4

CONSTITUTIONAL LAW – I
(FUNDAMENTAL RIGHTS)

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I INTRODUCTION

THE INDIVIDUAL freedom, liberty, gender identity and right to sex autonomy have superseded both law and religion in this country, be it the penal provisions relating to unnatural sex criminalised as 'unnatural offences' under section 377[1] or sex with another person's wife without her husband's consent or connivance criminalised as 'adultery' under section 497 of the Indian Penal Code, 1860 (the IPC)[2] or matters of religious faith such as entry in a temple[3] or the institution of marriage[4] or 'live in'

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1 *Navrej Singh Johar* v. *Union of India*, AIR 2018 SC 4321 : 2018 (10) SCALE 386 : (2018) 10 SCC 1 : JT 2019 (6) SC 1, in which Dipak Misra, CJI said: "The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution forming the concrete substratum of our fundamental rights…."

2 *Joseph Shine* v. *Union of India*, AIR 2018 SC 4898 : (2019) 3 SCC 39 : 2018 (11) SCALE 556. Likewise, relying on this decision, R. F. Nariman, J. in *Col. Rajnish Bhandari* v. *Union of India*, 2019 (2) SCALE 804 struck down section 497 of the Ranbir Penal Code, 1932, applicable in the State of Jammu and Kashmir, as the same was in *pari materia* with section 497, IPC which had been declared unconstitutional, being violative of Part III of the Constitution of India. The learned judge further held that the words "In such case the wife shall be punishable as an abettor", occurring in section 497 of the Ranbir Penal Code but not in section 497, IPC, could not stand by itself in view of the fact that the expression used was 'In such case'.

3 *Indian Young Lawyers Association* v. *State of Kerala*, AIR 2018 SC (Supp) 1650 : 2018 (10) SCALE 386 : (2018) 10 SCC 1 : JT 2019 (6) SC 1. A nine-judge bench, in a review petition, has referred this case for re-consideration to a larger bench: *Kantaru Rajeevaru* v. *Indian Young Lawyers Assn*., 2020 (3) SCALE 423.

4 *Shafin Jahan* v. *Ashokan K.M.* (2018) 16 SCC 368 : 2018 (5) SCALE 422 : AIR 2018 SC 1933; also see *Shakti Vahini* v. *Union of India*, 2018 (5) SCALE 51 : JT 2018 (4) SC 181 : (2018) 7 SCC 192 : AIR 2018 SC 1601.

relationship.[5] How much "earlier decisions have been swept away by the tidal wave of recent judgments expanding the scope of the fundamental rights contained in Articles 14, 15 and 21 of the Constitution of India" can be seen from over half a dozen leading judgments reported during the year 2018.[6] This seems to be, as Dipak Misra, CJI proclaimed,[7] on account of "changing perceptions of the world". The judges, not all, in India seem to have either no confidence or lost confidence in Indian culture, tradition, values and philosophy and they are blindly borrowing and applying western culture and philosophy unmindful of the Indian values and culture reflected in well accepted principles and practices, tested and followed since infinity.

The year 2018 would be remembered in the history of this country for the mental perversity of the legal fraternity – not only of the judges (at least some) and lawyers but also of the academicians, politicians, so-called present day social reformers and those championing the cause of "human rights" and "individual freedoms", supporting an identical view point; Indian culture and values have been given a burial by some of the decisions reported during the year. The well-known and long accepted concepts of 'morality' and 'ethics' have given way to 'constitutional morality' even in the context of religious faith.[8] Some laws in existence for over one and half a century, such as 'unnatural offences' under section 377, IPC [consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman)], held hereinbefore as constitutional,[9] has all of a sudden become invalid and declared by the Supreme Court to be unconstitutional in

5 *Nandakumar* v. *State of Kerala*, AIR 2018 SC 2254 : (2018) 16 SCC 602.

6 *Joseph Shine* v. *Union of India*, *supra* note 2 (R.F. Nariman, J at 4941 of AIR); *Navrej Singh Johar* v. *Union of India*, *supra* note 1; *Indian Young Lawyers Association* v. *State of Kerala*, *supra* note 3; *Shafin Jahan* v. *Ashokan K.M.*, *supra* note 4; *Common Cause (A Regd.) Society* v. *Union of India*, AIR 2018 SC 1665 : 2018 (4) SCALE 1 : (2018) 5 SCC 1; *Justice K.S. Puttaswamy* v. *Union of India*, 2018 (12) SCALE 1 : AIR 2018 SC (Supp) 1841 : (2019) 1 SCC 1; *Shakti Vahini* v. *Union of India*, *supra* note 4.

