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CONSTITUTIONAL LAW – I

(FUNDAMENTAL RIGHTS)

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I INTRODUCTION

A CITIZEN of India is a citizen of India first and a Hindu, Muslim, Christian, Sikh, Parsi, Jain or Buddha or a dalit, tribe, backward or a Bihari, Keralite, Maratha, Gujarati, Assamia, Kashmiri, Bengali, Rajasthani, Andhrite, Madrasi or Punjabi, only thereafter. Being a citizen of India, everyone is to be governed by the same set of laws so that equality in real terms is guaranteed. The Constitution of India does not envisage 'rule of law' is its strict sense. Rule of law has considerably been negated by carving out numerous exceptions which have over-shadowed 'rule of law'; there is a wide-spread concern about the negation of equality for deserving ones. Part III of the Constitution, guaranteeing fundamental rights, from its inception, contains self-contradictory provisions and numerous subsequent constitutional amendments have widened the existing gap between 'rule of law' and 'discrimination', substantially diluting the 'rule of law' in India. The 'rule of law' has been guaranteed by proclaiming "equality before law or the equal protection of laws" to all persons within the territory of India [article 14]; discrimination based *only* on the ground of religion, race, caste, sex or place of birth has been prohibited [article 15(1)]; discrimination based *only* on the ground of religion, race, caste, sex, descent, place of birth or residence has been prohibited for the purposes of employment or appointment to any office under the State [article 16]; all citizens have the same degree of freedoms such as freedom of speech and expression, assembly, form association or union, move freely throughout the territory of India, reside and settle in any part of India and practise any profession or carry on any occupation, trade or business [article 19(1)]; the life and liberty of every person is equally protected [article 21]; right against exploitation has been guaranteed in equal measure to everyone with further protection for children [articles 23 and 24]; freedom of religion has been guaranteed equally to every person [articles 25-28]; every section of the Indian citizen has been guaranteed right to conserve his

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distinct language, script or culture [article 29(1)]; denial of admission in an educational education maintained by the State or receiving aid out of State funds *only* on the ground of religion, race, caste or language is prohibited [article 29(2)]; and State is prohibited from making discrimination in granting aid to educational institutions on the ground that it under the management of a minority whether based on religion or language [article 30(2)]. In all these matters, the framers of the Constitution were clearly of the view that there can be no discrimination on any ground. However, while interpreting the above provisions, the Supreme Court has laid down certain riders such as 'equality among equals' only or 'reasonable classification' between persons, things or places is permissible if the same has a nexus with the object sought to be achieved thereby. Moreover, from the inception, certain provisions were incorporated to protect citizens such as women and children under article 15(3) but this provision has nothing to do with religion, race, class or caste. Likewise, untouchability has been abolished under article 17 which has nothing to do with any religion, race, caste, class or sex. But a provision like article 30 clearly aims at only one category of citizens, *i.e.* minorities. At the same time, certain provisions in Part III have been incorporated after the commencement of the Constitution through amendments which envisage un-equal treatment to certain categories of persons based *only* on the ground of religion, caste, language, *etc*. e.g. articles 15(4), (5), 16(3), (4-A), (4-B) and 30(1-A). The scope and ambit of these discriminatory provisions has been widened from time to time by the political rulers by amending these articles.

Once the Constitution guarantees equality in sex, religion, caste, place of birth, decent or residence, there can be no scope for making discriminatory provisions based on these very grounds which has been done by the amendments incorporated in articles 15(4), (5), 16(3), (4-A), (4-B) and 30(1-A) which have been upheld by the Supreme Court, with some riders.[1] When the Constitution proclaims that "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice", the question arises as to why should this guarantee apply only to "minorities" and not to all equally including the majority? Time has come when the discriminatory provisions of Part III need to be re-looked objectively and corrective measures taken for bringing about 'rule of law' in this country in its true sense and achieve the objectives enshrined in the Preamble to the Constitution of India.

Law is above everything else in a country governed by rule of law. Religion is subordinate to law and not *vice versa*. "The constitutional legitimacy, naturally, must supersede all religious beliefs or practices", observed Ranjan Gogoi, J in *Adi Saiva Sivachariyargal Nala Sangam* v. *State of Tamil Nadu*.[2] This observation was made by

1 See *Pramati Educational & Cultural Trust* v. *Union of India* (2014) 8 SCC 1; *Ashoka Kumar Thakur* v. *Union of India* (2008) 6 SCC 1; *M. Nararaj* v. *Union of India*, AIR 2007 SC 71; *U.P. Power Corpn.Ltd*. v. *Rajesh Kumar*, AIR 2012 SC 2728; *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477.

2 JT 2015 (12) SC 332 : 2015 (13) SCALE 714 : AIR 2016 SC 209 : (2016) 2 SCC 725.

the learned judge while considering the principle for the appointment of archaks for temples in the State of Tamil Nadu. Clubbing religion with law raises several significant questions pertaining to constitutional principles such as 'equality' among different sexes in some religions, criminal justice system, *etc*. There is no doubt that religious practices, as compared to economic, financial, political or other secular activities associated with religious practices which are already subject to state regulatory mechanism under article 25(2), must also give way to law. Religion-specific practices in conflict with law have no sanctity. Thus, the practice of sati prevalent among the Hindus particularly among Rajput women has been prohibited by law;[3] *samadhi* or any other method adopted to end life is a criminal act punishable under section 309 of the Indian Penal Code, 1860[4] and religious practices against public order, morality and health are not protected as freedom of religion under article 25(1) of the Constitution of India.[5] Torturing animals in *jallikattu* events or bullock cart races in the State of Tamil Nadu, Maharashtra and elsewhere in the country as a part of entertainment or religious event was banned by the Supreme Court.[6] Further, slaughtering of cows and their progeny on *bakrI'd* is not part of a religious ceremony.[7] The ban on the entry of women in shani temple at Shingnapur[8] or women in Haji Ali Dargah in Mumbai[9] has been successfully abolished by law and/or judicial verdicts. The management of a temple or maintenance of discipline and order inside the temple can be controlled by the state; the disciplinary power over the servants of the temple including the priests and the quantum and manner of payment of remuneration to the servants of the temple could be decided by a committee appointed by the state as it

3 The Sati (Prevention) Act, 1987; see also *Onkar Singh* v. *State of Rajasthan*, RLR 1987 (II) 957.

4 See *Gian Kaur* v. *State of Punjab* (1996) 2 SCC 648 which had overruled *P. Rathinam* v. *Union of India* (1994) 3 SCC 394.

5 *Tandava* dance in public places by Anand margis was not part of freedom of religion: *Jagadishwaranand Avadhuta Acharya* v. *Police Commissioner, Calcutta*, AIR 1984 SC 51. Likewise, in *Church of God (Full Gospel) in India* v. *K.K.R.Majestic Colony Welfare Association* (2000) 7 SCC 282, it was held that in a civilized society, activities disturbing old or infirm persons, students or children having their sleep in the early hours or during day time or other persons carrying on other activities could not be permitted in the name of religion; also see *N. Adithayan* v. *Travancore Devaswom Board* (2002) 8 SCC 106.

6 *Animal Welfare Board of India* v. *A. Nagaraja* (2014) 7 SCC 547.

7 *Mohd. Hanif Qureshi* v. *State of Bihar*, AIR 1958 SC 731; also see *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat* (2005) 8 SCC 534.

8 Order passed by High Court Bombay on April 1, 2016 in *Smt. Vidya Bal* v. *State of Maharashtra*, P.I.L. No. 55 of 2016 directing the respondents to ensure strict enforcement of the provisions of the Maharashtra Hindu Places of Public Worship (Entry Authorization) Act, 1956 so as to prevent any discrimination based on gender and keeping in view the provisions of art. 15, 25 and 51-A(e) of the Constitution so that the fundamental rights of women are fully realized and not allowed to be encroached upon by any authority or individual..

9 *Dr. Noorjehan Safia Niaz* v. *State of Maharashtra*, P.I.L. No. 106 of 2014 decided by a division bench of High Court of Bombay on August 26, 2016

was not a religious activity; the installation of the *hundis* for collection of offerings made by the devotees inside the Jagannath temple at Puri did not violate the religious rights of the *sevaks* of the temple in any manner.[10] The payment of salary to immams[11] is not a part of religious practice. A statutory provision casting disqualification on contesting an election or holding an elective office for those having more than two living children did not violate article 25 of the Constitution.[12] The stark reality of life is, however, otherwise.

In the name of freedom of religion, law including the Constitution of India and the fundamental rights engrained therein have been subjugated to religion by *thekedars* of religion. Even the apex court has not adopted a consistent approach in matters touching upon religious practices. It is claimed that according to religious texts, *santhara* or *sallekhana*[13] is permitted and is an integral part of Jainism. Anil Ambwani, CJ, High Court of Rajasthan on behalf of a division bench, in *Nikhil Soni* v. *Union of India*,[14] held that there was no dignity whatsoever in the act of fasting and, therefore, there exists no freedom to practise *santhara* as an extension of one's right to life under article 21 of the Constitution. Since 1960s, the court, on a case-by-case basis, has examined individual religious canons to determine what constituted an essential religious practice. The court held, "We do not find in any of the scriptures, preachings, articles or practices followed by the Jain ascetics, the Santhara…has been treated as an essential religious practice, nor is necessarily required for the pursuit of immortality or moksha."[15] The court, therefore, directed the state authorities to stop the practice of *santhara* or *sallekhana* and treat it as suicide punishable under section 302, IPC and its abetment by individuals under section 307, IPC. The court directed the state to stop and abolish the practice of *santhara* or *sallekhana* in the Jain religion in any form. Unfortunately, a two-judge bench, headed by H.L. Dattu, CJI, stayed the above order holding that Jain scholars were not consulted by the high court before it criminalised the practice of *santhara* or *sallekhana*.[16] This stay order had its toll within almost a year when a thirteen year old girl named Aradhana, the only child of her parents, studying in eighth standard in a school, died on October 3, 2016 after 68 days of fasting in the name of tapasya (penance). Though a criminal case was registered

10 *Sri Jagannath Temple Puri Management Committee* v. *Chintamani Khuntia* (1997) 8 SCC 422.

11 See *Bhartiya Janata Party* v. *State of West Bengal*, AIR 2013 Cal. 215.

12 *Javed* v. *State of Haryana* (2003) 8 SCC 369.

13 *Santhara* or *sallekhana* is a Jain custom of embracing voluntary death. According to Jains, to purge oneself of bad *karma* and attain *moksha* (salvation), an oath is taken to stop eating until death by starvation. Jains contend that *santhara* does not aim at trying to achieve an unnatural death, but it is a practice intrinsic to a person's ethical choice to live with dignity until death. It's a ritual of purification, done in consultation with a guru, following a detailed procedure.

14 2015 Cri LJ 4951.

15 *Id*. at 4969.

16 *Dhawal Jiwan Mehta* v. *Nikhil Soni*, SLP (C) No. 15592 of 2015, order of stay dated 31.08.2015 and the case was pending even till the end of December, 2016.

under section 304(II) (culpable homicide not amounting to murder) of IPC and section 77 of the Juvenile Justice Act against the parents of the child, the Jain spiritual leaders asserted that none had a right to interfere with the fundamental rights of Jains to practise their religion.[17] When active euthanasia has been held to be unconstitutional and even passive euthanasia has been permitted only under strict conditions,[18] how can death by fasting be considered to be constitutionally valid under article 21 of the Constitution?

One may also note the discrimination based *solely* on the ground of 'gender' being perpetuated in the name of Islam. Consider the rights claimed by Muslim males to marry up to four women, and even unlimited number of women by '*muta* marriage' and divorce their wives by pronouncing "triple talaq". Moreover, the rights of Muslim women in matters of inheritance are unfavorable to those of their male counterparts. Where then is the 'equality' between Muslim men and Muslim women? The decision, on behalf of a division bench of the apex court by Adarsh Kumar Goel, J in *Parkash* v. *Phulavati*,[19] deserves special mention as the issue of gender discrimination against Muslim women was taken up by the court *suo motu* though the issue was not directly

17 See *Hindustan Times* dated 11.10.2016.

18 *Ramchandra Shanbaug* v. *Union of India*, AIR 2011 SC 1290.

19 2015 (11) SCALE 643 : JT 2015 (11) SC 173. The issue of gender discrimination was raised before the Supreme Court earlier in *Ahmedabad Women Action Group (AWAG)* v. *Union of India* (1997) 3 SCC 573, where the court referred to the observations of Sahai, J. in *Sarla Mudgal* v. *Union of India* (1995) 3 SCC 635, that a climate was required to be built for a uniform civil code. Reference was also made to observations made in *Madhu Kishwar* v. *State of Bihar* (1996) 5 SCC 125, to the effect that the court could at best advise and focus attention to the problem instead of playing an activist role. The court did not go into the merits of discrimination with the observation that the issue involved state policy to be dealt with by the legislature. It was observed that challenge to the Muslim Women (Protection of Rights on Divorce) Act, 1986 was pending before the constitution bench and there was no reason to multiply proceedings on such an issue. The constitution b ench in *Daniel Latifi* v. *Union of India* (2001) 7 SCC 740, did not address the issue but the court held that art. 21 included right to live with dignity which supports the plea that a Muslim woman could invoke fundamental rights in such matters. Goel, J referred to a few other cases having a bearing on the issue: *Olga Tellis* v. *Bombay Municipal Corpn.* (1985) 3 SCC 545 and *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248 (the concept of "right to life and personal liberty" guaranteed under art. 21 of the Constitution included the "right to live with dignity"); *Javed* v. *State of Haryana* (2003) 8 SCC 369 (practice of polygamy was injurious to public morals and could be superseded by the state just as practice of 'sati' and the conduct rules providing for monogamy irrespective of religion were valid and could not be struck down on the ground of violation of personal law of Muslim); *John Vallamattom* v. *Union of India* (2003) 6 SCC 611 (s.118 of the Indian Succession Act, 1925 restricting right of Christians to make Will for charitable purpose was without any rational basis, discriminatory against Christians and violated art.14; laws dealing with marriage and succession were not part of religion; law has to change with time; international covenants and treaties could be referred to examine the validity and reasonableness of a provision); *Charu Khurana* v. *Union of India* (2015) 1 SCC 192 (gender discrimination by denial of membership of Cine Costume Make-up Artists and Hair Dressers Association) .

involved in the appeal. In this case, while disposing of an appeal filed by a Hindu woman regarding right of succession to her husband's property, raising the issue whether the Hindu Succession (Amendment) Act, 2005 had retrospective effect, the court directed that a public interest litigation be separately registered and notice be issued to the Attorney General and the National Legal Services Authority as the court was of the view that the issue was not merely a matter of policy but involved violation of fundamental rights of "Muslim women who are subjected to discrimination; there is no safeguard against arbitrary divorce and second marriage by her husband during the currency of the first marriage, resulting in denial of dignity and security to her." It may also be noted here that three independent writ petitions on behalf of Muslim women filed before the Supreme Court during 2016 challenging the constitutional validity of "triple talaq" were pending before the apex court. It is time now to enact uniform civil code[20] to bring about uniformity in matters relating to marriage, divorce, maintenance and inheritance and the monopoly of *thekedars* of religion be curbed. No marriage should be valid unless the same is performed in accordance with the provisions of the uniform civil code. It has rightly been held that it would be inexpedient and incorrect to think that all laws must be made uniformly applicable to all people in one go; the legislature has to be trusted for bringing about necessary reforms in matters relating to faith and religion which at times may include personal laws flowing from religious scriptures.[21]

The right to constitutional remedies is guaranteed "for the enforcement of the rights conferred" by Part III of the Constitution which are available only to "persons" and/or "citizens" and not to the "State".[22] Article 32 can be invoked only at the instance of an aggrieved person or citizen except when the issue relates to public interest affecting the public in general. Thus, article 32 comes in the picture only when (i) there is an issue of violation of any of the fundamental rights guaranteed under Part III and (ii) the person/citizen approaching a High Court under article 226 or the Supreme Court under article 32 is "aggrieved" on account of actual or threatened violation of its/his fundamental right except when one is approaching for a public interest cause. Even in respect of a public interest cause, the issue must relate to violation of any one of the fundamental rights. If there is no issue of violation of a fundamental right, article 32 cannot be invoked.[23] In case of absence of any of the above two requirements, article 32 cannot be invoked. Can the Supreme Court entertain a petition under article

20 *Shabnam Hashmi* v. *Union of India* (2014) 4 SCC 1.

21 *Pannalal Bansilal Pitti*. v. *State of Andhra Pradesh* (1996) 2 SCC 498; *Riju Prasad Sarma* v. *State of Assam*, 2015 (7) SCALE 602.

22 See *DM Wayanad Institute of Medical Sciences* v. *Union of India*, AIR 2015 SC 2940, in which the Supreme Court refused to entertain a petition under art.32 of the Constitution as the petitioner did not have a fundamental right to establish institutions for imparting medical and technical education.

23 See *Ramdas Athawale* v. *Union of India*, AIR 2010 SC 1310; S N Singh, "Constitutional Law-I (Fundamental Rights)", XLVI *ASIL* 159 at 193-94 (2010).

32 at the instance of the Union of India which has not been guaranteed any fundamental right under Part III of the Constitution and also when there is no violation of any fundamental right? If yes, for what purpose and for the protection of whose fundamental rights? If the fundamental right of a person is violated or there is any threat to such violation,[24] the Union of India, being 'State' under article 12 of the Constitution and one of the three organs of the State, is under a duty to protect that person's fundamental right, instead of running to the court, showing its helplessness. May be, the helplessness might be the result of federal structure adopted by the Constitution where the Union of India is not supposed to interfere with the exercise of power by the states in respect of matters assigned to them except as provided by the Constitution itself, e.g. articles 257, 258 under which directions can be issued by the Union of India to the states for specified purposes or 356 (failure of constitutional machinery in a state) or 360(3) (financial emergency) of the Constitution. This question was particularly raised, but not answered, in *Union of India* v. *V. Sriharan @ Murugan*.[25] In this case, the Union of India had filed Writ Petition (Crl.) No. 48 of 2014 under article 32 of the Constitution challenging letter dated 19.02.2014 sent by the Chief Secretary, Government of Tamil Nadu to the Secretary, Government of India whereby the State of Tamil Nadu proposed to remit the sentence of life imprisonment and release seven persons who had been convicted in the Rajiv Gandhi assassination case. Three of the seven convicts were originally awarded death sentence which had been commuted to life imprisonment by the Supreme Court on the ground of undue delay in the consideration of their mercy petitions by the President of India under article 72 of the Constitution. While commuting the sentence of death into imprisonment for life, the court had made it clear that "Life imprisonment means end of one's life, subject to any remission granted by the appropriate Government under Section 432 of the Code of Criminal Procedure, 1973 which, in turn, is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code."[26] The petition filed by the Union of India was considered by a full bench which referred the same, formulating seven questions, for consideration by a larger bench.[27] On behalf of the Constitution Bench, which considered the reference, Fakkir Mohamed Ibrahim Kalifulla, J. observed, "Having considered the objections raised on the ground of maintainability, having heard the respective counsel

24 Ranjan Gogoi, J in *Adi Saiva Sivachariyargal Nala Sangam* v. *State of Tamil Nadu*, JT 2015 (12) SC 332: 2015 (13) SCALE 714 : AIR 2016 SC 209 : (2016) 2 SCC 725 held that the "institution of a writ proceeding need not await actual prejudice and adverse effect and consequence. An apprehension of such harm, if the same is well founded, can furnish a cause of action for moving the Court."

