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CONSTITUTIONAL LAW –I

(FUNDAMENTAL RIGHTS)

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I INTRODUCTION

FUNDAMENTAL RIGHTS were incorporated in part III of the Constitution championing the liberty and freedom of the people of India, due to the ceaseless agitation from 1885 to the formation of the Constituent Assembly of India. This is of great significance as there was no fundamental rights in any of the Government of India Acts, which were naturally framed according to British ideas about individual rights.[1]

As far back as 1895, there were references to certain constitutionally guaranteed rights such as "freedom of expression", "inviolability of one's house" and "equality before law" which are found in the famous "Home Rule" Bill. In 1918, at a special sitting of the Indian National Congress at Bombay, under the presidentship of Syed Hasan Imam, a resolution had been passed demanding codification of fundamental rights of Indians, which was later adopted and confirmed in the general session, held at Delhi, under the presidentship of Pandit Madan Mohan Malviya.

Our Constitution makers were also influenced by the developments in the Irish Free State, at that time, as is apparent from the commonalities between the list of fundamental rights in the Constitution of the Irish Free State in 1921 and the statement of the rights in the Commonwealth of India Bill of 1925.

In 1928, the Nehru Committee, appointed by the All-Parties Conference, also incorporated a provision for the enumeration of such rights and recommended their adoption as a part of the future Constitution of India. What is important is that the committee, for the first time, demanded that "it is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances". A similar demand for fundamental rights was also made at

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1 Except for the rights provided under arts. 298 and 299, for the enforcement of which no constitutional remedy was provided.

the Karachi session of the All India Congress held in 1931 where it was declared that any Constitution which might be proposed would be acceptable only if it contained certain fundamental rights as formulated by it.

The apprehension that certain rights may be arbitrarily withdrawn by the British appears to be the reason behind their elevation to the status of "guaranteed" fundamental rights.

That is not to say that the demands of the Indian National Congress were readily accepted. There was strong opposition to this view by the Simon Commission as well as the Joint Select Committee of the British Parliament on the Government of India Bill, 1934. However, the committee ultimately conceded that some legal principles could appropriately be incorporated into the new Constitution as a result of which, in the Government of India Act, 1935 certain rights and forms of protection on British subjects in India were conferred, such as, the right against discrimination in respect of employment and the right to property, as also other rights protecting grants of land free of revenue or, subject to remissions of land revenue etc. However, these could not be termed as "Fundamental Rights" in the true sense as they had been framed according to British ideas of individual rights. There was also no machinery provided for their enforcement.

The Sapru Committee, however, demanded that in the "peculiar circumstances of India" fundamental rights were necessary not only as "assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, governments and the courts", however inconsistent with the British laws, it might be. Following this, in 1946, for the first time, the British Cabinet Mission recognised the need for a written guarantee of fundamental rights in the Constitution of India. They recommended the setting up of an advisory committee within which, a sub-committee on fundamental rights was formed. At this time, the Universal Declaration of Human Rights, which was promulgated by the United Nations (to which India was a party) on account of the global desire after the Nuremberg Trials, appears to have greatly influenced the framers of our Constitution as well.[2] Finally, the advisory committee did accept the recommendations of the sub-committee on fundamental rights contained in their draft report dated 03.04.1947. Although rights under the Constitution were segregated as "justiciable" and "non-justiciable" rights, certain rights were categorized under Part III as "Fundamental Rights", out of which some were guaranteed to all persons while others were only to citizens. All such rights were to be made uniformly applicable to the Union and the units.

Part III of the Indian Constitution relating to fundamental rights is more elaborate than the Bill of Rights contained in any other existing constitutions

2 As Seervai elucidates in his treatise on the Constitution of India, although the UDHR did not provide any machinery for enforcement, it for the first time proclaimed basic human rights. See Wade & Philips, *Constitutional and Administrative Law* 534-39, (9th ed. by A.W. Bradley) as cited in H.M. Seervai, I *Constitution of India* 43 (3rd edn., 1983).

of importance and covers a wide range of topics. The width of the subject had primarily been in keeping with the enormity of the subjects that had to be addressed by the Constituent Assembly like, economic and social conditions of such a huge population of heterogeneous elements.[3]

Part III of the Constitution protects substantive as well as procedural rights. The implications, which arise therefrom, must effectively be protected by the judiciary.

Many argue that it is a fallacy to regard fundamental rights as a gift from the state to its citizens, since individuals possess basic human rights independent of any Constitution by reason of the basic fact that they are members of the human race. Part III of the Constitution does not in the true sense confer fundamental rights. It only confirms their existence and guarantees their protection. Its purpose is to withdraw certain subjects from the area of political controversy and place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.[4] The object behind the inclusion of certain individual rights in a Bill of Rights is to establish a 'limited government' i.e. a government system in which absolute power is not vested in the hands of any of the organs of the state. Such a form of limited government is known as 'a government of laws and not of men'.

The fundamental rights have been and are considered to be the 'heart and soul' of the Constitution. However, the Constitution is a living document and its interpretation may have to change with the changing time and circumstances.

Unlike the United States' Constitution, the Indian Constitution expressly provides for judicial review in article 32. Article 13(1) declares that all laws that were in force in the territory of India immediately before the adoption of the Constitution, insofar as they are inconsistent with the fundamental rights, shall, to the extent of such inconsistency, be void. Clause (2) of that article further mandates that the state shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. Some members of the Constituent Assembly criticized these provisions in the Constitution as "potential lawyers' paradise". Others, like B R Ambedkar, defended the provisions of judicial review as being necessary.[5] According to Ambedkar, the provisions for judicial review, and, in particular, the writ jurisdiction that gave quick relief against the abridgment of fundamental rights, constituted the heart of the Constitution; the very soul of it.[6]

3 Durga Das Basu, *I Commentary on the Constitution of India*, Justice YV Chandrachud, *et al* (Eds.) (8th Edn., 2009).

4 *M. Nagraj* v. *Union of India*, (2006) 8 SCC 212.

5 VIII *Constitutional Assembly Debates*, 700.

6 See B. Shiva Rao, *The Framing of India's Constitution* 311 (1968) .

II RESERVATION IN HIGHER EDUCATION

The Constitution (Ninety-third Amendment) Act, 2005, had inserted clause (5) in article 15 enabling the state to make special provisions, by law, for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes or the scheduled tribes, insofar as such special provisions related to their admission in educational institutions, including private educational institutions, whether aided or unaided by the state. Minority educational institutions referred to in clause (1) of article 30 were, however, excluded from the purview of the newly inserted clause. The said amendment, which became effective from 30.1.2006, along with the newly enacted Central Educational Institutions (Reservation in Admission) Act, 2006[7] came to be challenged before the Supreme Court in *Ashoka Kumar Thakur* v. *Union of India*[8]. Section 3 of the Act provided for 15% reservations for scheduled castes, 7½% for scheduled tribes and 27% for Other Backward Classes in 'Central Educational Institutions'. Section 2 (d) of the Act defined 'Central Educational Institutions' to mean – (i) a university established or incorporated by or under a central Act; (ii) an institution of national importance set up by an Act of Parliament; (iii) an institution, declared as a deemed university under section 3 of the University Grants Commission Act, 1956 (3 of 1956), and maintained by or receiving aid from the central government; (iv) an institution maintained by or receiving aid from the central government, whether directly or indirectly, and affiliated to an institution referred to in clause (i) or clause (ii), or a constituent unit of an institution, referred to in clause (iii); (v) an educational institution set up by the central government under the Societies Registration Act, 1860 (21 of 1869). The Act, however, did not provide any reservation in any private unaided institution.

Challenge to the constitutional amendment

The validity of the 93rd constitutional amendment was challenged, *inter alia,* on the grounds that the amendment was destructive of the basic structure of the Constitution. The amendment, it was alleged, abridged the basic features of secularism as also the underlying principles of equality under articles 14 and 15 (1). It was also contended that article 15(5) introduced by the said amendment was in direct conflict with article 15(4) and hence article 15(5) should be declared *ultra vires*. It was further urged that the exclusion of minority educational institutions from article 15(5) was violative of article 14 of the Constitution and lastly, that the procedure prescribed for amendment of the Constitution under article 368 had not been followed.

7 'Hereinafter the Act'
8 (2008) 6 SCC 1.

Violation of basic feature

K G Balakrishnan, CJ, held that equality was a multicoloured concept incapable of a single definition as was also the fundamental right under article 19(1)(g). In his opinion "the larger principles of equality as stated in articles 14,15 and 16 may be understood as an element of the 'basic structure' of the Constitution and may not be subject to amendment, although, these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle." Observing that "if any constitutional amendment is made which moderately abridges or alters the equality principle or the principles under Article 19(1)(g), it cannot be said that it violates the constitutional amendment", he held that the Ninety-third Amendment to the Constitution did not violate the basic structure of the Constitution insofar as it related to aided educational institutions. The questions whether reservation could be made for SCs, STs or SEBCs in private unaided educational institutions on the basis of the Constitution (Ninety-third Amendment); or whether reservation could be given in such institutions; or whether any such legislation would be violative of article 19(1)(g) or article 14 of the Constitution; or whether the Constitution (Ninety-third Amendment) which enables the state legislatures or Parliament to make such legislation were, in his opinion, all questions to be decided in a properly constituted *lis* between the affected parties. In his opinion, in the absence of a challenge by private unaided institutions, it would not be proper for the court to decide the question as to whether the said constitutional amendment was violative of the basic structure of the Constitution insofar as it related to private unaided educational institutions.

Arijit Pasayat, J, speaking for himself as also for Thakkar, J, did not specifically rule on the question whether the constitutional amendment violated the basic structure of the Constitution but held that the challenge relating to private unaided educational institutions could not be examined because no such institution had laid any challenge.

However, Bhandari, J, in his dissent opined that "imposing reservation on unaided institutions violates the basic structure by obliterating citizen's right under Article 19(1)(g) to carry on an occupation. Unaided entities, whether they are educational institutions or private corporations, cannot be regulated out of existence when they are providing a public service like education. That is what reservation would do. That is an unreasonable restriction. When you do not take a single paisa of public money, you cannot be subjected to such restriction." Having so observed, Bhandari, J declared that the Ninety-third Amendment's reference to unaided institutions must be 'severed'. Although, no unaided institution had challenged the validity of the said constitutional amendment, the judge held that "the court [had] listened to the parties for months" and received voluminous written submissions from them, yet no objection was made with regard to the fact that no unaided institution had filed a writ petition". According to him, "the best lawyers in the country argued the case for both sides, and a brief from an unaided institution would not have added much if anything to the substance of the

arguments. The Government will likely target unaided institutions in the future. At that time, this Court will have to go through this entire exercise *de novo* to determine if unaided institutions should be subject to reservation. Such an exercise would unnecessarily cause further delay. The fate of lakhs of students and thousands of institutions would remain up in the air…", therefore, looking to the extraordinary facts, Bhandari, J pronounced on the validity of the amendment "in the larger public interest".

R V Raveendran, J, agreeing with the CJ and Pasayat, J, held that "Clause (5) of Article 15 is valid with reference to State-maintained educational institutions and aided educational institutions; and that the question whether Article 15(5) would be unconstitutional on the ground that it violates the basic structure of the Constitution imposing reservation in respect of private unaided institutions is left open".

Inter-relationship between article 15(4) and 15(5)

The petitioners had contended that there existed a dichotomy between clause (4) and the newly inserted clause (5) of article 15. Article 15(4), it was urged, was applicable to minority institutions, however, clause (5) in article 15 exempted the minority institutions from the purview of reservation contemplated therein. It was, therefore, contended that there was a conflict between article 15(4) and 15(5) and that since article 15(5) sought to undo the equal treatment contemplated under article 15(4), article 15(5) would have to be declared invalid as offending the equality clause.

Though, the court held that there was no conflict between the said two provisions as they operated in different fields, the judges differed in their opinion on the interpretation of article 15 and more particularly as regards the scope of the expression "nothing in this article" which appears in clauses (3), (4) and (5) of article 15. While Balakrishnan, CJ, held, rejecting the said plea of conflict, as "not tenable because the minority institutions have been given a separate treatment in view of article 30 of the Constitution… the exemption of minority educational institutions has been allowed to conform article 15(5) with the mandate of article 30 of the Constitution.[9] He opined that the phrase "nothing in this Article" appearing in article 15(5), "would only mean that nothing in this Article which prohibits the States on grounds which are mentioned in article 15(1) alone be given importance. Article 15(5) does not exclude article 15(4) of the Constitution." Pasayat, J held that the said provisions operated in different fields. Bhandari, J opined that "Article 15(5) is specific in that it refers to special provisions that relate to admission in educational institutions, whereas article 15(4) makes no such reference to the type of entity at which special provisions are to be enjoyed."[10] He observed that "because article 15(5) is later in time and specific to the question presented, it must neutralize article 15(4) *in regard*

9 *Id.* at 486 para 127.
10 *Id.* at 700 para 608.

to reservation in education… Our interpretation is harmonious because article 15(4) still applies to other areas in which reservation may be passed."[11] However, Raveendran, J was of the view that the words "Nothing in this Article" occurring in clauses (3), (4) and (5) of article 15 refer to clauses (1) and (2) of article 15. In his view "When Clause (4) starts with those words, it does not obviously refer to clause (3). Similarly when Clause (5) starts with those words, it does not refer to Clauses (3) and (4). Clauses (3), (4) and (5) of Article 15 are not to be read as being in conflict with each other, or prevailing over each other. Nor does an exception made under Clauses (4) and (5) operate independently; they have to be read harmoniously."[12]

Private unaided educational institutions

The eleven-judge bench decision in *TMA Pai Foundation*[13] by a majority held that "private unaided educational institutions have a fundamental right to establish and administer educational institutions guaranteed under Article 19(1)(g) of the Constitution." A subsequent five-judge bench in *Islamic Academy of Education*[14] clarified the scope of the decision in the *TMA Pai Foundation*. Subsequently, a seven-judge bench was constituted in *P A Inamdar*[15] to consider the correctness of the clarification given in *Islamic Academy of Education* as regards the ratio in *Pai Foundation.* The seven-judge bench in *P A Inamdar* held that the law laid down in *Pai Foundation* was that "neither can the policy of reservation be enforced by the State nor can any quota or percentage of admissions be carved out to be appropriated by the state in a minority or non-minority unaided educational institution."

