Public Interest Litigation.

CHAPTER - 5
PUBLIC INTEREST LITIGATION GUIDELINES OF PUNJAB AND HARYANA HIGH COURT

MAINTAINBILITY OF PUBLIC INTEREST LITIGATION RULES, 2010

1. (i) These Rules shall be called as MAINTAINBILITY OF PUBLIC INTEREST LITIGATION RULES, 2010.
   (ii) These Rules shall come into force with effect from the date of approval by the Full Court.
2. No Public Interest Litigation shall be entertained by the Registry unless the petitioner(s) has specifically disclosed his credentials and his direct or indirect personal motive or interest involved in the case, if any, by way of an affidavit.
3. Every Public Interest Litigation shall be separately numbered and categorized.
4. All the Public Interest Litigations shall be listed before a Division Bench by the orders of the Chief Justice of the High Court.
5. The Bench, wherever it appears so desirable, may ask the petitioner to deposit an appropriate amount with the Registry to be paid as compensation/costs to the person/institution who may be forced to contest the litigation, which is ultimately found to be vexatious, frivolous or mala fide.
6. Ordinarily, the PIL may be entertained on any subject of vital public importance, such as:
   (a) Bonded Labour matters.
   (b) Neglected Children.
   (c) Petitions from riot victims.
   (d) Petitions complaining of harassment or torture of persons belonging Scheduled Castes, Scheduled Tribes and other Backward Classes by the others or by the police.
   (e) Petitioner pertaining to environmental pollution, disturbance of ecological balance, forest and wild life.
   (f) Petitioners complaining violation of human rights.
7. The Registry shall be entitled to verify the antecedents of a person, society or an association who invokes the jurisdiction of the High Court on the cause of public interest. Where the Registry has any doubt on such antecedents, an office note to this effect shall be put up, except on the petitions which are received by post.
8. The Public Interest Petitions received through post shall not be entertained except in the following cases:-
   (i) Petitions sent by prisoners and detenues;
   (ii) Petitions complaining violation of human rights;
   (iii) Petitions seeking a writ in the nature of habeas corpus;

(iv) Petitions with a cause of such nature that it may require suo-motu proceedings by this Court in 'Public interest';

(v) Petitions by physically disabled persons, minors and/or oppressed sections of Society. The petitions falling in this category may be sent to the Member Secretary of the State Legal Services Authority concerned, who, on satisfaction regarding genuineness of the petitioner, may provide adequate legal aid including a counsel to the victim.

9. All the suo-motu petitions initiated by the High Court shall be put up before the Chief Justice for enlisting the same before an appropriate Bench as per roster within three days.

A perusal of the aforesaid guidelines also shows that although certain categories of issues have been listed, which falls within the ambit of the Public Interest Litigation, yet, the language of rules is such that public interest litigations on any subject of vital public importance, may be entertained. It is for the aforesaid reason, that the Hon'ble High Court is entertaining Public Interest Litigations in such cases where there is some issue of vital public interest involved therein.

CHAPTER - 6
INTERNATIONAL TREATIES ON HUMAN RIGHTS

The judgment of the Hon’ble Supreme Court of India in the case titled “Vishaka vs. State of Rajasthan” rendered in Writ Petition (Crl) Nos. 666-70 of 1992 decided on 13.08.1997 (AIR 1997 SC 3011), is a wonderful instance of implementation of International Treaties on Human Rights, and also the powers of the Hon’ble Supreme Court of India to issue guidelines in cases which are not covered by any suitable legislation.

The aforesaid petition was a class-action by certain social activists and NGOs with the aim of focusing attention towards the societal aberration and for assisting in finding suitable methods for realization of true concept of “Gender Equality”; and to prevent sexual harassment of working woman in all workplaces through judicial process, to fill the vacuum in the existing legislation.

The immediate cause for filing the aforesaid writ petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. The aforesaid incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguard by an alternative mechanism in the absence of legislative measures. Thus, in the absence of legislative measures, the need was to find an effective alternative mechanism to fulfill the felt and urgent social need. The Hon’ble Supreme Court therefore made the following significant observations while dictating the aforesaid judgment:

> “Each such incident results in violation of the fundamental rights of 'Gender Equality' and the 'Right to Life and Liberty'. It is clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(l)(g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of

a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum."

The Hon'ble Supreme Court made the following further observations also, before issuing directions to the Union of India and States to implement the guidelines being issued by it:

"In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(l)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil."

Eventually, the Hon'ble Supreme Court of India issued 12 guidelines and norms on the subject to the Central and State Governments, making it clear that the said guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions were to remain binding and enforceable in law until complete suitable legislation was enacted to occupy the field.

CHAPTER - 7
PARLIAMENTARY SECRETARIES

In terms of Constitution (Ninety-First Amendment) Act, 2003, the strength of Ministers, including the Chief Minister in a State cannot exceed 15% of the total number of Members of Legislative Assembly of that State. The object of the aforesaid amendment was that the size of the Council of Ministers should not be unduly large, so that the same becomes an unavoidable burden on the exchequer of the State. Various State Governments were circumventing the Constitutional Amendment of 2003, by appointing some of the members of the Legislative Assembly of that State, as Parliamentary Secretaries or Chief Parliamentary Secretaries. The State of Punjab also, with the same objects in mind, issued a notification dated 04.05.2006, vide which certain MLAs were appointed as Chief Parliamentary Secretaries, to function as intermediary channels between the Administrative Secretary of the Department and the concerned Minister , and they were extended the facilities and benefits at par with those admissible to the Deputy Ministers. It was in the aforesaid circumstances that two advocates practicing in Punjab and Haryana High Court, namely (i) Jagmohan Singh Bhatti in CWP No. 6715 of 2012; and (ii) H.C. Arora, in CWP No. 10167 of 2012, challenged the aforesaid notification dated 04.05.2006, and also sought removal of the concerned MLAs from the post of Chief Parliamentary Secretary. Ultimately, both of the aforesaid Civil Writ Petitions were allowed and the 21 Chief Parliamentary Secretaries, appointed by the State Government were ordered to be removed from their offices. The Special Leave Petition (Civil) No. 27844 of 2016 filed by the State is still pending for adjudication before Supreme Court of India. While allowing the aforesaid Civil Writ Petition, the Division Bench of the Hon'ble High Court of Punjab and Haryana observed in their judgment dated 12.08.2016 that at present the Chief Parliamentary Secretaries have been appointed from amongst the Members of the Punjab State Legislative Assembly,

(Jagmohan Bhatti, Advocate)

(H.C. Arora, Advocate)

which post evidently and admittedly does not find a mention in Constitution or any statutory enactment for appointment to such post. Creation of these posts therefore cannot be justified. The Bench also notices that as per the notification/circular issued by the State Government, the Chief Parliamentary Secretaries were placed above the Secretaries to the Government of Punjab and they were to act as intermediaries between the Minister and the Government Secretariat. The Division Bench further observed that it is well known that every executive action of the State Government must be supported by some legislative sanction, and in the absence thereof, the same is to be invalidated. The Rules made by the Government are therefore liable to be assailed for want of legislative competence to which none has been shown.

Referring to the statement of objects and reasons, as recorded in the Constitution (Ninety-First Amendment) Act, 2003, was aimed at strengthening and amending the Anti-Defection Law, as contained in the Tenth Schedule to the Constitution of India, on the ground that these provisions had not been able to achieve the desired goal of checking defections. The Tenth Schedule had also been criticized on the ground that it allows the bulk defections while declaring individual defection as illegal. The Division Bench further observed that the National Commission to Review the Working of the Constitution (NCRWC) in its report dated 31.03.2002 had inter alia, observed that normally large Council of Ministers were being constituted by various Governments at Centre and State, and this practice has to be prohibited by law, and that ceiling on the number of Ministers in a State or the Union Government be fixed at the maximum of 10% of the total strength of the Popular House of the Legislature. In the light of above, it was proposed to amend the Constitution by omitting paragraph 3 of the Tenth Schedule to the Constitution of India and to provide that the size of the Council of Ministers should not be more than 10% of the strength of House or Houses of the State concerned whether Unicameral or Bicameral. It was in consequence of the said proposals, that Constitution (Ninety-First Amendment) Act, 2003 was inserted in the Constitution, limiting the total number of Ministers including the Chief Minister in the Council of Ministers to 15% of the total number of members of Legislative Assembly of that State. Besides, certain other amendments were also made in the Constitution, in order to support the Constitution (Ninety-First Amendment) Act, 2003. Again referring to the object of the Constitution (Ninety-First Amendment) Act, 2003, the Division Bench observed that the object of the said amendment was to downsize the Ministry, and Ministers in a House, and that the constitutional amendment cannot be discarded or infringed in a manner so as to negate the effect of the same. Thus, by appointing Chief Parliamentary Secretaries or Parliamentary Secretaries,

instead of Ministers, from amongst the MLAs, the State Government cannot achieve indirectly what it could not have achieved directly. The Division Bench further observed that Parliamentary Secretaries in fact perform the functions almost like Ministers. Besides, they have perks and facilities equivalent to that of Ministers. Therefore, the Division Bench concluded that the Parliamentary Secretaries are in the nature of Junior Ministers, who change with the Government of the day. As such, the appointment of Chief Parliamentary Secretaries amounts to infraction of the provisions of the Article 164 (1A) of the Constitution. Having said that, the Division Bench finally recorded its conclusions as under:

"(a) The Governor of the State or the legislature has no competence or legislative sanction to frame rules regulating the conditions of appointment and services of Chief Parliamentary Secretaries and Parliamentary Secretaries for their functioning within the House of the State Assembly. Such posts are not part of regular services of the State under the executive forming part of the bodies involved in the governance of the State;

(b) The services under the State are entirely different from services within the Assembly House. Rules for governing the services under the State or its executive can be made in exercise of powers conferred by the proviso to Article 309 of the Constitution as also under the authority conferred by Entry 41 of List-II of the Seventh Schedule of the Constitution, i.e. the State List, which provides for: "State Public Services; State Public Service Commission's". These evidently relate to executive services under the State. However, in case a person is working as a Parliamentary Secretary under the State executive, he shall not be disqualified for being a member of the Punjab State Assembly in view of the provisions of the Disqualification Act 1952 which provides that a person shall not be disqualified for being chosen as, and for being, a member of Punjab State Legislature by reason for the fact that he holds the office of Parliamentary Secretary or Parliamentary Under Secretary under the Government of the State of Punjab. The holding of the office of Chief Parliamentary Secretary, therefore, is evidently contemplated under the Government of the State of Punjab and not as a link between the Ministers and the administrative Secretaries.

(c) The provisions of Article 162 of the Constitution relate to the extent of executive power of the State and that the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make laws. The power sought to be derived by the officials respondents is in the context of Article 309 of the Constitution. The 2006 Rules have been framed by the State in exercise of the

powers of Article 162 of the Constitution relate to services under the State of the executive and not that of the legislature.

(d) The appointments of Chief Parliamentary Secretaries are contrary to the Constitutional intent of limiting the number of Ministers or the size of the Cabinet. The appointments as made, therefore, are in fact a roundabout way of bypassing the Constitutional mandate of the provisions of Article 164 (1A) of the Constitution and, therefore, have to be invalidated.