25 2015 (13) SCALE 165 : JT 2015 (11) SC 480.

26 *V. Sriharan @ Murugan* v. *Union of India*, AIR 2014 SC 1368 at 1376 : (2014) 4 SCC 242 at 252.

27 *Union of India* v. *V. Sriharan @ Murugan* (2014) 11 SCC 1 at 19.

on the said question and having regard to the nature of issues which have been referred for consideration by this Constitution Bench, we are also convinced that answer to those questions would involve substantial questions of law as to the interpretation of Articles 72, 73, 161 and 162, various Entries in the Seventh Schedule consisting of Lists I to III as well as the corresponding provisions of Indian Penal Code and Code of Criminal Procedure and thereby serious public interest would arise for consideration and, therefore, we do not find it appropriate to reject the Reference on the narrow technical ground of maintainability."[28] In the same case, Uday Umesh Lalit, J. similarly held, "Having entertained the petition, issued notices to various State Governments, entertained applications for impleadment and granted interim orders, it would not be appropriate at this stage to consider such preliminary submissions. In the circumstances, we reject the preliminary submissions."[29] The issue is nonetheless very important. One thing is clear. This is not a case of 'dispute' between the Union of India and the State of Tamil Nadu which could be resolved by invoking the original exclusive jurisdiction of the Supreme Court under article 131 of the Constitution. But this was certainly an issue on which the President could have sought the advice of the Supreme Court under article 143 since, as observed above by Fakkir Mohamed Ibrahim Kalifulla, J, it raised "substantial questions of law as to the interpretation of Articles 72, 73, 161 and 162, various Entries in the Seventh Schedule consisting of Lists I to III as well as the corresponding provisions of Indian Penal Code and Code of Criminal Procedure." This approach of the court cannot be considered to be legally sound or tenable and in no case it can be treated as a precedent for any other case in which no issue of violation of any fundamental right was involved which could be adjudicated under article 32 of the Constitution. Approaching the court in the very first instance is not the right way of protecting the fundamental rights and this case has set a bad precedent for the executive. One cannot appreciate a judgment of a court simply because it has been rendered by the highest court of the land unless it stands the scrutiny by legally sound reasonings.

The Constitution prohibits discrimination based on sex but it is rare for any person to claim exemption from criminal prosecution on the ground of being a woman. In fact, this is what happened in *State of Tamil Nadu* v. *R. Vasanthi Stanley*,[30] in which the respondent woman along with her husband, accused of financial scam and forgery of documents for getting loans from multiple banks, was discharged/acquitted on the ground of her gender. The Supreme Court rightly held that an offence under the criminal law was an offence; it did not depend upon the gender of the accused. The charge-sheet had stated that she had signed the pronotes; was co-applicant in two cases and

28 *Union of India* v. *V. Sriharan @ Murugan* , 2015 (13) SCALE 165 at 198.

29 2015 (13) SCALE 165 at 275. For this view, the learned judge referred to *Mohd. Aslam alias Bhure* v. *Union of India* (2003) 4 SCC 1.

30 AIR 2015 SC 3691 : (2016) 1 SCC 376.

guarantor in two other cases. She had worked as assistant commissioner of commercial taxes and, after resigning, she became a member of Rajya Sabha. The plea of the woman was that she had merely followed the commands of her husband (the other accused who had since died) and had signed the documents without being aware of the transactions entered into by her husband and the nature of the business. She had also contended that all the loans had been repaid and no dues certificate obtained from the banks. The court found her assertions as "a mere pretence and sans substance given to the facts." Dipak Misra, J held that a person committing a murder or involved in a financial scam or forgery of documents cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. Such offences are gender neutral and provisions such section 437, Cr PC, *etc*. were not attracted in such a case.

The decision on fundamental rights, which was hailed most during the year 2015 and welcomed by all equally, giving a sigh of relief not only to those who were victims of the legal process but all those advocating citizen's freedom of speech and expression under article 19(1)(a) of the Constitution, was *Shreya Singhal* v. *Union of India*,[31] in which the apex court struck down section 66-A of the Information Technology Act, 2000, which had been added by an amendment in 2009 prescribing punishment for sending offensive messages through communication service by means of a computer resource or a communication device, in electronic form, that is grossly offensive or has menacing character or which is false or any electronic mail or message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, as being violative of the above freedom of the citizens.

The 20th Law Commission of India headed by A.P. Shah J. in its 262[32] report on "The Death Penalty" (2015) recommended abolition of death penalty in all cases except terrorism related offences and waging war. If this recommendation is accepted, it would go a long way in changing the entire face of criminal jurisprudence. But the record of human rights protection in this country is not satisfactory. The Protection of Human Rights Act, 1993 was enacted by Parliament to safeguard the human rights of the citizens. Section 21 of the Act prescribes that every state "may" constitute a human rights commission for that state to exercise the powers conferred upon, and to perform the functions assigned to, a state commission under the Act. The Supreme Court in *K. Saravanan Karuppasamy* v. *State of T.N.*,[33] had directed the State of Tamil Nadu to takes appropriate steps to fill up the vacancy of the chairperson, state human

31 2015 (4) SCALE 1 : AIR 2015 SC 1523.

32 The issue was taken up by the Law Commission as per the views of the Supreme Court expressed in *Shankar Kisanrao Khade* v. *State of Maharashtra* (2013) 5 SCC 546, para 149 and *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra* (2009) 6 SCC 498, para 112. Some of the members of the Commission were opposed to the recommendation.

33 (2014) 10 SCC 406.

rights commission, Tamil Nadu expeditiously. Despite this direction, it is sad to note that even after lapse of more than two decades some of the states like West Bengal did not bother to constitute a human rights commission for that state, presumably because they thought it was their 'discretion' (as compared to a statutory 'duty') to constitute or not to constitute such a commission. This lapse was brought to the notice of the Supreme Court in *Dilip K. Basu* v. *State of W.B.*,[34] in which the court was firm in directing that the setting up of human rights commission in each state was mandatory. The court further directed installation of CCTVs in all police stations. The direction deserves to be hailed despite the fact that the these commissions are toothless bodies and hardly any impact is noticeable on account of their working. It also needs to be emphasized that in view of the fact that the national human rights commission is headed by a retired Chief Justice of India and a state human rights commission is headed by a retired Chief Justice of a High Court and the retired judges of the Supreme Court and High Courts are their members, it is necessary to confer on them real power so that they may act as a potent weapon in safeguarding the human rights of individuals on the same pattern as the national green tribunal established under the National Green Tribunal Act, 2010 for environmental protection.

One noticeable decision of the Supreme Court during the current year related to the exercise of power by the Supreme Court under article 142 of the Constitution of India to enhance the amount of compensation to a person who had not even approached the court for the same.[35] This kind of magnanimity of the apex court is quite rare. This case raises a vital question regarding the scope of article 142 which confers power on the apex court to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it". When a party had not even approached the court, can his/her "cause or matter" be said to be pending before the court inviting exercise of power under article 142? Does article 142 confer an unlimited and uncontrolled power on the Supreme Court? Should not court itself lay down broad guidelines for the exercise of its power under that article? It seems the court has traversed much beyond the express provisions of law while exercising power under article 142.[36]

34 AIR 2015 SC 2887 : (2015) 8 SCC 744; also see *Dalit Manavadhikar Kendra Samiti* v. *State of Rajasthan*, 2015 (12) SCALE 565, in which the court, taking note of the fact that chairperson of the Rajasthan state human rights commission had not been appointed for five years, issued necessary directions.

35 *Jitendra Khimshankar Trivedi* v. *Kasam Daud Kumbhar* (2015) 4 SCC 237.

36 Thus in *Anil Kumar Jain* v. *Maya Jain*, AIR 2010 SC 222, the court passed an order which was contrary to the express provisions of s.13-B(2) of the Hindu Marriage Act, 1955. Despite the mandatory requirement of a minimum of six months time prescribed under s.13-B(2), after presentation of a petition for divorce by mutual consent by the husband and wife, the Supreme Court allowed divorce before six months as required by exercising power under art. 142 of the Constitution; also see *Prachi Singh Patil* v. *Rahul G. Patil* (2015) 2 SCC 157. Likewise, after holding a rule as being *ultra vires*, the court, exercising its power under art.

During the current year, a decision of the Supreme Court reveals the casualness in the decision making process where the court awarded punishment of imprisonment to a convict who had died more than two years prior to his conviction and award of sentence by the apex court. On 10th April, 2015, a division bench (consisting of Pinaki Chandra Ghose and Uday Umesh Lalit JJ), reversing the decision of the High Court of Chhatisgarh acquitting an accused for having committed the offence under section 376(2)(f) of the Indian Penal Code, 1860, convicted the accused; sentenced him to undergo imprisonment for seven years; imposed a fine of Rs.5,000/- and directed that the convict "shall be taken into custody forthwith to undergo the sentence as aforesaid."[37] It was noticed on 16.11.2015 that the accused had died on 14.10.2012, more than two years prior to the judgment delivered on April 10, 2015 by the Supreme Court.[38] This case raises many significant questions pertaining to judicial process including the appointment of amicus curiae and their role. The court in its judgment dated April 10, 2015 noted, "Despite service of notice upon Respondent No. 1 no appearance was entered on his behalf and as such this Court appointed Ms. Vanshaja Shukla as Amicus Curiae to assist this Court on behalf of Respondent No. 1. We must place on record appreciation for the assistance rendered by her." The relevant questions that require answer are: How and to whom notice was served for Respondent No. 1 (i.e. the accused)? What was the mode of service of notice and who received the notice when the accused was not alive? It is rather un-thinkable that an accused acquitted by two courts below (the trial court as well as the High Court)) will choose not to defend himself even after getting notice of hearing from the apex court. When the amicus curiae did not even know the whereabouts of the accused or whether he was alive or dead, in what way did she assist the court in the case is a matter of grave concern. And the court, overhelmed by her assistance, was pleased to "place on record

142, allowed the same to continue for six months: *Academy of Nutrition Improvement* v. *Union of India* (2011) 8 SCC 274.

37 *Ms. S.* v. *Sunil Kumar,* 2015 (4) SCALE 483

38 The judgment was recalled by the court vide its order dated 16.11.2015: *Ms. S.* v. *Sunil Kumar*, JT (2015) 12 SC 212 : 2015 (13) SCALE 44. While recalling the judgment dated Apr il 10, 2015, the court observed:

"3. The State of Chhatisgarh was duly represented by its counsel. The Appellant was also represented through the Supreme Court Legal Services Committee. However, the State and the Appellant, none of the parties, drew the attention of this Court that Respondent No. 1/ accused has already died. Accprdingly, hearing of appeal was taken up and concluded on 13th March, 2015. The judgment was delivered by this Court on April 10, 2015.

4. At that point of time it was not within the knowledge of this Court that Respondent No. 1/ accused has died. Subsequently, when the matter was placed before us, we have been informed by the learned Counsel Ms. Shashi Juneja, that Respondent No. 1 Sunil Kumar has died on 14.10.2012. Since the said fact was not within knowledge of this Court nor the attention of this Court was drawn to the said fact by the parties, including the State, it would be obvious that the judgment/order dated April 10, 2015 cannot be given effect to at this stage.

5. Accordingly, the judgment and order dated April 10, 2015 already passed in this matter, has to be recalled, recording the fact that the accused Respondent No. 1 had expired before the appeal was heard out. Hence, this appeal had become abated."

appreciation for the assistance rendered" by the amicus curiae. This raises a serious question as to the type of role played by the court appointed amicus curiae. There cannot be a more noticeable case of judicial negligence than what is noticeable in the present case. It is not known as to how the court pronounced the judgment in the absence of the convict. This is an unfortunate method of decision making and exposes the court as also the counsel for the parties, particularly the amicus curiae appointed by the court to defend an accused, as to their commitment to the cause of justice in general and the accused for whom he/she is appointed to defend in particular. This is one of those decisions because of which one would bow his head in shame and compel any reasonable person to think whether this is the kind of decision making at the highest level of the judiciary! Even if it is a solitary case, it is an eye opener to all those who matter in the society. More surprising is the fact that when the matter was taken up by the court on November16, 2015, instead of admitting the lapse in giving the judgment on April 10, 2015, and ordering an enquiry into the entire matter, the court simply recalled that judgment on the ground that on account of death of the convict, the appeal had abated. On the other hand, one may notice the order passed in *Chairman and Managing Director, Central Bank of India* v. *Central Bank of India SC/ST Employees Welfare Association*,[39] in which the court clearly admitted the error apparent on the face of record committed by it in the earlier judgment delivered in that case.[40]

Two cases reported during the current year raised the issue whether 'judiciary' is "State" under article 12 of the Constitution of India and whether a judicial order could be challenged as being violative of the fundamental rights?[41] Another pertinent question raised in one of the reported case was whether the administrator appointed by government for a society would be 'State' under article 12 of the Constitution even when the society itself was not 'State'.[42] This issue is important because there are numerous statutes under which the government has power to nominate/appoint administrators such as co-operative societies. Yet another important decision of the apex court was whether "deemed universities" are 'State' under article 12 of the Constitution.[43]

More than half a dozen cases decided by the Supreme Court and the high courts during the current year related to the perpetual problem touching various issues relating

39 2015 (1) SCALE 169 : (2015) 12 SCC 308.

40 *Chairman and Managing Director, Central Bank of India* v. *Central Bank of India SC/ST Employees Welfare Association*, 2016 (1) SCALE 236.

41 *Riju Prasad Sarma* v. *State of Assam*, JT 2015 (7) SC 602 and *Radhey Shyam* v. *Chhabi Nath*, 2015 (3) SCALE 88; also see *Kanpur Jal Sansthan* v. *Bapu Constructions* (2015) 5 SCC 267; *Board of Control for Cricket in India* v. *Cricket Assn. of India*, 2015 (2) SCALE 608; *T.M. Sampath* v. *Secretary, Ministry of Water Resources* (2015) 5 SCC 333; *Common Cause* v. *Union of India* (2015) 7 SCC 1; *The Organizer, Dehri C.D. and C.M. Union Ltd.* v. *State of Bihar*, AIR 2015 Pat. 67 (did the Constitution of India ever envisage an individual or person as 'State' under art.12?).

42 *Kandivali Co-op. Industrial Estate* v. *Municipal Corpn. of Greater Mumbai*, AIR 2015 SC 1434.

43 *Dr. Jeneth Jeyapaul* v. *SRM University*, 2015 (13) SCALE 622.

to 'reservation'.[44] One case which deserves special mention here is the new category of persons who are likely to get reservation, i.e. victims of acid burns about which the apex court has issued certain directions.[45] This category of persons would be in addition to reservation recently suggested by the Supreme Court for transgenders under article 16(4) of the Constitution of India.[46]

The apex court continued the monitoring of cases raising issues pertaining to child abuse including missing children;[47] health issues,[48] gender justice[49] particularly the issue of falling sex ratio where the court, after noticing the slackness of the state governments, issued many directions for proper and effective implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994[50] and for the protection of persons with disabilities including the effective enforcement of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.[51]

II 'STATE' UNDER ARTICLE 12

Bodies/institutions are not 'State' under article 12 of the Constitution are amenable to writ jurisdiction under article 226 – "deemed universities" and BCCI

In *V.R. Rudani*,[52] the Supreme Court had held that the term "authority" used in article 226 must receive a liberal meaning unlike the term 'other authorities' under

44 *Ram Singh* v. *Union of India*, 2015 (3) SCALE 570 [reservation for Jats]; *Sanjeet Shukla* v. *State of Maharashtra* [reservation for Maratha, Muslim] Bombay HC; *Chairman & Managing Director, Central Bank of India* v. *Central Bank of India SC/ST Employees Welfare Assn.* (2015) 12 SCC 308; *S. Paneer Selvam* v. *State of T.N.* (2015) 10 SCC 292 [article 16(4-A) – reservation in promotion - inadequacy of representation of SC/ST – referred to (2015) 12 SCC 308]; *Rajeshwar Baburao Bone* v. *State of Maharashtra*, 2015 (8) SCALE 287; *M. Surender Reddy* v. *State of A.P.* (2015) 8 SCC 410 [retrospective reservation]; *Akhilesh Kumar Singh* v. *Ram Dawan*, 2015 (10) SCALE 159; *Jayant Chakraborty* v. *State of Tripura*, AIR 2015 Tri. 43 (FB) [no reservation if adequate representation in service already exists].

45 *Parivartan Kendra* v. *Union of India*, JT 2015 (12) SC 14 : 2015 (13) SCALE 325.

46 *National Legal Services Authority* v. *Union of India*, AIR 2014 SC 1863 : (2014) 5 SCC 438.

47 *Bachpan Bachao Andolan* v. *Union of India*, 2015 (8) SCALE 667 & 671 [up date of the order 2014 (13) SCALE 83]; 2015 (9) SCALE 45, 47, 48.

48 *Occupational Health and Safety Assn*. v. *Union of India*, (2014) 2 SCC 547.

49 *Jitendra Khimshankar Trivedi* v. *Kasam Daud Kumbhar* (2015) 4 SCC 237; *Charu Khurana* v. *Union of India* (2015) 1 SCC 192 : AIR 2015 SC 839 : 2015 (5) SCALE 1 (the issue was of gender discrimination in the matter of denial of membership of "Cine Costume Make-up Artists and Hair Dressers Association" in film industry).