The majority of judges, however, declined to pronounce on the validity of article 15(5), though article 15(5) enabled the state to regulate the admissions in private unaided educational institutions, which the state could not in view of the decision in *Pai Foundation* and as clarified by subsequent decisions. Bhandari, J alone declared article 15(5) in its application to the private unaided institutions as violative of the basic structure of the Constitution as it obliterated citizens' right to carry on an occupation guaranteed under article (19)(1)(g). The judge, however, did not specifically hold that the guarantee under article (19)(1)(g) formed part of the basic structure of the Constitution. It appears to have been assumed that article 19 (1) (g) itself was part of the basic structure of the Constitution.

The Central Educational Institutions (Reservation in Admission) Act, 2006

The Act impugned did not provide for any reservation in unaided institutions. It provided for reservation only in central educational

11 *Ibid.,* para 609.
12 *Id.* at 715 para 655.
13 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481.
14 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697.
15 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537.

institutions. The challenge to the validity of the Act primarily was with respect to the 27% reservation for Other Backward Classes (OBCs). The challenge was two fold, firstly, that the Act did not identify the backward classes of citizens in whose favour the reservation was sought to be made and to that extent, it was left to the central government to identify the socially and educationally backward classes of citizens without the law laying down any guidelines for such identification and as such the Act conferred arbitrary powers and hence was illegal. Secondly, even for classifying socially and educationally backward classes of citizens, the sole basis was "caste" and hence the Act was unconstitutional being violative of articles 14 and 15.

Referring to the nine-judge bench decision in *Indra Sawhney*[16] the court reiterated that although 'caste' could not be the sole basis for recognizing backwardness, it could be the starting point and a determinative factor in identifying the socially and educationally backward classes of citizens. The court observed that the object of article 340 of the Constitution was to empower the President to appoint a commission to ascertain the difficulties and problems of socially and educationally backward classes of citizens and that the majority in *Indra Sawhney* had held that "the ideal and wise method would be to mark out various occupations which on the lower level in many cases amongst Hindus would be their caste itself and find out their social acceptability and educational standard, weigh them in the balance of economic conditions and, the result would be backward class of citizens needing a genuine protective umbrella. And after having adopted occupation as the starting point, the next point should be to ascertain their social acceptability." The court cautioned that the backwardness should be "traditional" and not mere educational and social. It took notice of the fact that for the purposes of reservation under article 16(4) of the Constitution, a central list had been in operation for the past 14 years and not a single person had challenged any inclusion in it as void or illegal. The court also noticed that the National Commission for the Backward Classes and the State Commission for Backward Classes had prepared a list based on elaborate guidelines and these had been framed after studying the criteria/indicators framed by the Mandal Commission and the commissions set up in the past by different state governments.

Balakrishnan, CJ, was of the view that "the lists of socially and educationally backward classes of citizens are being prepared not solely on the basis of the caste and if caste and other considerations were taken into account for determining backwardness, it could not be said that it would be violative of article 15(1) of the Constitution." The court held that the determination of SEBCs was done not solely based on caste and hence, the identification of SEBCs was not violative of article 15(1) of the Constitution.

16 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217.

Exclusion of creamy layer from SEBCs

The exclusion of the creamy layer among those identified as OBC has been an important issue in Indian reservation policy since *Indra Sawhney*. As to such exclusion, the court relied on the following observations of PB Sawant, J in *Indra Sawhney*:[16a]

> [S]ome individuals and families in the backward classes, gaining sufficient means to develop their capacities to compete with others in every field.... are not entitled to be … backward classes whatever their original birth mark. To continue to confer upon such advanced sections from the backward classes, the special benefits, would amount to treating equals unequally violating the equality provisions of the Constitution. Secondly, to rank them with the rest of the backward classes would equally violate the right to equality of the rest in those classes, since it would amount to treating the unequals equally.... It will lead to perverting the objectives of the special constitutional provisions since the forwards among the backward classes will thereby be enabled to tap up all the special benefits to the exclusion and to the cost of the rest in those classes, thus keeping the rest in perpetual backwardness.

This reasoning was held to be equally applicable to the reservation or any special action contemplated under article 15(5). If the creamy layer was not excluded, the identification of SEBC would not be complete and any SEBC without the exclusion of 'creamy layer' may not be in accordance with article 15(1) of the Constitution.

Determination of the 'creamy layer'

As regards the determination of the creamy layer for providing 27% reservation for backward classes, the court was of the view that the principles which had been applied for the determination of the creamy layer under article 16(4) need not be strictly followed in case of reservation envisaged under article 15(5) of the Constitution. If a strict income restriction was made for identifying the creamy layer, the court opined, those left in the particular caste may not be able to have a sufficient number of candidates for getting admission in the central institutions. The government could relax the norm so as to ensure that sufficient number of candidates would be available for the purpose of filling up the 27% reservation. While the Chief Justice and Raveendran, J appeared to be satisfied with the criteria which results in a thin creamy layer, Bhandari J clearly favoured a set of criteria which resulted in a much thicker creamy layer. Regardless of the views expressed in the separate opinions about how the creamy layer should be identified, all the four judges thought it best to refer the matter to the government but provided no strict guidelines.

16*a* *Id.* at 553.

Since the expression "other backward classes" defined in section 2(g) did not exclude the creamy layer, the court made it clear that the backward class, in the definition, be deemed to be such backward class by applying the principle of exclusion of 'creamy layer'.

Application of 'creamy layer' to scheduled tribes and scheduled castes

As regards the application of the creamy layer criteria to the scheduled tribes and scheduled castes is concerned the court laid special emphasis on the fact that so far 'creamy layer' had been applied only to identify the backward class of citizens. Balakrishnan, CJ, was of the view that creamy layer principle was one of the parameters to identify backward classes and hence principally, the creamy layer principle could not be applied to STs and SCs, as they were separate classes by themselves.[17] SC and ST are not a caste within the ordinary meaning of the term 'caste'. They, the CJ held, are so identified by virtue of the notification issued by the President of India under articles 341 and 342 of the Constitution. While Bhandari, J expressly refused to enter into the question, Pasayat and Raveendran, JJ were both silent on this point.

Extent of reservation

The extent of reservation provided under the Act 5 of 2007 was stated to be based on the facts available with Parliament. Various commissions have been in operation determining as to who shall form the SEBCs. Though a caste-wise census was not available, several other data and statistics were available. In *Indra Sawhney*, the Mandal Commission was accepted in principle though the details and findings of the commission were not fully accepted by the court, 27% of reservation in the matter of employment was accepted. The court laid special emphasis on the fact that the petitioners had not produced any documents to show that the backward class citizens were less than 27% of the population or that there was no requirement of 27% reservation for them. It noted that 'Parliament was vested with the power of legislation and must be deemed to have taken into consideration all relevant circumstances when passing a legislation' of such a nature. The court observed that it was futile to contend that Parliament was not aware of the statistical details of the population. The court accordingly concluded that 27% reservation provided under the Act was legal and valid.

Periodical review under the Act

On the challenge to the Act that it did not incorporate a periodical review, the court observed that 'it may not be possible to fix a time limit for a periodical review' in a legislation. Depending upon the result of the measures and improvements that have taken place in the status and educational advancement of SEBCs, the matter could be examined by

17 *Supra* note 8 at 512 para 186.

Parliament at a future time but that cannot be a ground for striking down a legislation. After some period, if it so happens that any section of the community gets an undue advantage of the affirmative action, the court opined, then such community can very well be excluded from such affirmative action programme. Parliament can certainly review the situation and even though a specific class of citizens is in the legislation, the court observed, that it was the constitutional duty of Parliament to review such affirmative action as and when the social conditions required. The court went on to hold that Parliament could, after a period of 10 years, examine whether the reservation has worked for the good of the country. The court concluded in its common order that though a legislation could not be held to be invalid on that ground but a review could be made after a period of five years.[18]

III RIGHT TO EQUALITY — ARTICLE 14

In *State of Maharashtra* v. *Bharat Shanti Lal Shah and Others*,[19] the validity of various provisions of the Maharashtra Control of Organised Crimes Act, 1999 (MCOCA) were challenged initially before the Bombay High Court, which upheld the validity of some of the provisions of the Act, but held sections 13 to 16 as unconstitutional being beyond the competence of the state legislature and also struck down section 21(5) of the Act as being violative of article 14 of the Constitution. In an appeal by the state government, the Supreme Court applying the doctrine of pith and substance, upheld the legislative competence of the state legislature to enact sections 13 to 16 of the Act keeping in view that the object of the Act was to prevent organized crime.[20] The court also upheld the validity of the provisions of the Act which authorized the interception of wire, electronic or oral communication with a view to prevent the commission of an organized crime or to collect the evidence to the commission of such an organized crime and declared that the said provision did not violate an individual's right to privacy under article 21 of the Constitution.

The validity of section 21(5) of the Act, which provided that an accused shall not be granted bail if it is noticed by the court that he was on bail in an offence under this Act, or "under any other Act", on the date of the offence in question, was challenged on the ground of being violative of articles 14 and 21 of the Constitution. Having regard to the object of the Act, the court was of the view that there could be good reasons to deny grant of bail to an accused if he had committed a similar offence after being released on bail. But there could be no justification to extend the said logic to deny grant of bail to a person who is alleged to have committed an offence under some other law unconnected with any organized crime, prevention of which was the

18 *Id.* at 718 para 671.
19 (2008) 13 SCC 5.
20 *Id*. at 22 paras 45-47 for the definition of the concept of 'pith and substance'.

object of MCOCA. The court upheld the decision of the high court declaring section 21(5) of the Act as unconstitutional being arbitrary and discriminatory and struck down the words "or under any other Act" in sub-section (5) of section 21. MK Sharma, J, speaking for the court held:[21]

> We consider that a person who is on bail after being arrested for violation of law unconnected with MCOCA, should not be denied his right to seek bail if he is arrested under the MCOCA, for it cannot be said that he is a habitual offender. The provision of denying his right to seek bail, if he was arrested earlier and was on bail for commission of an offence under any other Act, suffers from the vice of unreasonable classification by placing in the same class, offences which may have nothing in common with those under MCOCA, for the purpose of denying consideration of bail. The aforesaid expression and restriction on the right of seeking bail is not even in consonance with the object sought to be achieved by the Act and, therefore, on the face of the provisions this is an excessive restriction.

In *State of Bihar and Others* v. *Bihar State 'Plus-2' Lecturers Associations and Others*,[22] the court was called upon to consider whether different pay scales prescribed by the state for trained and untrained lecturers was valid and permissible under article 14 of the Constitution. The members of the respondent association had challenged a notification dated 10.6.99 issued by the state government fixing different pay scales for trained and untrained lecturers in the secondary government schools and nationalised schools. The challenge was based on the fact that in the advertisement issued by the state for appointment of plus two lecturers, there was no requirement of the candidates having training for appointment to the post and that the only qualification prescribed for such appointment was possession of a post graduate degree in second class, which condition was duly fulfilled by the members of the association. There were some earlier proceedings before the high court consequent upon which the state government had appointed a fitment committee to consider the pay scales of the trained and untrained lecturers. The fitment committee, prescribed different pay scales for the trained and untrained lecturers, which was accepted by the state government and notified. Since there was some resentment amongst the lecturers with regard to fixation of two different pay scales, the state government constituted a fitment appellate committee, presided by a sitting judge of the high court to go into the anomalies of trained and untrained lecturers. The fitment appellate committee recommended payment of uniform pay scales to the trained as well as untrained lecturers as according to it prescribing

21 *Id*. at 29 para 64.
22 (2008) 7 SCC 231.

different pay scales to trained and untrained lecturers would be arbitrary and unreasonable. The state government did not, however, accept this recommendation and maintained that there was a difference between trained and untrained lecturers and the difference in pay scales prescribed for each was not violative of article 14 of the Constitution. This decision of the state government was challenged in the high court and a single judge of the court upheld the same and dismissed the petition. On appeal by the respondent, the division bench of the high court set aside the order passed by the single judge and directed the state authorities to grant uniform pay scales to trained and untrained lecturers. In the appeal by the state government, the Supreme Court referring to a large number of previous decisions of the court[23] held that the distinction between trained and untrained lecturers was valid. It endorsed the view expressed in *Ram Sukh* v. *State of Rajasthan,*[24] wherein the court had observed that "the untrained teachers can never be a proper substitute to trained teachers". Thakkar, J, speaking for the court held:[25]

> There is a clear distinction between a trained teacher (lecturer) and an untrained teacher (lecturer). Such a distinction is legal, valid, rational and reasonable. Trained lecturers and untrained lecturers, therefore, can neither be said to be similarly circumstanced nor they form one and the same class. The classification is reasonable and is based on intelligible differentia which distinguishes one class (trained) included therein from the other class (untrained) which is left out. Such classification or differentia has a rational nexus or reasonable relation to the object intended to be achieved, *viz.*, imparting education to students. It, therefore, cannot be successfully contended that different pay scales cannot be fixed for trained lecturers on one hand and untrained lecturers on the other hand. Prescribing different pay scales, under the circumstances, cannot be held illegal, improper or unreasonable infringing Article 14 of the Constitution.

The court, however, declined to set aside the directions given by the division bench of the high court by invoking its powers under article 136 read with article 142 of the Constitution in view of the fact that the state government, while recording the anomaly in the pay scales to trained and untrained lecturers as viewed by the appellate fitment committee, had expressly mentioned that it would accept the recommendation of the committee. Secondly, the state government had also withdrawn its earlier

23 *State of Mysore* v. *P. Narasinga Rao*, AIR 1968 SC 349; *Confederation of Ex-Servicemen and Ors*. v. *Union of India and Ors*., (2006) 8 SCC 399; *U.P. State Sugar Corpn. Ltd. and Anr*. v. *Sant Raj Singh and Ors*., (2006) 9 SCC 82; *Arun Kumar and Ors*. v. *Union of India and Ors*., (2007) 1 SCC 732.

24 1989 Supp (2) SCC 189 at 192.