For the foregoing reasons, both the writ petitions are allowed and the appointment of the private respondents in both the petitions and their continuing as Chief Parliamentary Secretaries are set aside, invalidated and quashed. There shall, however, be no order as to costs."

It is however, to be noticed that Supreme Court of India has, in Transferred Case (Civil) No. 169 of 2006 (Bimolangshu Roy (dead) (through LRs) Vs. State of Assam and others) decided on 26.7.2017, categorically held that the State Legislature lacks the competence to make such an Act for creation of posts of Chief Parliamentary Secretaries. In the aforesaid case, the Supreme Court of India held that Article 194 of the Constitution of India does not expressly authorize the State Legislature to create the offices of Chief Parliamentary Secretaries. The operative extract of such contents in the para No. 44 and Para No. 45 thereof is reproduced hereunder for the sake of ready reference by this Hon'ble Court:-

"44. Thus, it can be seen from the scheme of Article 194 does not expressly authorize the State Legislature to create offices such as the one in question. On the other hand, Article 178 speaks about the offices of Speaker and Deputy Speaker. Article 179 deals with the vacation of those offices or resignations of incumbents of those offices whereas Article 182 and 183 deal with the Chairman and Deputy Chairman of the Legislative Council wherever the Council exists. In our opinion, the most crucial article in this Chapter is Article 187 which makes stipulations even with reference to the secretarial staff of the Legislature. On the face of such elaborate and explicit constitutional arrangement with respect to the Legislature and the various offices connected with the legislature and matters incidental to them to read the authority to create new offices by legislation would be a wholly irrational way of construing the scope of Article 194(3) and Entry 39 of List II. Such a construction would be enabling the legislature to make a law which has no rational connection with the subject matter of the entry. "The powers, privileges and immunities" contemplated by Article 194(3) and Entry 39 are those of the legislators qua legislators.

45. For the above-mentioned reasons, we are of the opinion that the Legislature of Assam lacks the competence to make the impugned Act. In view of the above conclusion, we do not see it necessary to examine the various other issues identified by us earlier in this judgment. The Writ Petition is allowed. The impugned Act is declared unconstitutional."

CHAPTER-8
CONVICTED MPs/MLAs

(S.N. Shukla, Lok Prahari)

It is said that in a democracy, all citizens are equal before the law. However, in reality, some category of persons are more equal before the law, whereas some other persons are less equal before the law. The provisions contained in Section 8(4) of the Representation of the People Act, 1951, before they were held unconstitutional by the Hon'ble Supreme Court of India in the famous "Lily Thomas" case, decided on July 10 2013, are a testimony in favor of the aforesaid proposition. It hardly needs be stated that a public servant, once he is convicted of an offence, is not entitled to continue in his service and in view of the gravity of the offence involved, he may be dismissed from service on such conviction. Such order of punishment of dismissal from service takes effect from the date of conviction of the concerned public servant. However, Section 8(4) of the Representation of the People Act, 1951 provided a totally discriminately treatment in favour of the elected Representatives of the People, in as much as, it laid down as under:

> "8 (4) Notwithstanding anything in sub- section (1), sub- section (2) or sub- section (3) a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the Court."

The inevitable consequence of the aforesaid provision of Section 8 (4) of the Representation of the People Act, 1951 was that once an MP or MLA on conviction, and on imposition of sentence of 2 years or more, would file an appeal or revision against his conviction and sentence, within a period of three months from date of his conviction, he would continue as MLA or MP till the completion of term of the concerned House of Parliament, or Legislature, unless of course, in a case where the revision or appeal preferred by such an MLA/MP against his conviction and sentence was also dismissed.

When the aforesaid issue of unconstitutionality of the provisions of Section 8 (4) (supra) was raised in Writ Petition (Civil) No. 490 of 2005

(Lily Thomas vs. Union of India and Ors.), and a connected Public Interest Litigation (PIL) titled "Lok Prahari, through its General Secretary", the Hon'ble Supreme Court of India came across 2 questions to be decided in the said case. The 1st question was whether the Parliament had the power to the enact the provisions of Section 8(4) of the Representation of the People Act, 1951; and the second question was as to whether the provisions of Section 8(4) of the Representation of the People Act, 1951, were unconstitutional, being violative of the Article 14 of the Constitution of India. The 2nd question pertaining to the constitutionality of the provisions of Section 8(4) of the aforesaid Act was however left as not required to be decided, since the Hon'ble Supreme Court of India, on the 1st question itself held that Parliament was not vested with the power to enact Section 8 (4) of the aforesaid Act, because the provisions of Article 101(3) (a) and 190(3) (a) of the Constitution expressly prohibit the Parliament to defer the date from which the disqualification will come into effect, in case of a sitting Member of Parliament or State Legislator. Thus, the Hon'ble Supreme Court of India held that the Parliament, by enacting Section 8 (4) of the Representation of the People Act, 1951, had exceeded its powers conferred by the Constitution. Accordingly, Sub-Section (4) of Section 8 of the Act was held to be *ultra vires* the Constitution.

Now it is a part of the history that the aforesaid judgment rendered by the Hon'ble Supreme Court of India was not to the liking of the elected Representatives, and the Government of Dr. Manmohan Singh tried to amend the law in the subject, so that the MLAs/MPs, on conviction, and on being imposed a sentence of imprisonment for not less than 2 years may continue to retain their seat in the Parliament or the State Legislature, until their appeal or revision against the judgment of conviction and sentence was finally decided by the Court of Law. However by now, it is also a part of history that Mr. Rahul Gandhi, at that time, publicly opposed the aforesaid move on the part of the Government of Dr. Manmohan Singh and tore the Ordinance which was brought by the then Government, into pieces in full view of public, in a press conference in the Press Club of India. The consequence is that the judgment in case of 'Lily Thomas" continues to hold the field, and the extra privilege available to the Members of the Parliament and those of the Legislature, in the event of their conviction and on being sentenced to imprisonment for 2 years or more, could not be conferred on them, and in that matter at least, the Members of Parliament/State Legislature, have came to become equal before law. Mr. Rahul Gandhi is perhaps the first Senior leader of a political party who appears to have learnt the meaning of "equality before law" on his conviction by a Surat Court in a case involving criminal defamation, and was immediately disqualified for continuing as a Member of Lok Sabha, with immediate effect.

CHAPTER - 9
EXPEDITING CRIMINAL CASES AGAINST MPs/MLAs

Certain aspects of the criminalization of politics in India have been considered by the Supreme Court in various judgments, to which a detailed reference has been made in Chapter (5) captioned "Electoral Reforms". However, certain other important aspects of the aforesaid problem came up for consideration before Supreme Court of India in the case titled "Public Interest Foundation and Ors. Versus Union of India and Others", Writ Petition (Civil) No.536 of 2011, decided on 10.03.2014. The Supreme Court referred in detail to the recommendations made by the Law Commission in its Report No. 244 titled "Electoral Disqualification". After considering the said report, and hearing the rival contentions, the Supreme Court eventually requested the Chief Justice of India to refer the matter to Constitution Bench, while issuing the following directions to be implemented in the intervening period:

> "12. We, accordingly, direct that in relation to sitting MPs and MLAs who have charges framed against them for the offences which are specified in Section 8(1), 8(2) and 8(3) of the RP Act, the trial shall be concluded as speedily and expeditiously as may be possible and in no case later than one year from the date of the framing of charge(s), in such cases, as far as possible, the trial shall be conducted on a day-to-day basis. If for some extraordinary circumstances the concerned court is being not able to conclude the trial within one year from the date of framing of charge(s), such court would submit the report to the Chief Justice of the respective High Court indicating special reasons for not adhering to the above time limit and delay in conclusion of the trial, in such situation, the Chief Justice may issue appropriate directions to the concerned court extending the time for conclusion of the trial."

<u>CHAPTER - 10</u>
PENSION TO CONVICTED MPs/MLAs IN HARYANA

(H.C. Arora, Advocate)

This is another instance of the elected Representatives of the People in India being treated above the law of the land. A public servant, who is convicted on charge of corruption, is immediately dismissed from service from the date of conviction. In case such public servant has already retired, and is subsequently convicted, he faces an order of forfeiture of pension, as the pension is paid to the retired public/Government servant, for good conduct and not for getting involved into corruption and being sentenced under the provisions of Prevention of Corruption Act. It is pertinent to state that Sh. Om Prakash Chautala, despite being convicted under Prevention of Corruption Act, 1988, was drawing pension at the rate of Rs. 2,15,430/-per month, when I came to know of the same, and filed Public Interest Litigation (PIL) against him in the Hon'ble High Court of Punjab and Haryana at Chandigarh in 2016. Similarly, Sh. Ajay Singh Chautala, who was convicted along with Shri Om Parkash Chautala, was drawing monthly pension at the rate of Rs. 56,100/-, and Sh. Satbir Singh Kadian (who later died on 10.04.2021), was drawing monthly pension to the tune of Rs. 1,25,215/-, despite his conviction . Another convicted MLA of Haryana namely, Sh. Ram Kishan Gujjar was drawing pension at the rate of Rs. 87,675/-per month, in February, 2016, when I filed PIL against him. To be precise, the following 4 Public Interest Litigations (PILs) on the issue of pension being given to the convicted Ex-MPs/MLAs in Haryana are pending in the Hon'ble High Court:

"Sr.No.	Particulars of PIL	Particulars of ex-MLAs involved	Amount of monthly pension drawn in 2016
1.	CWP-PIL-17589-2016	Satbir Singh Kadian	Rs.1,25,215/-
2.	CWP-PIL-17592-2016	Om Parkash Chautala Ajay Singh Chautala	Rs.2,15,430/- Rs.56,100/-
3.	CWP-PIL-7953-2017	Ram Kishan Gujjar	Rs.87,675/-
4.	CWP-PIL-18688-2016	Sh. Sher Singh Barhani	Rs.56,100/-

It is a matter of serious concern that even the present BJP Government in Haryana has also not discontinued the payment of pension to the aforesaid Ex-MLAs. Thus, the Government is indirectly supporting the convicted MLAs, and enabling them to continue to avail the ill-deserved benefit of pension. As regards the provisions contained in Section 7A(1-A) of the Haryana Legislative Assembly (Allowances and Pension of Members) Act, 1975, the same lays down the following provision for disqualifying the MLAs from getting pension, the moment they are disqualified under the Representation of the People Act, 1951:

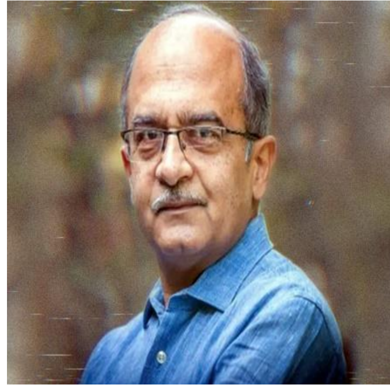
> "7A(1-A) No Pension shall be admissible under Sub-Section (1) to a member in respect of the term and during the period for which he is qualified under the Representation of the People Act, 1951 or any other Law for the timing in force."