50 *Voluntary Health Assn*. v. *Union of India*, 2015 (3) SCALE 122 (up date of order 2014 (13) SCALE 166) : (2015) 9 SCC 740; 2015 (6) SCALE 85; also see *Sabu Mathew George* v. *Union of India* (2015) 11 SCC 545.

51 *Justice Sunanda Bhandare Foundation* v. *Union of India*, 2015 (8) SCALE 121 (up date of order 2014 (4) SCALE 533); also see *Union of India* v. *Dileep Kumar Singh* (2015) 4 SCC 421.

52 *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani* (1989) 2 SCC 691; also see *Zee Telefilms Ltd*. v. *Union of India* (2005) 1 SCC 649.

article 12. Article 12 was relevant only for the purpose of enforcement of fundamental rights under article 32 while article 226 conferred power on the high courts to issue writs for the enforcement of the fundamental rights as well as other rights. The words "any person or authority" used in article 226 were not to be confined only to statutory authorities and instrumentalities of the state; they may cover any other person or body performing public duty. The form of the body concerned was not very much relevant. What was relevant was the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. It was immaterial by what means the duty was imposed. If a positive obligation exists, mandamus cannot be denied, the court had ruled. Despite the above clear exposition of law, the question whether a university established by an Act of a state legislature was amenable to writ jurisdiction of the high court was answered in the negative in *Arun Kumar* v. *ICFAI University*,[53] where the High Court of Uttaranchal had observed that even though the ICFAI university was established by the ICFAI University Act, 2003 passed by the state legislature, the university was not 'State' because "the University in spite of being a creature of a statute cannot be called a 'State' or an 'instrumentality of the State' within the meaning of article 12 of the Constitution of India as there was no 'deep and pervasive control' of the State over this body." Unfortunately, the court did not consider the cumulative effect of all the factors which the Supreme Court had laid down in *Ajay Hasia* v. *Khalid Mujib*.[54] The court had relied only on one factor, *viz*. deep and pervasive state control of the university; it did not consider the most relevant factor of nature of duty performed by the university. While commenting on this decision, this author had stated that this decision overlooks a catena of judicial pronouncements of the Supreme Court on the subject and does not at all answer the questions raised by creation of statutory bodies which has become a general trend now particularly in the field of education where not only private statutory universities but also a very large number of "deemed universities" have come into existence. It was specifically observed by this author that it was necessary for the Supreme Court to consider at the earliest opportunity the existing principles to decide the status of agencies/instrumentalities which owe statutory existence or have otherwise been vested with statutory powers and duties like statutory universities and deemed universities which decide the fate of a very large number of students, teachers and employees. In fact, the very existence of education at all levels is going in the hands of private sector with far-reaching implications. Keeping these bodies outside the ambit of article 12 would lead to making constitutional guarantee of fundamental rights to the individuals to be meaningless.[55] Later on, this author had further stated, "The court failed to consider that the university is providing not only an important public service like education, it has also powers to make delegated legislation such as statutes, ordinances, rules and regulations which have statutory force and binding on all."[56]

53 AIR 2009 (NOC) 2860 (UTR).

54 AIR 1981 SC 487.

55 S N Singh, "Constitutional Law – I (Fundamantal Rights)", XLV *ASIL* 125 at 127 (2009).

56 S N Singh, "Constitutional Law – I (Fundamental Rights)", XLIX *ASIL* 247 at 253 (2013).

The question has now been finally settled by the apex court with regard to "deemed universities" in *Dr. Jenet Jeyapaul* v. *SRM University*.[57] In this case, the services of the appellant teacher were terminated by the respondent "deemed university" on the ground of failure to take classes of the students of B.Sc. third year degree course and M.Sc. first year degree course. The single judge of the high court had quashed the termination order which was reversed by the division bench holding that the writ petition under article 226 of the Constitution was not maintainable against the respondent which was a "deemed university". On appeal, a division bench of the Supreme Court relied upon S.A. de Smith[58] and observed:[59]

57 2015 (13) SCALE 622.

58 S.A. de Smith, *Judicial Review of Administrative Action* 127(3- 027) and 135 (3-038) (7th ed., 2013) where it is stated:

"AMENABILITY TEST BASED ON THE SOURCE OF POWER

The courts have adopted two complementary approaches to determining whether a function falls within the ambit of the supervisory jurisdiction. First, the court considers the legal source of power exercised by the impugned decision-maker. In identifying the "classes of case in which judicial review is available", the courts place considerable importance on the source of legal authority exercised by the defendant public authority. Secondly and additionally, where the "source of power" approach does not yield a clear or satisfactory outcome, the court may consider the characteristics of the function being performed. This has enabled the courts to extend the reach of the supervisory jurisdiction to some activities of non-statutory bodies (such as self-regulatory organizations). We begin by looking at the first approach, based on the source of power."

"JUDICIAL REVIEW OF PUBLIC FUNCTIONS

The previous section considered susceptibility to judicial review based on the source of the power: statute or prerogative. The courts came to recognize that an approach based solely on the source of the public authority's power was too restrictive. Since 1987 they have developed an additional approach to determining susceptibility based on by the type of function performed by the decision-maker. The "public function" approach is, since 2000, reflected in the Civil Procedure Rules: CPR.54.1(2)(a)(ii), defines a claim for judicial review as a claim to the lawfulness of "a decision, action or failure to act in relation to the exercise of a public function." (Similar terminology is used in the Human Rights Act 1998 s.6(3)(b) to define a public authority as "any person certain of whose functions are functions of a public nature", but detailed consideration of that provision is postponed until later). As we noted at the outset, the term "public" is usually a synonym for "governmental".

"The aforesaid test was applied in *R.* v. *Panel on Take-overs and Mergers, ex parte Datafin Plc (Norton Opax Plc and another intervening)* (1987) 1 All ER 564, wherein Sir John Donaldson MR held:

"In determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body's powers and duties but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions the court had jurisdiction to entertain an application for judicial review of that body's decisions……"

The court also pointed out that the *ratio* of *Zee Telefilms Ltd*. [*Zee Telefilms Ltd.* v. *Union of India* (2005) 4 SCC 649] was firstly, that the BCCI was discharging public duties and

> Applying the aforesaid principle of law to the facts of the case in hand, we are of the considered view that the Division Bench of the High Court erred in holding that respondent No. 1 is not subjected to the writ jurisdiction of the High Court under Article 226 of the Constitution. In other words, it should have been held that respondent No.1 is subjected to the writ jurisdiction of the High Court under Article 226 of the Constitution.
>
> This we say for the reasons that firstly, respondent No. 1 is engaged in imparting education in higher studies to students at large. Secondly, it is discharging "public function" by way of imparting education. Thirdly, it is notified as a "Deemed University" by the Central Government under section 3 of the UGC Act. Fourthly, being a "Deemed University", all the provisions of the UGC Act are made applicable to respondent No. 1, which inter alia provides for effective discharge of the public function - namely education for the benefit of public. Fifthly, once respondent No. 1 is declared as "Deemed University" whose all functions and activities are governed by the UGC Act, alike other universities then it is an "authority" within the meaning of Article 12 of the Constitution. Lastly, once it is held to be an "authority" as provided in Article 12 then as a necessary consequence, it becomes amenable to writ jurisdiction of High Court under Article 226 of the Constitution.

It has now been almost settled that even if an authority was not strictly 'State' as defined under article 12 of the Constitution, a writ may still lie against it if it performs public functions and for this purpose all the six tests laid by the court in earlier cases and applied consistently[60] have lost their meaning. In *K.K. Saksena* v. *International Commission on Irrigation & Drainage*,[61] a division bench of the apex court held that the respondent registered society - International Commission on Irrigation & Drainage (ICID) - was not state under article 12 of the Constitution and not answerable to writ jurisdiction of the high court under article 226. The issue raised on behalf of the appellant before the Supreme Court was that even without being considered 'State' under article 12 of the Constitution, the high court still exercises its jurisdiction under article 226 by looking into the nature of functions of ICID by considering it as

secondly, an aggrieved party could seek a public law remedy against the BCCI under article 226 of the Constitution of India.

59 2015 (13) SCALE 622 at 628.

60 *Sukhdev* v. *Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421; *Ramana Dayaram Shetty* v. *International Airport Authority of India* (1979) 3 SCC 489; *Ajay Hasia* v. *Khalid Mujib Sehravardi* (1981) 1 SCC 722; *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology* (2002) 5 SCC 111.

61 (2015) 4 SCC 670 : 2014 (14) SCALE 384. This case was discussed in detail in 2014 Survey, see S N Singh, "Constitutional Law – I (Fundamental Rights)", L *ASIL* 251 at 259 (2014).

"authority" as envisaged under article 226. If ICID was discharging any public duty as an "authority", article 226 could still be invoked. The question really was whether there was any difference between the term "other authorities" used under article 12 and the term "authority" used under article 226 of the Constitution? The Supreme Court proceeded on the premise that there was no pervasive governmental control over the functioning of ICID and held that merely because some government officers came on deputation, the same had no consequence. Likewise, in *T.M. Sampath* v. *Secretary, Ministry of Water Resources*,[62] the appellants were employees of national water development agency (NWDA) registered as a society under the Societies Registration Act, 1860. They had approached the court seeking parity with central government employees in respect of pension. The NWDA, fully funded, was under the administrative and financial control of the Ministry of Water Resources headed by the Union Minister for Water Resources as the President. The NWDA had framed rules and regulations for its smooth functioning. The emoluments prescribed for the government servants by the central government by office memorandum (OM) applied *mutatis mutandis* to the employees of NWDA. Bye-law 28 of the NWDA also mandated that the rules and orders concerning service conditions applicable to the central government employees apply *mutatis mutandis* to the employees of NWDA but the same could be modified by the governing body. In case of any doubt, however, the matter was required to be referred to the governing body for decision. Bye-law 26(a) provided for the structure of emoluments for all employees that will be adopted by NWDA, with the approval of ministry of finance (department of expenditure). Bye-law 28 provided that till such time the NWDA frames its rules governing service conditions of the employees, rules and orders applicable to central government employees shall apply *mutatis mutandis*, subject to such modifications as made by NWDA from time to time. The court refused to treat NWDA as an instrumentality of the state under article 12 merely on the basis that its funds were granted by the central government.

It may be remembered that by a majority of 3:2, relying on earlier decisions, the Supreme Court had held that Board of Control for Cricket in India (BCCI) was not 'State' under article 12 as it was not financially, functionally or administratively dominated by or under the control of the government[63] since it was not the creation of a statute but was an autonomous body; it did not derive any financial help from the government; it did not enjoy any monopoly position conferred or protected by the government; there was no deep and pervasive state control over it and all its functions were neither public nor governmental functions. Having held that, N. Santosh Hegde J, for the majority, observed:[64]

62 (2015) 5 SCC 333 : 2015 (1) SCALE 527. The court relied upon the decision in *Zee Telefilms Ltd.* v. *Union of India* (2005) 4 SCC 649.

63 *Zee Telefilms Ltd*. v. *Union of India* (2005) 4 SCC 649.

64 *Id*. at 681.

> (I)t cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32.

The question again came up before the apex court in *Board of Control for Cricket in India* v. *Cricket Assn. of Bihar*.[65] Is the BCCI 'State' within the meaning of article 12 and is it amenable to the writ jurisdiction of the high courts under article 226 of the Constitution of India even if it was not 'State'? In this case, the court was considering complaints regarding sporting frauds in the nature of match fixing and betting arising out of conflicts of interest between the duties of the administrators and their personal commercial interests in the Indian Premier League (IPL) matches conducted by BCCI. On the basis of materials disclosing prima facie commission of the frauds, the apex court had appointed an independent committee consisting of a retired Chief Justice of India to investigate the matter and suggest corrective measures. BCCI contended that it was not 'State' under article 12 of the Constitution and no writ could be issued to it. Relying on the above observation of the majority, T.S. Thakur, J, noting the inclusive nature of the definition of the term 'State' under article 12, observed:[66]

The majority view thus favours the view that BCCI is amenable to the writ jurisdiction of the High Court under Article 226 even when it is not 'State' within the meaning of Article 12. The rationale underlying that view if we may say with utmost respect lies in the "nature of duties and functions" which the BCCI performs. It is common ground that the respondent-Board has a complete sway over the game of cricket in this country. It regulates and controls the game to the exclusion of all others. It formulates rules, regulations norms and standards covering all aspect of the game. It enjoys the power of choosing the members of the national team and the umpires. It exercises the power of disqualifying players which may at times put an end to the sporting career of a person. It spends crores of rupees on building and maintaining infrastructure like stadia, running of cricket academies and supporting State

65 AIR 2015 SC 3194 : 2015 (2) SCALE 608 : (2015) 3 SCC 251.

66 *Id.* at 3208-09 (of AIR).

Associations. It frames pension schemes and incurs expenditure on coaches, trainers etc. It sells broadcast and telecast rights and collects admission fee to venues where the matches are played. All these activities are undertaken with the tacit concurrence of the State Government and the Government of India who are not only fully aware but supportive of the activities of the Board. The State has not chosen to bring any law or taken any other step that would either deprive or dilute the Board's monopoly in the field of cricket. On the contrary, the Government of India have allowed the Board to select the national team which is then recognized by all concerned and applauded by the entire nation including at times by the highest of the dignitaries when they win tournaments and bring laurels home. Those distinguishing themselves in the international arena are conferred highest civilian awards like the Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shri apart from sporting awards instituted by the Government. Such is the passion for this game in this country that cricketers are seen as icons by youngsters, middle aged and the old alike. Any organization or entity that has such pervasive control over the game and its affairs and such powers as can make dreams end up in smoke or come true cannot be said to be undertaking any private activity. The functions of the Board are clearly public functions, which, till such time the State intervenes to takeover the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act. Suffice it to say that if the Government not only allows an autonomous/private body to discharge functions which it could in law takeover or regulate but even lends its assistance to such a non-government body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action.… BCCI may not be State under Article 12 of the Constitution but is certainly amenable to writ jurisdiction under Article 226 of the Constitution of India.

Kanpur "Jal Sansthan" even though an extended wing or agency of the state could not be considered "government" under Order XXVII, rules 8A and 8B, CPC which are applicable only to the government and not to an instrumentality or agency of the state. While drawing a distinction between "government" under the above rules and "other authorities" under article 12 of the Constitution, Dipak Misra, J in *Kanpur Jal Sansthan* v. *Bapu Constructions*,[67] held:

> (I)n certain contexts the term "Government" may be required to be liberally construed and under certain circumstances it has to be understood in a narrow spectrum. The concept of "State" as used under Article 12 is quite different than what is meant by an "Executive Government". In fact to determine whether a body is an instrumentality or agency of the Government this Court has laid down general principles but no exhaustive tests have been specified. As has been

67 (2015) 5 SCC 267 at 281; also see *Common Cause* v. *Union of India* (2015) 7 SCC 1.

> held in *Chander Mohan Khanna* v. *National Council of Educational Research and Training* [(1991) 4 SCC 578], even in general principles there is no cut and dried formula which would provide correct division of bodies into those which are instrumentalities or agencies of the Government and those which are not…. It has been laid down therein that if the functions of the institution are of public importance and related to governmental functions, it would also be a relevant factor and these are merely indicative indicia and are by no means conclusive or clinching in any case. It has been further opined therein, after referring to host of decisions, that a wide enlargement of the meaning must be tempered by a wise limitation, for the State control does not render such bodies as "State" under Article 12 of the Constitution. The State control, however, vast and pervasive is not determinative; the financial contribution by the State is also not conclusive. If the Government operates behind a corporate veil, carrying out governmental functions of vital public importance, there may be little difficulty in identifying the body as "State".

Judiciary is not 'State' under article 12 and judicial orders are not subject to writ jurisdiction under article 32 or 226 of the Constitution of India

In *Naresh Shridhar Mirajkar* v. *State of Maharashtra*,[68] a nine-judge bench of the Supreme Court, by majority, had held that a judicial order passed by the high court prohibiting the publication of evidence given by a witness pending the hearing of the suit in newspapers, was not amenable correction by a writ of certiorari issued by the court under article 32(2) as a judicial order did not violate the fundamental rights under article 19(1)(a), (d) and (g) of the Constitution. Likewise, a constitution bench in *Rupa Ashok Hurra*[69] held that final order of the Supreme Court cannot be challenged under article 32 as violative of fundamental rights.

In *Surya Dev Rai* v. *Ram Chander Rai*,[70] however, a two-judge bench held to the contrary by observing that the amendment Act of section 115, CPC did not affect the jurisdiction of the high courts under articles 226 and 227 to challenge interlocutory orders passed by the lower courts against which remedy by way of revision had been excluded and the high courts continued to have power to issue writ of certiorari.

The question again came up for consideration before the Supreme Court in *Radhey Shyam* v. *Chhabi Nath*,[71] in which Adarsh Kumar Goel, J. on behalf of a full bench of the court, on reference by a two-judge bench, held that judicial orders of civil courts were not amenable to a writ of certiorari under article 226 and that a writ of mandamus

68 AIR 1967 SC 1 : (1966) 3 SCR 744; *Riju Prasad Sarma* v. *State of Assam*, 2015 (7) SCALE 602 (para. 64).

69 *Rupa Ashok Hurra* v. *Ashok Hurra* (2002) 4 SCC 388.

70 (2003) 6 SCC 675.

71 2015 (3) SCALE 88.

does not lie against a private person not discharging any public duty. The court also held that the scope of article 227 was different from that of article 226.

In this connection, one may note the views of a two-judge bench of the apex court (Aftab Alam and Asok Kumar Ganguly JJ) that even the decisions of the Supreme Court can violate the fundamental rights of citizens.[72]

III RIGHT TO EQUALITY

It is well settled that two persons identically situated cannot be treated differently as that would be violative of equality clause under article 14 of the Constitution of India. Article 14 prohibits class legislation but not a reasonable classification if there is an 'intelligible differentia between those grouped together and other left out of that group and there exists a nexus between the differentia and the object of the legislation. This principle was applied in some cases during the year in service matters and taxes.