25 2008 (7) SCC 231 at 242 para 32.

order dated 19.10.2000 for sending untrained lecturers (in-service candidates) for taking training on the ground that no such training was mandatory in view of report of the committee, which had prescribed uniform pay scales for trained as well as untrained lecturers. The fact that the court invoked its powers under article 142 after having held that the classification of trained and untrained lecturers was intended to achieve a larger public interest, i.e., "imparting education to students", is not paradoxical. The humane face before the court — the lecturers — did influence the thinking of the judges. Whether a sitting judge of the high court should have presided our the fitment appellate committee was, however, not considered by the court.[25a]

In *P. Venugopal* v. *Union of India*,[26] the validity of a law, which may well be characterized as a one-man legislation, came up for consideration before the Supreme Court. The petitioner was appointed as the Director of the All India Institute of Medical Sciences (AIIMS) on 3.7.2003 (at the age of 61 years) for a term of five years, expiring on 2.7.2008 i.e., on attainment of 66 years. The tenure of the petitioner was sought to be curtailed pre-maturely, which was challenged by the petitioner in a separate proceedings before the High Court of Delhi. A single judge of the high court on 7.7.2006, set aside the pre-mature termination of the petitioner and observed that the petitioner had not been given any notice and as such his tenure of five years could not be curtailed on the grounds which were not justifiable. It, accordingly injuncted the respondent against premature termination of the petitioner. On an appeal, a division bench of the high court reiterated that the petitioner had the right to continue as director of the institute for a term of five years upto 2.7.2008. In purported implementation of the said directions of the High Court of Delhi, Parliament enacted the All India Institute of Medical Sciences and the Post-Graduate Institute of Medical Education and Research (Amendment) Act, 2007 amending section 11(1)(A) of the Act, which reads as under:-

> (1A) -The Director shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier.
> Provided that any person holding office as a Director immediately before the commencement of the All-India Institute of Medical Sciences and the Post-Graduate Institute of Medical Education and Research (Amendment) Act, 2007, shall insofar as his appointment is inconsistent with the provisions of this sub- section, cease to hold office on such commencement as such Director and shall be entitled to claim compensation not exceeding three months' pay and

25*a* In *T. Fenn Walter* v. *Union of India,* (2002) 6 SCC 184 para 16 the Supreme Court has laid down the norms that should guide the sitting judges while accepting appointments to tribunals which are subject to the supervisory jurisdiction of high courts under article 226 and 227 of the Constitution.

26 2008 (5) SCC 1.

> allowances for the premature termination of his office or of any contract of service…

It was this amendment, particularly, the proviso thereof that was challenged by the petitioner before the Supreme Court, *inter alia*, on the ground that it was incidentally a single-man legislation and was intended to affect the petitioner only and none else and thus introduced a "naked discrimination" to deprive him of his fundamental right under article 14 of the Constitution.[27] The petitioner was singled out depriving two protective conditions in respect of curtailment of his tenure i.e., the benefit of notice and justifiable reasons thereof. While these two conditions would continue to be available to all future directors, the proviso made them non-available to the writ petitioner being the director then in office and required him to move out of the office under the legislative command in view of the orders passed between different court proceedings. It was evident that such calculated steps were intended to force the writ petitioner out of his office which offend the constitutional scheme envisaging fair, reasonable and equal treatment to the petitioner. Moreover, because of his status as a person in public employment, he acquired additional constitutionally protected rights. The state or other public authorities are not, therefore, entitled to make and impose laws governing the service conditions of an employee which manifestly deprived him of the privileges of that status. A person in public employment is endowed with a status not merely subjecting him to liabilities and obligations but also protecting him against any arbitrary, unreasonable and unequal treatment. Referring to the other binding precedents, the court speaking through Chatterjee, J held:[28]

> From the aforesaid discussion, the principle of law stipulated by this Court is that curtailment of the term of five years can only be made for justifiable reasons and compliance with principles of natural justice for premature termination of the term of a Director of AIIMS squarely applied also to the case of the writ petitioner as well and will also apply to any future Director of AIIMS. Thus there was never any permissibility for any artificial and impermissible classification between the writ petitioner on the one hand and any future Director of AIIMS on the other when it relates to the premature termination of the term of office of the Director. Such an impermissible over classification through a one-man legislation clearly falls foul of Article 14 of the Constitution being an apparent case of "naked discrimination" in our democratic civilized society governed by Rule of Law and renders the impugned proviso as void, ab initio and unconstitutional.

27 *Id*. at 8 para 8.
28 *Id.* at 23 para 36.

Allowing the writ petition, the court directed that "the writ petitioner shall serve the nation for some more period, i.e., upto 2.7.2008". The authorities were directed to restore the writ petitioner in his office as Director of AIIMS till his tenure came to an end.

Temporal reasonableness

It is now a well settled law[29] that a legislation, which is reasonable and rational at the time of its enactment may, with the lapse of time or under changed circumstances, become arbitrary, unreasonable and violative of the constitutional guarantee of equality under article 14. It is also now well settled law[30] that even if the validity of such a legislation is upheld on an earlier occasion, the court may, in subsequent proceedings strike down such legislation if it finds that the rationale of the classification which the legislation contemplated had become non-existant.

In *Satyawati Sharma* v. *Union of India,*[31] the court was called upon to consider the question whether section 14(1)(e) of the Delhi Rent Control Act, 1958 violated the mandate of article 14 of the Constitution insofar as it differentiated between the premises let out for residential and non-residential purposes and in the matter of eviction on the ground of *bona fide* requirement of landlord and restricted the landlord's right only to the residential premises. Section 14(1)(e) of the Act read as under:

> *14. Protection of tenant against eviction.* - (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any court or Controller in favour of the landlord against a tenant:
>
> Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely:
>
> (a) to (d) ...
>
> (e) that the premises let for residential purposes are required bona fide by the landlord for occupation as a residence for himself or for any member of his family dependent on him, if he is the owner thereof, or for any person for whose benefit the premises are held and that the landlord or such person has no other reasonably suitable residential accommodation.

29 *State of Madhya Pradesh* v *Bhopal Sugar Industries* , AIR 1964 SC 1179; *Narottam Kishore Deb Verman* v. *Union of India*, AIR 1964 SC 1590; *H H Shri Swamiji of Shri Amar Mutt* v. *Commr., Hindu Religious & Charitable Endowments Deptt*., (1979) 4 SCC 642.

30 *Motor General Traders* v. *State of A.P.*, (1984) 1 SCC 222; *Rattan Arya* v. *State of T.N*., (1986) 3 SCC 385.

31 (2008) 5 SCC 287.

> **Explanation**. - For the purposes of this clause, "premises let for residential purposes" include any premises which having been let for use as a residence are, without the consent of the landlord, used incidentally for commercial or other purposes.

A division bench of the Delhi High Court in *H C Sharma*[32] upheld the validity of section 14(1)(e) taking cognizance of the acute housing problem in Delhi created due to the partition of the country and upheld the classification restricting the right of the landlord to recover the possession of only those premises which were let for residential purposes. In 1999, Satyawati Sharma, the appellant before the Supreme Court filed a writ petition in the High Court of Delhi, seeking a declaration that section 14(1)(e) of the Act was *ultra vires* article 14 of the Constitution as it did not provide for eviction of the tenant from the premises let for non-residential purposes. The writ petition alongwith a batch of other petitions stood referred to a full bench of the high court which upheld the validity of section 14(1)(e) relying on its earlier judgment in *H.C. Sharma* and also a subsequent judgment of the Supreme Court in *Amarjit Singh*[33] holding, *inter alia,* that the legislature had the right to classify persons, things and goods into different groups and that the court cannot sit over such judgment of the legislature. The full bench, however, did not advert to the question whether the reason which supplied rationale to the classification continue to subsist even after a lapse of 44 years and whether the tenants of premises let for non-residential purposes should continue to avail the benefit of implicit exemption from eviction in the case of *bona fide* requirement despite the "see-saw change in the housing scenario in Delhi and substantial increase in the availability of buildings and premises which could be let for non-residential or commercial purposes" [34].

On appeal to the Supreme Court, a two judge bench quoted with approval the following principles enunciated by S.R.Das, CJ, in *Ram Krishna Dalmia*,[35] as regards constitutional validity of law:[35a]

> 11. ….(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
> (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;

32 *H.C. Sharma* v. *LIC of India*, ILR(1973) 1 Del 90.
33 *Amarjit Singh* v. *Khatoon Quamarain*, (1986) 4 SCC 736.
34 (2008) 8 SCC 287 at 318 para 29.
35 *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*, AIR 1958 SC 538.

> (c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
> (d) that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
> (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of times and may assume every state of facts which can be conceived existing at the time of legislation; and
> (f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be resumed (*sic* presumed), if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

Referring to the earlier division bench judgment of the Delhi High Court, which had upheld the validity of section 14(1)(e), the court held that the reasons which prompted high court to sustain the differentiation in classification of the premises with reference to the purposes of their user was no longer available and hence it could not have upheld the arbitrary classification of residential and non-residential premises, particularly, in view of the subsequent pronouncement of the Supreme Court in *Harbilas Rai Bansal*[36] reiterated in *Joginder Pal* v. *Naval Kishore Behal*[37] and approved by a three judge bench in *Rakesh Vij* v. *Dr. Raminder Pal Singh Sethi*.[38] The court held that the discrimination which was "latent"[39] in section 14(1)(e) at the time of the enactment of the 1958 Act has, with the passage of time (almost 50 years), become so pronounced that the said provision could not be treated as *intra vires* article 14 of the Constitution. Singhvi, J, speaking for the court held:[39*a*]

> The reasons which weighed with the High Court in *H.C. Sharma* vs. *Life Insurance Corporation of India & Anr*. and the impugned judgment cannot in the changed scenario and in the light of the ratio

35*a* Quoted in *supra* note 31 at 307-08.
36 *Harbilas Rai Bansal* v. *State of Punjab*, (1996) 1 SCC 1.
37 (2002) 5 SCC 397.
38 (2005) 8 SCC 504.
39 (2008)5 SCC 285 at 319 para 31.
39*a* *Supra* note 31 at 318-19.

> of *Harbilas Rai Bansal* vs. *State of Punjab*, which was approved by three-Judge Bench in *Rakesh Vij* vs. *Dr. Raminder Pal Singh Sethi* and of *Rattan Arya* vs. *State of Tamil Nadu,* as also the observations contained in the concluding portion of the judgment in *Gian Devi Anand* vs. *Jeevan Kumar & Ors*. now be made the basis for justifying the classification of premises into residential and non-residential in the context of the landlord's right to recover possession thereof for his bona fide requirement. At the cost of repetition, we deem it proper to mention that in the rent control legislations made applicable to Delhi from time to time residential and non-residential premises were treated on a par for all purposes. The scheme of the 1958 Act also does not make any substantial distinction between residential and non-residential premises. Even in the grounds of eviction set out in proviso to Section 14(1), no such distinction has been made except in Clauses (d) and (e).

Finally, the court declared only a part of section 14(1)(e) as unconstitutional and ruled that after striking down the discriminatory portion, the remaining part of the provision would read as under:[39*b*]

> That the premises are required bona fide by the landlord for himself or for any member of his family dependent on him, if he is the owner thereof, or for any person for whose benefit the premises are held and that the landlord or such person has no other reasonably suitable accommodation.

The court further declared, as a sequel, that the explanation to the section "will have to be treated as redundant". This decision is significant insofar as the court struck down a portion of a legislation taking judicial notice of the prevailing state of availability of non-residential premises in Delhi and consequent impact of the legislation on a section of the landlords, who had let out their premises for non-residential purposes. The decision also makes a departure from its self-imposed restrictions, which the court had enunciated in earlier pronouncements restricting its jurisdiction to only ironing out the creases while construing a piece of legislation and not enacting a law by itself.[40]

39*b* *Id*. at 324.

40 See, *High Court of Gujarat* v. *Gujarat Kisan Mazdoor Panchayat,* (2003) 4 SCC 712 para 35. Subsequent judicial pronouncements, however, appear to take the view that the courts could "mould or creatively interpret legislation" and they are thus "finishers, refiners and polishers of legislation, which comes to them in a state requiring varying degrees of further processing" [*Corocraft Ltd.* v. *Pan American Airways Inc*., 1968 3 WLR 714 at 732]; In *Bhatia International* v. *Bulk Trading S.A*. [(2002) 4 SCC 105], it was held that "since interpretation always implies a degree of discrimination and choice, hence the creativity, a degree which is especially high in certain areas such as constitutional adjudication dealing with social and diffuse rights".

In *M/s Seema Silk & Sarees & Anr.* v. *Directorate of Enforcement & Ors*[41], the validity of section 18(2) and (3) of the Foreign Exchange Regulation Act, 1973 as well as the constitutional validity of the Constitution (39th Amendment) Act, 1975 were the subject matters of decision before a two-judge bench.

The appellants used to export garments and textiles to various countries. They could not repatriate the value of goods from the export proceeds and their business came to a standstill because of their inability to repatriate exports proceeds to the tune of 16.5 crores from a few overseas buyers. A notice was issued by the Enforcement Directorate under section 18(2) and 18(3) of the Act alleging that in view of their failure to repatriate the entire sale proceeds of the exports which the appellants had made during 1997-98, the said provisions were attracted. A criminal case was also initiated in pursuance thereof.

The appellants preferred a writ petition questioning the constitutionality of section 18(2) and 18(3) of the Act as also the constitutional validity of the Constitution 39th Amendment Act through which the impugned Act had been inserted in the Ninth Schedule of the Constitution. The high court dismissed the challenge and upheld the provisions.

Before the Supreme Court, the appellant submitted that section 18(2) and 18(3) of the Act, which places the burden of proof upon the accused, must be held to be a law having draconian character and, thus, unconstitutional. It was submitted that by reason of the said provision, discrimination has been made between a domestic trader and an exporter and, thus, the same were violative of article 14 of the Constitution. It was further urged by the appellants that all traders in terms of the provisions of the Income Tax Act, 1961 made provisions for bad debt. When a trader suffers loss, it is permissible to make a provision for writing off such bad debts. In terms of the provisions of the Income Tax Act, the accounts were required to be audited by a chartered accountant.