All the four people mentioned above were disqualified by operation of law (i.e., Section 8 (4) of the Representation of the People Act, 1951, from the respective dates of their conviction, and have to continue to be disqualified for a further period of six years since their release. That being so, they will remain disqualified from getting pension for the above said period under Section 7A(1-A) of the Haryana Legislative Assembly (Allowances and Pension of Members) Act, 1975.

The aforesaid four ex-MLAs have been getting hefty amount of pension, despite having been disqualified under the provisions of Representation of the People Act, 1951, for having been convicted in various heinous offences. As regards Om Prakash Chautala and his son Ajay Singh Chautala, both of them were convicted under the provisions of Section 13(1) (d) of the Prevention of Corruption Act, 1988 read with provisions of Section 467/471 etc. of the Indian Penal Code, by the Special CBI Court, Delhi on 16.01.2013. They have completed their sentence of 10 years. As regards Sh. Ram Kishan Gujjar, he was convicted under Section 306/34 of the Indian Penal Code and was sentenced to 4 years of rigorous imprisonment vide judgement dated 02.03.2017, by the Court of Additional Sessions Judge, Ambala. Similarly, Sh. Sher Singh Badshami, Ex-MLA, was convicted and sentenced to 10 years of imprisonment, under Section 13(1)(d) of the Prevention of Corruption Act, 1988 read with Section 467/471 of the Indian Penal Code on January 16th, 2013. Sh. Satbir Singh Kadian, was convicted and sentenced to 7 years of imprisonment by the Court of Special Judge, CBI, under the Prevention of Corruption Act. He unfortunately died during the pendency of the PIL filed by me. These PILs are however still pending for adjudication on merits.

CHAPTER - 11
PROTECTION TO SENIOR BUREAUCRATS

The Government of India had issued a letter, which was called "Single Directive". The relevant portion of the said Single Directive is reproduced hereunder:


(Prashant Bhushan)

> "4.7(3)(i) In regard to any person who is or has been a decision-making level officer (Joint Secretary or equivalent or above in the Central Government or such officers as are or have been on the deputation to a public sector undertaking; officers of Reserve Bank of India of the level equivalent to Joint Secretary or above in the Central Government, Executive Directors and above of SEBI and Chairman and Managing Director and Executive Director and such of the bank officers who are one level below the Board of Nationalised Banks), there should be a prior sanction of the Secretary of the Ministry/Department concerned before SPE takes up any enquiry (PE or RC), including ordering research in respect of them. Without such sanction, no enquiry shall be initiated by SPE."

(Dr. Subramanian Swami)

The aforesaid Single Directive came up for consideration before the Supreme Court of India in the case of Vineet Narain versus Union of India (1998) 1 SCC 226, and it was held that powers of investigation which are governed by the statutory provisions, cannot be curtailed by any Executive instruction. Having said that, the Hon'ble Supreme Court of India further stated that the law did not classify offenders differently for treatment there under, including investigation of offences and prosecution for offences, according to their status in life. Every person accused of committing the same offence is to be dealt with in the same manner in accordance with law, which is equal in its application to everyone. However, the Single Directive was applicable only to certain persons above the specified level, who were described as decision-making officers. The Supreme Court did not agree that any distinction can be made for the decision-making officers

for the purpose of investigation of an offence, of which they are accused. The aforesaid Single Directive was therefore struck down by The Supreme Court.

However, in order to get rid of the problem created by the judgment of Supreme Court in Vineet Narain's case, the Government inserted Section 6-A in the Delhi Special Police Establishment Act, 1946. The said Section 6-A read as under:

> "6A. Approval of Central Government to conduct inquiry or investigation.—
>
> (1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to—
>
> (a) the employees of the Central Government of the Level of Joint Secretary and above; and
> (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.
>
> (2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to section 7 of the Prevention of Corruption Act, 1988 (49 of 1988)."

While examining the legality and validity of newly inserted Section 6-A (supra), the Supreme Court observed that Section 6-A replicates Single Directive 4.7 (3)(i) which was struck down by the Supreme Court earlier in Vineet Narian's case. The Supreme Court now observed that the only change brought in by the Section 6-A (supra) is that the executive instruction is replaced by the legislation. Now, the question remained, whether Section 6-A meers the touchstone of Article 14 of the Constitution of India. While examining the constitutionality and legality of newly inserted Section 6-A (supra), the Supreme Court observed as under in the case titled "Subramanian Swami vs. Central Bureau of Investigation" and other connected matter, i.e., Writ Petition (C) No. 21 of 2004 (Centre for Public Interest Litigation Versus Union of India) decided on 06.05.2014

and reported as (2014) 8 Supreme Court Cases 682, which was a judgment rendered by Constitution Bench of the Supreme Court:

> "65. It is true that sub- section (2) of Section 6-A has taken care of observations of this Court in Vineet Narain insofar as trap cases are concerned. It also takes care of the infirmity pointed out by this Court that in the absence of any statutory requirement of prior permission of sanction for investigation, it cannot be imposed as a condition precedent for initiation of investigation, but, Section 6-A continues to suffer from the other two infirmities which this Court noted concerning Single Directive viz. (a) where inference is to be drawn that the decision must have been for corrupt motive and direct evidence is not there, the expertise to take decision rather to proceed or not in such cases should be with the CBI itself and not with the Central Government, and (b) in any event the final decision to commence investigation into the offences must be of CBI with the internal aid and advice and not of anybody else. Section 6-A also suffers from the vice of classifying offenders differently for treatment thereunder for enquiry and investigation of offences, according to their status in life. Every person accused of committing the same offence is to be dealt with in the same manner in accordance with law, which is equal in its application to everyone."

While having said so, the Hon'ble Supreme Court reiterated the signature tune in Vineet Narain's case that "however high you may be the lawyers above you", and further observed that Section 6-A offends the aforesaid signature tune and offends Article 14 of the Constitution of India also. The Supreme Court further observed that the classification amongst officers created by Section 6-A (supra) was not founded on intelligible differentia, and that the differentia did not have any rational relation with the object sought to be achieved by the legislation. The said provision was therefore struck down by the Constitution Bench.

CHAPTER - 12
APPOINTMENT OF ELECTION COMMISSIONS

(Ashwani Kumar Upadhyay)

In the views of this author, the two PIL petitioners, who were instrumental, along with some individuals, in getting this landmark judgment from the Constitution Bench of Supreme Court of India, have truly proved that Public Interest Litigation is the 5th Pillar of democracy in our country. The contribution of these two PIL Petitioners, namely (i) Ashwani Kumar Upadhyay (in Writ Petition (Civil) No. 1043 of 2017; and (ii) the Association for Democratic Reforms (in Writ Petition (Civil) No.569 of 2021, is laudable. Ball these Writ Petitions, along with main case, i.e., Writ Petition (Civil) No. Anoop Baranwal v. Union of India, being the lead case, were decided on 02.03.2023.

It may be noticed that in view of the duty and responsibility conferred on the Election Commission of India to endure free and fair elections, it is necessary that the Election Commission should itself be free from the interference of the Executive. Thus, only the persons who are impartial and independent, need be appointed as Chief Election Commissioner or the Election Commissioner. In this regard, the Constitution Bench observed as under:-

> "Article 324(2) refers to the appointment of the Chief Election Commissioner and other Election Commissioners which shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President. It contemplates that the Parliament makes a law laying down the procedure of selection for appointment of the Chief Election Commissioner and other Election Commissioners, but such law has not been made by the Parliament, even after 73 years since the adoption of the Constitution. In order to fill the legislative vacuum, i.e. the absence of any law made by the Parliament for the appointment of members of the Election Commission and in the light of the views expressed in various reports of the Law Commission, Election Commission, etc., this Court is of the considered view that the instant case thus aptly calls for the exercise of the power of this Court under Article 142 to lay down guidelines to govern the process of selection

> and removal of Chief Election Commissioner and Election Commissioners, till the Legislature steps in."

In the aforesaid judgment, the Constitution Bench further observed that:

> "The office of the Election Commission is an independent constitutional body which has been vested with the powers of superintendence, direction and control of the preparation of electoral rolls and the conduct of all parliamentary and State Legislatures' elections and that of the office of President and Vice-President in terms of Article 324(1) of the Constitution. In terms of Article 324(2), the office of Election Commission comprises of Chief Election Commissioner and ''such number of other Election Commissioners, if any, as the President may from time to time fix" and by an Order dated 01 October, 1993, the President has fixed the number of Election Commissioners to two until further orders. Since 1993, it is a multimember Commission with equal participation in transacting the business of the Election Commission as provided under Chapter III of the Act, 1991 to ensure the smooth and effective functioning of the Election Commission."

The Constitution Bench finally referred to Article 324 (5) of the Constitution of India, in the following terms:-

> "Article 324 (5) of the Constitution is intended to ensure the independence of the Election Commission free from all external political interference and, thus, expressly provides that the removal of the Chief Election Commission from office shall be in like manner as on the grounds as of a Judge of the Supreme Court. Nevertheless, a similar procedure has not been provided for other Election Commissioners under second proviso to Article 324(5) of the Constitution. The other conditions of the service of Chief Election Commissioner/other Election Commissioners have been protected by the Legislature by the Act 1991."

The Constitution Bench finally recorded its conclusions and issued the following guidelines:

> "In the facts and circumstances, keeping in view the importance of maintaining the neutrality and independence of the office of the Election Commission to hold free and fair election which is a sine qua non for upholding the democracy as enshrined in our Constitution, it becomes imperative to shield the appointment of Election Commissioners and to be insulated from the executive interference. It is the need of the hour and advisable, in my view, to extend the protection

available to the Chief Election Commissioner under the first proviso to Article 324(5) to other Election Commissioners as well until any law is being framed by the Parliament.

Directions

Until the Parliament makes a law in consonance with Article 324(2) of the Constitution, the following guidelines shall be in effect:

(1) We declare that the appointment of the Chief Election Commissioner and the Election Commissioners shall be made on the recommendations made by a three-member Committee comprising of the Prime Minister, Leader of the Opposition of the Lok Sabha and in case no Leader of Opposition is available, the Leader of the largest opposition party in the Lok Sabha in terms of numerical strength and the Chief Justice of India.

(2) It is desirable that the grounds of removal of the Election Commissioners shall be the same as that of the Chief Election Commissioner that is on the like grounds as a Judge of the Supreme Court subject to the "recommendation of the Chief Election Commissioner" as provided under the second proviso to Article 324(5) of the Constitution of India

(3) The conditions of service of the Election Commissioners shall not be varied to his disadvantage after appointment."

It is also pertinent to notice at this stage that the pioneer organization in the field of electoral reforms, namely, Association for Democratic Reforms has now filed a Public Interest Litigation (PIL), challenging the appointment of Sh. Arun Goel as Chief Election Commissioner on various grounds. It hardly needs reiteration to the effect that such organizations or individuals who file such important Public Interest Litigations (PILs) for strengthening democracy in our Country have amply proved that the Public Interest Litigation is the 5th Pillar of democracy in our Country.