7 *Indian Young Lawyers Association* v. *State of Kerala*, supra note 3 at 1665 (of AIR), in the context of ban on the entry of women in the age group of 10 to 50 in Lord Ayyappa Temple at Sabarimala, Kerala, while discarding the "dogmatic notions of biological or physiological factors arising out of rigid socio-cultural attitudes."

8 *Indian Young Lawyers Association* v. *State of Kerala*, *id* at 1688; also see the observations of Dipak Misra, CJI in *State (NCT of Delhi)* v. *Union of India* (2018) 8 SCC 50: "Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the documents. When a country is endowed with a Constitution, there is an accompanying promise which stipulates that every Member of the country right from its citizens to the high constitutional functionaries must idolize the constitutional fundamental." (p. 537); "Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse" (p. 646).

9 *Suresh Kumar Koushal* v. *Naz Foundation*, AIR 2014 SC 563. It is significant to note that the issue had been finally decided by the Supreme Court four years back dismissing an appeal after long arguments while upholding the constitutional validity of section 377, IPC and even the review and curative petitions had been dismissed: *Suresh Kumar Koushal* v. *Naz Foundation*, AIR 2014 SC 563; see S N Singh. "Constitutional Law – I (Fundamental Rights)", L *ASIL* 239 at 317-18 (2014).

the name of individual dignity, privacy and freedom of sex.[10] The same has been the fate of the offence of adultery under section 497, IPC which penalised a man for having sex with another person's wife without the consent or connivance of her husband has been de-criminalised by a Constitution Bench on account of growing constitutional precepts and progressive perception.[11] Likewise, the role of the parents and family members in the marriage of their children or their being in "live in" relationship with somebody has become irrelevant and held by the Supreme Court to be so in the name of individual freedom, privacy and personal liberty.[12] It must, however, be remembered that the changing perceptions of the world cannot, and should not, be applied to destroy the Indian culture and ethos. What would be the limit of individual freedom and liberty in coming years in the long term is unknown; only future developments will shape and transform the Indian values, let it be so hoped.

In the ill-famous Bhima Koregaon case involving the right of personal liberty of some activists arrested in connection with some alleged offence, the court showed restraint in issuing an order for changing the investigating agency at the behest of the named five accused who were human rights defenders, lawyers, activists and a prayer of the same nature made at the behest of the next friend of the accused in the garb of PIL. The prayers in the PIL included direction for an independent and comprehensive enquiry into the arrest of the human rights activists in connection with the Bhima Koregaon violence and calling for an explanation from the State of Maharashtra for this sweeping round of arrests. The court pointed out that "the writ petitioners, who are strangers to the offence under investigation and since they are merely espousing the cause of the arrested five accused as their next friends, cannot be heard to ask for the reliefs which otherwise cannot be granted to the accused themselves. What cannot be done directly, cannot be allowed to be done indirectly even in the guise of public interest litigation."[13]

During the current year, the Supreme Court realised that the cases of persons lodged in jails are not adequately and properly represented by advocates who appear in cases entrusted to them by the Supreme Court Legal Services Committee as they do not have the advantage of either talking to the accused or those who know the details of the case. This seriously hampers the efforts of the advocates. The dialogue between the counsel and his client would further the cause of justice, making the legal aid programme meaningful. The court, therefore, directed all the legal services authorities/committees in every state to extend the facility of video conferencing between the counsel and the accused or anybody in the know of the matter in every criminal case wherever the accused was lodged in jail so that the cause of justice was well served.[14] The directions for video conferencing between persons lodged in jails

10 *Navrej Singh Johar* v. *Union of India*, *supra* note 1

11 *Joseph Shine* v. *Union of India*, *supra* note 2.

12 *Ibid.*; see also *Nandakumar* v. *State of Kerala*, supra note 5

13 *Romila Thapar* v. *Union of India* (2018) 10 SCC 753 at 777 : AIR 2018 SC 4683 : JT 2018 (10) SC 442 : 2018 (13) SCALE 278.

14 *Imtiyaz Khan* v. *State of Maharashtra* (2018) 9 SCC 160.

and their counsel assigned by the legal services authorities/committees in every state is a welcome step in the criminal justice delivery system.