It was urged that the validity of the said provision must be judged on the touchstone of commercial considerations inasmuch as an exporter may not be able to repatriate the export proceeds particularly when such exports are made to the developing countries. Such repatriation of export proceeds, thus, being uncertain, it was urged, the impugned provisions as also the Constitution 39th Amendment Act cannot be sustained. Sinha, J, speaking for the court held that:[42]

> Apart from the fact that the Act is protected under Article 31B of the Constitution of India having been placed in the Ninth Schedule thereof, even otherwise, we do not find any reason to arrive at a conclusion that the Act is ultra vires Article 14 of the Constitution

41 (2008) 5 SCC 580.

42 *Id.* at 585 paras 14 and 15.

> of India. A discrimination on the ground of valid classification which answers the test of intelligible differentia does not attract the wrath of Article 14 of the Constitution of India. Hardship, by itself, may not be a ground for holding the said provision to be unconstitutional. …. No case has been made out that the Act is confiscatory in nature. No foundational fact has also been brought on record. Appellants have not annexed even a copy of the writ petition. The learned counsel has not been able to satisfy us that there existed any factual foundation in support of his argument.

The charge of discrimination was also rejected on the ground that a domestic trader and an exporter stood on different footings and that when the provisions, under challenge, were enacted, the country was undergoing severe 'foreign exchange crunch'. Parliament in its wisdom has inserted the said provisions so as to prevent fraud. Moreover, sub-section (1) of section 18 of the Act provided that filing of an application for grant of exemption by the Reserve Bank of India and refusal to give such an exemption is required to be preceded by reasonable opportunity of making a representation. The rights of exporters were, therefore, fully protected. It was further held that "A legal provision does not become unconstitutional only because it provides for a reverse burden". The presumption raised against the trader was a rebuttable one. Reverse burden as also statutory presumptions can be raised in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act, TADA, etc. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. Rejecting the challenge to the initiation of the criminal proceedings, Sinha, J further held: "Commercial expediency or auditing of books of accounts cannot be a ground for questioning the constitutional validity of a Parliamentary Act. If the Parliamentary Act is valid and constitutional, the same cannot be declared ultra vires only because the appellant faces some difficulty in writing off the bad debts in his books of accounts. He may do so. But that does not mean the statute is unconstitutional or the criminal prosecution becomes vitiated in law."[43]

In *Anuj Garg & Ors.* v. *Hotel Association of India & Ors.,*[44] the constitutional validity of section 30 the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drugs were consumed by the public", was the question to be decided by the court. The challenge to the said provision was sustained by the Delhi High Court declaring section 30 of the Act to be *ultra vires* articles 14, 15 and 19(1)(g) of the

43 *Id.* at 587 para 21.
44 (2008) 3 SCC 1.

Constitution to the extent it prohibits employment of any woman in any part of such premises, in which liquor or intoxicating drugs were consumed by the public.

A few residents of Delhi, preferred an appeal before the Supreme Court. National Capital Territory of Delhi appears to have accepted the said judgment of the high court. During the hearing, the NCT, as the respondents had sought to support the statutory provision without however filing any SLP from the judgment of the high court. The court noted that though the Act was a pre-constitutional legislation, it was saved in terms of article 372 of the Constitution. However, the said provisions were amenable to a challenge on the touchstone of articles 14,15 and 19(1)(g) of the Constitution. Before considering the question on merits, the court outlined the settled principles of law that a statute although could have been held to be a valid piece of legislation keeping in view "the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid".[45] While setting the debate, the court observed that "the important jurisprudential tenet involved in the matter is not the prioritization of rights *inter se* but *practical implementation issues* competing with a right. It is one thing when two norms falling in the same category (for instance individual rights versus community orientation of rights) compete and quite another when two norms with unequal hierarchical status come in conflict with each other".[46] The court noted that the impugned provision not only imposed wide restrictions on men and women with regard to their choice of employment but was also irrational inasmuch as "it prohibits employment of any woman in any part of the premises where liquor is being served. It would prohibit employment of women and men below 25 years in any of the restaurants. As liquor is permitted to be served even in rooms, the restriction would also operate in any of the services including housekeeping where a woman has to enter into a room; the logical corollary of such a wide restriction would be that even if service of liquor is made permissible in the flight, the employment of women as air-hostesses may be held to be prohibited. Hotel management has opened up a vista for young men and women for employment. A large number of them, the court noted, are taking hotel management graduation courses. They pass their examinations at a very young age. If prohibition in employment of women and men below 25 years is to be implemented in its letter and spirit, a large section of young graduates who have spent a lot of time, money and energy in obtaining the degree or diploma in hotel management would be deprived of their right of employment. The court further emphasized that the right to be considered for employment subject to just exceptions is recognized by article 16 of the Constitution and that right of employment itself may not be a fundamental right but in terms of

45 *Id.* at para 7.
46 *Id*. at para 19

both articles 14 and 16 of the Constitution each person similarly situated has a fundamental right to be considered therefor. On the standards of judicial scrutiny of legislation to test their validity, the court held that "legislations with pronounced 'protective discrimination' aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects".[47] The court observed that "privacy rights prescribe autonomy to choose profession whereas *security concerns* texture methodology of delivery of this assurance". Sinha, J cautioned that:

> [T]he measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship…Women would be as vulnerable without state protection as by the loss of freedom because of impugned Act. The present law ends up victimizing its subject in the name of protection…. Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the state as well as law modeling done in this behalf".

The court thus upheld the decision of the high court, declaring the said pre-constitutional provision as unconstitutional.

IV RIGHT TO FREEDOM – ARTICLE 19

Freedom of speech and expression – article 19(1)(a)

Article 19(1)(a) declares that all citizens shall have the right to freedom of speech and expression. Clause (2) of article 19, however, provides that the right to freedom of speech and expression shall not affect the operation of any existing law, or prevent the state from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right in the interests of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence.

In *NOVVA ADS* v. *Secretary, Department of Municipal Administration and Water Supply*,[48] the court was called upon to consider the question of validity of sections 326-A to 326-J of the Chennai City Municipal Corporation Act, 1919 and the Chennai City Municipal Corporation (Licensing of Hoardings and Levy and Collection of Advertisement Tax) Rules, 2003, *inter alia,* on the ground of violation of article 19 (1)(a) of the Constitution and being not covered by the parameters prescribed under article 19(2).

47 *Id*. at para 46.
48 (2008) 8 SCC 42.

The appellants, who were owners of various hoardings put up in the city of Chennai, had filed writ petitions before the high court challenging the said provisions of the Act and the rules, *inter alia,* on the ground that they violated their fundamental right to freedom of speech and expression guaranteed under article 19(1)(a) of the Constitution. The high court repelled the challenge and upheld their validity and issued a number of directions to the state government including a direction that a committee be constituted headed by a retired judge for identifying the historical importance or aesthetic value and popular places of worship in and around the city and to oversee the operation of the removal of illegal and unauthorized hoardings in the city of Chennai.

On appeal the Supreme Court noted that a set of rules with similar provisions had been challenged and their validity was upheld by the court in *P. Narayana Bhat* v. *State of T.N.*[49] holding, *inter alia,* that the rules, which regulated putting up of hoardings, did not violate the mandate of article 19(1)(a) of the Constitution. As far as public places were concerned the court held that "the State has a full right to regulate them, as they vest in the State as trustees for the public. The State can impose such limitations on the user of public places as may be necessary to protect the public generally."[50]

With regard to hoardings erected on private places, the court held that erection of such hoardings were required to be licensed and regulated "as they generally abut on and are visible on public roads and public places. Hoardings erected on a private building may obstruct public roads when put up on private buildings; they may be dangerous to the building and to the public; they may be hazardous and dangerous to the smooth flow of traffic by distracting traffic, and their content may be obscene or objectionable".[51] The court noticed that the licensing procedure were made especially to check "hazardous hoardings and the power to licence was not unfettered as appeals may be preferred to the state government from the adverse orders of the district collectors. The court, however, rejected the contention of possible misuse of power by holding that "there cannot be a presumption of misuse of power merely because discretion is conferred on a public authority for the exercise/use of power".[52] It was held that the said statutory provisions were enacted in public interest for the purposes of: (i) Preventing haphazard erection and proliferation of hoardings in the city; (ii) for orderly and aesthetic appearance in the city; (iii) for safety and prevention of hazardous and dangerous hoardings. The court also rejected the contention of the appellant that the said statutory measures were intended to control and regulate the contents of the advertisements in the said hoardings and as such their right to commercial speech guaranteed under article 19(1)(a) was

49 (2001) 4 SCC 554.
50 *Supra* note 48 at 52, para 29.
51 *Ibid*., para 30.
52 *Id.* at 53 para 32.

infringed. The court held that "the Advertisement Rules in essence constitute a Code for regulating erection of hoardings and do not deal with content except where it is found to be obscene or objectionable".[53] It was held that the Act and the advertisement rules do not regulate advertisement as such but they regulate putting of the hoarding which is found to be objectionable, destructive or obstructive in character. However, with a view to prevent the authorities from acting in an arbitrary manner, the court held: "[T]he apprehended arbitrariness can be well taken care of. If show cause notice is issued, it should specify the reasons as to why the action is proposed to be taken in respect of any hoarding or hoardings. The principles of natural justice can also be complied with if reasons are indicated in the show cause notice and there is scope for reply to be given. Thereafter, reasoned adjudication can be made by the authorities. It goes without saying that objectivity has to be there, even though initially at the stage of issuing show cause notice there is subjectivity."[54] At the same time, emphasizing the significance of right of free speech and expression, that the Constitution "sought to guarantee to each citizen of the country and significance of such right in a democratic society", Pasayat, J observed:[55]

> Very narrow and stringent limits have been set to permissible legislative abridgment of the right to free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risk of abuse. But the framers of the Constitution may well have reflected, with Madison who was 'the leading spirit in the preparation of the First Amendment of the Federal Constitution,' that 'it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.

Right to practice any profession, carry on any occupation, trade or businsess – article (19)(1)(g)

Right to freedom could not be curtailed by quasi judicial order

In *Ritesh Agarwal & Anr.* v *Securities & Exchange Board of India & Ors.*,[56] the question for consideration before the court was whether a citizen's fundamental right to practice any profession or to carry on any occupation, trade or business guaranteed under article 19(1)(g) of the

53 *Id*. at 57 para 55.
54 *Id*. at 56 para 52.
55 *Ibid*., para 53.
56 (2008) 8 SCC 205.

Constitution, could be taken away for a period of 10 years by a judicial order of the Securities & Exchange Board of India (SEBI) in the absence of a valid law operating in the filed as contemplated under clause (6) of article 19. In the instant case, one Surinder Kumar Agarwal, promoter of a company, M/s Ritesh Polyster Ltd., had claimed that his two sons Ritesh Agarwal and Deepak Agarwal, said to be minors at the relevant time, and his wife Rooprekha Agarwal, had made contributions to the capital of the company. The company issued a prospectus for a public issue of 30 lacs equity shares of Rs.10/- each at a premium of Rs.5/- per share aggregating to Rs. 450 lacs. The issue opened on 12.6.1995 and was closed on 22.6.1995. Fifteen lac shares of Rs.10/- each for cash at a premium of Rs. 5/- per share were reserved for firm allotment to the promoters and directors of the company and their friends and relatives. It was stated that a sum of Rs. 2.25 crores (Rs. 225/- lakhs) was to be invested by the promoters. After the issue went through, it transpired that Pratha Investments, Ritesh Capital and Ritesh Agarwal asked for issuance of duplicate shares contending that the shares issued in their favour had been misplaced. An advertisement was issued and a notice was also sent to the stock exchange. The stock exchange, on an enquiry made in that behalf, came to know that the alleged lost shares had in fact been sold in the market. It suspended the trading in the scrip of the company, and referred the matter to the Securities and Exchange Board of India. SEBI, in its enquiry, discovered that only 7.96% of the public issue had been subscribed by the public till the closing date and the promoters who were required to subscribe Rs. 225/- lakhs, infact, had invested a sum of Rs. 35/- lakhs only. The board having found large number of other irregularities, vide its order dated 9.2.2004, invoking its powers under section 4(3) read with section 11 and 11(b) of SEBI Act and Regulation 11 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 1995, directed M/s. Ritesh Polyster Limited and its promoters, i.e. Ritesh Exports Ltd., Surendra Kumar Agarwal, Roop Rekha Agarwal, Ritesh Agarwal and Deepak Agarwal to disassociate themselves in every respect from the capital market related activities and not to access the capital market for a period of ten years. As a remedial measure, the board also directed the said promoters to buy back the shares from the allottees/ shareholders offering an amount at which the shares were issued i.e. Rs. 15/- per share if the shares were fully paid or at Rs. 7.50 per share if the shares were partly paid and also directed that M/s Ritesh Polyster Ltd. be delisted from the stock exchanges. On an appeal by the said promoters, the tribunal also confirmed the said order passed by the SEBI. In the appeal, for the first time, it was urged that the appellants Ritesh Agarwal and Deepak Agarwal, were minors and, therefore, they could not be subjected to the penalty imposed upon them by the board. The tribunal rejected the contention on the ground that the proceedings under SEBI Act being civil in nature, the fact that the said two appellants were minors, had no relevance. The board went on to hold that "at any rate, they had attained majority on the date when the impugned order was passed and, therefore, the direction restraining them from accessing the capital market

could be passed by the board". On further appeal to the Supreme Court, S.B. Sinha, J held:[57]

> The question as to whether the provisions of the FUTP Regulations are attracted in this case may now be examined. The FUTP Regulations came into force for the first time on 25.10.1995. Would it apply in a case where the cause of action arose prior thereto? Ex facie, a penal statute will not have any retrospective effect or retroactive operation. If commission of fraud was complete prior to the said date, the question of invoking the penal provisions contained in the said Regulations including Regulations 3 to 6 would not arise. It is not that the Parliament did not provide for any penal provision in this behalf. If the appellants have violated the provisions of the Companies Act, they can be prosecuted thereunder. If they have violated the provisions of the SEBI Act, all actions taken thereunder may be taken to their logical conclusion. A citizen of India has a right to carry on a profession or business as envisaged by Article 19(1)(g) of the Constitution of India. Any restriction imposed thereupon must be made by reason of a law contemplated under Clause (6) thereof. In absence of any valid law operating in the field, there would not be any source for imposing penalty. A right to carry on trade is a constitutional right. By reason of the penalty imposed, the Board *inter alia* has taken away the said constitutional right for a period of ten years which, in our opinion, is impermissible in law as the Regulations were not attracted.