CHAPTER - 13
POLICE COMPLAINT AUTHORITY

The Police Complaint Authorities which have been set up in some of the States in our Country, have their origin in the judgement of Supreme Court of India in the case titled "Prakash Singh and Ors. Vs. Union of India and Ors.", decided on 22.09.2006, and reported as 2006 (8) SCC 1: 2006 (12) JT 225. Several other police reforms have also been the result of the aforesaid judgement. The case was filed by a former Director General of Police of Uttar Pradesh. What the petitioners in the aforesaid case had asked for was that Union of India be directed to re-define the role and functions of the police and frame a new Police Act on the lines of the Model Act drafted by the National Police Commission in order to ensure that the police is made accountable essentially and primarily to the law of the land and the people. The directions were also sought against the Union of India and State Governments to constitute various Commissions and Boards laying down the policies and ensuring that the police performs their duties and function free from any pressure and also for separation of investigation wing from that of Law & Order. In the instant Chapter, we shall be restricting ourselves to the directions issued by the Supreme Court of India in regard to setting up Police Complaints Authority for hearing complaints of the citizens against the conduct of the Police Officers. In this regard, the following recommendations were made by the Supreme Court in relation to setting up of "Police Complaints Authority":

(Prakash Singh, former DGP)

"Police Complaints Authority:

(6) There shall be a Police Complaints Authority at the district level to look into complaints against police officers of and up to the rank of Deputy Superintendent of Police. Similarly, there should be another Police Complaints Authority at the State level to look into complaints against officers of the rank of Superintendent of Police and above. The district level Authority may be headed by a retired District Judge while the State level Authority may be headed by a retired Judge of the High Court/Supreme Court. The head of the State level Complaints Authority shall be chosen by the State Government out of a panel of names proposed by the Chief Justice; the head of the district level

Complaints Authority may also be chosen out of a panel of names proposed by the Chief Justice or a Judge of the High Court nominated by him. These Authorities may be assisted by three to five members depending upon the volume of complaints in different States/districts, and they shall be selected by the State Government from a panel prepared by the State Human Rights Commission/Lok Ayukta/State Public Service Commission. The panel may include members from amongst retired civil servants, police officers or officers from any other department, or from the civil society. They would work whole time for the Authority and would have to be suitably remunerated for the services rendered by them. The Authority may also need the services of regular staff to conduct field inquiries. For this purpose, they may utilize the services of retired investigators from the CID, Intelligence, Vigilance or any other organization. The State level Complaints Authority would take cognizance of only allegations of serious misconduct by the police personnel, which would include incidents involving death, grievous hurt or rape in police custody. The district level Complaints Authority would, apart from above cases, may also inquire into allegations of extortion, land/house grabbing or any incident involving serious abuse of authority. The recommendations of the Complaints Authority, both at the district and State levels, for any action, departmental or criminal, against a delinquent police officer shall be binding on the concerned authority."

It is however, a matter of concern that the various State Governments have not acted on the aforesaid directions, in their letter and spirit. Many State Governments have enacted their Police Acts, and provided for Constitution of the Police Complaints Authority at District/Division level which is markedly different from the directions issued by the Supreme Court of India, and appointed retired Bureaucrats/Police Officers, as Chairman of State level Police Complaints Authority. Resultantly, the provisions pertaining to setting up the Police Complaints Authority in those States have been challenged before the Supreme Court itself and in some cases, before the concerned High Courts. For instance, Section 54 (2) and Section 54 (3) of the Punjab Police Act, 2007, which prescribes the qualifications for appointment of Chairman and other Members of the State Level and Divisional Level Police Complaint Authority, laid down as under:

"54 (2). The State Police Complaints Authority shall consist of the following who shall be appointed by the State Government, by notification in the Official Gazette,-

(i) a Chairperson, who is or a retired Civil Services Officer not below the rank of Chief Secretary of the State Government or a Secretary

to the Government of India or a retired Director General of Police of the State Government;

(ii) two members from amongst the following:-

(a) a civil service officer who has retired from a post not below the rank of Principal Secretary to the State Government; or

(b) a police officer who has retired from a post not below the rank of Additional Director General of Police of the State Government; or

(c) persons belonging to the State of Punjab with repute and contribution in the field of academia, social work, public affairs or law:

Provided that the State Police Complaints Authority shall have at least one woman as a member in case the Chairperson is not a woman.

(3) The Divisional Police Complaints Authority shall consist of the following who shall be appointed by the State Government, by notification in the Official Gazette and shall have the jurisdiction in the area as specified by the State Government,–

(a) a Chairperson, who was a civil service officer retired from a post not below the rank of Secretary to the State Government or a police officer who has retired from a post not below the rank of Deputy Inspector General of Police of the State Government;

(b) two members from amongst the following:–

(i) a police officer who has retired from a post not below the rank of Senior Superintendent of Police of the State Government; or

(ii) Persons belonging to the State of Punjab with repute and contribution in the field of academia, social work, public affairs or law:

Provided that the Divisional Police Complaints Authority shall have at least one woman as a member in case the Chairperson is not a woman."

Similarly, the State of Haryana has also not acted in the letter and spirit of directions issued by the Supreme Court. The provisions contained in Section 59 of the Haryana Police Act, 2007, which provide for the setting up of the Police Complaint Authority in the State of Haryana Government, are as under:

"59. Constitution of Authority.- The State Government shall constitute a body to be called the State Police Complaint Authority to exercise the powers and perform the functions conferred on or assigned to it under this Act.

(2) The Authority shall consist of –

(a) A Chairperson; and

(b) Such number of members as deemed necessary but not exceeding three;

(c) The Chairperson and the members shall be appointed by the Chief Minister from amongst the persons of eminence having wide knowledge and experience of at least twenty years in the field of public life, academics, law, administration and governance, criminal administration and social work on the recommendations of the State Committee to be constituted in this behalf which shall submit its proposal to the Chief Minister;

Provided that at least one of the members or the Chairperson shall be a woman."

As regards the provisions of setting up of Police Complaints Authority in the State of Punjab, the same are under challenge in CWP (PIL) 20009 of 2014 (H.C. Arora, Advocate vs. State of Punjab and Ors.). Similarly, the offending provisions of Haryana Police Act, on the issue of setting up of Police Complaint Authority in Haryana, are under challenge in CWP (PIL) 24907 of 2014 (H.C. Arora, Advocate vs. State of Haryana and Ors.). Both the aforesaid PILs are yet to be finally adjudicated by the High Court.

CHAPTER-14
ELECTORAL REFORMS
(VOTER'S RIGHT TO KNOW)

The first step in this direction was taken by the Hon'ble Supreme Court of India in a writ petition filed by Association for Democratic Reforms in the case titled Union of India versus Association for Democratic Reforms, (JT) 2002 (4) SC 501, when, in furtherance of the voter's right to know about the candidates, including their antecedents, the following directions were given by the Hon'ble Supreme Court:

(Jagdeep Chhokar)
(Association for Democratic Rights)

"The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature-

(1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past if any. whether he is punished with imprisonment or fine?
(2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof?
(3) The assets (immovable, movable, bank balance etc.) of a candidate and of his/her spouse and that of dependants.
(4) Liabilities, if any particularly whether there are any over dues of any public financial institution or government dues.
(5) The educational qualifications of the candidate."

As was expected from the Government, in order to circumvent the aforesaid directions issued by the Supreme Court of India, it enacted the following provisions by way of Section 33-A and 33-B of the Representative of the People Act, 1951:

"**33A. Right to Information—**

(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of section 33, also furnish the information as to whether—

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8 and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

33B. Candidate to furnish information only under the Act and the rules— Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."

That the aforesaid newly incorporated provisions of the Section 33A and 33B of the Representatives of the People Act, 1951 came up for challenge in the Writ Petition filed by "People's Union for Civil Liberties (PUCL) versus Union of India and Anr., along with another Writ Petition by Lok Satta and Ors. Vs. Union of India, and still another Writ Petition filed by Association for Democratic Reforms versus Union of India and Another", which have been reported as JT 2003 (2) SC 528. By scrutinising the impugned provisions of Section 33A and 33B (supra), the Supreme Court came to the conclusion that in terms of the amended provisions of Section 33A and 33B of the Representatives of the People Act, a candidate for election to a Legislative Assembly or a Parliament, was not required to disclose (a) the cases in which he is acquitted or discharge of criminal

offence(s); (b) his assets and liabilities; and (c) educational qualifications. With regard to assets, however, a plea taken by the Government was that under the amended provisions, the candidate would be required to disclose his assets and liabilities to the Speaker, after being elected. It was further contended by the Government that once the person is acquitted or discharge of any criminal offence there was no necessity of disclosing the same to the voters. While reiterating the directions issued by it in the case of Association for Democratic Reforms (supra) the Supreme Court observed that the voter's right to know the antecedents of the candidates is based upon interpretation of Article 19(1)(a) of the Constitution, which provides that all citizens of this country would have fundamental right to "Freedom of Speech and Expression" and these phrases include fundamental rights to know relevant antecedents of the candidate contesting the election. Further observations were also made by the Hon'ble Supreme Court of India to the following effect in the aforesaid judgement:

> "So, the foundation of a healthy democracy is to have well-informed citizens-voters. The reason to have right of information with regard to the antecedents of the candidate is that voter can judge and decide in whose favour he should cast his vote. It is voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth. For assets or liability, the voter may exercise his discretion in favour of a candidate whose liability is minimum and/or there are no over dues of public financial institution or government dues. From this information, it would be, to some extent easy to verify whether unaccounted money is utilized for contesting election for getting rich after being elected to what extent he became richer. Exposure to public scrutiny is one of the known means for getting clean and less polluted persons to govern the country. A little man-a citizen-a voter is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as MP or MLA."

Continuing with the judgment, the Supreme Court made some other important observations also. The Supreme Court observed that Fundamental Right to know the antecedents of the candidate is independent of statutory right under the Election Law. A voter is first citizen of this country and apart from statutory rights, he has Fundamental Rights conferred by the Constitution. Members of the Democratic Society should be sufficiently informed so that they may cast their votes intelligently in favor of persons who are to govern them. Right to vote would be

meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our Democratic Governing System and to have competent legislatures. On the issue of legality of amended provisions contained in the Representatives of the People's Act, 1951, the Supreme Court observed that legislature can remove the basis of a decision rendered by a competent Court by rendering it ineffective but cannot direct the instrumentalities of the State to disobey or disregard the decisions given by the Supreme Court. The legislature cannot enact a law which is violative of the fundamental rights. The Supreme Court therefore, concluded that Section 33B of the amended Act was illegal and null and void. However, it was clarified that the aforesaid judgment which was rendered on 13.03.2003 would not have any retrospective effect but would be prospective.

The matter regarding criminalization of the politics also came up for hearing before a Constitution Bench of the Supreme Court of India in the case titled "Public Interest Foundation and Others Versus Union of India and Another" decided on 25.09.2018. With reference to the problem of criminalization of politics, the Constitution Bench made the following starting observation in the para No. 2 of the said judgment-

> "2. The constitutional functionaries, who have taken the pledge to uphold the constitutional principles, are charged with the responsibility to ensure that the existing political framework does not get tainted with the evil of corruption. However, despite this heavy mandate prescribed by our Constitution, our Indian democracy, which is the world's largest democracy, has seen a steady increase in the level of criminalization that has been creeping into the Indian polity. This unsettlingly increasing trend of criminalization of politics, to which our country has been a witness, tends to disrupt the constitutional ethos and strikes at the very root of our democratic form of government by making our citizenry suffer at the hands of those who are nothing but a liability to our country."