Actions held to be discriminatory and arbitrary

One of the most leading cases reported during the tear was *Charu Khurana* v. *Union of Indi*a,[73] which raised the issue of gender equality in film industry. The clauses 4 and 6 of the bye-laws framed by the cine costume, make-up artists and hair dressers association, registered under the Trade Unions Act, 1926 stipulated inter alia that its membership was restricted to men only. The request of the petitioner to register her as a make-up artist was rejected by the association. The Supreme Court quashed the impugned clauses on the ground that they violated the equality clause under articles 14, 15 and 21 of the Constitution which were aimed at gender equality. It was also held that the registrar of trade unions was under an obligation to ensure that the petitioner was registered as a make-up artist and if any hurdle was created by the association, the police administration would ensure that female make-up artists are not harassed in any manner whatsoever in the state of Maharashtra. This kind of discrimination in other states was to be considered by the court separately.

Under the M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976, the state had been levying entry tax between 2 to 10 per cent inter alia on coal, gypsum and bauxite. By issuing a notification on 4.5.1999, the tax was reduced to one per cent uniformly from 1.5.1997 to 30.9.1997 but an explanation was later added to the notification stating that the "shall not be refunded in any case on the basis that the dealer had paid that tax at a higher rate." The petitioner was a producer of cement using the above items as raw materials applied for refund since it had paid higher tax during the relevant period. As the request was refused, the petitioner approached the court pleading discrimination vis-à-vis those who were defaulters and had later on paid tax at the reduced rate of one per cent. The court found no objective behind the explanation which discriminated between persons like the petitioner who had paid

72 *Ramdeo Chauhan @ Rajnath Chauhan* v. *Bani Kant Das*, 2010 (12) SCALE 184; also see *A.R. Antulay* v. *R.S. Nayak* (1988) 2 SCC 602.

73 AIR 2015 SC 839.

the tax at a higher rate within time and those defaulters who paid later on at the reduced rate.The court, therefore, quashed the explanation on the ground of the discrimination. The selection of only 10 factories with a view to prevent unemployment leaving aside 36 others similarly situated by the Kerala Cashew Factories Acquisition (Amendment) Act, 1995 was held to be discriminatory.[74]

The principles of discrimination, arbitrariness, reasonableness and fairness were applied during the year in a few cases pertaining to public employment. In *Union of India* v. *Atul Shukla*,[75] the apex court considered the question whether prescribing different retirement age for time scale officers and select officers was discriminatory. In this case, the respondents held the rank of group captain (time scale) in the Indian air force and they were entitled to continue in service till 54 or 57 years of age depending on whether they were serving in the flying or ground duty branch in the force. In the Indian air force, group captains were placed two categories for the purposes of retirement. Group captains (select) were retiring at the age of 57 years while group captains (time scale) were retiring at the age of 54 years. The group captains of both the categories were having the same rank, enjoyed similar service benefits and were doing the same nature of work; the only difference was in the method of their appointment. While group captain (select) were being selected in a shorter time from among the wing commanders, group captain (time scale) were promoted on completing minimum number of years of service as wing commanders. T.S. Thakur, J held the retirement age as discriminatory under article 14 and quashed the same by observing:[76]

> Classification of employees based on the method of their recruitment has long since been declared impermissible by this Court. There can be no differential treatment between an employee directly recruited *vis-a-vis* another who is promoted. So long as the two employees are a part of the same cadre, they cannot be treated differently either for purposes of pay and allowances or other conditions of service, including the age of superannuation. Take for instance, a directly recruited District Judge, *vis-a-vis* a promotee. There is no question of their age of superannuation being different only because one is a direct recruit while the other is a promotee. So also an IAS Officer recruited directly cannot

74 *S.T. Sadiq* v. *State of Kerala*, AIR 2015 SC 1306.

75 AIR 2015 SC 1777. See, however, *Union of India* v. *A.K. Behl*, AIR 2015 SC 2929, in which the court held as valid the prescription of different age of retirement for Lt. Generals and equivalent officers in the armed forces medical service granting a tenure of two years each. The tenure clause in the notification provided that officer completing tenue of two years before touching 60 years of age can continue till he completes 60 years of age and officer not completing tenure of two years till he reaches 61 years of age would demit office at the age of 61 years but the same was not discriminatory.

76 *Id.* at 1787.

77 *M.P. Singh Bargoti* v. *State of M.P.*, AIR 2015 SC 556.

> for purposes of age of superannuation be classified differently from others who join the cadre by promotion from the State services. The underlying principle is that so long as the officers are a part of the cadre, their birth marks, based on how they joined the cadre is not relevant. They must be treated equal in all respects salary, other benefits and the age of superannuation included.
>
> In the case at hand, Group Captains constitute one rank and cadre. The distinction between a Group Captain (Select) and Group Captain (Time Scale) is indicative only of the route by which they have risen to that rank. Both are promotees. One reaches the rank earlier because of merit than the other who takes a longer time to do so because he failed to make it in the three chances admissible to them. The select officers may in that sense be on a relative basis more meritorious than time scale officers. But that is bound to happen in every cadre irrespective of whether the cadre comprises only directly recruited officers or only promotes or a mix of both. Inter se merit will always be different, with one officer placed above the other. But just because one is more meritorious than the other would not by itself justify a different treatment much less in the matter of age of superannuation.

The non-consideration of an employee for promotion while considering his junior was held to be arbitrary by the Supreme Court. The court directed notional promotion to the senior employee from the date his junior was promoted.[77] The removal of an employee from service on the basis of an inquiry into his misconduct was held to be arbitrary since the concerned employee was neither supplied with the documents relied upon by the employer not the full list of documents and witnesses and thus there was violation of the rules of natural justice.[78] If a person is appointed on deputation for a fixed period, the same cannot be curtailed in an arbitrary manner. In *Union of India* v. *S.N. Maity*,[79] the respondent, working as scientist II in central mining research institute, was appointed on deputation after going through the entire selection procession by the union public service commission to the post of controller general, patent, designs and trade marks for a period of five year or "until further orders". He was, however, repatriated to his parent department after eleven months. The apex court held that the curtailment of deputation could not be done in an arbitrary or capricious manner as had been done in the present case. But since another person has been working as controller general, patent, designs and trade marks, in order to avoid any anomalous situation, instead of directing his re-appointment to that post, the court directed that he be paid the salary that was payable to him as controller general, patent, designs

78 *Bilaspur Raipur Kshetriya Gramin Bank* v. *Madanlal Tandon*, AIR 2015 SC 2876.

79 AIR 2015 SC 1008.

80 AIR 2015 SC 1777.

81 AIR 2015 SC 3436. The provision of s. 66-A was, however, quashed by the court for violation

and trade marks. In *Union of India* v. *Atul Shukla*,[80] the apex court considered the question whether prescribing different retirement age for time scale officers select officers was discriminatory. In this case, the respondents held the rank of group captain (time scale) in the Indian air force and they were entitled to continue in service till 54 or 57 years of age depending on whether they were serving in the flying or ground duty branch in the force.

The government agencies entrusted with the task of constructing residential accommodation for allotment to the general public ordinarily stipulate that the price at the time of registration/allotment would be tentative subject to final cost to be worked out at a later stage, say completion of the project or before giving possession to the allottee. The question raised in *M.P. Housing & Infrastructure Development Board* v. *B.S.S. Parihar*,[81] was whether the appellant board can increase the price by more than 300 per cent of the tentative cost of the house. The tentative cost in this case was Rs. 9000/- and the final demand was Rs. 30000/- per sq. mtr. The Supreme Court held that there is nothing arbitrary in increasing the price keeping in view the final cost of the land, cost the materials and escalation. The court emphasized that the increase must be in consonance with the doctrine of proportionality and not on the basis of market price. In this case, the court found that the principle of proportionality had been violated and therefore the court reduced the price fixed by the appellant board which was unreasonable and unfair.

Actions held to be non-discriminatory and reasonable

There are number of cases in which the apex court did not find any kind of discrimination or arbitrariness in the state action. In *Shreya Singhal* v. *Union of India*,[82] constitutional validity of section 66-A of the Information Technology Act, 2000 (IT Act) was challenged on the grounds of violation of articles 14 and 19(1)(a) of the Constitution. Section 66-A prescribed punishment of up to three years and fine for sending offensive messages through communication service (internet). The section did not apply to print media, broadcast and real live speech. It was argued that this provision was discriminatory and violated article 14. Repelling the contention, the Supreme Court held that there was no intelligible differentia between the medium of print, broadcast and real live speech and the speech on internet. The "internet gives any individual a platform which requires very little or no payment through to air his view," observed R.F. Nariman, J. The learned judge also agreed with the argument that anything posted on a site or website travels like lightning and reach the entire world. The court also held that on account of intelligible differentia between the two kinds of communications, separate offences can be created by law.

The constitutional validity of the University Grants Commission Regulations

of art.19(1)(a) of the Constitution.

82 AIR 2015 SC 1523.

83 *P. Suseela* v. *University Grants Commission*, AIR 2015 SC 1976.

(Minimum Qualifications Required for the Appointment and Career Advancement of Teachers in Universities and Institutions affiliated to it) (the Third Amendment) Regulations, 2009, prescribing NET/SLET as the minimum eligibility condition for recruitment of lecturers in the universities/colleges/institutions, was challenged on the ground of being arbitrary under article 14.[83] It was contended that the UGC had acted on the directions of the central government in amending the regulations which was not permissible. Rejecting the argument, R.F. Nariman, J observed:[84]

> The arguments based on Article 14 equally have to be rejected. It is clear that the object of the directions of the Central Government read with the UGC regulations of 2009/2010 are to maintain excellence in standards of higher education. Keeping this object in mind, a minimum eligibility condition of passing the national eligibility test is laid down. True, there may have been exemptions laid down by the UGC in the past, but the Central Government now as a matter of policy feels that any exemption would compromise the excellence of teaching standards in Universities/Colleges/ Institutions governed by the UGC. Obviously, there is nothing arbitrary or discriminatory in this - in fact it is a core function of the UGC to see that such standards do not get diluted.

It may be noted here that the post of a lecturer (now Assistant Professor) is the lowest in the hierarchy of teaching posts in which none can claim any right to claim an appointment even if working on ad hoc or contract basis and, therefore, the essential qualifications would mean the qualifications as prescribed on the date of advertisement. But what would happen if a person is eligible for promotion as an Associate Professor or Professor from a particular date and his case is not considered for two or three years (as is usual). Meanwhile the essential requirements for promotion are modified, can the modified requirements be applied to such a person, which in any case would mean, retrospective operation of the modified requirements. That would amount to arbitrariness in taking away the right of a person which has already vested in him/her, i.e. right to be considered for promotion from the date of eligibility.

In *Sampath* v. *Secretary, Ministry of Water Resources*,[85] the appellants, employees of national water development agency (NWDA) registered as a society under the Societies Registration Act, 1860 approached the court for parity in the pension scheme vis-à-vis central government employees as the bye-laws of the NWDAS provided that till such time the NWDA frames its rules governing service conditions of the employees, rules and orders applicable to central government employees shall apply *mutatis mutandis*, subject to such modifications as made by NWDA from time to time. The appellants contended that NWDA had implemented all the recommendations

84 *Id.* at 1985.

85 (2015) 5 SCC 333 : 2015 (1) SCALE 527.

of the fourth central pay commission since 1986. On the recommendation of the fourth central pay commission, OM dated May1,1987 was issued by the ministry of personnel, public grievance and pension, department of pensions and pensioners' welfare, for switch-over of employees from contributory provident scheme (CPF) to pension scheme. As per the scheme, all CPF scheme beneficiaries, in service of the central government on January1,1986, were deemed to have come over to the pension scheme unless they specifically opted out to continue under CPF scheme latest by September 30, 1987.[86] The OM clearly stipulates that while it applied to all employees of the central government automatically, the switch-over was not applicable automatically to autonomous bodies under different ministries of central government who were subscribing to any other scheme. The OM directed the administrative bodies to issue similar orders for CPF beneficiaries, in consultation with department of pensions and pensioners' welfare. It was only in the year 2000 that the employees of NWDA were told through a RTI application that their representation to allow the benefit of the above OM had been rejected by the decision of ministry of finance and that decision had been accepted by the governing body. The court held that the appellants had failed to prove that they were at par with their counterparts, with whom they claimed parity. Discrimination cannot be invoked in cases where discrimination was between acts of two different authorities functioning as state under Article 12. The employees of NWDA were not the central government employees. The appellants were governed by the NWDA CPF Rules, 1982 and the OM was not applicable to them and they cannot seek parity with central government employees.

In the above case, the court also rejected the petition of the principals and other officials of Jawahar Navodaya Vidyalaya and the employees of the Navodaya Vidyalaya Samiti for issuance of an appropriate writ in the nature of mandamus or any other direction/s to the respondents to introduce and implement CCS Pension Scheme, 1972 to all the employees of the Navodaya Vidyalaya Samiti. The parity was being claimed on the basis of pension scheme being implemented for the teachers and employees of the Kendriya Vidyalayas, IITs, Sainik Schools, NCERT, *etc*. which the court rejected. The court refused to apply the rule of 'equal pay for equal work'. The appellants had failed to prove any arbitrariness and discrimination with respect to the New Pension Scheme made applicable from 2004, the court held.

86 As relevant clauses of the OM reads thus: "3.1 All CPF beneficiaries, who were in service on 1st January, 1986, and who are still in service on the date of issue of these orders (viz, 1st May, 1987) will be deemed to have come over to the pension Scheme.

3.2 The employees of the category mentioned above will, however, have as option to continue under the CPF Scheme, if they so desire. The option will have to be exercised and conveyed to the Head of Office by 30.09.1987, in the form enclosed if the employees wish to continue under the CPF Scheme. If no option is received by the Head of Office by the above date the employees will be deemed to have come over to the Pension Scheme.

7.2 Administrative Ministries administering any of the Contributory Provident Fund Rules, other than Contributory Provident Fund Rules (India) 1962, are also advised to issue similar orders in respect of CPF beneficiaries covered by those rules in consultation with the Department of Pension and Pensioners' Welfare."

The constitutional validity of rule 159 of the High Court of Jharkhand Rules, 2001 prescribed that in *Vivek Rai* v. *High Court of Jharkhand*,[87] was challenged before the Supreme Court on the ground *inter alia* that it violated the constitutional guarantee under articles 14 and 21 of the Constitution. The rule required that no revision under sections 397 and 401, Cr PC against conviction and sentence shall be entertained by the high court "unless the petitioner has surrendered to custody in the concerned Court." The Supreme Court held that the rule did not violate articles 14 and 21 as the impugned rule was aimed at ensuring that a person convicted by two courts obeys the law and does not abscond.

Regularisation in service

It was stated in an earlier survey[88] that the Constitution bench decision in *Uma Devi*[89] "did not place a blanket ban on regularization in all cases as understood by many judges including one judge of the High Court of Delhi in about five dozen writ petitions decided by him during 2013 dismissing all of them." Statement stands corroborated when one analyses a number of cases decided by the Supreme Court after *Uma Devi* decision.[90] Some cases reported during the current year may be noted here. In *Mohan Singh* v. *Chairman, Railway Board*,[91] the Supreme Court refused to direct regularization of the appellants as their appointments were outside the constitutional scheme but directed the respondent to consider regularization of services of the canteen staff working at time of the decision in consonance with the principles laid down in *Uma Devi* case. This direction was given despite the fact that the canteen staff had not been appointed as per prescribed. The court also directed the respondent to fill up posts in future by following regular selection process in which the appellants be given age relaxation as well as proper weightage for their having worked in the canteen. In *Govt. School Teachers Assn*. v. *Union of India*, High Court of Delhi granted regularization in service to government school teachers.[92] The court refused to apply the principle of legitimate expectation for regularization of daily wagers who had been treated differently from regular employees. The court rightly held that regularization cannot be a matter of course.[93]

87 AIR 2015 SC 1088; also see *S. Seshachalam* v. *Chairman, Bar Council of Tamil Nadu*, AIR 2015 SC 816.

88 *Secretary, State of Kasrnataka* v. *Uma Devi* (2008) 4 SCC 1.

89 See S N Singh, "Constitutional Law – I (Fundamental Rights), XLIX *ASIL* 247 at 291 (2013).

90 See, e.g. *Maharashtra SRTC* v. *Casteribe Rajya Parivahan Karamchari Sangthan* (2009) 8 SCC 556; *Nihal Singh* v. *State of Punjab*, AIR 2013 SC 3547.

91 AIR 2015 SC 3027; also see *Food Corpn. of India* v. *Sankar Ghosh*, AIR 2015 SC 3555.

92 220 (2015) DLT 22.

93 *Nand Kumar* v. *State of Bihar*, AIR 2015 SC 133; also see *Jiban Krishna Mondal* v. *State of West Bengal*, AIR 2015 SC 2417; *Grah Rakshak Home Guards Welfare Association* v. *State of H.P.*, 2015 (3) SCALE 353; *Prem Ram* v. *M.D., Uttarakhand Pey Jal & Nirman Nigam, Dehradun*, 2015 (6) SCALE 569; *Hari nandan Prasad* v. *Food Corpn. of India* (2014) 7 SCC 190; *Durgapur Casual Workers Union* v. *Food Corpn. of India* (2015) 5 SCC 786.

IV STATE LARGESSE

It is well settled principle of law that the government cannot enter into a contract or issue a licence in an arbitrary manner at its sweet will; it must act in accordance with law.[94] The Supreme Court has emphasized that disposal of national wealth in the form of mines and minerals has to be done strictly in accordance with the prescribed statutory provisions. In *Muneer Enterprises* v. *M/s. Ramgad Minerals and Mining Ltd*.,[95] the Supreme Court held the conduct of the state and its authorities highly condemnable calling for stringent action for passing an order for transfer of a mining lease from the original licensee (M/s. Dalmia Cement (Bharat) Ltd. to the first respondent. The order had been passed at the instance of the original licensee who had already surrendered the lease. This action was held by the court to be in clear violation of the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 and the Mineral Concession Rules, 1960.