The imposition of penalty was, therefore, set aside by the court on both the grounds. The board was, however, granted liberty to direct the authorities to proceed against the offenders for any other offences under the SEBI Act or the Companies Act that they might be liable.

Ban on slaughter of animals

In *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat and Ors*,[58] a two judge bench of the Supreme Court had to consider the validity of two resolutions dated 14.8.1998 and 29.8.1999 passed by the Standing Committee of the Municipal Corporation of Ahmedabad directing closure of the slaughter houses of the municipality for a period of eight days and 10 days on the *Maha Paryushan Parv* of Jain Community having regard to the sentiments of the followers of the Jain religion. The validity of the resolution was questioned before the high court of Gujarat by the respondents who are a registered public charitable trust working for safeguarding the interests of the persons engaged in the business of slaughter

57 *Id*. at 214 para 25.
58 (2008) 5 SCC 33.

and sale of livestock, mutton etc. Respondents alleged that the closure of the municipal slaughter houses directly resulted in violation of their fundamental rights to carry on trade and business in meat products guaranteed by article 19(1)(g) of the Constitution and that the said closure cannot be characterized as reasonable restriction merely because a particular community or a section of the society feels that, for a particular period, there should be closure of the municipal slaughter houses as that will be in consonance with their religious ideology of *ahimsa* (non-violence). The slaughter houses in Ahmedabad are owned and managed by the Ahmedabad Municipal Corporation, but the animals which are slaughtered there belong to private persons, who bring their animals to the slaughter house for slaughtering and then sell the meat through retail outlets in the city.

The division bench of the high court accepted the challenge and declared that the closure of the slaughter houses, as ordered by the municipal corporation infringed the rights of the writ petitioners to carry on the trade of slaughter and selling meat which could not be curtailed or abridged merely on asking by a particular section of society or organizations belonging to a particular community only because the members of that community feel that according to their religion people should not eat non-vegetarian food during a particular festival. The court was of the view that it was a matter of private affair of the people, whether they would prefer to eat vegetarian or non-vegetarian food, and the court cannot make any pronouncement on it. People living in different parts of the country have different eating habits and even in a particular locality, village or town, there are some who are vegetarian and others who are non-vegetarian. The high court, therefore, held that no restriction can be placed on the slaughtering or eating of meat merely because it may hurt the sentiments or the religious feelings of a particular community or a society. In coming to the said conclusion, the high court relied on the decision of a constitution bench in *Mohd. Faruk* v. *State of Madhya Pradesh*,[59] wherein it was held, *inter alia,* that: "[T]he sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But a prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade or business will not be regarded as reasonable, if it is imposed not in the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of the people whose way of life, belief or thought is not the same as that of the claimant."[60]

On appeal, a two-judge bench, referring to the decision of a seven-judge bench in *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat & Ors*,[61] held that the decision of the five-judge constitution bench in *Md. Hanif*

59 (1969) 1 SCC 853.
60 *Supra* note 58 at 45 para 22.
61 2005(8) SCC 534.

Qureshi[62] stood partially over-ruled. The bench was also of the view that the seven-judge constitution bench had referred, *inter alia,* to the decision of the subsequent five-judge constitution bench in *Md. Faruk* and in view of what was observed in para 67 of the seven-judge bench decision, the observations in page 11 of the judgment in *Md. Faruk* that "the sentiments of a particular sections of the people are irrelevant in imposing a prohibition" will be deemed to have been impliedly overruled.[63] The question before the seven-judge bench was with regard to the validity of Bombay Animal Prevention (Gujarat Prevention) Act, 1994 which banned slaughtering of cow progeny irrespective of their age. In the opinion of the court, the question really was whether the views expressed in *Md. Hanif Quareshi* v. *State of Bihar*,[64] should be upheld or not? The court referred to an earlier decision of a constitution bench in *Jan Mahammed Usmanbhai*[65] wherein the court had held that the standing orders of the municipal corporation impugned therein were identified for preservation, protection and improvement of live stock, cows, bulls, bullocks and calves of cows are most important as one of the most indispensable adjuncts of agriculture.

Examining the question, as to whether banning of slaughter of cow progeny was in public interest, the seven-judge bench, examined voluminous facts available on record which supported the statement of fact contained in the preamble to the amending Act and the statement of objects and reasons appended to the bill. The bench declared that in that case the court was confined only to cow progeny and based on the available material, it had held that the ban on slaughter of cow progeny was in the interest of general public within the meaning of clause (6) of article 19 of the Constitution. Since, the majority viewed that the question before them was "not purely one of law, rather, it is an important finding of fact and law", the court observed that the factual basis of the decision in *Quareshi* can no longer be held to be good in view of the new facts, circumstances and experience. Lahoti, CJ, speaking for the court, held that " We have already indicated that in *Quareshi's* case the challenge to the constitutional validity of the legislation impugned therein, was turned down on several grounds though forcefully urged, excepting for one ground of "unreasonableness"; which is no longer the position in the case before us in the altered factual situation and circumstances. In *Quareshi's* case the reasonableness of the restriction pitted against the fundamental right to carry on any occupation, trade or business determined the final decision, having been influenced mainly by considerations of weighing the comparative inconvenience to the butchers and the advancement of public interest. As the detailed discussion contained

62 (1959) SCR 629.
63 *Supra* note 58 at 47 para 25.
64 AIR 1958 SC 731.
65 *Municipal Corporation of the City of Ahmedabad* v. *Jaan Mohammed Usmanbhai*, (1986) 3 SCC 20.

in the judgment reveals, this determination is not purely one of law, rather, it is a mixed finding of fact and law. Once the strength of the factual component is shaken, the legal component of the finding in *Quareshi's* loses much of its significance. Subsequent decisions have merely followed *Quareshi's*. In the case before us, we have material in abundance justifying the need to alter the flow of judicial opinion".[66]

It appears that the contents of the law under challenge as well as the factual background in the two cases – *Md. Faruk* and *Mirzapur Moti Kureshi Kassab Jamat* were completely different and hence the seven-judge bench finding in the latter case construed in *Hinsa* to the effect that the earlier decision in *MD Faruk* "would be deemed to have impliedly overruled" would have to be considered in that perspective.

Tracing the anthropology and origin of Indians being a mixed race and the historical facts particularly that of the era of great tolerance of the great emperor Akbar, speaking for the bench, Katju, J posed the question "[I]f the Emperor Akbar could forbid meat eating for six months in a year, in Gujarat, is it unreasonable to abstain from meat for nine days in a year in Ahmedabad today?"[67] and answered the question by observing that "we do not find any clear violation of any constitutional provision by the impugned resolutions. As already stated above, had the closure of the slaughter houses been ordered for a considerable period of time, we would have declared it to be unconstitutional on the ground of violation of Articles 14, 19(1)(g) as well as 21 of the Constitution. However, in the present case, the closure is only for a few days and has been done out of respect for the sentiments of the Jain community which has a large population in Gujarat. Moreover such closure during Paryushan has been consistently observed in Ahmedabad for a very long time, at least from 1993 and probably for a longer period." [68]

Fee structure in educational institutions

In *Cochin University of Science and Technology and Anr*. v. *Thomas P. John and Ors*,[69] NRI students, who were admitted to the undergraduate 4 year B. Tech. Cost-Sharing Engineering Course of the university for the academic year 1997-98 and 1998-1999 filed writ petition before the Kerala High Court challenging the fee structure for the NRI students, which the university prescribed for these two years but reduced in the subsequent years, on the ground that such higher fee fixed in these two academic years was unfair and arbitrary.

It appears that in 1995, the university had reserved 10% of its seats for NRI students, who are required to deposit US $ 5000.00 at the time of their admission towards "development charges" and in addition a fee of

66 2005 (8) SCC 534 at 591-92 para 120.
67 *Id.* at para 55.
68 *Id.* at 49 para 40.
69 (2008) 8 SCC 82.

Rs.20,000/- per semester whereas other category of students were required to pay Rs. 20,000/-. From the academic year 1996-97, the university increased the fee for NRI students to US $4000 whereas other students continued to pay fee at the rate of Rs.20,000/- per semester. This practice continued till 1998-99. From 1999-2000, the university reduced the fee payable by the NRI students to Rs.20,000/- per semester in addition to one time payment of US $5000.00. NRI students, who were admitted in 1998-99 represented to the university complaining of different treatment made to them in the matter of fee payable by NRI students and demanded refund of excess amount paid by them. In the absence of a favourable reply received from university, they filed a writ petition. A division bench of the high court framed the following two questions for consideration:

> (1) Is the action of the university in charging fee at different rates from the students on the basis of the batches in which they were admitted arbitrary and unfair ?
> (2) Are the petitioners estopped from challenging the impugned action?

While dealing with the first question, the high court observed that there appeared to be no rationale for subjecting the writ petitioners to a higher rate of fee than the rate fixed in the years 1995-96 and 1999-2000 onwards, more particularly, as in the written statement filed on behalf of the university no basis for a differential treatment had been disclosed and the averment that a reduction in the fee would lead to financial stress in the conduct of the courses had not been substantiated by facts and figures. The court also observed that even assuming that the university had the right to fix the rate of fee, a duty was still cast on it to act fairly, and being a statutory body, its decision was to be based on reasonable facts and if a classification between the different categories of students was pleaded, it must satisfy the test of having a rational basis.

On the second question, the high court held that though the university had issued a prospectus disclosing the fee structure, it would not bind the respondents even on the principle of estoppel, as estoppel was a principle of equity and as it appeared that the fundamental right of the writ petitioner under article 14 of the Constitution had been violated, the same could not be waived even by their own action. The writ petitions were allowed. The university was directed to refund the extra fee charged from the petitioners. The university was also directed to declare the result of the petitioners forthwith.

On appeal at the instance of the university, the Supreme Court reversed the judgment of the high court and held:[70]

70 *Id.* at 86 para 4.

> An educational institution must be left to its own devices in the matter of fixation of fee though profiteering or the imposition of capitation fee is to be ruled out.

The court was of the opinion that it would be well nigh impossible for an educational institution to have an effective administration and maintain high educational standards, if a downward revision during the pendency of a course is automatically made applicable to students admitted earlier under a different fee structure. A periodic revision, it noted, was also visualized in the directions of the Supreme Court in *Islamic Academy* wherein it has been provided that the fee structure fixed by a committee headed by a retired judge would be operable for three years. The court found that the NRI students had taken admission on certain specific conditions and the university had a right to insist that those conditions were observed. It was thus not open to the students to contend that notwithstanding that they had been admitted on a certain fee structure, they were entitled to claim, as a matter of right, a reduction in fee to bring them at par with students admitted later under a lower fee structure. The plea of estoppel would, thus, be available to an educational institution.

Bedi, J, speaking for the court, held:[71]

> A reading of the aforesaid judgments would reveal that the broad principle is that an educational institution must be left to its own devices in the matter of fixation of fee though profiteering or the imposition of capitation fee is to be ruled out and that some amount towards surplus funds available to an institution must be permitted and visualized but it has also been laid down by inference that if the broad principles with regard to fixation of fee are adopted, an educational institution cannot be called upon to explain the receipts and the expenses as before a Chartered Accountant. We find that the observations of the Division Bench of the High Court that no rational basis for the fixation of a higher fee for two years had been furnished, lays down an onus on the educational institution, which would be difficult for it to discharge with accuracy… The University had set up the self-financing B.Tech. Course in the year 1995 and no grant in aid was available during this period or later and it had to make arrangements for its own funds. We have also examined the budget estimates, receipts and expenditure from the year 1996- 97 to 1999-2000. We do find that there is a surplus in the hands of institution but in the facts that a new course was being initiated which would require huge investments, the surplus was not unconscionable so as to require interference. Moreover, the University had made its

71 *Id.* at 91 para 16.

> budget estimates keeping in view the proposed receipts and if the fee levied by it and accepted by the students was permitted to be cut down mid term on the premise that the University had not been able to explain each and every item to justify the levy, it would perhaps be impossible for it to function effectively.

Constitutional validity of a legislation (test for judicial review)

In *Government of Andhra Pradesh and Ors*. v. *Smt. P. Laxmi Devi*,[72] the question regarding the validity of the provisions of section 47A of the Indian Stamp Act as amended by A.P. Act 8 of 1998 came up for consideration. Section 47 of the Act provided that where registering officer while registering any instrument of conveyance etc., has reason to believe that the market value of the property, which is the subject matter of such instrument, has not been truly set forth in the instrument, he may keep pending such instrument and refer the matter to the collector for determination of the market value of the property and the proper duty payable thereon. The proviso, however, declared that no reference shall be made by the registering officer unless an amount equal to fifty per cent of the deficit duty arrived at by him is deposited by the party concerned." The High Court of Andhra Pradesh declared the said requirement of pre-deposit of 50% of deficit stamp duty as unconstitutional being violative of articles 14 and 19 of the Constitution. Reversing the judgment of the high court, the Supreme Court upheld the validity of section 47A as, in its opinion, the said mandate did not violate provisions of articles 14 and 19 or any other article of the Constitution. It was observed that the said amendment was "only for plugging the loopholes and for quick realization of the stamp duty." In coming to the said conclusion, the court drew support from similar provisions in various other statutes in which the right to appeal conferred on the party and particularly, the condition regarding pre-deposit of the differential amount involved was the subject matter of the appeal. As regards, the power of judicial review of legislation and how and when such power could be exercised by the court, Katju, J, referring to the classic essay by James Bradley Thayer, in 'The Origin and Scope of the American Doctrine of Constitutional Law' and the decisions of the Supreme Court in *Mohd Hanif* and *Kesavananda Bharati*, held that:[73]

> In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways, e.g. if a State legislature makes a law which only the Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the

72 (2008) 4 SCC 720.
73 *Id.* at 740 para 46.

> Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope.... Also, it is none of the concern of the Court whether the legislation in its opinion is wise or unwise.

Finally, in view of the fact that the impugned amendment was an economic measure, whose aim was to plug the loopholes and secure speedy realization of stamp duty, the court was of the opinion that the said amendment could not be said to be unconstitutional.

V PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES

Article 20(1) of the Constitution grants two-fold protection in respect of conviction for offences and also with regard to imposition of penalty. It declares that:

> No person
> (1) shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence,
> (2) nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

In *Superintendent, Narcotic Control Bureau* v. *Parash Singh*,[74] the bureau preferred an appeal from the judgment of the High Court of Calcutta quashing the charges framed under section 20(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) as amended by Act 9 of 2001. The high court directed the trial court to frame charges under section 20(b) (i) of the Act as it stood before the said amendment since the offences alleged to have been committed by the respondent was prior to 2.10.2001 i.e., before the said amendment was brought into force. The court noticed that the complaint against the accused person filed under section 8 of the NDPS Act on 21.9.2001 alleged commission of an offence by the respondent under section 20(b)(i) of the Act, as it stood then. Section 20, which deals with

74 (2008) 13 SCC 499.

punishment for contravention in relation to cannabis plant and cannabis, before it was amended, provided as under:

> 20. *Punishment for contravention in relation to cannabis plant and cannabis*-Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder:
> (b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable-
> (i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extent to five years and shall also be liable to fine which may extend to fifty thousand rupees.

After the amendment the section read as under:

> 20. *Punishment for contravention in relation to cannabis plant and cannabis*-Whoever, in contravention, of any provisions of this Act or any rule or order made or condition of licence granted thereunder:
> (b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable-
> (ii) where such contravention relates to sub-clause (b),
> (A) and involves small quantity, with rigorous imprisonment for a term which may extent to six months, or with fine, which may extend to ten thousand rupees, or with both;
> (B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;
> (C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.
> Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Charges were framed in the instant case under the amended section 20(b)(ii)(C). The high court was of the view that a new offence was made out because a higher punishment was imposed. The stand of the appellant was that no new offence was created but what was provided for related to a more stringent sentence. It was submitted that the high court was not justified in holding that a new offence was committed.

The appellant bureau contended before the Supreme Court that by the amendment no new offence was created but a more stringent sentence was provided for. The court noted that the validity of the said amendment was challenged earlier in *Basheer* v. *State of Kerala*,[75] but the Act was held to be valid. The court also noticed the directions given in that case with regard to disposal of the new cases in accordance with the provisions of the Act as amended by Act of 2001.

Reiterating the law, laid down in *State* v. *Gian Singh*[76] with regard to the scope of article 20(1) of the Constitution, it was held that "it is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes and no ex-post facto legislation is permissible for escalating the severity of the punishment[77]." However, if any subsequent legislation downgrades the harshness of the sentence for the same offence, the legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence. Pasayat J, speaking for the court, however, held that "Before the amendment as well as after the amendment, the ingredients of Section 8 remain same and there was no amendment in this provision. Only punishment for contravention in relation to cannabis plant and cannabis i.e. Section 20 of the Act has been amended by the Amendment Act."[78] The appeal preferred by the bureau was, however, dismissed with clarification that "no new offence was created by Amendment Act. But at the same time, no punishment higher than, which was originally provided for can be imposed on the accused."[79] It appears that though the court referred to the decision in *Basheer* but the context in which the said decision was rendered was overlooked. In that case the constitutional validity of the proviso of sub-section (1) of section 41 of the NDPS Act as amended by Act 9 of 2001 was in question. Section 41(1) of the amending Act 9 of 2001 declared that "all cases pending before the courts or under investigation at the commencement of this Act, shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before commencement, shall be liable for a punishment, which is lesser than the punishment for which he is liable at the date of commission of such offence". The proviso to section 41(1), however, declared that "nothing in section shall apply to cases pending in appeal".

The challenge in that case had been limited to the proviso to section 41 on the ground that the classification of all cases pending before the court or under investigation on one hand and the cases pending in appeal, on the other, were wholly unjustified and without any rational basis and hence the proviso infringed article 14. It was this contention, which was repelled by the

75 (2004) 3 SCC 609.
76 (1999) 9 SCC 312.
77 *Supra* note 75 at 501 para 7.
78 *Ibid*., para 8.
79 *Id.* at 502 para 9.

court in *Basheer* upholding the classification of the three categories of cases i.e. cases pending before the trial courts; (ii) cases pending investigation; and (iii) where trials have concluded and which were pending in appeal. Srikrishna, J, speaking for the court, had explained the rationale behind the Act and the justification for excluding the cases pending in appeal from the benefit of mollified rigours of the law. In his opinion, "if the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against *post facto* legislation contained in Article 20(1). However, we find that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity, they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the Amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution."[80]

Referring to the statement of objects and reasons, the court held that the object of the amendment was to secure: (1) avoidance of delay in trials; and (2) rationalisation of sentence structure. Analysing the provisions of the amending Act 9 of 2001, it was held that the said amendment introduced significant and material changes in the parent Act, which would affect the trial itself. Application of the amended Act to cases where the trials had concluded and appeals were pending on the date of its commencement could possibly result in the trials being vitiated, leading to retrials, thereby defeating at least the first objective of avoiding delay in trials. The accused, who had been tried and convicted before 2.10.2001 (i.e. as per the unamended 1985 Act) could possibly urge in the pending appeals, that as their trials were not held in accordance with the amended provisions of the Act, their trials must be held to be vitiated and that they should be re-tried in accordance with the amended provisions of the Act. This could be a direct and deleterious consequence of applying the amended provisions of the Act to trials which had concluded and in which appeals were filed prior to the date of the amending Act coming into force. This would certainly defeat the first objective of avoiding delay in such trials. Hence, Parliament appears to have removed this class of cases from the ambit of the amendments and excluded them from the scope of the amending Act so that the pending appeals could be disposed off expeditiously by applying the unamended Act without the possibility of reopening the concluded trials. Since in *Basheer* the court expressly held that the amending Act introduced significant and important changes in the said Act, could it then be said that the subsequent decision rendered by a two judge bench (Arijit Pasayat and M K Sharma, JJ) were right in holding that "no new offence was created by the amending Act"? Infact, *Basheer* itself explains how a new concept of commercial quantity in relation to narcotic drugs and psychotropic substances were introduced by

80 2004 (3) SCC 614 para 12.

the amendment and prescribed a much harsher punishment. If the unamended provision of section 20(1) (b) did not make any distinction between small quantity and commercial quantity of narcotic drugs and psychotropic substances,[81] specifically in respect of 239 narcotic drugs and psychotropic substances, as to what would be 'small quantity' and 'commercial quantity' and 'specific quantity' and prescribed a much lesser punishment of rigorous imprisonment of maximum five years and a fine of Rs.5000/-, could it be said that the amendment did not introduce a new offence and also did not prescribe a harsher punishment? If the answer to the question is in the negative, could the provision then offend article 20(1) of the Constitution and consequently the directions given by the high court to frame charges under section 20(b)(1) could be held to be not justified?

VI ENFORCEMENT OF FUNDAMENTAL RIGHTS – ARTICLE 32

Article 32, which provides for remedies for enforcement of fundamental rights is itself a fundamental right and it declares that the right to move the Supreme Court by appropriate proceedings for the enforcement of rights conferred by this part is guaranteed. In spite of the Constitution declaring article 32 itself being a fundamental right, a survey of judicial pronouncements compels one to ask the question as to how fundamental it is?[82] In spite of the various labels accruing to it, such as 'heart and soul of the Constitution', 'inviolable right', 'crown jewel of the Constitution' and so on, it stands on the same footing as other fundamental rights. As pointed out earlier, it does not possess the protection given to article 225 as regards its amendability. (Gajendragadkar, CJ even described it, in *Sajjan Singh* v. *State of Rajasthan*,[83] as an 'anomaly'.) Be that as it may, the Supreme Court has consistently discouraged petitions under article 32 if adequate relief could be obtained from high courts under article 226.[84]

In Baby Manji Yamada v. *Union of India*,[85] a petition under article 32 of the Constitution filed on behalf of the minor Baby Manji Yamada, involved the question regarding the rights of a minor *vis-a-vis* a surrogate mother but whose biological parents were foreigners. Baby Manji was born on 25.7.2008 to an Indian surrogate mother. Biological parents Yuki Yamada

81 Notification issued on 9.10.2001.

82 A K Ganguli, "Constitutional Law (Fundamental Rights)", XLI *ASIL* 95-96 (2005).

83 (1965) 1 SCR 933.

84 It was held in *Romesh Thapar* v. *State of Madras*, AIR 1950 SC 124 that art. 32 confers a fundamental right, and that it was not necessary to first approach the appropriate high court under art. 226. However, in *PN Kumar* v. *Municipal Corporation of Delhi,* (1987) 4 SCC 609 the court held that in view of the enormous arrears before it, petitioners should be discouraged to resort to art 32 if equally effective remedy is available under art 226. Also see *Tilokichand Motichand* v. *HB Munshi*, (1969) 1 SCC 110.

85 (2008) 13 SCC 518.

and Ikufumi Yamada came to India in 2007 and had chosen a surrogate mother in Anand, Gujarat and entered into a surrogacy agreement with the surrogate mother. On 3.8.2008 the child was moved to Arya Hospital, Jaipur following a law and order situation in Gujarat and she was provided with much needed care including being breastfed by a woman. When the genetic father Ifukumi Yamada had to return to Japan with the baby, an NGO M/s. SATYA, initiated proceedings by way of public interest litigation before the High Court of Rajasthan, seeking protection and custody of the child. The high court made certain directions in the said proceedings. Since, the genetic father's visa was due to expire, he moved the petition under article 32 of the Constitution on behalf of the minor, seeking directions regarding grant of passport to the minor and extension of his visa etc. The NGO was also impleaded as respondent no. 3 in the said proceedings. It was contended, on behalf of the said NGO, that in the name of surrogacy a money making racket was being perpetuated and that the Union of India should enact a law relating to surrogacy and strictly enforce the same. The writ petitioner, however, questioned the *locus standi* of respondent no. 3 in filing a *habeas corpus* petition without even alleging in whose illegal custody the child was?

The court declined to consider the contentions raised by the parties on their merits since it noted that Parliament has enacted a law for protection of the rights of the child - Commissions For Protection of Child Rights Act, 2005. The Act contemplated constitution of a national commission and state commissions for protection of child rights and children's courts for providing speedy trial of offences against children or of violation of child rights. Section 13 delineated the duties and functions of the commission, which, *inter alia,* provided that the commission shall examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation; inquire into violation of child rights and recommend initiation of proceedings in such cases etc. The court also noted that there are several kinds of surrogacy like traditional, gestational, altruistic and commercial. Pasayat, J, speaking for the court, described commercial surrogacy as "a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms 'wombs for rent', 'outsourced pregnancies' or 'baby farms'".[86]

86 *Id*. at 523 para 13.

However, taking note of the fact that since no complaint has been lodged by anyone regarding the child, who was the petitioner before the court, it disposed of the writ petition, *inter alia,* with a direction that if any person has any grievance, the same can be ventilated before the commission constituted under the Act. It was held that the commercial right to inquire into complaints and even to take *suo motu* notice of matters relating to, (i) deprivation and violation of child rights; (ii) non-implementation of laws providing for protection and development of children; and (iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities is with the commission.[87] As regards the grievance of the petitioner with regard to permission to travel, including issuance of passport etc, the court accepted the assurance given by the Solicitor General to the effect that if a comprehensive application, as required under law, is filed within a week, the same shall be disposed of expeditiously and not later than four weeks from the date of receipt of the application.

VII PUBLIC INTEREST LITIGATION

Despite its origin elsewhere, public interest litigation (PIL) as witnessed in Indian courts has sparked the imagination of jurists across the world. Over the past decade a tide of public interest cases have been brought before the Supreme Court that led the court to express its opinion on virtually every aspect of public life.

The court's intervention was apparently sought due to executive and in some cases, legislative, inaction. This has inevitably brought forth the need for some introspection as far as the role of the judiciary is concerned. What has caused the raising of many an eyebrow is the fact that PIL has traversed much beyond the original object of providing access to the judicial process to the poor and disadvantaged. Often enough it has been said that what started as a movement to secure better access for the underprivileged to the judicial system has crossed over to the realm of policy making and implementation. On the other hand, questions are being raised as to whether the court is justified in expanding the scope of judicial review by 'judicial activism'; whether the court has been able to devise solutions for problems that, strictly speaking, ought to be resolved by legislative and executive action; and finally, whether the court's intervention in such widespread matters has benefited the society, enriched the institutions, and strengthened democracy?[88]

Under the traditional theory of separation of powers, the legislature, the executive and the judiciary enjoy separate and distinct domain. Policy making

87 *Id.* at 524 para 17.

88 A K Ganguli, "Public Interest Litigation", XLIII *ASIL* 567-85 (2007).

and implementation are conventionally regarded as the exclusive domain of the legislature and the executive respectively, with the judiciary performing a supervisory function. The Indian Constitution does envisage distinct roles for the three organs of the state. It absorbs the philosophy of the theory of separation of powers, but to an extent. Specific provisions of the Constitution vest in each of these organs powers and functions to be exercised in the manner laid down in it. But this division of powers does not carve out mutually exclusive domains as contemplated in the Montesquien doctrine. What the Constitution contemplates is a separation of functions rather than a separation of powers. It is well within the scheme of this framework for the legislature and the executive to perform a judging function as it is for the executive and judiciary to assume policy making and implementation functions.

Inspite of the overlaps in the division of powers and functions amongst the organs of the state, a fine balance is envisaged in the Constitution drawn on a system of checks and balances. But overlaps do not mean that one organ can usurp the powers of another.[89] The Supreme Court has itself recognized the differentiation of functions between the executive, legislature and judiciary and reasoned that although the Constitution did not incorporate a rigid separation of powers, no organ could constitutionally assume the powers that essentially belonged to another organ.[90] However, to deny the element of fluidity in the constitutional framework would be to rob the Constitution of the dynamism that has been the very reason of its survival for about 60 years now.