After a threadbare discussion on the issue, the Constitution Bench issued the following directions in this regard:

> "116. Keeping the aforesaid in view, we think it appropriate to issue the following directions which are in accord with the decisions of this Court
>
> **(11)** Each contesting candidate shall fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein.

(12) It shall state, in bold letters, with regard to the criminal cases pending against the candidate.

(13) If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her.

(14) The concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents.

(15) The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that the same shall be done at least thrice after filing of the nomination papers."

Further, as regards the impact of the implementation of the aforesaid directions, the Constitution Bench made the following important observations:-

> "117. These directions ought to be implemented in true spirit and right earnestness in a bid to strengthen the democratic set-up. There may be certain gaps or lacunae in a law or legislative enactment which can definitely be addressed by the legislature if it is backed by the proper intent, strong resolve and determined will of right-thinking minds to ameliorate the situation. It must also be borne in mind that the law cannot always be found fault with for the lack of its stringent implementation by the concerned authorities. Therefore, it is the solemn responsibility of all concerned to enforce the law as well as the directions laid down by this Court from time to time in order to infuse the culture of purity in politics and in democracy and foster and nurture an informed citizenry, for ultimately it is the citizenry which decides the fate and course of politics in a nation and thereby ensures that we shall be governed no better than we deserve', and thus, complete information about the criminal antecedents of the candidates forms the bedrock of wise decision-making and informed choice by the citizenry. Be it clearly stated that informed choice is the cornerstone to have a pure and strong democracy."

Further, before concluding the said judgment, the Constitution Bench made certain further very important observations to the following effect:

> "118. We have issued the aforesaid directions with immense anguish, for the Election Commission cannot deny a candidate to contest on the

symbol of a party. A time has come that the Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. It is one thing to take cover under the presumption of innocence of the accused but it is equally imperative that persons who enter public life and participate in law making should be above any kind of serious criminal allegation. It is true that false cases are foisted on prospective candidates, but the same can be addressed by the Parliament through appropriate legislation. The nation eagerly waits for such legislation, for the society has a legitimate expectation to be governed by proper constitutional governance. The voters cry for systematic sustenance of constitutionalism. The country feels agonized when money and muscle power become the supreme power. Substantial efforts have to be undertaken to cleanse the polluted stream of politics by prohibiting people with criminal antecedents so that they do not even conceive of the idea of entering into politics. They should be kept at bay."

CHAPTER - 15
FREQUENT TRANSFERS OF POLICE OFFICERS

(Prakash Singh, former DGP)

The aforesaid issue also came up for hearing before the Supreme Court of India in the case titled "Prakash Singh vs. Union of India" and reported as 2006 (8) SCC 1: 2006 (12) JT 225. A perusal of the judgement shows that National Police Commission set up by the Government of India on 15.11.1977, had made certain recommendations, which inter alia, included the observations that there was a wide ranging phenomena of unhealthy practice of frequent and indiscriminate transfers ordered on political considerations, and also other unhealthy influences and pressures brought to bear on Police and inter alia, recommended for statutory tenure of the Police officials by including specific provisions in the Police Act itself. The Supreme Court expressed the hope that the State Governments would give due consideration and would pass suitable legislations on recommended lines, the Police being its State subject under the Constitution of India.

The Supreme Court therefore went on to issue directions in regard to the minimum tenure of the Police officials, for immediate compliance, and such directions were to remain operative till such time a new model Police Act is prepared by the Central Government and/or State Government pass the requisite legislation. To be specific, the following directions were issued by the Supreme Court on the issue of minimum tenure of I.G. of Police and other Officers:

"Minimum Tenure of I.G. of Police and other officers:

> (3) Police Officers on operational duties in the field like the Inspector General of Police in-charge Zone, Deputy Inspector General of Police in-charge Range, Superintendent of Police in-charge district and Station House Officer in-charge of a Police Station shall also have a prescribed minimum tenure of two years unless it is found necessary to remove them prematurely following disciplinary proceedings against them or their conviction in a criminal offence or in a case of corruption or if the incumbent is otherwise incapacitated from discharging his responsibilities. This would be subject to promotion and retirement of the officer."

However, as is often noticed, in a large number of cases, in regard to the minimum tenure of the Police officers of various levels, the

directions of the Supreme Court as given in Prakash Singh's Case (supra) have also been circumvented to a great extent, and instead of minimum assured tenure of 2 years, to be given to police officers of various levels, only an assured tenure of one year against those posts has been provided for in the Punjab Police Act, 2007, enacted by the State of Punjab. Besides, so many lacunas have been kept in the legislation, with the result that any Police officer can be transferred to any other vacant post, without assigning any reasons. Proviso (e) to Section 15 of the Punjab Police Act, 2007 envisages that wherever there is vacancy, which may be required to be filled up, a Police officer can be transferred to that place. Thus, the vital step taken by the Supreme Court of India to ensure that the Police officers are not transferred frequently or recklessly, on account of extraneous considerations and influences, has been totally frustrated. The provisions contained in Section 15 of the Punjab Police Act, 2007, to the above effect, are reproduced hereunder for the sake of ready reference by the readers:

> "Section 15-Terms of office of key police functionaries. - The officers posted to the following posts, shall have a minimum assured tenure of one year against those posts, which shall be extendable to maximum period of three years:-
>
> 1. Inspector General of Police of a Zone,
> 2. Deputy Inspector General of Police of a Range,
> 3. Senior Superintendent of Police,
> 4. Superintendent of Police,
> 5. Assistant Superintendent of Police,
> 6. Deputy Superintendent of Police,
> 7. Station House Officer of a Police Station
>
> Provided that an officer may be removed or transferred by the competent authority from his post before the expiry of the said tenure, if he is, -
>
> (a) promoted to a higher post, or
> (b) convicted or against whom, charges having been framed by a court of law, or
> (c) suspended from Service in accordance with the provisions of the relevant rules, or
> (d) incapacitated by physical or mental illness or otherwise becoming unable to discharge his duties and functions ; or
> (e) there is a need to fill up the vacancy, caused by promotion, transfer or retirement.
>
> (2) *In exceptional cases, an officer may be transferred from his post by the competent authority before the expiry of his tenure for inefficiency or negligence or non-performance or where a prima facie case of a serious nature is found against him on the basis of preliminary enquiry*."

CHAPTER - 16
CHAIRMAN, PUNJAB PUBLIC SERVICE COMMISSION

(Salil Sabhlok, Advocate)

The issue pertaining to appointment of Chairman of the Punjab Public Service Commission came up for consideration before the Supreme Court, in the case titled "State of Punjab vs. Salil Sabhlok and Ors., 2013 (5) SCC1: 2013 (2) SCT 555 (SC)", in various Civil Appeals filed by State of Punjab, the State of Haryana, and Shri Harish Rai Dhanda (whose appointment as Chairman of Public Service Commission was set aside by the High Court) against the judgment of Punjab and Haryana High Court, decided on 15.02.2013. As a matter of fact, the High Court, vide its judgment dated 17.08.2011, had issued direction to the States of Punjab and Haryana, to follow the procedure as mandated by the High Court, till such time a fair, correct, objective and transparent policy meeting the mandate of Article 14 of the Constitution of India, is evolved:

"1. There shall be Search Committee constituted under the Chairmanship of the Chief Secretary of the respective State Governments.
2. The Search Committee shall consist of at least three members. One of the members shall be serving Principal Secretary i.e. not below the rank of Financial Commissioner and the third member can be serving or retired Bureaucrat not below the rank of Financial Commissioner, or member of the Armed Forces not below the rank of Brigadier or of equivalent rank.
3. The Search Committee shall consider all the names which came to its notice or are forwarded by any person of by any aspirant. The Search Committee shall prepare panel of suitable candidates equal to the three times the number of vacancies.
4. While preparation of the panel, it shall be specifically elicited about the pendency of any court litigation, civil or criminal, conviction or otherwise in a criminal court or civil court decree or any other proceedings that may have a bearing on the integrity and character of the candidates.
5. Such panel prepared by the Search Committee shall be considered by a High Powered Committee consisting of Hon'ble Chief Minister, Speaker of Assembly and Leader of Opposition.

6. It is thereafter, the recommendation shall be placed with all relevant materials with relative merits of the candidates for the approval of the Hon'ble Governor after completing the procedure before such approval.
7. The proceedings of the Search Committee shall be conducted keeping in view the principles laid down in Centre for Public Interest Litigation (supra)

Regarding the requirement of independence of the Punjab Public Service Commission, in the matter of recruitment to be made by such Commission, the Supreme Court distinguished between the functions of "Chief Secretary" or those of "Director General of Police" or any other important statutory post. The Supreme Court observed that:

> "The question of the Chief Minister or the State Government having "confidence" (in the sense in which the word is used with reference to the Chief Secretary or the Director General of Police or any important statutory post) in the Chairperson of a State Public Service Commission simply does not arise, nor does the issue of compatibility. The Chairperson of a Public Service Commission does not function at the pleasure of the Chief Minister or the State Government. He or she has a fixed tenure of six years or till the age of sixty two years, whichever is earlier. Security of tenure is provided through a mechanism in our Constitution. The Chairperson of a State Public Service Commission, even though appointed by the Governor, may be removed only by the President on the ground of misbehaviour after an inquiry by this Court, or on other specified grounds of insolvency, or being engaged in any other paid employment or being unfit to continue in office by reason of infirmity of mind or body. There is no question of the Chairperson of a Public Service Commission being shifted out if his views are not in sync with the views of the Chief Minister or the State Government."

Examining the issue of appointment of Mr. Harish Rai Dhanda as Chairman of Punjab Public Service Commission, the Supreme Court concluded that the said appointment was not in conformity with the requirement of the post of Chairman of such a Commission. Besides, while issuing notification for appointment of Mr. Harish Rai Dhanda as Chairman of the Public Service Commission, there was no deliberative process worth the name in making the appointment, and also that the constitutional, functional and institutional requirements of the Punjab Public Service Commission were not met. The Supreme Court also observed that as regards the objection a Public Interest Litigation (PIL) for challenging the appointment of a person as a Chairman of Punjab Public Service Commission would not be maintainable, shall not be sustainable, as the appointment of the Chairperson of the Public Service Commission was an

appointment to a Constitutional position and it was not a "Service Matter". The PIL challenging such an appointment was therefore held to be maintainable, both for the issuance of a writ of Quo Warranto and for a writ of Declaration, as a case be.

CHAPTER - 17
FREE BUNGALOWS FOR EX-CHIEF MINISTERS

(S.N. Shukla-Lok Prahari)

The aforesaid important issue pertaining to allotment of Bungalows free of rent to Ex-Chief Ministers for life time came up for hearing before the Supreme Court of India in Writ Petition (Civil) No. 657 of 2004 (Lok Prahari versus State of UP and others), which was allowed by the Supreme Court on 01.08.2016.