One significant development of the year 2018 was the decision of the Supreme Court regarding live telecast of the Supreme Court proceedings[15] in a limited and restricted manner. This would go a long way in ensuring transparency and, to an extent, even accountability of the lawyers who neglect to their cases and the judges who dictate orders in the open court and then there is allegation that the order was modified subsequently. Moreover, this would help in checking misleading reporting of court proceedings through print and electronic media. The court held that "the publication of court proceedings of the Supreme Court was a facet of the status of this Court as a Court of Record by virtue of Article 129 of the Constitution. Moreover, live streaming of court proceedings in the prescribed digital format would be an affirmation of the constitutional rights bestowed upon the public and the litigants in particular." Unfortunately, nothing was done in this direction till the end of April, 2020.

The other leading fundamental rights cases reported during the year which engaged the attention of all dealt with the constitutional validity of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (right to privacy),[16] two leading cases pertaining to the scheduled castes and scheduled tribes relating to anticipatory bail under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989[17] and the application of creamy layer principle to SC and ST categories in public employment and admission to educational institutions,[18] right to personal liberty,[19] exercise of inherent power by the high courts to quash criminal proceedings under section 482, CrPC,[20] guidelines in cases of mob lynching,[21] reliance on parliamentary committee reports while deciding cases[22] and status of khap

15 *Swapnil Tripathi* v. *Supreme Court of India,* 2018 (11) SCALE 475 : AIR 2018 SC 4806.

16 *Justice K.S. Puttaswamy*v. *Union of India*, *supra* note 6.

17 *Subhash Kashinath Mahajan* v. *State of Maharashtra* (2018) 6 SCC 454 : AIR 2018 SC 1498. Three of the five directions issued in this case were recalled by a full-bench in *Union of India* v. *State of Maharashtra*, 2019 (13) SCALE 280. Moreover, the Supreme Court in *Prathvi Raj Chauhan* v. *Union of India*, 2020 (4) SCALE 198 upheld the constitutional validity of section 18A which had been inserted by an amendment to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to nullify the decision.

18 *Jarnail Singh* v. *Lachhmi Narayan Gupta* (2018) 10 SCC 396 : AIR 2018 SC 4729 : 2018 (11) SCALE 530. Review petition filed by Union of India in this case was pending till April, 2020.

19 *Nilesh Tarachand Shah* v. *Union of India, supra* note 45.

20 *Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur* v. *State of Gujarat* (2018) 1 SCC (Cri) 1 : (2017) 9 SCC 641

21 *Tehseen S. Poonawalla* v. *Union of India* (2018) 6 SCC 72 : AIR 2018 SC 3354; also see K*odungallur Film Society* v. *Union of India* (2018) 10 SCC 713 : 2018 (13) SCALE 607; *Koshy Jacob* v. *Union of India* (2018) 11 SCC 756; *Shakti Vahini* v. *Union of India*, *supra* note 4.

22 *Kalpana Mehta* v. *Union of India*, 2018 (7) SCALE 106 : AIR 2018 SC 2493.

panchayats.[23] The leading cases concerning children related to the direction issued to control child abuse,[24] effective enforcement of the Juvenile Justice (Care and Protection of Children) Act, 2015[25] and awareness programme regarding the killer blue whale challenge game.[26]

At times, one wonders the way the courts dismiss writ petitions raising the issue of violation of fundamental rights. In *Ganga Malik* v. *Union of India*,[27] a member of the police party was killed by firing while chasing miscreants and the father of the deceased approached the apex court seeking compensation, among other reliefs. The petition was dismissed by a cryptic order stating that the petitioner may approach the state government for compensation. Is this justice? This was a clear case where the court could have called upon the state government to pay a reasonable amount of compensation to the petitioner who had lost his son on duty. This case is in direct contrast to *Secretary to the Government of Tamil Nadu* v. *Kamala*,[28] in which the challenge was to a preventive detention order issued under section 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 without specifying any period of detention. When the matter came up for hearing, the state informed the court that the period of detention had already expired and the petition had become infructuous. Instead of dismissing/disposing of the petition on this ground, the court not only proceeded but actually decided the issue stating that the preventive detention order was valid even if no period had been prescribed. When the issue had become infructuous, the court still had enough time to hear the arguments and pronounce on the principles of law!