The principle of openness and fairness was also applied by the Supreme Court in *City Industrial Development* v. *Platinum Entertainment.*[96] In this case plots were allotted to two private companies and one trust, all floated in different names by the same person. The allotments were made by the appellant for construction of a multiplex-cum-auditorium-cum-entertainment centre, *etc*. on the basis of letters written by the companies/trust to the chief minister; neither tenders were invited from the public nor the process of competitive bidding was followed. The appellant, after allotment of plots and execution of lease deeds, issued show cause notices and cancelled the allotments. The high court quashed the cancellation orders. On appeal, the apex court noted that the plots had been allotted on fixed prices; no application was invited or received from the interested persons as neither any tender was advertised nor any notice inviting applications was issued and, therefore, there was no occasion for any person to apply for allotment of plots. The court, therefore, found no transparency in the allotment of government land. While upholding the cancellation orders, the court pointed out that the state and its agencies could not give largesse to any person at sweet will and whims of the political entities or officers of the state; the actions and decisions of the state must be founded on a sound, transparent and well defined policy made known to the public. It further observed that even if there was any rule permitting allotment by entertaining individual application, tender or competitive bidding, rule of law requires publicity to be given before allotment was made. Likewise, in *Institute*

94 See *R.D. Shetty* v. *International Airport Authority*, AIR 1979 SC 1628 : (1979) 3 SCC 489; *Akhil Bhartiya Upbhokta Congress* v. *State of M.P.*, AIR 2011 SC 1834 : (2011) 5 SCC 29; *Kasturi Lal Lakshmi Reddy* v. *State of J. & K.*, AIR 1980 SC 1992 : (1980) 4 SCC 1.

95 AIR 2015 SC 1834.

96 AIR 2015 SC 340 : (2015) 1 SCC 558. The distribution of state largesse – LPG distributorship – was held to be vitiated by extraneous considerations and quashed in *Bharat Petroleum Corpn. Ltd.* v. *Ramesh Chand Trivedi* (2014) 16 SCC 799; *Awadhesh Mani Tripathi* v. *Union of India* (2014) 16 SCC 538; *Indian Oil Corpn. Ltd.* v. *Sunita Kumari* (2014) 16 SCC 790.

of Law, Chandigarh v. *Neeraj Sharma*,[97] the allotment of land at throw away price was quashed by the court on the ground of arbitrariness.

In *2G spectrum* case,[98] the Supreme Court had held that public auction was perhaps the best method for alienation of natural resources/public property. Later on in *Natural Resources Allocation, In re, Special Reference No. 1 of 2012,*[99] the court had clarified that the 2G spectrum case related only to allocation of spectrum and it did not apply to all kinds of alienation of natural resources as the auction was not the constitutional mandate. The same question once again came for decision in *Bharti Airtel Ltd*. v. *Union of India*.[100] In this case, the appellants/petitioners had been given licences through a transparent process of bidding for spectrum during 1994-95 for twenty years subject to the condition that they may seek an extension in the nineteenth year. When they applied for extension, the same was refused by the government as it had decided to grant spectrum through the process of fresh auction. The refusal was challenged by the appellants/petitioners on the ground that fresh auction would lead to unhealthy competition among the competitors which would lead to burdening the consumers. Rejecting the contention, the court held that the state owed an obligation not only under the contract but also under the Constitution and other laws which stand on a higher footing. In case of a conflict between the obligation flowing from a contract and the one imposed by the Constitution and other laws of the land, the latter prevails over the former. The court held that the action of the government in deciding to allocate spectrum by auction (held during the pendency of the appeals/writ petitions), which had already yielded huge revenue for the state and the decision could not be said to be irrational or based on irrelevant considerations. The court, therefore, dismissed the appeals/writ petitions.

V RESERVATION

After *Indra Sawhney*,[101] there is no controversy regarding the constitutional validity of reservation to socially and educationally backward classes of citizens (OBCs) as envisaged under article 15(4) and (5) of the Constitution of India in admission to educational institutions and appointment to public services. There is also no controversy as to the ceiling on reservation for OBCs because the over all reservation has to be less than 50 per cent and there already exists 22.5 per cent reservation for scheduled castes and scheduled tribes and, therefore, only 27.5 per cent is left out which could be given to any other category. That is why OBCs have

97 (2015) 1 SCC 720.

98 *Centre for PIL* v. *Union of India*, AIR 2012 SC 3725. For a detailed discussion, see S N Singh, "Constitutional Law – I (Fundamental Rights", XLVIII *ASIL* 173 at 180-84 (2012).

99 (2012) 10 SCC 1.

100 AIR 2015 SC 2583.

101 *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477 : 1992 Supp. (3) SCC 217; see also *Ashoka Kumar Thakur* v. *Union of India* (2008) 6 SCC 1.

been given 27 per cent reservation. The only controversy had been as to the extent of relaxation in eligibility[102] and the concept of 'creamy layer'.[103] Lately, a new kind of controversy has cropped up due to political consideration (the vote bank politics), *viz*. who or which community can be included in OBC category so as to give them some share out of 27 per cent reservation meant for OBCs. The reservation given to certain sections of Muslims covered under social and economic backwardness by the state of Andhra Pradesh in 2010 had been quashed by the high court.[104] The state government of Maharashtra included Marathas and Muslims in OBC list in the month of July, 2014 by promulgating two separate Ordinances just on the eve of elections to legislative assembly in the state of Maharashtra, the operation of which was stayed by the high court.[105] The Supreme Court, on appeal, refused to stay the order passed by the division bench.[106]

Reservation for Jats

The constitutional validity of the reservation for Jats was challenged in *Ram Singh* v. *Union of India.*[107] The national commission for backward classes (NCBC) in its report submitted to the central government in 1997 recommended inclusion of the Jats of Rajasthan, except the Bharatpur and Dhaulpur districts in the Central List and rejected similar claim for inclusion of Jats from Delhi and the states of Haryana, Rajasthan, Madhya Pradesh and Uttar Pradesh. Initially, the NCBC did not have power to review its advice to the government. The rules were amended in 2011 and it was given the power to do so. Thereafter, in 2013, the central government asked the NCBC to tender fresh advice based on existing material. As the NCBC did not have sufficient expertise in the matter, it requested the ICSSR to set up an expert committee to conduct

102 *P.V. Indiresan (1)* v. *Union of India* (2009) 7 SCC 300 and *P.V. Indiresan (2)* v. *Union of India* (2011) 8 SCC 441.

103 *Ashoka Kumar Thakur* v. *State of Bihar* (1995) 5 SCC 403, in which two legislations of Bihar and U.P. were quashed for not properly defining creamy layer: the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 1995 and schedule II read with section 3 (*b*) of the Uttar Pradesh Public Services Reservation of Scheduled Castes and Scheduled Tribes andOther Backward Classes Act, 1994 see also *Nair Service Society* v. *State of Kerala* (2007) 4 SCC 1. It has been in *Surinder Singh* v. *Punjab State Electricity Board*, AIR 2015 SC 537 that while computing total income, only the income of the parents of the individual concerned is to be considered and not the income of the individual concerned.

104 *T. Murlidhar Rao* v. *State of A.P.*, 2010 (2) ALT 357

105 *Sanjeet Shukla* v. *State of Maharashtra,* WP (L) No. 2053/2014, order dt. 14.11.2014. This Order had been noted in the last year's survey – see S N Singh, "Constitutional Law – I (Fundamental Rights", L *ASIL* 239 at 277-79 (2014). The case was pending till the end of the year 2015.

106 In *State of Maharashtra* v. *Sanjeet Shukla*, Special Leave Petition (C) No.34335/2014, full bench of the Supreme Court on December 18, 2014, while refusing to stay the interim order passed by the High Court of Bombay, observed that in the special leave petitions only an interim order passed by the High Court had been challenged.

107 2015 (3) SCALE 570.

an extensive literature survey on the subject with a view to collect sufficient materials. The expert body constituted by the ICSSR submitted its report which was based mainly on the reports of the various state commissions. It had not undertaken any study of other materials such as books/literature/representations. The report of the ICSSR did not make any recommendations. After considering the report and holding public hearings, NCBC submitted its advice dated February 26, 2014 to the central government stating that the Jat community had not fulfilled the criteria for inclusion in the central list of OBCs. It found that the Jats were neither socially nor educationally backward; merely belonging to an agricultural community could not confer backward status on the Jats. It also found them adequately represented in armed forces, government services and educational institutions.

The Union Cabinet in a meeting held on March 2, 2014 rejected the advice of the NCBC holding that it did not adequately take into account the "ground realities." The Cabinet, decided to include the Jats in the central list of backward classes for the states of Bihar, Gujarat, Haryana, Himachal Pradesh and NCT of Delhi, Bharatpur and Dholpur districts of Rajasthan, Uttar Pradesh and Uttarakhand. Thereafter, the central government issued a notification on March 4, 2014 including the Jats in backward classes for the above states. This notification was challenged contending that the notification was based on wholly extraneous considerations and actuated by political motives to gain electoral advantages. It was further contended that the NCBC under section 9 of the National Commission for Backward Classes Act, 1993 has been entrusted with the function of examining requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the central government as it deems appropriate and the advice of NCBC is ordinarily binding upon the central government. The decision of the central government to override the advice given by the NCBC was not supported by any reasons; the decision was not reasonable that could have been reached by the central government on the basis of available materials as against materials available with NCBC.

Ranjan Gogoi J accepted the argument that ordinarily the advice of the NCBC is binding on the government; the same could be overruled/ignored only for strong and compelling reasons should be available in writing. Since the NCBC came into existence by virtue of the opinion expressed *Indra Sawhney*, there was no doubt that even when the exercise was undertaken by the central government under section 11 of the Act, the views expressed by the NCBC in the process of the consultation mandated by Section 11, would have a binding effect in the normal course, Gogoi J held. The learned judge found that the advice of NCBC was based primarily on reports of various commissions appointed by nine states for inclusion of Jats in their list of OBC and the findings of the expert body of the ICSSR. Considering the summary of the findings of the expert body of ICSSR, Gogoi J, observed:[108]

108 *Id.* at 591-92.

Undoubtedly, the report dated 26.02.2014 of the NCBC was made on a detailed consideration of the various reports of the State Backward Classes Commissions; other available literature on the subject and also upon consideration of the findings of the Expert Committee constituted by the ICSSR to examine the matter. The decision not to recommend the Jats for inclusion in the Central List of OBCs of the States in question cannot be said to be based on no materials or unsupported by reasons or characterized as decisions arrived at on consideration of matters that are, in any way, extraneous and irrelevant. Having requested the ICSSR to go into the matter and upon receipt of the report of the Expert Committee constituted in this regard, the NCBC was under a duty and obligation to consider the same and arrive at its own independent decision in the matter, a duty cast upon it by the Act in question. Consideration of the report of the Expert Body and disagreement with the views expressed by the said body cannot, therefore, amount to sitting in judgment over the views of the experts as has been sought to be contended on behalf of the Union. In fact, as noticed earlier, the Expert Body of the ICSSR did not take any particular stand in the matter and did not come up with any positive recommendation either in favour or against the inclusion of the Jats in the Central List of OBCs. The report of the said Body merely recited the facts as found upon the survey undertaken, leaving the eventual conclusion to be drawn by the NCBC. It may be possible that the NCBC upon consideration of the various materials documented before it had underplayed and/or overstressed parts of the said material. That is bound to happen in any process of consideration by any Body or Authority of voluminous information that may have been laid before it for the purpose of taking of a decision. Such an approach, by itself, would not make either the decision making process or the decision taken legally infirm or unsustainable. Something more would be required in order to bypass the advice tendered by the NCBC which judicially (*Indra Sawhney*) and statutorily (NCBC Act) would be binding on the Union Government in the ordinary course. An impossible or perverse view would justify exclusion of the advice tendered but that had, by no means, happened in the present case. The mere possibility of a different opinion or view would not detract from the binding nature of the advice tendered by the NCBC.

Of relevance, at this stage, would be one of the arguments advanced on behalf of the Union claiming a power to itself to bypass the NCBC and to include groups of citizens in the Central List of OBCs on the basis of Article 16(4) itself. Undoubtedly, Article 16(4) confers such a power on the Union but what cannot be overlooked is the enactment of the specific statutory provisions constituting a Commission (NCBC) whose recommendations in the matter are required to be adequately

> considered by the Union Government before taking its final decision. Surely, the Union cannot be permitted to discard its self-professed norms which in the present case are statutory in character.

Gogoi J, emphasising the importance of the advice of NCBC vis-à-vis central government's authority to ignore it, observed:[109]

> A very fundamental and basic test to determine the authority of the Government's decision in the matter would be to assume the advice of the NCBC against the inclusion of the Jats in the Central List of Other Backward Classes to be wrong and thereafter by examining, in that light, whether the decision of the Union Government to the contrary would pass the required scrutiny. Proceeding on that basis what is clear is that save and except the State Commission Report in the case of Haryana (Justice K.C. Gupta Commission Report) which was submitted in the year 2012, all the other reports as well as the literature on the subject would be at least a decade old. The necessary data on which the exercise has to be made, as already observed by us, has to be contemporaneous. Outdated statistics cannot provide accurate parameters for measuring backwardness for the purpose of inclusion in the list of Other Backward Classes. This is because one may legitimately presume progressive advancement of all citizens on every front i.e. social, economic and education. Any other view would amount to retrograde governance. Yet, surprisingly the facts that stare at us indicate a governmental affirmation of such negative governance inasmuch as decade old decisions not to treat the Jats as backward, arrived at on due consideration of the existing ground realities, have been reopened, in spite of perceptible all round development of the nation. This is the basic fallacy inherent in the impugned governmental decision that has been challenged in the present proceedings. The percentage of the OBC population estimated at "not less than 52%" (*Indra Sawhney*) certainly must have gone up considerably as over the last two decades there has been only inclusions in the Central as well as State OBC Lists and hardly any exclusion therefrom. This is certainly not what has been envisaged in our Constitutional Scheme.
>
> In so far as the contemporaneous report for the State of Haryana is concerned, the discussion that has preceded indicate adequate and good reasons for the view taken by the NCBC in respect of the said Report and not to accept the findings contained therein.

Gogoi J also brushed aside the argument of the central government that the OBC lists of the concerned States, by themselves, can furnish a reasonable basis for inclusion

109 *Id*. at 593-94.

in the central lists as the union and the state governments had to work in tandem and not at cross purposes under the constitutional scheme. The learned judge pointed out that in most of the states the Jats were included in the OBC lists over a decade back and since the action of the central government impacts the rights of a large number of persons under articles 14 and 16 of the Constitution, the decision must be taken on the basis of "contemporaneous inputs and not outdated and antiquated data". This view is supported by section 11 of the Act which requires revision of the central lists every ten years. Furthermore, the backwardness contemplated by article 16(4) was social backwardness and the educational and economic backwardness might contribute to social backwardness. Gogoi J found that in Haryana, Rajasthan, M.P., Gujarat and Bihar, Uttar Pradesh Uttarakhand and NCT of Delhi, educational backwardness had been taken into account for inclusion of Jats as were lagging behind the Gujjars who had already included in the central lists of OBCs in Delhi.

Gogoi J pointed out the distinction between "backward class" as used in article 15(4) and "socially and educationally backward classes" as used in article 16(4) by observing:[110]

> It is in *Indra Sawhney's* case that this Court held that the terms "backward class" and "socially and educationally backward classes" are not equivalent and further that in Article 16(4) the backwardness contemplated is mainly social. The above interpretation of backwardness in *Indra Sawhney* would be binding on numerically smaller Benches. We may, therefore, understand a social class as an identifiable section of society which may be internally homogenous (based on caste or occupation) or heterogeneous (based on disability or gender e.g. transgender). Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. Owing to historical conditions, particularly in Hindu society, recognition of backwardness has been associated with caste. Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, this Court has been routinely discouraging the identification of a group as backward solely on the basis of caste. Article 16(4) as also Article 15(4) lays the foundation for affirmative action by the State to reach out the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action. The

110 *Id.* at 594-95.The court relied upon *M.R. Balaji* v. *State of Mysore*,1963 Suppl. (1) SCR 439 and *Janaki Prasad* v. *State of Jammu & Kashmir* (1973) 1 SCC 420.

> recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in *National Legal Services Authority vs. Union of India* [(2014) 5 SCC 438] is too significant a development to be ignored. In fact it is a path finder, if not a path-breaker. It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice would certainly result in under-protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover "lost ground" in claiming preference and benefits on the basis of historical prejudice.
>
> The perception of a self-proclaimed socially backward class of citizens or even the perception of the "advanced classes" as to the social status of the "less fortunates" cannot continue to be a constitutionally permissible yardstick for determination of backwardness, both in the context of Articles 15(4) and 16(4) of the Constitution. Neither can any longer backwardness be a matter of determination on the basis of mathematical formulae evolved by taking into account social, economic and educational indicators. Determination of backwardness must also cease to be relative; possible wrong inclusions cannot be the basis for further inclusions but the gates would be opened only to permit entry of the most distressed. Any other inclusion would be a serious abdication of the constitutional duty of the State. Judged by the aforesaid standards we must hold that inclusion of the politically organized classes (such as Jats) in the list of backward classes mainly, if not solely, on the basis that on same parameters other groups who have fared better have been so included cannot be affirmed.

The court, therefore, did not agree with the view taken by the central government that Jats in the nine states in question were backward entitled for inclusion in the central lists of OBC. The contrary view taken by the NCBC was fully supported by good reasons. The impugned notification, was, therefore, quashed.

Reservation in promotions

In *Indra Sawhney* case,[111] the Supreme Court had clearly held that the reservation under article 16(4) of the Constitution of India is confined to initial appointment and cannot extend to reservation in the matters of promotion. The amendments made in

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

article 16 by inserting[112] and later amending[113] clause (4-A) enable the state of provide for such a promotion and consequential seniority subject, of course, to the observations made by the Supreme Court in *M. Nagaraj* v. *Union of India*.[114] The same position was reiterated in *U.P. Power Corpn. Ltd*. v. *Rajesh Kumar*.[115] In *Chairman & Managing Director, Central Bank of India* v. *Central Bank of India SC/ST Employees Welfare Association*,[116] the question was whether there was any reservation in the promotions of the Scheduled Castes (SC) and Scheduled Tribes (ST) in the promotion in the officer grade/scale in the appellant banks which are statutory/public sector banks from one officer grade/scale to higher grade/scale, when such promotions are to be made on selection basis, *i.e.* on merits. As a matter of fact, these banks had been following the guidelines applicable to central government with regard to reservation of SC/ST employees for promotion from clerical grade to officer grade. The banks contended that there was no rule of promotion in class A (Class-I) to the posts/scales having basic salary of more than Rs. 5,700/- and in the form of office memoranda, only a concession was provided in the manner officers belonging to SC/ST category were to be considered for promotion. In this case, the court did not find anything in the two office memoranda of 1990 and 1997 to establish that any reservation had been provided for promotion in class A (Class-I) to the posts/scales having basic salary of more than Rs. 5,700/-; what had been provided for was merely a concession which could not be the basis for issuing a writ of mandamus commanding the appellant banks to grant such a reservation.[117] The court, however, took of the grievance of the SC/ST employees

112 The Constitution (Seventy-seventh Amendment) Act, 1995.

113 The Constitution (Eighty-fifth Amendment) Act, 2001, enacted to nullify the views of the Supreme Court in *Union of India* v. *Virpal Singh Chauhan* (1995) 6 SCC 684

114 (2006) 8 SCC 212. In this case, the court had held that (i) clause (4-A) flew from art. 16(4) and, did not alter the structure of art. 16(4); (ii) it did not obliterate the constitutional requirement, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs, on the one hand, and SCs/STs on the other hand; and (iii) the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency which were the constitutional requirements without which the structure of equality of opportunity in art.16 would collapse.