The aforesaid organization had challenged the validity of the Ex-Chief Ministers Residence Allotment Rules 1997, inter-alia, on the ground that the rules are non-statutory, and could not have been framed in the light of the provisions of the Uttar Pradesh Ministers (Salaries, Allowances and Misc. Provisions) Act, 1981. The 1997 Rules envisaged that the former Chief Ministers should be provided, bungalows for their residence for the life and upon their death, the family members occupying the bungalow should hand over the vacant possession of the bungalow within 3 months from the date of the death of the former Chief Minister failing which, they will be liable to pay penal rent. During the hearing of the aforesaid PIL (Public Interest Litigation), the Union of India raised objection to the maintainability of the writ petition as a Public Interest Litigation (PIL) and challenged the locus standi of the petitioner to file such petition. The Supreme Court held that the petitioner- Society was formed by retired Civil Servants, Journalists and other persons who were residents of the State of UP, and they did not have any mala fide intention behind filing the present petition and none of them had any personal grudge against any of the occupants of the Government premises or any of the former Chief Ministers. In the circumstances, the Supreme Court held that the petitioner had the locus standi to file the aforesaid writ petition as a PIL. The second question framed by the Supreme Court, for adjudication was whether the Ex-Chief Minister's Residence Allotment Rule, 1987 were legal and valid. During the hearing of the aforesaid PIL, the Supreme Court noticed that many of the Former Chief Ministers, who were in occupation of the Government bungalows, were either serving as Member of Parliament, or Governors or Cabinet Minister in Central Government, and they had already been provided another accommodation. Therefore, the Supreme Court observed that it will not be proper to permit them to have permanent residence at two places. The Supreme Court further observed that the 1997 Rules cannot be said to be legal, because those are non-statutory instructions, and they were only in

the nature of executive instructions. Coming to the merits of the case, the Supreme Court referred to its previous judgments, wherein the Supreme Court had deprecated the conduct of employees, officers, representatives of the people, and other high dignitaries, who continued to stay on the residential accommodation provided by the Government of India although they were no longer entitled to such accommodation. Further, as regards the allotment of bungalows free of cost to the Ex-Chief Minister, for the life time, the Supreme Court made the following remarkable observations:

> "One should remember here that public property cannot be disposed of in favour of any one without adequate consideration. Allotment of Government property to someone without adequate market rent, in absence of any special statutory provision, would also be bad in law because the State has no right to fritter away Government property in favour of private persons or bodies without adequate consideration and therefore, all such allotments, which have been made in absence of any statutory provision cannot be upheld. If any allotment was not made in accordance with a statutory provision at the relevant time, it must be discontinued and must be treated as cancelled and the State shall take possession of such premises as soon as possible and at the same time, the State should also recover appropriate rent in respect of such premises which had been allotted without any statutory provision."

Eventually, the Supreme Court directed the respondents to handover the possession of the bungalows occupied by them within 2 months from the date of the said judgment, and the UP Government was also directed to recover appropriate rent from the occupants of the said bungalows, for the period during which they were in unauthorized occupation of the said bungalows.

CHAPTER - 18
VOTING RIGHT OF NOMINATED MEMBERS

(Satinder Singh, Advocate)

Article 243 R (2) (a)(i) of the Constitution of India contains the provision that the Legislature of a State, by law, provide, inter-alia, for the representation in a Municipality of persons having special knowledge or experience in Municipal administration. However, it is also provided therein that the persons referred to above shall not have right to vote in the meetings of the Municipality.

However, in distinction to the aforesaid provision of Article 243 R (2) (a) (i) of the Constitution of India, Section 4 (3) (ii) of the Punjab Municipal Corporation Act, 1976, (as extended to the Union Territory, Chandigarh) specifically confers the voting right on the nominated Members. The aforesaid provision was capable of being misused, in as much as such Members were always selected at the instance of the Ruling Party and were bound to frustrate the democratic mandate given by the electorate to the elected members of the Municipal Corporation. The aforesaid provision contained in Section 4 (3) (ii) of the Punjab Municipal Corporation Act, 1976 (as extended to the Union Territory, Chandigarh) was challenged by Satinder Singh, an Advocate and elected Municipal Councilor of the Municipal Corporation, Chandigarh, by filing CWP No. 20346 of 2016 (Satinder Singh versus Union of India and others) which was eventually decided by the Punjab and Haryana High Court vide judgment dated 23.08.2017. Advocate H.C. Arora, assisted the High Court as an intervener in the aforesaid case, had earlier filed CWP-6095-2017 9h.c. Arora, advocate v. Union of India, by way of a PIL, but he had to withdraw it, for technical reasons, and was given liberty to assist the High Court in writ petition filed by Satinder Singh. The sum and substance of the arguments of the petitioner in the aforesaid case was that the impugned provisions of the Punjab Municipal Corporation Act, 1976 (as extended to Unitary, Chandigarh) were ultra vires and unconstitutional, besides being totally contrary to the provisions of Article 243 R of the Constitution of India. The nine nominated Members of Municipal Corporation, Chandigarh were also impleaded as respondents in the aforesaid case, and a prayer was made before the High Court that those nominated Members be not permitted to vote in the meetings of Municipal Corporation, Chandigarh, including in the meeting to be held for election of the Mayor of the Municipal Corporation. The High Court in the aforesaid

hotly contested Civil Writ Petition, concluded that the clear intent for Constitutional provision of the proviso to Article 243 R (2) (a) is that the nominated Members referred to therein do not have right to vote in the meetings of the Municipality and this cannot be incorporated in a Legislation in derogation of the Constitutional mandate. The conclusions reached by the High Court, as operative portion of the aforesaid judgment are reproduced hereunder for the sake of ready reference:

"(a) The constitutional mandate of the proviso to Article 243R (2) (a) is that the persons mentioned in paragraph (i) i.e. relating to representation in a municipality of persons having special knowledge or experience in Municipal Administration or the nominated members of the Municipal Corporation, Chandigarh do not have the right of voting in the meetings of the Municipality.

(b) In the meeting to be convened for the election of Mayor, the nominated members who have no right to vote in the meetings of the municipalities would have no right to vote even in the meetings for the election of the Mayor of the Municipal Corporation, Chandigarh.

(c) The proviso to Article 243ZB of the Constitution in its application to the Union Territories enables the President by notification to direct that the provisions of Part IX A of the Constitution shall apply to Union Territory or part thereof subject to such exceptions, modifications as he may specify in the notification. However, the exceptions and modifications that are to be specified are not to be contrary to or in derogation to the provisions of the Constitutional scheme.

(d) The exceptions and modifications that are to be specified by the President in terms of the proviso to Article 243 ZB are to be in consonance with the Constitutional scheme and exercise of excessive delegation, is impermissible and is to be invalidated.

(e) A delegatee can exercise the powers to the extent of the delegation as held in Delhi Laws (supra).

(f) The Presidential notification dated 24.05.1994 does not in any manner confer on the legislature to make laws conferring voting rights to the nominated members.

(g) The nominated members to the House of the Municipal Corporation not having the right to vote by the prohibitive provisions of the Constitution cannot be conferred such rights in exercise of a legislative enactment.

(h) The Parliament would be a legislature for the Union Territory and would be controlled by the provisions of Article 243 ZB insofar as the Union Territory of Chandigarh is concerned.

In view of the above, the provisions of Section 4 (3) (ii) of the MC Act are liable to be invalidated to the extent voting rights have been conferred on the nominated members of the Municipal Corporation, Chandigarh as these are clearly in violation of Constitutional mandate of the proviso to Article 243 R (2) (a)."

Thus, through the aforesaid Civil Writ Petitions, the petitioners were able to protect the democratic mandate given by the electorate to the elected Members of the Municipal Corporation, Chandigarh, from being hijacked by the nominated members casting their votes, for frustrating such democratic mandate. That is how the aforesaid Writ Petitions became Saviors of the democracy.

CHAPTER - 19
TAINTED PERSONS AS MINISTERS

The issue of great public importance as to whether a person with criminal background, and/or who is charged with offences involving moral turpitude, can be appointed as Minister in Central or State Government, came up for consideration before a Constitution Bench of Supreme Court of India, in Writ Petition (Civil) No. 289 of 2005 (Manoj Narula vs. Union of India) filed in the Public Interest, which was decided on 27.08.2014. After threadbare discussion over several hearings, the Constitution Bench came to the following conclusions:

> "85-86. From the aforesaid, it becomes graphically vivid that the Prime Minister has been regarded as the repository of constitutional trust. The use of the words "on the advice of the Prime Minister" cannot be allowed to operate in a vacuum to lose their significance. There can be no scintilla of doubt that the Prime Minister's advice is binding on the President for the appointment of a person as a Minister to the Council of Ministers unless the said person is disqualified under the Constitution to contest the election or under the 1951 Act, as has been held in B.R. Kapur's case. That is in the realm of disqualification. But, a pregnant one, the trust reposed in a high constitutional functionary like the Prime Minister under the Constitution does not end there. That the Prime Minister would be giving apposite advice to the President is a legitimate constitutional expectation, for it is a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance.
>
> 87. It is worthy to note that the Council of Ministers has the collective responsibility to sustain the integrity and purity of the constitutional structure. That is why the Prime Minister enjoys a great magnitude of constitutional power. Therefore, the responsibility is more; regard being had to the instillation of trust, a constitutional one. It is also expected that the Prime Minister should act in the interest of the national polity of the nation-state. He has to bear in mind that unwarranted elements or persons who are facing charge in certain category of offences may thwart or hinder the canons of constitutional morality or principles of good governance and eventually diminish the

constitutional trust. We have already held that prohibition cannot be brought in within the province of advice' but indubitably, the concepts, especially the constitutional trust, can be allowed to be perceived in the act of such advice.

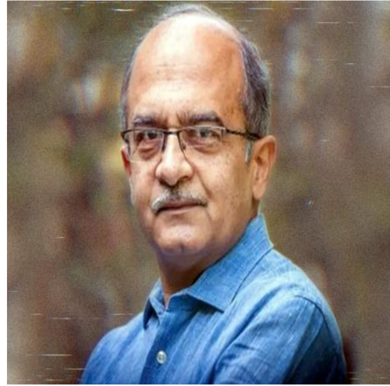
Thus, while interpreting Article 75(1), definitely a disqualification cannot be added. However, it can always be legitimately expected, regard being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests and that is the constitutional expectation from the Prime Minister. Rest has to be left to the wisdom of the Prime Minister. We say nothing more, nothing less.

At this stage, we must hasten to add what we have said for the Prime Minister is wholly applicable to the Chief Minister, regard being had to the language employed in Article 164(1) of the Constitution of India."