Some unfortunate tendencies in the judicial process have been noticed during this year. One, the court passes final orders first and after considerable time, picks up "reasons" for the decision.[29] This clearly shows that the court was clueless or at least uncertain at the time of passing orders and supporting the directions by supplementing reasons subsequent to the passing of the directions is not at all justified and correct. It is a well established principle of law that an order already passed cannot be justified by supplementing reasons and justifications subsequent to the passing of the order. The Supreme Court itself has held that if death penalty is to be affirmed by the apex court, even while dismissing the special leave petition in *limine*, it should be by a

23 *Shakti Vahini*v. *Union of India, supra* note 4.

24 *Alakh Alok Srivastava* v. *Union of India*, 2018 (7) SCALE 88 : AIR 2018 SC 2440.

25 *Sampurna Behura* v. *Union of India* (2018) 4 SCC 433.

26 *Sneha Kalita* v. *Union of India* (2018) 12 SCC 674.

27 (2018) 5 SCC 771.

28 AIR 2018 SC (Supp) 1099 : JT 2018 (4) SC 136.

29 See, for instance, *Shafin Jahan* v. *Ashokan K. M, supra* note 4, in which the order was passed on 08.03.2018 and the reasons were given by Dipak Misra, CJI on 09.04.2018. Likewise, an order was passed by the Supreme Court on 09.05.2017 (*In re Hon'ble JusticsC.S. Karnan* (2017) 7 SCC 1) against the contemnor (C.S. Karnan, J) that he shall not perform any administrative or judicial functions but detailed order was to follow which actually followed only on 04.07.2017: *In Re, Hon'ble Shri Justice C.S. Karnan*, AIR 2017 SC 3191.

reasoned order on the aspect of sentence, at least.[30] Two, the judges, after final arguments, keep the decision pending till about the time of their retirement. This has happened in case of Dipak Misra, CJI who delivered more than half a dozen judgments[31] in most important cases just 4-5 days before his retirement. The judgments show a huge compilation of cases/other materials making the judgments very bulky and judgments themselves being most controversial. The judgments in similar number of cases were delivered by some other judges with Dipak Misra, CJI being a member of the bench.[32] Three, a new trend seems to have overtaken the judgment writing by the judges. They do not seem merely to accept or reject one point of view or the other with justified reasons but write research papers/articles, properly dividing the judgements into parts and sub-parts. While doing so, they keep on loading their judgments with rhetoric and keep sermonising and a reader becomes so much bored that he/she leaves the judgment un-read or half read.[33] These judgments include everything available anywhere in the world – national, regional, international, treaties, declarations, conventions, religion, history, tradition, belief, faith, views, reports and

30 *Babasaheb Maruti Kamble* v. *State of Maharashtra*, 2018 (15) SCALE 228. In *Sumer Singh* v. *State of Rajasthan*, JT 2018 (11) SC 239, the Supreme Court set aside the judgments/orders given by a division bench of the High Court of Rajasthan dismissing appeals without discussion on issues involved in the cases, without any finding on the submissions of the parties and without assigning any reason; to the same effect were the decisions in *State of Orissa* v. *Chandra Nandi*, JT 2019 (4) SC 6 and *Mahipal* v. *Rajesh Kumar*, 2019 (16) SCALE 813 (bail granted by the high court in a murder case without recording reasons was set aside by the apex court).

31 See *Joseph Shine* v. *Union of India*, *supra* note 2 (27.09.2018); *Indian Young Lawyers Association* v. *State of Kerala*, *supra* note 3 (28.09.2018); *Justice K.S. Puttaswamy*v. *Union of India*, *supra* note 6 (26.09.2018); *Jarnail Singh* v. *Lachhmi Narain Gupta*, *supra* note 18 (26.09.2018 in which Dipak Misra, CJI was a party); *Aseer Jamal* v. *Union of India* (2018) 10 SCC 437 (27.09.2018); *Public Interest Foundation* v. *Union of India*, AIR 2018 SC 4550 (25.09.2018); *Union of India* v. *Hardy Exploration and Production (India) INC*, AIR 2018 SC 4871 (25.09.2018), *etc*.

32 See, for instance*, Common Cause (A Regd.) Society* v. *Union of India*, *supra* note 6, judgment of Dipak Misra, CJI running into 192 pages/197 paras. After sermonising in 126 pages (136 paras), Chief Justice came to the real controversy under the head "K. Passive Euthanasia in the context of Article 21 of the Constitution", "K.1 Individual Dignity as a facet of Article 21", "L. Right of self-determination and individual autonomy", "M. Social morality, medical ethicality and State interest". He also kept on referring copiously to Indian and foreign judgements under these heads. Even the submissions of parties and interveners have been discussed under two separate heads, wasting reader's time.