115 AIR 2012 SC 2728 : (2012) 7 SCC 1. For a critical comment, see S N Singh, "Constitutional Law – I (Fundamental Rights", XLVIII *ASIL* 173 at 186-91 (2012). In *Suresh Chand Kaushal* v. *State of U.P.*, JT 2016 (3) SC 540, the apex court refused to issue mandamus to the respondent to constitute a committee for collecting necessary quality data of SC/ST in services in the state for giving reservation in promotions.

116 2015 (1) SCALE 169 read with 2016 (1) SCALE 236 326 (Order in view deleting paras. 33-37 of the original judgment).

117 The respondents had relied upon to office memoranda (O.M.). Relevant paras 2 and 3 of the O.M. dated 01-11-1990 read as under:

> "2. Though in the OM cited above it has been clearly mentioned that in promotion by selection within Class I (now Group A) to posts which carry an ultimate salary of Rs. 2000/- per month or less (since revised to Rs. 5700/-) the Scheduled Castes and Scheduled Tribes will be given concession namely "those scheduled Castes and Scheduled Tribes who are senior enough in the zone of

that there was negligible representation of employees belonging to their community in the officers' category at all levels. The court, therefore, observed that in view of the statistical figures placed before it showing their representation in officers' scales, it would be open to the state and the banks to consider whether their demand was justified and it was feasible to provide reservation to SC/ST category promotion in the officers' category and if so, up to which scale/level.

In this connection the decision of a full bench of High Court of Tripura in *Jayanta Chakraborty* v. *State of Tripura*[118] is noteworthy. In this case, the general category candidates had approached the court claiming that they had been deprived of their right to equality as the state had granted promotions to the reserved category candidates in total violation of the law laid down by the apex court in *M. Nagaraj*.[119] They has alleged that promotions had been granted to SC and ST candidates without taking into consideration the existence of the three essential stipulated in the above case and the cap of 50% had also been exceeded. The court noted that even though the state had collected quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment but the data so collected had not been collated or appreciated in the light of *Nagaraj* case. "The State has failed to

consideration for promotion so as to be within the number of vacancies for which select list has to be drawn up, would be included in that list provided they are not considered unfit for promotion", doubts have been expressed in certain quarters as to whether the concession given herein above is anreservation or a concession.

3. It is hereby clarified that in promotion by selection within group A posts which carry an ultimate salary of Rs. 5700/- p.m. there is no reservation." The O.M. dated 13th August, 1997 read thus:

"SUBJECT: RESERVATION FOR THE SCs/STs IN PROMOTION

The undersigned is directed to invite attention to this Department's OM No. 36012/37/93-Esst. (SCT) dated 19.8.1993 clarifying that the Supreme Court had, in the Indira Sawhney case, permitted the reservation for the Scheduled Castes and Scheduled Tribes, in promotion, to continue for a period of five years from 16.11.1992.

2. Consequent to the Judgment in Indira Sawhney's case the Constitution was amended by the Constitution (Seventy seventh Amendment) Act, 1995 and Article 16(4A) was incorporated in the Constitution. This article enables the State to provide for reservation in matters of promotion, in favour of the Scheduled Castes and the Scheduled Tribes, which in the opinion of the State are not adequately represented in the Services under the State.

3. In pursuance of Article 16(4A), it has been decided to continue the Reservation in promotion as at present, for the Scheduled Castes and the Scheduled Tribes in the services/posts under the Central Government beyond 15.11.1997 till such time as the representation of each of the above two categories in each cadre reaches the prescribed percentages of reservation whereafter, the reservation in promotion shall continue to maintain the representation to the extent of the prescribed percentages for the respective categories."

118 AIR 2015 Tri. 43.

119 (2006) 8 SCC 212.

determine the backwardness of the SCs and STs in the context of determining the inadequacy of their representation in public employment, especially in regard to promotional posts. As held by us above, the State has not even carried out this exercise", Deepak Gupta CJ observed. But the court left it to the state to decide the level of efficiency but under no circumstances can total reservation exceed 50% of the cadre strength if efficiency of public service was to be maintained. The court clarified that only those meritorious candidates belonging to the reserved category could be excluded while determining the maximum reservation as per the rules who had never got benefit of reservation during their service. The court further held that the quantifiable data has to be applied cadre-wise and where the SC and ST candidates are adequately represented in the cadre, reservation cannot continue. One most important observation of the court was that if an employee who has got the benefit of being a member of SC or ST at any stage of his career (whether it be at the stage of direct recruitment or at the stage of promotion), from that day onward cannot be treated to be an unreserved own merit candidate for filling up the higher post(s); only those SC and ST candidates who have qualified solely on the basis of merit and have never taken the benefit of reservation will be treated to be own merit candidates and entitled to occupy the posts meant for the general category. The court directed that the state must fix a time cap, *i.e.* the maximum period for which reserved category posts can be kept vacant. The court in this tried to balance the right of equality of the individual petitioners with preferential treatment available to the reserved categories so that there was a level playing field in the matter of public employment.

Validity of residential requirement or institutional preference in educational institutions

The Supreme Court in *Pradeep Jain* v. *Union of India*,[120] had held that so far as admissions to post-graduate courses, such as MS, MD and the like were concerned, it was desirable not to provide for any reservation based on residence requirement within the state or on institutional preference. But this view was modified subsequently in *Reita Nirankari* v. *Union of India*[121] to the effect that the judgment did not apply to the States of Andhra Pradesh and Jammu and Kashmir there were special constitutional provisions for them which needed independent consideration by the court.

In *Dr. Sandeep s/o Sadashivrao Kansurkar* v. *Union of India*,[122] the court considered the question whether the action of the states of Andhra Pradesh, Telangana and Tamil Nadu in confining the eligibility for appearing in the superspecialty entrance

120 (1984) 3 SCC 654.
To the same effect are the decisions in *Nikhil Himthani* v. *State of Uttarakhand* (2013) 10 SCC 237; *Vishal Goel* v. *State of Karnataka* (2014) 11 SCC 456 and *Saurabh Chaudri* v. *Union of India* (2003) 11 SCC 146; see S N Singh, "Constitutional Law – I (Fundamental Rights", L *ASIL* 239 at 267-68 (2014).

121 (1984) 3 SCC 706.

122 JT 2015 (11) SC 321.

examination conducted in different States in India for admissions to D.M. (Doctorate of Medicine) and M.Ch. (Masters of Chirurgiae) courses only to the candidates having domicile in their respective states was violative of article 14 of the Constitution, being discriminatory in nature. It was contended that while most of the states conduct the entrance examination for the eligible candidates from all over India and permit them to appear in the entrance examination, but the above states confined the eligibility only to the candidates with domicile in their state only. Moreover, while the candidates domiciled in the above states could compete in all states, the candidates of other states could not compete in the above states. This resulted not only in discrimination but also deprived candidates of many other states which do not have any institutes with super-specialty courses thereby depriving such candidates to obtain higher education in such courses. Dipak Misra J, after a detailed analysis of the constitutional provisions of article 371-D which contains special provisions with respect to the state of Andhra Pradesh, the Presidential Order issued under that article and the circular issued by the state government, held that the position of the State of Andhra Pradesh (and now Telangana also) was not comparable to other states and, since the provisions of that article have been given overriding effect under clause (10) over any other provision of the Constitution or any other law for the time being in force in matters of public employment and education, merely echoed the observation made in *Fazal Ghafoor*[123] and reiterated the aspirations of others so that authorities could objectively assess and approach the situation keeping the national interest as paramount. The court dismissed the petitions filed against the states of Andhra Pradesh and Telangana but kept the matter pending in respect of the state of Tamil Nadu. In this case, the court did not consider the constitutional validity of article 371-D of the Constitution; it merely considered the validity of the action taken thereunder. May be, because the validity of the article was not challenged or only a division bench was considering the matter. As the court itself indicates, a time has come when such kind of reservation should be done away with. The states like Andhra Pradesh and Telangana are not backward where a provision like article 371-D should continue to remain in force; time has considerably changed.

VI FREEDOM OF SPEECH AND EXPRESSION

One of the most hailed decisions of the year was *Shreya Singhal* v. *Union of India*,[124] in which the Supreme Court struck down section 66-A of the Information

123 *Fazal Ghafoor* v. *Union of India*, AIR 1989 SC 48 : "In *Dr Pradeep Jain* case this Court has observed that in Super Specialities there should really be no reservation. This is so in the general interest of the country and for improving the standard of higher education and thereby improving the quality of available medical services to the people of India. We hope and trust that the Government of India and the State Governments shall seriously consider this aspect of the matter without delay and appropriate guidelines shall be evolved by the Indian Medical Council so as to keep the Super Specialities in medical education unreserved, open and free."

124 2015 (4) SCALE 1 : AIR 2015 SC 1523.

Technology Act, 2000,[125] on the ground that the provision covered all information disseminated through internet and, therefore, violative of freedom of speech and expression guaranteed to the citizens under article 19(1)(a) of the Constitution and it was not covered within the protective umbrella of clause (2) to that article. It was held that section 66-A directly curbed the freedom of speech and expression of the citizens at large as it had created an offence against persons who use internet and annoy or cause inconvenience to others. The court further held that the impugned provision did not relate to public order, incitement to an offence, defamation, decency or morality as provided under clause (2) to article 19. R.F. Nariman, J further held:[126]

> Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. This being the case, it is clear that Section 66A is unconstitutionally vague.
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> Ultimately, applying the tests referred to in *Chintaman Rao*[127] and *V.G. Row's*[128] case, it is clear that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.
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> Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over

125 S. 66-A, Information Technology Act, 2000 as inserted by Act 10 of 2009 reads as under: "66-A. Punishment for sending offensive messages through communication service, etc.— Any person who sends, by means of a computer resource or a communication device,—

(*a*) any information that is grossly offensive or has menacing character; or

(*b*) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(*c*) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.— For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."

126 *Supra* note 124 at 1559, 1561 (of AIR).

127 *Chintaman Rao* v. *State of M.P.*, AIR 1951 SC 118.

128 *State of Madras* v. *V.G. Row*, AIR 1952 SC 196.

> the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views" - such as the emancipation of women or the abolition of the caste system or whether certain members of a non-proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total. xxxxxx
>
> These two Constitution Bench decisions[129] bind us and would apply directly on Section 66A. We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth.

Nariman, J further held that section 66-A was not protected under any of the subjects mentioned in clause (2) to article 19 and the section as a whole had to be struck down as it was not severable. The learned judge also struck down section 118(d) of the Kerala Police Act which suffered from the same kind of vagueness and over breadth as section 66-A of the IT Act. But the provisions of section 69-A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Police) Rules, 2009 were constitutionally valid. Likewise, section 79 of the IT Act was also held to be valid subject to section 79(3)(b) if read down in the manner indicated by the court.

In *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra*,[130] the Supreme Court refused to quash criminal prosecution of a poet under section 292, IPC (obscenity), while at same time quashed the charge against the printer and publisher for having published the poem written by the poet as they had unconditionally

129 *Kameshwar Prasad* v. *State of Bihar*, AIR 1962 SC 1166 and *Superintendent, Central Prison* v. *Ram Manohar Lohia*, AIR 1960 SC 633

130 AIR 2015 SC 2612.

apologized much before their prosecution. The controversy related to the poem "Gandhi Mala Bhetala (I met Gandhi) published in the magazine called "Bulletin" in July-August, 1994 issue, which was meant for private circulation amongst the members of the All India Bank Association Union. The court was not convinced with the poet's argument that the poem has already been recited during Akhil Bhartiya Sahitya Sammelan in 1980 and the same was published in 1986. The court held that the freedom of speech and expression guaranteed under article 19(1)(a) is not an unlimited freedom; it is subject to the grounds mentioned in clause (2).

The publication of advertisement by governmental agencies was questioned in *Common Cause* v. *Union of India*.[131] In this case, the petitioners prayed that the Union of India and states must be restrained from using public funds on government advertisements which were aimed at projecting individual functionaries and the political parties in power. The court had accepted that the primary cause of government advertisement was to use public funds to inform the public of their rights, obligations and entitlements as well as to explain government policies, programmes, services and initiatives. It was further held that only such government advertisements which did not fulfill the above requisites fell outside the area of permissible advertisements. The court had appointed a committee to formulate guidelines for the publication of government advertisements. Accepting most of the recommendations of the committee, the court held that the advertisements, only the photographs of the President, prime Minister and Chief Justice be published as also those acknowledged personalities like Mahatma Gandhi while commemorating their anniversaries. The court, however, did not agree that on the eve of elections an embargo be imposed on advertisements. The court also realized that the directions passed under article 142 were not comprehensive. These directed were partly modified in the *State of Karnataka* v. *Common Cause*,[132] when the court directed that permitting the publication of the photographs of the President, Prime Minister and Chief Justice of the country was also extended to the governors and the chief ministers of the states. In lieu of the photograph of the Prime Minister, the photograph of the departmental (cabinet) minister/minister In-charge of the concerned ministry may be published.

VII RIGHT TO LIFE AND PERSONAL LIBERTY

No laches where there is violation of right to life and liberty

In *Assam Sanmilita Mahasangha* v. *Union of India*,[133] the question of about massive influx on illegal migrants from Bangladesh to the state of Assam placing the sovereignty and integrity of the country at stake and putting the life of Indian citizens in danger. There was large scale resentment and agitation against these migrants by certain organizations in the state. In 1985, section 6-A was inserted to the Citizenship

131 AIR 2015 SC 2286.
132 2016 (3) SCALE 346.
133 AIR 2015 SC 783.

Act, 1955 giving citizenship rights to those who had migrated to India prior to January 1, 1966 and even after that date before March 25, 1971. The validity of the provision was challenged after over 20 years. The Supreme Court held that when there is a violation of the fundamental right to life and liberty as contended in the present case, the petition could not be thrown out merely on the ground of delay and laches.

Inordinate delay in disposal of mercy petition

It had been by the Supreme Court in *Shatrughan Chauhan* v. *Union of India*,[134] that undue delay in considering mercy petition was a good ground to commute death sentence into the sentence of life imprisonment. This principle was applied in *Ajay Kumar Pal* v. *Union of India*,[135] in which commutation from death sentence to that of life imprisonment was prayed for on the ground that there was a delay of three years and ten months in deciding the mercy petition by the President of India. The court held that such a long delay had deprived the convict of his right under article 21 by keeping him in solitary confinement and, therefore, the sentence was commuted as prayed.

Extending suspension of an employee violates article 21

In *Ajay Kumar Choudhary* v. *Union of India*,[136] the appellant was suspended pending enquiry into his conduct of issuing no objection certificates in respect of land belonging to defence. The suspension was extended four times when he approached the central administrative tribunal and subsequently the court. According to the appellant, this extension had violated his right to live with dignity under article 21 of the Constitution. Accepting the argument, the court held:[137]

> Suspension, specially preceding the formulation of charges, is essentially transitory or temporary in nature, and must perforce be of short duration. If it is for an indeterminate period or if its renewal is not based on sound reasoning contemporaneously available on the record, this would render it punitive in nature. Departmental/disciplinary proceedings invariably commence with delay, are plagued with procrastination prior and post the drawing up of the Memorandum of Charges, and eventually culminate after even longer delay.
>
> Protracted periods of suspension, repeated renewal thereof, have regrettably become the norm and not the exception that they ought to be. The suspended person suffering the ignominy of insinuations, the scorn of society and the derision of his Department, has to endure this

134 (2014) 3 SCC 1. This decision was followed in *V. Sriharan* v. *Union of India* (2014) 4 SCC 242.

135 AIR 2015 SC 715.

136 AIR 2015 SC 2389.

137 *Id.* at 2392-93.

> excruciation even before he is formally charged with some misdemeanour, indiscretion or offence. His torment is his knowledge that if and when charged, it will inexorably take an inordinate time for the inquisition or inquiry to come to its culmination, that is to determine his innocence or iniquity. Much too often this has now become an accompaniment to retirement. Indubitably the sophist will nimbly counter that our Constitution does not explicitly guarantee either the right to a speedy trial even to the incarcerated, or assume the presumption of innocence to the accused. But we must remember that both these factors are legal ground norms, are inextricable tenets of common law jurisprudence, antedating even the Magna Carta of 1215, which assures that – "We will sell to no man, we will not deny or defer to any man either justice or right."

Drawing comparison with the powers of a magistrate to detain an accused under the Criminal Procedure, 1973, the court held:[138]

> It seems to us that if Parliament considered it necessary that a person be released from incarceration after the expiry of 90 days even though accused of commission of the most heinous crimes, a fortiori suspension should not be continued after the expiry of the similar period especially when a Memorandum of Charges/Chargesheet has not been served on the suspended person. It is true that the proviso to Section 167(2) Cr.P.C. postulates personal freedom, but respect and preservation of human dignity as well as the right to a speedy trial should also be placed on the same pedestal.
>
> We, therefore, direct that the currency of a Suspension Order should not extend beyond three months if within this period the Memorandum of Charges/Chargesheet is not served on the delinquent officer/ employee; if the Memorandum of Charges/Chargesheet is served a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the concerned person to any Department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence. We think this will adequately safeguard the universally recognized principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution. We recognize that previous Constitution Benches have been reluctant

138 *Id.* at 2396-97.

> to quash proceedings on the grounds of delay, and to set time limits to their duration. However, the imposition of a limit on the period of suspension has not been discussed in prior case law, and would not be contrary to the interests of justice.

Right to privacy

Does right to life include right to privacy under article 21? This question has gained much significance as the central government has adopted aadhar card scheme which has now become a statutory scheme by virtue of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 which aims at providing for "a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals." The scheme applies to *all persons residing in India* as compared to citizens only. Under the scheme, the Government of India collects and compiles both demographic and biometric data of the residents in India for use for various purposes. The constitutional validity of the scheme was challenged on the ground that it violates the right to privacy guaranteed under article 21 of the Constitution of India. Pointing out the importance of the issue, the court observed:[139]

> We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in *M.P. Sharma*[140] and *Kharak Singh*[141] are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments -where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.