Thus, the Supreme Court expressed a hope that the Prime Minister or the Chief Minister would give correct advice to the President of India or Governor of the concerned State, about the person to be appointed as Minister, so that the Council of Ministers discharges the collective responsibility to sustain the integrity and purity of the constitutional structure. Thus, while recommending the name of a person to be included in the Council of Ministers, the Prime Minister or the concerned Chief Minister should bear in mind that unwarranted elements or persons who are facing charge in certain category of offences may not hinder the canon of constitutional morality or the principles of good governance and eventually diminish the constitutional trust. The aforesaid expectation is necessary from the Prime Minister or the concerned Chief Minister keeping in view the role of Minister in the Council of Ministers and keeping in view the sanctity of the oath he takes. Thus, the Prime Minister, or the concerned Chief Minister would consider not choosing a person with criminal antecedents, against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests, and that is the Constitutional expectation from the Prime Minister, or the Chief Minister concerned. Rest has to be left to the wisdom of the Prime Minister or the Chief Minister concerned. Thus, the Supreme Court of India, after giving its advice, left the matter entirely to the wisdom of the Prime Minister or the Chief Minister concerned. It would be pertinent to refer to CWP No. 24864 of 2016 (Sukhjeet Singh vs. State of Punjab), filed through this

Author as his Counsel. In the said writ petition, which was filed by way of Public Interest Litigation (PIL), Sukhjeet Singh had sought the issuance of appropriate direction to the Sh. Parkash Singh Badal, the then Chief Minister, Punjab to remove Sh. Tota Singh as Agriculture Minister from his Cabinet, as he stood convicted in a corruption case, in which he was sentenced to one year's rigorous imprisonment. He also stated in the PIL that Sh. Tota Singh has resigned as a Cabinet Minister, on being convicted but after one year, he was again taken into the Council of Ministers. The crux of the arguments raised by Sukhjeet Singh in the aforesaid case was that that let there be a conscious application of mind by the Chief Minister, to the facts of the case, and let him decide whether he wants to continue Sh. Tota Singh in his Council of Ministers. However, the case could not be decided within a reasonable period, and eventually the PIL was rendered infructuous because of announcement of next elections, when Sh. Tota Singh ceased to be a Minister, by virtue of the election to the State Assembly, as the electorate did not return the Shiromani Akali Dal (SAD) into power.

CHAPTER - 20
APPOINTMENT OF CHIEF VIGILANCE COMMISSIONER



(Prashant Bhushan, Advocate, Supreme Court)
(Centre for P. I. L.)

Vigilance is an integral part of all Government Institutions. Anti-corruption measures the responsibility of the Central Government. Towards this end, under the Central Vigilance Commission Act, 2003, the Central Government has set up (i) CBI (Central Bureau of Investigation); (ii) Administrative Vigilance Division in the Department of Personnel and Training; (iii)Domestic Vigilance Units in the Ministries/Departments, Government Companies, Government Corporations, Nationalized Banks and Public Sector Units; and (iv) Central Vigilance Commission.

The Central Vigilance Commission being an integrity Institution, was supposed to be independent of the Executive. The sole purpose behind setting up the Central Vigilance Commission was to improve the vigilance administration of the Country. Under the provision of the Section 3 of the 2003 Act, the Central Vigilance Commission comprises (i) A Central Vigilance Commissioner/Chairperson, (ii) and not more than two Vigilance Commissioners-Members. The Central Vigilance Commissioner and the Vigilance Commissioners are to be appointed from amongst persons, who have been, or are in All India Services or in any Civil Services, or in a Civil post under the Union, having knowledge and experience in the matters relating to vigilance, and policy making and administration, including the Police Administration. The appointment of Central Vigilance Commissioner and the Vigilance Commissioners is to be made by the President by warrant under his hand and seal, provided that every such appointment is to be made after the recommendation of a Committee consisting of "(a) Prime Minister/Chairperson; (b) The Minister of Home Affairs-Member; (c) The leader of the Opposition in the House of the People-Member:."

That validity of appointment of Sh. P.J. Thomas, as Central Vigilance Commissioner, came up for consideration before the Supreme Court of India, in a PIL filed by Centre for Public Interest Litigation and another Vs. Union of India and Others, Writ Petition (Civil) No. 348 and 355 of 2010, which were eventually decided on 03.03.2011.

In the aforesaid case, the High Powered Committee constituted under the 2003 Act had recommended the case of Sh. P.J. Thomas, for appointed as Central Vigilance Commissioner, and his appointment was accordingly made by the President of India as Central Vigilance Commissioner. It was pointed out by the PIL petitioner that as regards the bio-data of the empanelled candidates, including Sh. P.J. Thomas, there was nothing adverse in the said bio-data. However, it was brought to the notice of the Supreme Court that there were certain notings of the DoPT recommending the initiation of penalty proceedings against Mr. P.J. Thomas. However, those notings were not put up before the High Power Committee. The Supreme Court therefore, concluded that the appointment of Sh. P.J. Thomas stood vitiated, as the High Power Committee had failed to consider the relevant material keeping in mind the purpose and policy on the 2003 Act, as even the DOPT had failed to bring those notings to the notice of High Powered Committee. The Supreme Court further observed that it was concerned with the institution and its integrity, including institutional competence and functioning, not the desirability of the candidate along who is going to be the Central Vigilance Commissioner, although the personal integrity an important quality. It is the independence and impartiality of the institution like CVC, which has to be maintained and preserved in larger interest of the rule of law. While making recommendations, the High Powered Committee performed statutory duty. Its duty is to recommend. While making recommendations, the criteria of the candidate being a public servant or a civil servant in the past is not the sole consideration. The High-Powered Committee had to look at the record and take into consideration whether the candidate would or would not be able to function as a Central Vigilance Commissioner, and whether the institutional competency would be adversely affected by the pending proceedings and if by that touchstone the candidates faces disqualification, then it shall be the duty of the High-Powered Committee not to recommend such a candidate. Reverting to the case in hand, the Supreme Court stated that the notings of the DoPT recommending disciplinary action against Sh. P.J. Thomas in respect of Palmolein in case, had not been considered by the High-Powered Committee. The Supreme Court also noticed that in the case in hand, the zone of considerations stood restricted only to the Civil Service , and the candidates from Civil Service of the Union, in derogation of the provisions contained in Section 3 (3) of the 2003 Act, according to which, the Central Vigilance Commissioner or the Vigilance Commissioners are to be appointed from amongst persons, who have been or who are in All India Service or in any Civil Service of the Union or in a Civil Post under the Union, having the requisite knowledge and experience, and the zone of consideration also includes the persons who have held office or are holding office in a Corporation established by or under the Central Act or Central Government, and persons who have experience in Finance including

Insurance and Banking, Law, Vigilance and Investigation. It was in the aforesaid circumstances that the Supreme Court held that the recommendation of the High-Powered Committee made on 3rd September, 2010, recommending the name of Sh. P.J. Thomas as Central Vigilance Commissioner was non-est in law and consequently the appointment of Sh. P.J. Thomas as Central Vigilance Commissioner was quashed. The writ petition was accordingly allowed. However, for future, the following directions were issued for bringing transparency into the appointment of the Central Vigilance Commissioner or that of the other two Vigilance Commissioners:-

(i) "In our judgment we have held that there is no prescription of unanimity or consensus under Section 4(2) of the 2003 Act. However, the question still remains as to what should be done in cases of difference of opinion amongst the Members of the High Powered Committee. As in the present case, if one Member of the Committee dissents that Member should give reasons for the dissent and if the majority disagrees with the dissent, the majority shall give reasons for overruling the dissent. This will bring about fairness-in-action. Since we have held that legality of the choice or selection is open to judicial review we are of the view that if the above methodology is followed transparency would emerge which would also maintain the integrity of the decision- making process.

(ii) In future the zone of consideration should be in terms of Section 3(3) of the 2003 Act. It shall not be restricted to civil servants.

(iii) All the civil servants and other persons empanelled shall be outstanding civil servants or persons of impeccable integrity.

(iv) The empanelment shall be carried out on the basis of rational criteria, which is to be reflected by recording of reasons and/or noting akin to reasons by the empanelling authority.

(v) The empanelment shall be carried out by a person not below the rank of Secretary to the Government of India in the concerned Ministry.

(vi) The empanelling authority, while forwarding the names of the empanelled officers/persons, shall enclose complete information, material and data of the concerned officer/person, whether favourable or adverse. Nothing relevant or material should be withheld from the Selection Committee. It will not only be useful but would also serve larger public interest and enhance public confidence if the contemporaneous service record and acts of outstanding performance of the officer under consideration, even with adverse remarks is specifically brought to the notice of the Selection Committee.

(vii) The Selection Committee may adopt a fair and transparent process of consideration of the empanelled officers."

CHAPTER - 21
HANDCUFFING OF PRISONERS

In Sunil Batra v. Delhi Administration (1979) 1 SCR 392, Supreme Court of India pronounced that under trials shall be deemed to be in custody, but not undergoing punitive imprisonment. Fetters, especially bar fetters, shall be shunned as violative of human dignity, within and without prisons. The indiscriminate resort to handcuffs when accused persons are taken to and from Court and the expedient of forcing irons on prison inmates are illegal and shall be stopped forthwith save in small category of cases where an under trial has a credible tendency for violence and escape a humanely graduated degree of "iron" restraint is permissible if - other disciplinary alternatives are unworkable. The burden of proof of the ground is on the custodian. And if he fails, he will be liable in law. Reckless handcuffing and chaining in public degrades, puts to shame finer sensibilities and is a slur on our culture.

The law as declared by the Supreme Court in Shukla's case and Batra's case was a mandate under Article 141 and 144 of the Constitution of India, and all concerned were bound to obey the same. However, the guidelines laid down by the Supreme Court and the directions issued repeatedly regarding handcuffing of under-trials and convicts were not being followed by the police, jail authorities and even by the subordinate judiciary. It was in the aforesaid situation that an NGO, namely Citizens for Democracy filed Writ Petition (Civil) No. 22 of 1995 before the Hon'ble Supreme Court of India, which was decided on 01.05.1995, and the Supreme Court made it amply clear that the law laid down by it in the above said 2 judgments and the directions issued by the Supreme Court were binding on all concerned and any violation or circumvention shall attract the provisions of the Contempt of Courts Act, apart from other penal consequences under the law.

In order to make the law amply clear and to prevent the misuse of authority by the police & jail authorities, who were handcuffing the prisoners or using other fetters, on the prisoners-convicted or under trial-, were categorically issued the following directions:

(i) "We declare, direct and lay down as a rule that handcuffs or other fetters shall not be forced on prisoners- convicted or under trial - while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to Court and back. The police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the

country or during transport from one jail to another or from jail to Court and back.

(ii) Where the police or the jail authorities have well grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being so dangerous/desperate and the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner.

(iii) In all the cases where a person arrested by police, is produced before the Magistrate and remand - judicial or non-judicial - is given by the Magistrate the person concerned shall not be handcuffed unless special orders in that respect are obtained from the Magistrate at the time of the grant of the remand.

(iv) When the police arrests a person in execution of a warrant of arrest obtained from a Magistrate, the person arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested.

(v) Where a person is arrested by the police without warrant the police officer concerned may if he is satisfied, on the basis of the guide-lines given by us in para above, that it is necessary to handcuff such a person, he may do so till the time he is taken to the police station and thereafter his production before the Magistrate. Further use of fetters thereafter can only be under the orders of the Magistrate as already indicated by us.