In the year under review, some of the pronouncements of the Supreme Court reflect the anxiety of the court to maintain and preserve this fine balance in the *inter se* relationship between the organs of the state. In a writ petition filed by an NGO[91] by way of public interest litigation, it was alleged, *inter alia,* that the number of road accidents have been rising in the country due to various reasons, including, defects in the licensing procedure, training of drivers, negligent driving, driving under influence of alcohol, inadequate infrastructure relating to roads and inadequate provisions of traffic control devices including traffic signals, road sign, devices and other road safety measures. Petitioner claimed that pedestrian and non-motorised traffic face enormous risks as they account for 60-80% fatalities in the country. According to the petitioner, all non motorized traffic needs to be given thorough and repeated orientation in observance of road traffic rules and avoidance of any situations which can cause accidents and that all users of roads, including, pedestrians, traffic participants, cyclists, handcart men, bullock cart drivers etc. would be required to be educated on road safety and

89 *Kihoto Hollohan* v. *Zachillu and Others*; 1992 Supp (2) SCC 651 at 692.
90 *In re Delhi Laws (1951)*, SCR 747; *Ram Jawaya* v. *Union of Inida,* (1955) 2 SCR 225.
91 *Common Cause (A Regd. Society)* v. *Union of India & Ors.*, (2008) 5 SCC 511.

that such measures should be duly publicized through media including TV and radio. The petitioner, therefore, *inter alia,* prayed for a direction in the nature of *mandamus* or any other writ, direction or order directing Union of India, government of NCT of Delhi, other state governments and also the union territories to enact Road Traffic Safety Act laying down regulations dealing with specific responsibilities of drivers, proper maintenance of roads and traffic, connected signs and signals, rules and regulations for observance by all concerned including pedestrians and non-motorized traffic etc. The petitioner suggested that the enactment in question should contain all the regulations and the requirements relating to avoidance of accidents, responsibilities of respective departments of state governments, municipal bodies, police authorities, and the penalty for non-observance of prescribed regulations. The Act should specify the duties, responsibilities, rights, directives and punishments in case of failures by any one e.g. driver, vehicle, road user, etc.

A two-judge bench of the Supreme Court dismissed the writ petition holding, *inter alia,* that the Motor Vehicles Act, 1988 was a comprehensive enactment on the subject and that if there be any lacuna or defect in the Act, it was for the legislature to correct it by suitable amendments and not for the court by issuing directions to the legislatures or the executive. While both the judges agreed that the court could not issue a writ or direction to the legislatures or the executive to enact a law, they differed on the jurisdiction of the court in the matter of verification of antecedents of the person who filed the PIL covering various fields. Sema, J was of the view that "if there is a buffer zone unoccupied by the legislature or executive which is detrimental to the public interest, judiciary must occupy the field to subserve public interest."[92] Sema, J found support for his view in an earlier pronouncement of the court to which he was a party,[93] wherein the court while examining the correctness of the directions given by the Delhi High Court to the Election Commission in a PIL to secure to the voters certain information pertaining to each of the candidates contesting elections to Parliament and the state legislatures, and the parties they represent, if any, had ruled "that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till a suitable law is enacted.[94] ..... if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the executive to subserve public interest."[95]

92 *Id.* at 533 para 64.
93 *Union of India* v. *Association for Democratic Reforms*, (2002) 5 SCC 294.
94 *Id.* at 308 para 20.
95 *Id.* at 321-22 para 46.

Katju, J expressed a rather strong opinion disagreeing with Sema, J observing that "the Courts of the country have sometimes clearly crossed the limits of the judicial function and have taken over functions which really belong either to the legislature or to the executive. This is unconstitutional. If there is a law, Judges can certainly enforce it. But Judges cannot create a law by judicial verdict and seek to enforce it."[96] Citing a large number of judicial precedents, which outlined that the functions of the different parts or branches of the government have been sufficiently differentiated and consequently our Constitution does not contemplate assumption by one organ or part of the state, of functions that essentially belong to another, Katju, J held that the petitioner desired the court to direct the Union of India to formulate a suitable Road Traffic Safety Act, but it was well settled that the court could not direct either the legislature or the executive to legislate upon any subject, even if, there be a gap or lacuna in the existing law. He was of the view that "If there is a lacuna or defect in the Act, it is for the legislature to correct it by a suitable amendment and not by the Court[97]…. This Court cannot direct legislation. The Court should not encroach into the sphere."[98] Acknowledging that PIL which was initially created as a useful judicial tool to help the poor and weaker section of society who could not afford to come to courts, Katju, J observed that "in course of time, largely developed into an uncontrollable Frankenstein and a nuisance which is threatening to choke the dockets of the superior courts obstructing the hearing of the genuine and regular cases which have been waiting to be taken up for years together". Adverting to the practice of courts appointing committees giving them power to issue orders to the authorities or to the public, Katju, J observed that "This is wholly unconstitutional. The power to issue a mandamus or injunction is only with the Court. The Court cannot abdicate its function by handing over its powers under the Constitution or the C.P.C. or Cr.P.C. to a person or committee appointed by it. Such 'outsourcing' of judicial functions is not only illegal and unconstitutional, it is also giving rise to adverse public comment due to the alleged despotic behaviour of these committees and some other allegations. A committee can be appointed by the Court to gather some information and/or give some suggestions to the Court on a matter pending before it, but the Court cannot arm such a committee to issue orders which only a Court can do."[99] The judge cautioned all concerned, observing that "The people must know that Courts are not the remedy for all ills in society. The problems confronting the nation are so huge that it will be creating an illusion in the minds of the people that the judiciary can solve all the problems. No doubt, the judiciary can make some suggestions/recommendations to the legislature or the

96 2008 (5) SCC 511 at 522 para 20.
97 *Id.* at 523 para 24.
98 *Id.* at 523 para 26-27.
99 *Id.* at 526 para 36.

executive, but these suggestions/recommendations cannot be binding on the legislature or the executive, otherwise there will be violation of the seven-judge bench decision of this court in *P. Ramachandra Rao's case*[100] and violation of the principle of separation of powers. The judiciary must know its limits and exercise judicial restraint vide Divisional Manager, Aravali Golf Course & Anr. vs. Chander Hass, JT 2008(3) SC 221. The people must also realize that the judiciary has its limits and cannot solve all their problems, despite its best intentions."[101]

One Maninderjit Singh Bitta[102] filed a writ petition purporting to be PIL seeking implementation by the state and union territories of the judgment dated 30.11.2004 of the Supreme Court in *Association of Registration Plates* v. *Union of India & Ors*.[103] The Association of Registration Plates had challenged the terms and conditions of notices inviting tenders for supply of high security registration plales ('HSRP') for motor vehicles issued by various state governments following the guidelines circulated by the central government for implementation of the provisions of Motor Vehicle Act, 1988 and rule 50 of the Central Motor Vehicles Rule, 1989 as amended w.e.f. 1.1.2004, which laid down the form and the manner of display of registration marks on the motor vehicles. The amended rules required, *inter alia,* that the registration marks on all motor vehicles shall be displayed both at front and rear of the motor vehicles clearly and legibly in the form of a security license plate, which "shall be fastened with non-removable/ non-reusable snap-lock fitting system on rear of the vehicle at the premises of the Registering Authority". The implementation of the rule required co-operation and co-ordination between the authorities and the manufacturers of the registration plates. In order to give full effect to the said provisions of law, the central government issued the Motor Vehicles (New High Security Registration Plates) Order, 2001. The conditions of the tender were challenged, *inter alia,* on the ground that they were tailor made to sub serve the business interests of a class of manufacturers having foreign collaboration and for a cartel of companies. It was alleged that the said conditions were highly unreasonable and resulted in complete exclusion of indigenous manufacturers. The condition to award contract for a period of 15 years for supply of high security plates was also challenged as an attempt to create monopoly in favour of one company or a cartel of companies, which was against the public interest. Rejecting all the contentions, the court had ruled that "none of the impugned clauses in the tender conditions can be held to be arbitrary or discriminatory deserving its striking down".

Maninderjit Singh, in his petition, filed under article 32 of the Constitution in public interest sought implementation of the said decision

100 *P. Ramachandra Rao* v. *State of Karnataka*, (2002) 4 SCC 578.
101 *Supra* note 91 at 530 para 53.
102 *Maninderjit Singh Bitta* v. *Union of India & Ors*., (2008) 7 SCC 328.
103 (2005) 1 SCC 679.

contending, *inter alia,* that the central government had framed a new scheme of HSRP in order to curb the growing menace of crime and terrorist activities using motor vehicles as a tool. However, the said scheme remained unimplemented by the state governments and the union territories. In the said proceedings, All India Motor Vehicles Security Association also intervened and supported the petition seeking implementation of the scheme. It was alleged by the petitioner and the intervener that though most of the states had floated the tenders, the process had been slowed down, with the result the scheme remained unimplemented. The Union of India and some of the states questioned the *locus standi* of the petitioner and contended that the petition was not a PIL but some business concerns who would be benefited from the tenders have put up the petitioner as a front to add legitimacy to the cause. The court, while declining to rule on the question whether the petition was a *bona fide* PIL, observed that "it would be in the interest of all concerned if the States and the Union Territories take definite decision as to whether there is need for giving effect to the amended Rule 50 and the Scheme of HSRP and the modalities to be followed".[104] The court directed the respective authorities to take definite decision within a period of six months keeping in view all aspects that were highlighted in its earlier decisions.

In *Divine Retreat Centre* v. *State of Kerala & Ors*.[105] one M, a female remand prisoner, sent a petition to the district judge, Kozhikode, *inter alia*, alleging that while she was taking shelter in the appellant's institution, she had been subjected to molestation and exploitation and became pregnant from the head of that institution. When she came out of the centre to attend her sister's marriage, she was implicated in a false theft case and lodged in the jail. The district judge forwarded the complaint to the concerned magistrate to do the needful. The judicial magistrate recorded the statement of the victim and thereafter transferred the case to the police for investigation. After the investigation, a case was registered under section 376(g) IPC at the concerned police station. The district judge had also forwarded a copy of the said complaint to the registrar of the high court which was placed before a single judge, who in turn directed that the complaint be forwarded to the superintendent of police, to cause an inquiry and if necessary to register a case and report to the court. The superintendent of police and the circle inspector of police also submitted their reports informing the registry of the court that a case has already been registered and is being investigated. In the meantime, the district judge had received an anonymous petition addressed to a particular high court judge. The district judge forwarded the said anonymous petition to the registrar general, high court. The petition was accompanied by press reports and three video CDs. In the covering letter, the district judge also referred to the facts leading to the registration of the case under section 376(g) IPC. He also reported that in the meantime, Smt. M

104 2008 (7) SCC 328 at 333 para 8.
105 (2008) 3 SCC 542.

delivered and that the local police arrested her in the alleged theft case. He also forwarded some of the press reports to the effect that the police is not properly investigating the case and instead, are more interested in tracing her antecedents and alleged bad character. The matter was again placed before the single judge, who in turn directed the matter to be placed before the registrar general for necessary action. The registry finally submitted all the papers related to the case, before the single judge, who thereafter made an order on 8.2.2006, *inter alia,* to the following effect:[106]

> A perusal of the anonymous petition dated 26-10-05 shows it contains serious allegation. So it is only just and proper the matter is taken on the judicial side especially in view of the allegation of involvement of senior IAS and IPS officers.
> So there will be direction to the Registry to treat the anonymous petition alongwith petition of FPR 287 received in the court on 21-11-05 *as petitions praying for an order for proper investigation and Register as a suo motu Criminal Miscellaneous Case*. Serve a copy of the above stated petition to the Director General of Prosecution. The copies of the documents except the CDs may also be given to him. Keep the CD under safe custody for the time being till a decision is taken in the matter. Register the Crl. Misc. Case and post for admission.

In compliance of the said directions, the matter was placed before the court, which directed serving of notice upon the director general of prosecution. Finally, the court, in exercise, of its powers under section 482 Civil Procedure Code directed investigation by a special investigation team (SIT) constituted by it. The high court also directed that the said authority to investigate / inquire into various other allegations leveled in an anonymous petition filed against the appellant institution. Reiterating the view, expressed by the court in its earlier pronouncements,[107] the court visualized grave danger inherent in a practice where a mere letter is entertained as a petition from a person whose antecedents and status are unknown or so uncertain that no sense of responsibility can, without anything more, be attributed to the communication. It has been observed that the document petitioning the court for relief should be supported by satisfactory verification and this requirement is all the greater where petitions are received by the court through post. It is never beyond the realm of possibility that an unverified communication received through the post by the court may in fact have been employed *mala fide*, as an instrument of coercion or blackmail or other oblique motive against a person named therein who holds a position of honour and respect in society. The court must be ever vigilant against the

106 *Id.* at 553 para 13.
107 *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161.

abuse of its process. Setting aside the directions issued by the high court constituting the SIT to investigate into the matter, Sudershan Reddy, J, speaking for the court, observed: "How to verify the credentials, character or standing of the informant who does not disclose his identity? In the instant case, there is no whisper in the order passed by the High Court about any attempts made to verify the credentials, character or standing of the informant. Obviously, the High Court could not have verified the same since the petition received by it is an unsigned one…. In our view, the Public Interest Litigant must disclose his identity so as to enable the court to decide that the informant is not a wayfarer or officious intervener without any interest or concern. In such view of the matter the *suo moto* action initiated cannot be treated as the one in public interest litigation."[108]