139 *K.S. Puttaswamy* v. *Union of India*, AIR 2015 SC 3081at 3085.

140 *Gobind* v. *M.P. Sharma*, AIR 1975 SC 1378.

141 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295.

As an interim measure, the court issued the following directions to the Union of India and the UIDA till the matter was finally decided by a larger Bench:-

1. The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card;

2. The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen;

3. The Unique Identification Number or the Aadhaar card will not be used by the respondents for any purpose other than the PDS Scheme and in particular for the purpose of distribution of foodgrains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of the LPG Distribution Scheme;

4. The information about an individual obtained by the Unique Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation.

The above directions have to be read with the provisions of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 and rules and notifications issued under it since the Act came into force after the court had issued the directions.

Right to human dignity for a convict

A.K. Sikri, J in *Shabnam* v. *Union of India*,[142] has emphasized that issuing of death warrant within six days after the decision of the Supreme Court was not permissible. In this case, two persons were convicted and sentenced to death by the trial court for having murdered seven members of a family and the sentence was confirmed by the high court as well as the Supreme Court. Within six days, the session court issued warrant of execution. The court found this to be impermissible. Sikri, J observed:[143]

> Once we recognize this aspect of dignity of human being, it does not end with the confirmation of death sentence, but goes beyond and remains valid till such a convict meets his/her destiny. Therefore, the process/procedure from confirmation of death sentence by the highest Court till the execution of the said sentence, the convict is to be treated with human dignity to the extent which is reasonable and permissible in law.
>
> This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being 'as a human being'. Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical

142 AIR 2015 SC 3648.

143 *Id.* at 3654.

> or mental welfare is armed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being. These may include the presumption that every person is innocent until proven guilty; the right of the accused to a fair trial as well as speedy trial; right of legal aid, all part of human dignity. Even after conviction, when a person is spending prison life, allowing humane conditions in jail is part of human dignity. Prisons reforms or Jail reforms measures to make convicts a reformed person so that they are able to lead normal life and assimilate in the society, after serving the jail term, are motivated by human dignity jurisprudence.

Sikri, J held that death sentence must accord with human dignity, i.e. it should be certain, humane, quick and decent. The learned judge held that issuing of warrant within six days was impermissible for many reasons: (1) The convicts had not exhausted all judicial and administrative remedies. Thus the remedy of filing review petition within 30 days had not been exhausted; (2) The remedy of mercy petition to the President or the Governor remains intact; (3) Period for filing review petition and a reasonable time for filing mercy petition had not lapsed; and (4) Right to life under article 21 includes right to human dignity. Sikri, J also noted the following fourfold tests laid down in *Deena* v. *Union of India*[144] which were to be satisfied in the execution of death penalty:

(i) The act of execution should be as quick and simple as possible and free from anything that unnecessarily sharpens the poignancy of the prisoner's apprehension.

(ii) The act of the execution should produce immediate unconsciousness passing quickly into the death.

(iii) It should be decent.

(iv) It should not involve mutilation.

Sikri, J quashed the warrant as the same had been issued before the convicts had exercised all the remedies available to them.

VIII RIGHT TO RELIGIOUS FREEDOM

Appointment of archaks

The fundamental right to freedom of religion guaranteed under article 25 of the Constitution of India is subject to public order, morality and health and other fundamental rights besides the law which state can make under clause (2) of article 25. But the freedom to manage religious affairs is subject only to public order, morality and health and not subject to other fundamental rights.[145] While considering the content

144 AIR 1983 SC 1155.

145 *Dr. Subramanian Swamy* v. *State of Tamil Nadu*, AIR 2015 SC 460.

of articles 25 and 26, the main principles underlying these provisions, as summarized by a Constitution Bench of the Supreme Court in one of the earlier cases was:[146]

> The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

The above observation was relied upon by a Constitution Bench in *Seshammal* v. *State of Tamil Nadu*[147] which had raised the issue of constitutional validity of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 as amended by the Amendment Act of 1970. Under section 55 of the Act, in case where the office holders or servants of a religious institution were required to be appointed on the principle of hereditary succession, the person next in line of succession was entitled to succeed with the exception when the next in line of succession was a minor or suffering from incapacity. Section 55 and other provisions of the Act were amended by the Amendment Act of 1970 by which the principle of next in line of succession was abolished. The amendment was upheld by the apex court in *Seshammal*, in which the court had also answered in the affirmative the question whether, after abolition of the principle of next in line of succession, the appointment of office bearers or servants of the temples was required to be made from a particular denomination/group/sect as mandated by the Agamas i.e. treatises pertaining to matters like construction of temples; installation of idols and conduct of worship of the Deity. In this respect, D.G. Palekar, J had made the following observation:[148]

> Any State action which permits the defilement or pollution of the image by the touch of an Archaka not authorised by the Agamas would violently interfere with the religious faith and practices of the Hindu worshipper in a vital respect, and would, therefore, be prima facie invalid under Article 25(1) of the Constitution.

The above two cases were relied upon by the Supreme Court in *Adi Saiva Sivachariyargal Nala Sangam v. The Government of Tamil Nadu,*[149] *in which* writ petitions under article 32 of the Constitution were filed by an association of Archakas

146 *Sardar Syedna T bbaher Saifuddin Saheb* v. *State of Bombay*, 1962 Supp. (2) SCR 531-32 (as per Das Gupta, J) : AIR 1962 SC 853 at 868.

147 (1972) 2 SCC 11.

148 *Id.* at 21.

149 JT 2015 (12) SC 332 : 2015 (13) SCALE 714 : AIR 2016 SC 209 : (2016) 2 SCC 725.

and individual Archakas of Sri Meenakshi Amman Temple of Madurai *challenging* G.O. No. 118 dated 23.05.2006 issued by the Government of Tamil Nadu, Department of Tamil Development, Cultural and Endowments to the effect that, "Any person who is a Hindu and possessing the requisite qualification and training can be appointed as a Archaka in Hindu temples". In *Seshammal* the court had held that that the hereditary principle long usage was a secular principle and a legislation to alter that usage (i.e. the Amendment Act of 1970), was permissible under article 25(2)(a) but the same was limited extent that liberty to make the appointment from persons beyond next in line to the last holder that the trustee was released from the obligation imposed on him by section 28 of the Act which required the trustee to administer the affairs of the temple in accordance with the usage governing the temple. The court had held:[150]

> (T)he choice of the trustee in the matter of appointment of an Archaka is no longer limited by the operation of the rule of next-in-line of succession in temples where the usage was to appoint the Archaka on the hereditary principle. The trustee is not bound to make the appointment on the sole ground that the candidate, is the next-in-line of succession to the last holder of office. *To that extent, and to that extent alone*, the trustee is released from the obligation imposed on him by Section 28 of the principal Act to administer the affairs in accordance with that part of the usage of a temple which enjoined hereditary appointments. The legislation in this respect… does not interfere with any religious practice or matter of religion and, therefore, is not invalid.

With regard to what had been held in *Seshammal* as the ratio, Ranjan Gogoi, J in *Adi Saiva* held:[151]

> (T)he Bench considered the expanse of the Agamas both in Saivite and Vaishnavite temples to hold that the said treatises restricted the appointment of Archakas to a particular religious denomination(s) and further that worship of the deity by persons who do not belong to the particular denomination(s) may have the effect of even defiling the idol requiring purification ceremonies to be performed. The Constitution Bench further held that while the appointment of Archakas on the principle of next in line is a secular act the particular denomination from which Archakas are required to be appointed as per the Agamas embody a long standing belief that has come to be firmly embedded in the practices immediately surrounding the worship of the image and therefore such beliefs/practice constitute an essential

150 *Supra* note 147 at 25.

151 *Supra* note 149 at 725 (of SCALE).

> part of the religious practice which under Section 28 of the Act the trustee is bound to follow.

Gogoi, J pointed out that the exclusion of persons for appointment as archak solely on the basis of caste was not an issue in *Seshammal but in Adithayan*,[152] the appointment of a non-Namboodri Brahmin who was otherwise well qualified to be appointed as a priest in the temple in question was challenged by a Namboodri Brahmin on the ground that it had been a long standing practice and usage in the temple that its priests were appointed exclusively from Namboodri Brahmins and any departure was in violation of the rights of Namboodri Brahmins under articles 25 and 26 of the Constitution. Upon a consideration of the various earlier decisions of the court, it was held that rights claimed solely on the basis of caste could not enjoy the protection of articles 25 and 26 and no decision supported the contention that even duly qualified persons could be barred from performing Poojas on the sole ground that such a person is not a Brahmin by birth or pedigree. In *Adithayan*, it was held that even proof of any such practice since the pre-constitutional days could not sustain such a claim as the same would be contrary to constitutional values and opposed to public policy or social decency. The above view thus did not strike a different note from the views expressed in any earlier decision including *Seshammal* in which the issue related to the entry to the sanctum sanctorum for a particular denomination without any reference to caste or social status.

While defining the word "Hinduism", Ranjan Gogoi, J quoted the following observations made by the apex court in *Sastri Yagnapurushadji* v. *Muldas Bhudradas Vaishya*[153] in which the question was whether Swaminarayan sect was a religion distinguishable and separate from the Hindu religion and consequently the temples belonging to the said sect fell outside the scope of Section 3 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 which provided that every temple to which the Act applied shall be open to the excluded classes for worship in the same manner and to the same extent as other Hindus in general. It was held that the sect in question was not a distinguishable and different religion. It was further observed:[154]

> When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any

152 *N. Adhithyan* v. *Travancore Devasom Board* (2002) 8 SCC 106.

153 1966 (3) SCR 242.

154 *Id*. at 260-61.

> religion or creed. It may broadly be described as a way of life and nothing more. xxxxxx
>
> The Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods, and practiced different rites (*Kurma Purana*).

Image worship is a predominant feature of Hindu religion. What is the scope of guarantee under articles 25 and 26 is reflected in the following observations of Gogoi, J:[155]

> The Ecclesiastical jurisprudence in India, sans any specific Ecclesiastical jurisdiction, revolves around the exposition of the constitutional guarantees under Articles 25 and 26 as made from time to time. The development of this branch of jurisprudence primarily arises out of claimed rights of religious groups and denominations to complete autonomy and the prerogative of exclusive determination of essential religious practices and principles on the bedrock of the constitutional guarantees under Articles 25 and 26 of the Constitution and the judicial understanding of the inter-play between Article 25(2)(b) and 26(b) of the Constitution in the context of such claims.

Gogoi, J held that the above view finds support from *Shirur Mutt*,[156] in which the apex court had struck down section 21 of the Madras Hindu Religious and Charitable Endowments Act, 1951 which empowered the commissioner and his subordinates to enter the premises of any religious institution at any time for performance of duties enjoined under the Act. The court had held the provision to confer unregulated and unrestricted power to enter the premises of any religious institution; it conferred this power on persons not connected with the spiritual functions; traditionally outsiders are not allowed access to the sacred parts of a temple; the hours of worship and rest are fixed; the impugned provision did not confine the right of entry only to the outside portion of the premises and did not even exclude the inner sanctuary (the Holi of Holies), the sanctity of which was zealously preserved; no notice to the head of the temple for entry was prescribed; no hours of entry were prescribed so as to ensure that the entry did not interfere with the due observance of the rites and ceremonies in the institution. The impugned provision of section 21 thus interfered with the rights of the mahadhipati and his institution guaranteed under articles 25 and 26.

155 *Supra* note 149 at 729-30 (of SCALE).

156 *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005; *Sri Venkataramana Devaru* v. *State of Mysore*, AIR 1958 SC 255.

Gogoi, J further pointed out the limitations on the power of the court to decide on what constitutes an essential religious practice. The learned judge quoted Gajendragadkar, J in *Durgah Committee, Ajmer* v. *Syed Hussain Ali*[157] in which it was observed:

> (T)hat in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.

After the detailed analysis of the decisions of the apex court, Gogoi, J held:[158]

> That the freedom of religion under Articles 25 and 26 of the Constitution is not only confined to beliefs but extends to religious practices also would hardly require reiteration. Right of belief and practice is guaranteed by Article 25 subject to public order, morality and health and other provisions of Part-III of the Constitution. Sub-Article (2) is an exception and makes the right guaranteed by Sub-article (1) subject to any existing law or to such law as may be enacted to, *inter alia,* provide for social welfare and reforms or throwing or proposing to throw open Hindu religious institutions of a public character to all classes and sections of Hindus. Article 26(b) on the other hand guarantees to every religious denomination or section full freedom to manage its own affairs insofar as matters of religion are concerned, subject, once again, to public order, morality and health and as held by this Court subject to such laws as may be made under Article 25(2)(b). The rights guaranteed by Articles 25 and 26, therefore, are circumscribed and are to be enjoyed within constitutionally permissible parameters. Often occasions will arise when it may become

157 AIR 1961 SC 1402 at 1415. The same view was reiterated in *Commissioner of Police* v. *Acharya Jagadishwarananda Avadhuta* (2004) 12 SCC 770.

158 *Supra* note 149 at 733-34.

> necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the Constitutional Court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as the Constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity. Without such a determination there can be no effective adjudication whether the claimed right it is in conformity with public order, morality and health and in accord with the undisputable and unquestionable notions of social welfare and reforms. A just balance can always be made by holding that the exercise of judicial power to determine essential religious practices, though always available being an inherent power to protect the guarantees under Articles 25 and 26, the exercise thereof must always be restricted and restrained.

According to Gogoi, J, *Sheshammal* was not an authority for any proposition as to what an Agama or a set of Agamas governing a particular or group of temples lay down with regard to the question whether any particular denomination of worshippers or believers had an exclusive right to be appointed as Archakas to perform the poojas. According to that decision, some of the Agamas do incorporate a fundamental religious belief of the necessity of performance of the poojas by Archakas belonging to a particular and distinct sect/group/denomination, failing which, there would be defilement of deity requiring purification ceremonies. If the Agamas in question did not proscribe any group of citizens from being appointed as Archakas on the basis of caste or class, the sanctity of article 17 or any other provision of Part III of the Constitution or even the Protection of Civil Rights Act,

1955 will not be violated. What had been said in *Sheshammal* was that if any prescription with regard to appointment of Archakas was made by the Agamas, section 28 of the Tamil

Nadu Act mandates the Trustee to conduct the temple affairs in accordance with such custom or usage. The requirement of constitutional conformity was inbuilt and if a custom or usage was outside the protection provided by articles 25 and 26, the law would take its course. "The constitutional legitimacy, naturally, must supersede all religious beliefs or practices", Gogoi, J held. Gogoi, J further held:[159]

159 *Id*. at 735.

(T)o determine whether a claim of state action in furtherance thereof overrides the constitutional guarantees under Article 25 and 26 may often involve what has already been referred to as a delicate and unenviable task of identifying essential religious beliefs and practices, sans which the religion itself does not survive. It is in the performance of this task that the absence of any exclusive ecclesiastical jurisdiction of this Court, if not other shortcomings and adequacies, that can be felt. Moreover, there is some amount of uncertainty with regard to the prescription contained in the Agamas. Coupled with the above is the lack of easy availability of established works and the declining numbers of acknowledged and undisputed scholars on the subject. In such a situation one is reminded of the observations, if not the caution note struck by Mukherjea, J. in *Shirur Mutt* with regard to complete autonomy of a denomination to decide as to what constitutes an essential religious practice, a view that has also been subsequently echoed by this Court though as a "minority view". But we must hasten to clarify that no such view of the Court can be understood to an indication of any bar to judicial determination of the issue as and when it arises. Any contrary opinion would go rise to large scale conflicts of claims and usages as to what is an essential religious practice with no acceptable or adequate forum for resolution. That apart the "complete autonomy" contemplated in *Shirur Mutt* and the meaning of "outside authority" must not be torn out of the context in which the views, already extracted, came to be recorded (page 1028). The exclusion of all "outside authorities" from deciding what is an essential religion practice must be viewed in the context of the limited role of the State in matters relating to religious freedom as envisaged by Articles 25 and 26 itself and not of the Courts as the arbiter of Constitutional rights and principles.

What then is the eventual result? The answer defies a straight forward resolution and it is the considered view of the court that the validity or otherwise of the impugned G.O. would depend on the facts of each case of appointment. What is found and held to be prescribed by one particular or a set of Agamas for a solitary or a group of temples, as may be, would be determinative of the issue. In this regard it will be necessary to re-emphasise what has been already stated with regard to the purport and effect of Article 16(5) of the Constitution, namely, that the exclusion of some and inclusion of a particular segment or denomination for appointment as Archakas would not violate Article 14 so long such inclusion/exclusion is not based on the criteria of caste, birth or any other constitutionally unacceptable parameter. So long as the prescription(s) under a particular Agama or Agamas is not contrary to any constitutional mandate as discussed above, the impugned G.O. dated 23.05.2006 by its blanket fiat to the effect that, "*Any person who*

> *is a Hindu and possessing the requisite qualification and training can be appointed as a Archaka in Hindu temples*" has the potential of falling foul of the dictum laid down in *Seshammal*. A determination of the contours of a claimed custom or usage would be imperative and it is in that light that the validity of the impugned G.O. dated 23.05.2006 will have to be decided in each case of appointment of Archakas whenever and wherever the issue is raised. The necessity of seeking specific judicial verdicts in the future is inevitable and unavoidable; the contours of the present case and the issues arising being what has been discussed.

Gogoi J concluded by holding that "as held in *Seshammal* appointments of Archakas will have to be made in accordance with the Agamas, subject to their due identification as well as their conformity with the Constitutional mandates and principles."

Practice of santhara – whether constitutional under article 25?

The decision of the division bench of the High Court of Rajasthan in *Nikhil Soni* v. *Union of India*[160] has raised a very pertinent question: Can a religious practice to "die" negate the right to life under article 21 of the Constitution of India? In this public interest writ petition filed under article 226 of the Constitution by a practising lawyer, directions had been prayed for the Union of India and the state of Rajasthan to treat "santhara" or "sallekhana" as illegal and punishable under the law and suitable prosecution should be directed against those responsible for this practice. The question before the court was whether the practice of santhara/sallekhana practised by the Shvetambaras Jains was an essential tenet of the Jain religion protected by the freedom of religion under article 25.