(vi) We direct all ranks of police and the prison authorities to meticulously obey the above mentioned directions. Any violation of any of the directions issued by us by rank of police in the country or members of the jail establishment shall be summarily punishable under the Contempt of Courts Act apart from other penal consequences under law. The writ petition is allowed in the above terms. No costs."

This is how the Public Interest Litigation, the fifth Pillar of Democracy, is ensuring the rule of law, and also ensuring that democracy also means respect for human dignity.

CHAPTER - 22
MPLAD SCHEME

(Bhim Singh)

One political personality had filed the Public Interest Litigation in the Hon'ble Supreme Court of India, for challenging the Members of Parliament Local Area Development Scheme (MPLAD Scheme). He had prayed that the Hon'ble Court may scrap the MPLAD Scheme because funds were being misused by the Members of Parliament. The Hon'ble Supreme Court of India upheld the Scheme and observed that the Scheme falls within the meaning of "Public Purpose" aiming for the fulfillment of the development and welfare of the State as reflected in the Directive Principles of State Policy. It was further observed by the Hon'ble Supreme Court of India that the Indian Constitution does not recognize strict separation of powers. The constitutional principles of separation of powers will only be violated if an essential of one branch is taken over by another branch, leading to a removal of checks and balances. Even though MPs have been given seemingly executive role, such a role is limited to "recommending" works and implementation is done by the local authorities. There is no removal of checks and balances, since these are duly provided and have to be strictly adhered to by the guidelines of the Scheme and the Parliament. Therefore, the Scheme does not violate separation of powers. Further, in the present Scheme, an accountability regime has been provided. However, the efforts must be made to make the regime more robust, but in its current form it cannot be struck down as unconstitutional. The aforesaid judgment was given by the Constitution Bench of Supreme Court in Writ Petition (Civil) No. 404 of 1999, and other connected petitions, in the case titled as "Bhim Singh vs. Union of India" decided on 06.05.2010. Subsequently however, in Civil Appeal No. 11004 of 2016 (Lok Prahari vs. State of U.P.) decided on 21.11.2016, the Hon'ble Supreme Court adjudicated the challenge to the constitutional validity of the Vidhayak Nidhi Scheme in the State of Uttar Pradesh, which provided

(S.N. Shukla, Lok Prahari)

for annual budgetary grants to Members of the Legislative Assembly and Legislative Councils for development work in their constituencies. While considering the aforesaid Scheme, the Hon'ble Supreme Court directed that the guidelines be reframed and the directions set out in Bhim Singh's case be complied with. Such safeguards must include the following also:

(i) The role of the elected representatives would be to recommend the work of a developmental nature in their constituencies within the budget allotted under the Scheme;
(ii) The feasibility of the work, estimate of funds, selection of the implementing agency and supervision of work must be independently determined by a nominated authority or body of the State government;
(iii) Panchayati raj institutions in rural areas and municipal bodies in urban areas may be considered as preferred implementing agencies having regard to the entrustment of responsibilities under Parts IX and IXA of the Constitution;
(iv) The plans prepared by the District Planning Committees under Article 243ZD read with the U.P. District Planning Committee Act, 1999 may be made available by every district Collector to elected representatives to enable them to decide whether any developmental work which has already been identified in the above plan should be executed in pursuance of the funds made available under the Vidhayak Nidhi Scheme; and
(v) Sufficient safeguards should be provided to ensure against conflicts of interest such as the allocation of funds to institutions controlled by an elected representative or a member of his or her family; and
(vi) The Scheme must include sufficient safeguards to ensure financial transparency, such as proper supervision of work, monitoring quality and timely completion besides procedures to ensure proper audit and utilization of funds.

Such Schemes for annual grants to the Members of Legislative Assemblies are available in many States. However, the Hon'ble Courts, while considering Public Interest Litigations, have incorporated certain safeguards in regard to such schemes for providing discretionary grants to the MLAs for the purpose of development work in their constituencies.

CHAPTER - 23
INFORMATION COMMISSIONERS

The enactment of "The Right to Information Act, 2005", was a revolutionary step, which aimed at providing for a practical regime of Right to Information for Citizens to secure access to information under the control of Public Authorities, in order to promote transparency and accountability in the working of every Public Authority, and for the constitution of a Central Information Commission and State Information Commissions, and for matters connected therewith or incidental thereto. Section 12 and 15 of the Act envisage the constitution of Central Information Commission by the Central Government and the State Information Commissions in all the States, by the concerned State Government. However, a controversy arose in view of the provisions contained in Section 12 (6) and Section 15 (6) of the Act. Section 12 (6) envisages that the Chief Information Commissioner , or an Information Commissioner shall not be a Member of Parliament or Member of Legislature of any State or Union Territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession. Analogous provisions are made in Section 15 (6) of the Act, in relation to appointment of Information Commissioners in the State Information Commissions in various States. The Hon'ble Supreme Court of India adjudicated the aforesaid issue in its judgment rendered in Review Petition (C) No. 2309 of 2012 in Writ Petition (C) Number 210 of 2012 and another connected Review Petition captioned "Union of India Versus Namit Sharma". The Hon'ble Supreme Court of India declared that Section 12 (6) and Section 15 (6) of the Act are not ultravires the Constitution, and that these provisions do not debar a Member of Parliament or Member of Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession, from being considered for appointment as Chief Information Commissioner or Information Commissioner, but after such person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament or Member of Legislature of any State or Union Territory or discontinue to hold any office of profit or remain connected with any political party or carry on any business or pursue any profession during the function as Chief Information Commissioner or Information Commissioner.

CHAPTER - 24
ENEMIES OF DEMOCRACY

(H.C.Arora, Advocate)

Corrupt and convicted public servants are the enemies of Democracy. It is for this reason that in this chapter of the book, I am referring to them as "enemies", who have been hit by the bullets of PIL (Public Interest Litigation). It will not be an exaggeration if I may say that the 2nd pillar of Democracy (Executive) is patronizing corrupt people as well. Honest people are often harassed by the executive. The figure of convicted public servants in the States of Punjab & Haryana is astonishing. An affidavit dated 11.08.2008 was filed by the Additional Secretary, Vigilance Department, Government of Punjab, in CWP No. 18552 of 2007 (H.C Arora vs. State of Punjab and others) stating that as many as 150 officials convicted for various offences for which they were charged have been dismissed from service by the Government. Another affidavit filed by Additional Secretary, Vigilance Department, Government of Punjab, on 10.11.2008 gave certain further details and stated that 16 more employees had been similarly removed from service, the details thereof are set out in Annexure P-2 to the said affidavit. The aforesaid Civil Writ Petition No. 18552 of 2007 (H.C Arora vs. State of Punjab and others) was therefore disposed of by the Hon'ble High Court, by directing the Chief Secretary, Government of Punjab to periodically monitor the actions against the employees who are convicted for the offences alleged against them and ensure that those deserve to be weeded out on account of their conviction in accordance with rule on the subject are dealt with strictly in accordance with the said rules. The Chief Secretary was further directed to take similar action against 4 employees pointed out by the petitioner therein. On the same date, CWP No. 11537 of 2008 (H.C Arora vs. State of Haryana and others) was also disposed of by the Hon'ble High Court of Punjab and Haryana, wherein similar directions were issued to the State of Haryana. Still further, in a subsequent writ petition (PIL) namely, CWP No. 17753 of 2010 (H.C Arora vs. State of Punjab and others,) it was noticed that four police officials who were convicted for murder and sentenced to life imprisonment but were still continuing in service in the Department of Police, a Division Bench of the Hon'ble High Court of Punjab and Haryana directed their immediate removal from service. Their names are (i) Ravinder Kumar, DSP; (ii) Rajinder Pal Anand, DSP; (iii) Malwinder Singh, ASI; (iv) Manjit Singh, Constable; and (v) Gurcharan Singh,

Constable. In yet another proceedings namely COCP-631-2020 filed by this author, which was listed on 17.11.2011, with another writ petition, a Division Bench of the Hon'ble High Court of Punjab and Haryana had noticed that 43 Police Officials whose names were reproduced in the interim order dated 17.11.2011 itself, were removed from service by the State Government, during the pendency of the aforesaid Contempt Petition. This was all about fierce battles against the enemies of democracy. However, reference can be made to several small skirmishes, in which a handful enemies of democracy fell to the the bullets of PIL. An instance may be of one Pargat Singh, Deputy Superintendent of Police, who was removed by the Government from service in persuance to CWP No. 2596 of 2008 (H.C Arora vs. State of Punjab and others) filed by this author. Again, one Sh. S.K. Goel, Superintending Engineer in the Haryana State Agricultural Marketing Board had fallen to the bullets of PIL in pursuance to CWP No. 5814 of 2008 (H.C Arora vs. Haryana State Agricultural Marketing Board), which was disposed of as infructuous, on the removal of Sh. S.K. Goel from service. Still further, two Revenue Department Officials, namely Kulwant Singh Kanoongo and Smt. Prem Lata, Naib Tehsildar, who had been convicted on the charge of corruption, but were still contending in service, fell to the PIL bullets, in pursuance to the CWP No. 1396 of 2008 (H.C Arora vs. State of Punjab and others), which was disposed of accordingly vide order dated 28.03.2008. Still, another officer convicted on the charge of corruption, was ordered to be removed from service, in pursuance to the PIL bullet fired during pendency of CWP No. 5019 of 2008 (H.C Arora vs. State of Punjab and others). One Sh. Bhagwan Das Mittal, Senior Medical Officer (SMO) and one Sh. Ashok Bhandari, Superintendent, Health Department, Punjab Government, who were convicted on corruption charges, were removed from service as they fell the PIL bullet fired during pendency of CWP No. 2586 of 2008 (H.C Arora vs. State of Punjab and others). It may be worthwhile to mention that a Division Bench of the Hon'ble High Court in CWP No. 18552 of 2007 (H.C Arora vs. State of Punjab and others), vide interim order dated 14.12.2011 had also recorded that 48 police officials, who had been dismissed in service, on account of their conviction in criminal cases, had fallen to the PIL bullet fired during pendency of CWP No. 1957 of 2011 (H.C Arora vs. State of Punjab and others) heard along with COCP No. 631 of 2010 (H.C Arora vs. S.C. Aggarwal).

The aforesaid are only illustrative examples of the enemies of democracy falling to the PIL bullets, by virtue of some of my Public Interest Litigations filed in the Hon'ble High Court of Punjab and Haryana at Chandigarh. As a matter of fact, in Punjab, there were about 600 public servants, who were convicted under the charge of corruption, and whose list was obtained by the then Punjab Vigilance Commission, from State

Government, and I was able to lay my hand on the said list. Accordingly, I had pursued the matter with the concerned heads of the departments through RTI applications, and a substantial number of convicted police officials fell to the RTI bullets. The remaining fell to the subsequent PIL bullets fired on them. Notwithstanding the aforesaid efforts made by me, a large number of enemies of democracy are still at large. The million-dollar question that now arises for consideration by the readers is as to whether in such a situation, the pillars of democracy are required to be redefined, particularly for the reason that the Executive Pillar of Democracy is infected with deadly virus of corruption.