PIL in consumer protection cases

In *Godfrey Phillips India Ltd* v. *Ajay Kumar*,[109] the respondent filed a complaint by way of PIL before the district forum challenging an advertisement published in the newspapers and magazines in 1999 at the instance of the appellant for cigarette manufactured and sold by it in the brand name "Red and White". The advertisement stated that "Red & White smokers are one of a kind". It also showed the smiling face of a popular film actor holding a cigarette. The complainant's case was that smoking of cigarette by an actor with the slogans used in the advertisement would detract the people from the statutory warning. The advertisement, therefore, constituted an unfair trade practice. Since, the complainant had also filed a suit in relation to the impugned advertisement in the civil court, the district forum dismissed the complaint. On appeal, the state commission affirmed the order of the district forum. Thereafter, the complainant withdrew the suit, but filed a revision petition before the national commission which held, *inter alia,* that comparative size of the letters loses its prominence which is usurped by more prominent and attractive face of the actor and is sufficient to detract the attention of the viewers from the statutory warning to the image of film actor with the slogan indicating smokers of Red and White Cigarette could be super actor performing all the film stunts without duplicates. Holding that the impugned advertisement amount to unfair trade practices, the national commission directed: (i) to discontinue forthwith the unfair trade practice of detracting from the statutorily specified warning and not to publish any advertisements like Ext. R-1 in any language giving any impression that a person who smokes Red and White Cigarette could perform such acts as could be performed by Akshay Kumar in films and thereby detracting from the specified warning; and (ii) to issue corrective advertisements of equal size in all the newspapers in which advertisements in Hindi & English like Ext. R-1 were published to neutralize the effect of

108 (2008) 3 SCC 542 at 568 para 63.
109 (2008) 4 SCC 504.

the said impugned misleading advertisements; (iii) Shri Ajay Kumar, the petitioner, shall be paid a sum of Rs.20,000/- by way of compensation and Rs.5,000/- as cost." A review petition filed by the appellant was also dismissed by the National Commission. On further appeal, the Supreme Court held that the directions regarding discontinuance of the so called unfair trade practices were without any material or evidence. There was no material on record to show that the advertisement was of a particular film star or that he could perform certain stunts without duplicates. Pasayat, J observed that "When such serious allegation which was required to be established was not even specifically pleaded and when nothing specific was indicated in the complaint, the Commission should not have given the direction on pure surmises".[110] For the very same reason, it was held that the second direction could not be sustained. As regards, the third direction for payment of compensation, the court held that "There was no allegation that the complainant had suffered any loss. Compensation can be granted only in terms of section 14(1)(d)of the Act. Clause (d) contemplates award of compensation to the consumer for any loss or injury suffered due to negligence of the opposite party. In the present case there was no allegation or material placed on record to show negligence".[111] On the question of maintainability of the complaint as a PIL the court observed that "It is to be noted that the National Commission itself noted that the respondent was not representing a "voluntary consumer association" registered under the Companies Act, 1956 or under any other law for the time being in force and was not entitled to file a complaint about unfair trade practice to represent other consumers. Having said so, it is not understandable as to how the national commission even proceeded to deal with the complaint. It also noted that the complainant had not moved any application or obtained any permission under section 13(6) of the Act and/or no such permission was granted. In the circumstances, it was not permissible for the complainant to represent others.[112]

PIL in forest matters

M/s. Vedanta Aluminium Ltd.[113] filed an application before this court seeking clearance of the proposal for use of 723.343 ha of land (including 58.943 ha of reserve forest land) in Lanjigarh Tehsil of Kalahandi District for setting up an alumina refinery. The project consisted of setting up of a large integrated aluminium complex in Orissa by the applicant. The court emphasized that adherence to the principle of sustainable development is now a "constitutional requirement". The court held that "it was required to balance developmental needs with the protection of the environment and

110 *Id.* at 510 para 17.
111 *Ibid*., para 18
112 *Ibid*., para 21.
113 *T.N. Godavarman Thirumulpad* v. *Union of India & Ors*, (2008) 2 SCC 222.

ecology. It is the duty of the state under our Constitution to devise and implement a coherent and co-ordinated programme to meet its obligation of sustainable development based on inter-generational equity (See: A.P. Pollution Control Board v. Prof. M.V. Nayudu.[113a] Mining is an important revenue-generating industry. However, we cannot allow our national assets to be placed into the hands of companies without a proper mechanism in place and without ascertaining the credibility of the user agency".[114] The said observations were founded on the ground, *inter alia,* that the proposed refinery would be totally dependent on mining of bauxite from Niyamgiri Hills, Lanjigarh, which is the only vital wildlife habitat, part of which constitutes elephant corridor; and the said project, including the mining area, would obstruct the proposed wildlife sanctuary and the residence of tribes like Dongaria Kandha. According to CEC, Niyamgiri Hills would be vitally affected if mining is allowed in the area as it is an important water source for two rivers. Also the project would destroy flora and fauna of the entire region and would result in soil erosion. The court also noticed the other side of the picture which depicted that the local people including the tribals are living in abject poverty in Lanjigarh Tehsil. There is no proper housing. There are no hospitals. There are no schools and the people are living in extremely poor conditions. Keeping in view the extreme conditions, the court sought to strike a balance by directing that the holding company of the applicant, M/s. Sterlite Industries (India) Ltd. (SIIL), if they agree, may move the court complying with the modalities suggested by the court, which included, *inter alia,* demarcation of the lease area on the ground using four feet high cement concrete pillars with serial number, forward and back bearings and distance from pillar to pillar, compensatory afforestation at project cost with suitable indigenous species, rehabilitation of project affected families, phased reclamation of mined out area, fencing of the safety zone area, soil conservation measures, study on hydrogeology and preparation of a site specific comprehensive wild life management plan for conservation and management of the wild life in the project impact area under the guidance of chief wild life warden of the state and also deposit the NPV for the forest land sought for diversion for undertaking mining operations the user agency.

Subsequently, the SIL moved the court again stating that the applicant, the State of Orissa, unconditionally accepted the terms and conditions and the modalities suggested by the court. However, in response to the said application, CEC filed its report containing its action /suggestions on certain aspects. The court finally granted its clearance to the proposal in favour of SIL leaving it finally to the Ministry of Environment and Forests to deal with it in accordance with law.

113*a* (1999) 2 SCC 718.
114 *Supra* note 113 at 225 para 3.

VIII CONCLUSION

The Constitution is not only a legal document that provides the fundamental law of the country and lays down the powers, functions and duties of different organs of the state but also a political document that delineates the normative standards of governance of the country in terms of the political and civil rights of its citizens and even the rights of aliens. Though, under the Constitution, policy making and implementation are the exclusive domain of the legislature and the executive respectively, judiciary is assigned the task of not only enforcing the fundamental and other legal rights of the citizens and non-citizens but also to determine and maintain the balance of power between the various tiers of governments in a federal setup. In the ultimate analysis, the Constitution is what the judiciary declares it to be.

The most significant provisions in the Constitution are the fundamental rights in part III together with the directive principles of state policy in part IV. These provisions constitute the core of the Constitution. Article 32 in part III not only provides the remedial machinery for enforcement of the fundamental rights but also declares that the right to move the Supreme Court by appropriate proceedings for enforcement of the fundamental rights is itself a fundamental right guaranteed under the Constitution. The Supreme Court has the right and also the duty to enforce the fundamental rights not only when there is a clear violation of the rights but also when such rights are threatened to be violated. The declaration by the framers of the Constitution that the rights guaranteed by article 32 of the Constitution shall not be suspended, except as otherwise provided in the Constitution itself, signifies the status of the fundamental right guaranteed under article 32.

It is now firmly established and well accepted by all concerned that the Supreme Court has played a pivotal role in shaping the destination of the nation. Since our independence, the court, like the country, has had to pass through various phases. Emergence of judicial activism, which is attributed to the post emergency crisis faced by the judiciary, has transformed the entire judicial process in this country. What is of significance, however, is the introspection by the court itself and its self restraint and cautious approach to ensure that it does not overstep its constitutional limits, in order to avoid the blame of having usurped the powers and functions of the other organs of the state. A rather strong opinion expressed by Katju, J in *Common Cause*[115] that "judges cannot create a law by judicial verdict and seek to enforce it" and that "the courts of the country have sometimes clearly crossed the limits of judicial function and have taken over functions, which really belongs either to the legislature or the executive", is a clear testimony of such introspection. This statement is significant for many reasons. The opinion expressed by Katju, J may be faulted as an instance of overstepping

115 *Supra* note 91.

the rule of precedent and *stare decisis* but it has served an important purpose of demonstrating that the judges constituting the court do foresee how the other organs of the state perceive the courts while they embark upon declaring what the Constitution and the law is, in the process of adjudication.

Article 46 of the Constitution mandates the state to promote with special care the educational and economic interests of the weaker sections, and, in particular, of the scheduled castes and scheduled tribes and to protect them from social injustice and all forms of exploitation. At the same time, a balance is struck by the declaration in article 335 that the claims of the members of the scheduled castes and scheduled tribes shall be taken into consideration consistently with the maintenance of efficiency of administration, in the making of appointment to services and the posts in connection with the affairs of the union or of the state. The proviso to article 335 added by the Constitution (Eighty-second Amendment) Act, 2000 declared that the mandate in article 335 shall not prevent the state from making any provision, in favour of the members of the scheduled castes and scheduled tribes, for relaxation in qualifying marks in any examination or lowering the standard of evaluation for reservation in matters of promotion to any class or classes of service or posts in connection with the affairs of the union or of the state.

In *Indra Sawhney*[116] the majority opinion of the court favoured maintenance of a balance between reservation and efficiency and that such reservation should not only be with reference to the scheduled castes and scheduled tribes but also with reference to other backward classes. In the context of the right of the minority to establish and administer educational institutions including admission to such institutions, an eleven-judge bench in *Pai Foundation*[117] held by majority that private unaided educational institutions have a fundamental right to establish and administer educational institutions and that such a right is guaranteed under article 19(1)(g) of the Constitution. Subsequently, a seven-judge bench in *P.A. Inamdar*[118] on its interpretation of *Pai Foundation* held that "the State cannot enforce its policy of reservation nor any quota or percentage of admissions be appropriated by the state in any unaided educational institution established and administered either by a minority or a non-minority body." Article 15(5) inserted by the Constitution (Ninety-third Amendment) Act, 2005 enables the state to make special provisions for advancement of socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes for their admission to educational institutions, including, private educational institutions whether aided or unaided by the state. The Supreme Court, in *Ashoka Kumar Thakur*[119] by a majority, though upheld the validity of article 15(5), on crucial issues, like determination of "creamy

116 *Supra* note 16.
117 *Supra* note 13
118 *Supra* note 15.
119 *Supra* note 8.

layer", exclusion of "creamy layer" from socially and educationally backward classes, application of "creamy layer" to scheduled castes and scheduled tribes and the justification for a review of such reservation and the periodicity thereof, rendered a fractured verdict. The most significant aspect of the decision is that the majority of the judges declined to consider and pronounce upon the validity of the said constitutional amendment insofar as it enabled the state to make law providing for reservation in private unaided educational institutions although the very purpose of the amendment inserting clause (5) in article 15 was to overcome the decision in *P.A. Inamdar* and to establish a right in the state to compell unaided educational institutions to provide for a quota in favour of the state. The sole opinion, expressed by Bhandari, J, on this crucial question, however, proceeds on the assumption that "obliterating citizen's right" under article 19(1)(g) to carry on at occupation amounts to violation of the basic structure of the Constitution if the law imposed reservation on unaided educational institutions. During the course of his opinion, Balakrishnan, CJ, also embarked upon an in-depth sociological analysis of the interrelationship between "caste" and "class". The motivation for the discussion appeared to clarify the manner in which the mandate of *Indra Sawhney* (that reservation was an acceptable form of affirmative action so long as "caste" was not the sole criterion in identification of a "class") was being sought to be projected in *Ashoka Kumar Thakur*. However, it is rather difficult to glean any concrete findings/conclusions from his opinion on the interrelationship between "caste" and "class", except that *"...a class always enjoys certain privileges or at least certain advantages over others in society. When it is more or less rigorously closed, or enjoys hereditary privileges, it is called a caste"* and that *"a caste is a horizontal division and a class, a vertical division"*.

A legislation enacted for one person though could not be questioned as inherently discriminatory, the decision of the court in *P. Venugopal*[120] is significant as it fortifies the continued faith in the judiciary and its ability to declare a legislation invalid if it suffers from "naked discrimination". The declaration of law by Chatterjee, J to the effect that "curtailment of term of 5 years can only be made for justifiable reasons and in compliance that the principles of natural justice for pre-mature termination of a term of Director of AIIMS squarely applied also to the case of the writ petitioner as well as also apply to any future director of AIIMS" should act as sufficient guideline for future Union Ministers of Health or for that matter, any other minister or public authority, when they choose to bend the law to achieve their personal objectives.

The decision in *Anuj Garg*[121] is of great significance as the court by declaring section 30 of the Punjab Excise Act as unconstitutional restored

120 *Supra* note 26.
121 *Supra* note 44.

the rights of women to be employed in premises in which liquor or intoxicated drugs are consumed by public. The declaration of law by Sinha, J that "legislations with pronounced 'protective discrimination' aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects" is of great significance in the context of powers of court to scrutinize the validity of legislation by taking into consideration not only the objects which legislations apparently seek to achieve but also the other parameters such as implications of such legislation and the effects thereof. Emphasizing how the legislation in question instead of empowering women, sought to victimize them, Sinha, J observed "the present law ends up victimizing its subject in the name of protection…. Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the state as well as law modeling done in this behalf".

The court in *NOVVA ADS*[122] rightly held that the right to commercial speech guaranteed under article 19(1)(a) and right to carry on any trade or business guaranteed under article 19(1)(g) cannot take precedence over the right of the state to regulate advertisements by erection of hoardings, which are visible on public roads and public places whether such hoardings are constructed on public roads and buildings or on private buildings. This decision truly balances the competing claims of citizen's right to free speech and the public interest in securing public safety though Pasayat, J appears to have laid a greater emphasis on the right to free speech by observing that "very narrow and stringent limits have been set to permissible legislative abridgment of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible".

The decision of the court[123] upholding the closure of slaughter houses of the municipality for a period of 8-10 days on the *Maha Paryushan Parv* of Jain Community, ordered by Municipal Corporation of Ahmedabad is of equal significance as the court had to balance the claims of two groups of citizens following different religions and having different preferences for food. The court, speaking through Katju, J successfully struck the balance by taking a leaf from history and observing that "if the Emperor Akbar could forbid meat eating for six months in a year in Gujarat, is it unreasonable to abstain from meat for nine days in a year in Ahmedabad today?"

122 *Supra* note 48.
123 *Supra* note 58.