Sunil Ambwani, CJ, after extensively quoting leading judgments to the effect that article 21 did not include right to die[161] and those dealing with right to religious freedom under article 25[162] held that santhara/sallekhana was not an essential religious practice. The Chief Justice observed:[163]

> The Constitution being governing law and fountain head of the laws in India, guarantees certain freedoms as fundamental rights and also provides for constitutional rights and duties and statutory rights under the laws made under it. It does not permit nor include under

160 2015 Cr LJ 4951.

161 *Gian Kaur* v. *State of Punjab* (1996) 2 SCC 648.

162 *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*, AIR 1962 SC 853; *Javed* v. *State of Haryana* (2003) 8 SCC 369; *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat* (2005) 8 SCC 534; *Onkar Singh* v. *State of Rajasthan*, RLR 1987 (II) 957.

163 *Supra* note 160 at 4969. Unfortunately, on appeal, the Supreme Court stayed the operation of the decision of the high court on the ground that the opinion of Jain scholars had not been taken before it gave the judgment.

> Article 21 the right to take one's own life, nor can include the right to take life as an essential religious practice under Article 25 of the Constitution.
>
> Article 25 of the Constitution of India guarantees freedom of conscience and free profession, practice and propagation of religion under the heading "Right to Freedom of Religion", subject to public order, morality and health and to the other provisions of this Part, which includes Article 21. No religious practice, whether essential or non-essential or voluntary can permit taking one's own life to be included under Article 25. The right guaranteed for freedom of conscience and the right to freely profess, practice and propagate cannot include the right to take one's life, on the ground that right to life includes the right to end the life. Even in extraordinary circumstances, the voluntary act of taking one's life cannot be permitted as the right to practice and profess the religion under Article 25 of the Constitution of India.
>
> The respondents have failed to establish that the Santhara or 'Sallekhana' is an essential religious practice, without which the following of the Jain religion is not permissible. There is no evidence or material to show that the Santhara or Sallekhana has been practiced by the persons professing Jain religion even prior to or after the promulgation of the Constitution of India to protect such right under Article 25 of the Constitution of India. The over-riding and governing principles of public order, morality and health, conditions the right to freedom of conscience and the right to freely profess, practice and propagate religion. The right under Article 25 is subject to the other provisions of this Part, which includes Article 21. We are unable to accept the submission that the practice of 'Santhara' or 'Sallekhana' as a religious practice is an essential part of the Jain religion, to be saved by Article 25 or Article 26 or Article 29 of the Constitution of India.

In view of the above, the court directed that state authorities to stop the practice of 'santhara' or 'sallekhana' and treat it as suicide punishable under section 309 and its abetment under section 306 of the Indian Penal Code, 1860. "The State shall stop and abolish the practice of 'Santhara' and 'Sallekhana' in the Jain religion in any form. Any complaint made in this regard shall be registered as a criminal case and investigated by the police, in the light of the recognition of law in the Constitution of India and in accordance with Section 309 or Section 306 IPC, in accordance with law", the Chief Justice ruled. This decision has given rise to a new controversy regarding the extent of freedom of religion. If a practice to "die" is considered to be covered under article 25 read with article 21, then why not several practices prevalent not only in Muslim law but also practices like jallikattu? The Supreme Court cannot keep the appeal pending for long because the stay order would give legitimacy to the practice 'santhara'/'sallekhana' as it has already taken the life of a teenager school girl of 13 years.

IX CULTURAL AND EDUCATIONAL RIGHTS OF MINORITIES

Chandana Das v. *State of W.B.*,[164] raised the question of appointment of teachers in a minority educational institution. The appellants in this case were appointed as teachers on temporary basis in Khalsa Girls High School, Calcutta. The appointments were not approved by district inspector of schools as any such appointment could be made only on the recommendations of the school service commission established under the rules for Management of Recognised Non-Government Institutions (Aided and Unaided) framed under the provisions of the West Bengal Board of Secondary Education Act, 1963. A single judge of the high court allowed the petition filed by the teachers who held that the institution concerned was a linguistic minority institution and entitled to select and appoint its teachers. On appeal, a division bench allowed the appeal holding that that since the institution in which the appellants were appointed was a recognised aided institution, the management of the institution was bound to follow the mandate of rule 28 of the rules which permitted appointments against a permanent post only if the candidate was recommended for appointment by the school service commission. The division bench further held that the appellants had been appointed beyond the sanctioned staff strength and *de hors* the rules could not claim any approval. The bench further held that since the institution had not claimed to be a minority institution, the petitioners-employees could not claim any such status on behalf of the institution.

The question before the Supreme Court was whether Khalsa Girls High School was a minority institution and, if so, whether the institutions right to select and appoint teachers was in any way affected by the provisions of the rules. The appellants relied upon the fact that the institution was a minority institution entitled to appoint its own teachers de hors the procedure applicable to other institutes governed by the Rules. The division bench of the apex court took divergent views in the matter. While T.S. Thakur, J held that respondent-school had been established by Punjabi speaking Sikh community which was a linguistic minority not only in the State of West Bengal but in the entire country and the institution cannot be denied the status of being a minority institution. This was clear from the correspondence exchanged between the school and the authorities. Thakur, J further held that a reading of rule 8 (3) clearly showed that special constitution was not envisaged for any particular class of institutes; special constitution could be approved on the application of any institution or class of institution, whether the institution was a minority institution or not. The approval of a special constitution did not indicate that the institution had given up its claim of being a minority institution. Rule 8(3) did not suggest either an implied recognition of an institution as a minority Institution or the surrender of any such claim just because

164 2014 (14) SCALE 1. The opinion of two learned judges was divided and, therefore, the matter was referred to a three judge bench: *Chandana Das* v. *State of West Bengal*, 2015 (10) SCALE 233. The case was listed before a full bench on 29.07.2016 and the same was pending till the end of the year 2016.

special constitution had been approved for it. This was clear by rule 33 which confers power on the state government to frame rules for institutes governed by the provisions of articles 26 and 30 of the Constitution of India. When such rules are framed, the composition, powers, functions of the managing committee(s) of such institution or class of institutions could be regulated. The state government had not made any such rules. Thakur, J held that once an institution was recognized as a minority institution, its minority status would entitle its managing committee to make appointment of teachers against vacancies within its sanctioned strength. The power to make such appointments was enjoyed by the institutions by virtue of the constitutional protection. Thakur, J further held:[165]

> Linguistic institution and religious are entitled to establish and administer their institutions. Such right of administration includes the right of appointing teachers of its choice but does not denude the state of its power to frame regulations that may prescribe the conditions of eligibility for appointment of such teachers. The regulations can also prescribe measures to ensure that the institution is run efficiently for the right to administer does not include the right to maladministration. While grant in aid is not included in the guarantee contained in the Constitution to linguistic and religious minorities for establishing and running their educational institutions, such grant cannot be denied to such institutions only because the institutions are established by linguistic or religious minority. Grant of aid cannot, however, be made subservient to conditions which deprive the institution of their substantive right of administering such institutions. Suffice it to say that once respondent No.4-institution is held to be a minority institution entitled to the protection of Articles 26 and 30 of the Constitution of India the right to appoint teachers of its choice who satisfy the conditions of eligibility prescribed for such appointments under the relevant rules is implicit in their rights to administer such institutions. Such rights cannot then be diluted by the State or its functionaries insisting that the appointment should be made only with the approval of the Director or by following the mechanism generally prescribed for institutions that do not enjoy the minority status.
>
> The view taken by the Division Bench of the High Court that appointments of the appellants were de hors the rules inasmuch as they were not made by the School Service Commission hence did not qualify for approval, does not appear to us to be sound. The mechanism provided for making appointments under Rule 28 has no application to minority educational institutions.

165 *Id.* at 13-14.

> Placed in juxtaposition to Rule 33 of the Rules extracted earlier, it is self evident that while Rule 28 applies generally to other institutions; Rule 33 is more specific in its application to minority educational institutions covered by Article 26 or 30 of the Constitution. In the absence of any rules framed for such minority educational institutions the minority educational institution in the present case was entitled to select and appoint its teachers so long as other conditions for such appointments, namely, availability of substantive vacancies and the eligibility of the candidates for such appointments were duly satisfied.

The learned judge noted that the appellants were duly qualified for appointment and had been working for long time on meagre salary. Thakur J, therefore, directed that appointments of the appellants should be approved with effect from the date the vacancies become available against which such appointments could be regularized.

R. Banumathi, J, however, did not agree with the views of Thakur, J. on the interpretation of rule 8(3). It was held by Banumathi, J that merely because an educational institution was established by a religious or linguistic minority, it did not automatically become a minority institution for the purposes of claiming right of administration and for getting grant-in-aid; the concerned educational institution so established by the religious or linguistic minority must be recognized or granted the status of minority institution by the competent authorities. As the respondent-school was never declared to be a minority institution by the competent authorities, the judgment in *T.M.A. Pai Foundation* case was not applicable to it. The respondent-school being a recognized aided institution was bound by the Rules for Management of Recognized Non-Government Institutions (Aided and Unaided) 1969. While stating the scope of right under article 30(1), Banumathi, J observed:[166]

> Clause (1) of Article 30 of the Constitution of India provides that all minorities whether based on religion or language shall have the right (i) to establish and (ii) to administer educational institutions of their choice. The expression to establish means to set up on permanent basis. The expression to administer means to manage or to attend to the running of the affairs of the institution. The choice must be the absolute choice vested absolutely in the minority community.

The respondent-school had accepted the special constitution and had not challenged the same. When the respondent-school had accepted the special constitution and not claimed to be a minority institution, the appellants who were merely employees of the institution, could not contend that the institution was a minority institution entitled to appoint its own teachers. The appellants were appointed de hors the provisions contained in Rule 28 of the rules, the high court rightly held that their

166 *Id*. at 24.

appointment was in contravention of the rules and beyond the sanctioned strength at the relevant time and no direction could be issued for approval of their appointment.

In *Dr. Ranjit Kumar* v. *Union of India*,[167] the issue was admission of non-minority students in minority institutions. The petitioners had appeared in the post graduate medical admission test (PGMAT)-2012 conducted by Bihar combined entrance competitive examination board. They were successful and admitted to various post graduate courses offered by Katihar Medical College, Katihar or the M.G.M. Medical College, Kishanganj affiliated to Bhupendra Narain Mandal University, Madhepura. Despite the appellants' passing the post graduate medical admission test and admission to the concerned college by the state government, the concerned colleges refused to accept the admission and to allow the appellants to join the course. The colleges, that they were self financed minority medical colleges and the un-aided minority medical colleges had a right to fill in the seats in the post graduate courses through their own selection process; they were not obliged to admit students selected and admitted by the state government through the post graduate medical admission test. The state government and the Medical Council of India argued that the colleges were bound to allow the appellants to join the concerned course pursuant to their admission by the government of Bihar, pursuant to the Post Graduate Medical Education Regulation, 2000 framed by the Medical Council of India in exercise of powers conferred by the Indian Medical Council Act, 1956. A single judge of High Court of Patna dismissed the petition holding that un-aided minority medical colleges had unfettered right to admit students in post graduate courses according to their own selection process.

On appeal, a division bench of the high court, relying on three judgments of the Supreme Court,[168] affirming the decision of the single judge, dismissed the appeal holding that the issue had been answered by the Supreme Court in those cases. However, since the petitioners had joined the courses pursuant to ad interim orders passed by the court, the division bench directed the colleges to complete their courses and declare the results. It may be noted that a review petition against the decision in *Christian Medical College, Vellore* v. *Union of India*[169] is currently pending before the Supreme Court.s

X AWARD OF COMPENSATION

Compensation in service matter

In a petition filed under article 32 of the Constitution of India[170] by an officer of the Indian Forest Service from U.P. cadre, the petitioner claimed inter alia compensation

167 AIR 2015 Pat. 21.

168 These were: *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 48; *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537 and *Christian Medical College, Vellore* v. *Union of India* (2014) 2 SCC 305.

169 *Ibid*.

170 *Dr. Ram Lakhan Singh* v. *State Government of U.P.*, 2015 (12) SCALE 479 : JT 2015 (11) SC 79.

for the violation of the fundamental rights of his family members and also for financial loss and loss of professional career. It was alleged by the petitioner that the legal process had been abused maliciously and willfully by the respondent which had led to great financial loss and loss of his professional career, reputation and had caused mental agony not only to the petitioner but also his family members. The petitioner had rendered 35 years of service with unblemished record. He became a member of the national board for wild life (NBWL) on September 22, 2003. The then chief minister of the state wanted the petitioner to take necessary steps to get the Benti Bird Sanctuary located at Kunda of Pratapgarh district denotified by the NBWL in its meeting held on October 15, 2003. The petitioner did not comply with the directions. The chief minister, in the guise of a complaint by the MLA of his own party against the petitioner, directed the director general, state vigilance establishment to initiate a vigilance enquiry against him. The respondent state, without following the prescribed procedure, conducted vigilance enquiry and removed the petitioner from his post. In a writ petition filed by the petitioner before the high court challenging the inquiry without following the prescribed procedure, certain directions were issued by the court but the respondent did not follow them. In the meanwhile, a PIL was filed before the high court by an advocate arraying the petitioner as one of the respondents. According to the petitioner, the PIL was got filed by the advocate who had been working in the office of the advocate general making false averment that the vigilance committee had already completed the enquiry in various issues against him. On the date of institution of the PIL, the enquiry against the petitioner was not even referred to the state vigilance committee. In the PIL, the High Court passed an order directing that the vigilance committee shall carry on with the proceeding but no final order shall be passed. Thereafter, FIR was registered against the petitioner, his house was raided and he was arrested without taking prior permission and approval of the state chief secretary as required. Later on, the respondent obtained approval by a pre-dated letter, concealing the fact of raiding the petitioner's house. Two more FIRs were registered later against the petitioner on the same day and he was suspended from service. The petitioner filed a writ petition under article 32 but the court directed him to approach the high court. The petitioner then approached the high court which disposed of the matter holding that:[171]

> The prayer of the counsel for the petitioner is that all actions and orders passed, if any, in violation of the Court's order dated 30-01-2004 be declared to be null and void and be quashed and that, in fact, the matter was never referred to Vigilance Committee and consequently, no vigilance enquiry was ever initiated against the petitioner and, therefore, all actions taken/complaints lodged with the assumption that vigilance enquiry has been initiated against the petitioner, shall stand void and non est.

171 *Id*. at 483.

> Sri J.N. Mathur does not dispute the aforesaid position and has no objection if such a direction is issued. We have gone through the documents on record and we find that it is a case where the petitioner has undergone severe agony because of the incorrect statement about the Vigilance Committee being constituted and vigilance enquiry being initiated against him.

The petitioner had submitted that he was prosecuted without a plausible cause and only by malicious and willful intention of the respondent, he had to suffer unlawful suspension from the post of Principal Chief Conservator of Forest, loss of full salary and retirement benefits which were withheld for a period of more than ten years. For causing him the loss of professional career including that of the Member of NBWL, reputation, great mental agony and heavy financial loss besides defaming his character, the petitioner prayed for compensation. The court held that there were no materials to substantiate the allegations against the petitioner that FIRs against him were lodged for the crimes relating to his owning disproportionate assets beyond his income, illegal mining and auction of tendu patta leaves causing loss of revenue to government and undue gain to the purchasers; these allegations were made only to justify its illegal action against the petitioner, without producing any material supporting the allegations. Keeping in view the peculiar facts and circumstances of the case and the age and trauma suffered by the petitioner who had spent about 11 days in jail and fought the legal battle for about a period of 10 years before various forums and particularly in the absence of any proved charges of corruption against him, the court directed the State of Uttar Pradesh to pay a lump sum of Rs.10 lakh to the petitioner within a period of three months towards compensation.

In *Vijay Shankar Pandey* v. *Union of India*,[172] likewise, the Supreme Court awarded cost of Rs. five lakh to the petitioner, a senior officer of the Indian administrative service, who had faced disciplinary action by the respondents on the ground that he had written a complaint to the Supreme Court alleging "executive mal-feasance causing debilitating economic and security concerns for the country" which the apex court did not find to be an inappropriate conduct (failure to maintain absolute integrity and devotion to duty or of indulging in conduct unbecoming of a member of the service) deserving disciplinary proceedings. The court also noted that a petition making similar allegations had been filed before the Supreme Court by other officer which the respondents did not consider to be misconduct. The court also left it to the respondents to identify the persons responsible for the initiation of the action against the petitioner and recover the amount from them "if the respondents can and have the political will" to do so.

172 AIR 2015 SC 326.

XI CONCLUSION

Many significant issues raised in various cases during the year could not be decided by the courts. These included gender justice for Muslim women, constitutional validity of religious practice of santhara or sellekhana, validity of aadhar card scheme, residential requirement/institutional preference for admissions in medical courses in the state of Tamil Nadu, *etc*. Further, many of the burning issues such as reservation for Muslims has been pending before the Supreme Court since 2010.

It has also been noticed that the courts have not been consistent in their approach in matters concerning religion. Many times, they have taken a stringent view to curb objectionable religious practices and at times they have shown reluctance to intervene in religious matters.

The role played by the judiciary during the year concerning issues relating to fundamental rifghts had been by and large commendable but the difference of opinion among judges on some of the issues has created confusion in the individuals as to how they should conduct themselves, *e.g*. in matters concerning admission of students in minority educational institutions or the weightage given on the basis of domicile. With regard to the states of Andhra Pradesh and Telangana particularly one fails to understand the relevance of article 371-D in the Constitution at this juncture.

One fails to appreciate the helplessness of the court in holding the view that even though institutional preference or the residential requirement in admissions to suerspeciality medical courses was not in the national interest, it could do nothing to stop the states of Andhra Pradesh and Telangana from prescribing this requirement by virtue of the provisions of article 371-D of the Constitution.[173] Without issuing any directions, the court merely echoed the feelings expressed in an earlier case[174] and reiterated "the aspirations of others so that authorities can objectively assess and approach the situation so that the national interest can become paramount." Likewise, the court's reluctance to direct recovery of compensation ordered in *Dr. Ram Lakhan Singh*[175] from the persons responsible for the plight of the petitioner is also not appreciable. Had the court directed such recovery, it must have made a lot of impact not only on the guilty persons but also would make an impact in future whenever malafide administrative actions are taken.

173 *Supra* note 122.

174 *Supra* note123.

175 *Supra* note170.