33 *Justice K.S. Puttaswamy* v. *Union of India*, *supra* note 6**.** This was the lengthiest judgment of the year with three separate judgments running into 1448 pages written by A.K. Sikri, J (567 pages), D.Y. Chandrachud, J (481 pages) and Ashok Bhushan, J (400 pages). Writing bulky judgments, competing with each other, by loading and over-loading materials from all over the world and quoting themselves or each other from previous judgments is not a good method of judgment writing, as it is rightly said 'brevity is the soul of wit'. Instead of writing 1448 pages in one case, at least 20 judgments could have been written to dispose of as many cases.

even songs from films[34] and then all of a sudden conclude the judgments. Finally, the Supreme Court has started assuming the role assigned to the executive. Under the Finance Act, 2017, seventeen tribunals established under various legislations were merged or abolished and new provision was made for their re-structuring/composition. The constitutional validity of this legislation was challenged in *Oger Mathew* v. *South Indian Bank Ltd.*,[35] in which the court referred the matter to a larger bench for consideration of four issues: (i) Creation of a regular cadres laying down eligibility for recruitment for Tribunals; (ii) Setting up of an autonomous oversight body for recruitment and overseeing the performance and discipline of the members so recruited and other issues relating thereto; (iii) Amending the scheme of direct appeals to the Supreme Court so that the orders of tribunals were subject to jurisdiction of the high courts; and (iv) Making benches of tribunals accessible to common man at convenient locations instead of having only one location at Delhi or elsewhere; in the alternative, conferring jurisdiction on existing courts as special courts or tribunals.[36] It may be noted that the case has now been finally decided by a Constitution Bench which struck down the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 made by the central government pursuant to the Finance Act, 2017 and issued detailed directions regarding the composition of the tribunals.[37]

II RIGHT TO EQUALITY

Reasonable classification rule

The classification between persons, places and things is permissible when twin tests are satisfied, *viz.*classification should be founded on intelligible differentia and the same should have rational nexus with the object sought to be achieved. In *Director General, Central Reserve Police Force* v. *Janardan Singh*,[38] special (duty) allowance was granted to employees/officers on posting to any station in the north-eastern region having their headquarters in that region. The respondent, posted in Assam, was denied that allowance on the ground that his headquarter was in Gwalior. Ashok Bhushan, J held that the object and purpose of the scheme of granting special (duty) allowance was to encourage, attract and retain the services of the officers/employees in north-east region and there was no intelligible differentia between employees/officers posted in north-east region with headquarter in the same region and those posted in north-east region but having their head-quarter outside that region.

34 *Common Cause (A Regd.) Society* v. *Union of India*, *supra* note 6, judgment of A.K. Sikri, J, para. 47: रोते हुए आते हैं सब, हंसता हुआ जो जाएगा, वो मुकद्दर का सिकंदर जानेमन कहलायेगा. *"Every person in this world comes crying. However, that person who leaves the world laughing/smiling will be the luckiest of all"* (Hindi Film – *Muqaddar Ka Sikandar*). One can only lament on this kind of simile. Does anyone die laughing; only a judge can imagine this kind of luxury at the time of death because he is under no control, internal or external, while making observations.

35 (2018) 16 SCC 241 : 2018 (7) SCALE 29.

36 *Id*. at 352 (of SCC).

37 *Rojer Mathew* v. *South Indian Bank Ltd*., 2019 (15) SCALE 615.

38 (2018) 7 SCC 656 : AIR 2018 SC 3101.

In exercise of powers under the Karnataka Police Act, 1963, the Commissioner of Police issued Licensing and Controlling of Places of Public Entertainment (Bangalore City) Order, 2005 which required the restaurant owners to obtain licences under the Order for providing the facility of displaying "live band music", "cabaret dance" and "discotheque" in the restaurants. The validity of the Act and the Order was challenged in *Karnataka Live Band Restaurants Assn.* v. *State of Karnataka*,[39] on the ground that the same were violative of articles 14 and 19(1)(g) of the Constitution of India. Section 31 of the Karnataka Police Act, 1963 empowered the commissioner of police and the district magistrate to make, alter or rescind orders consistent with the provisions of the Act for regulation of traffic and for preservation of order in public places.[40]

Clause 7 of the Licensing and Controlling of Places of Public Entertainment (Bangalore City) Order, 2005 required the licensing authority to have regard to the following aspects while deciding to grant or refuse a licence under the Order, namely: (a) the interest of public in general; (b) the status and antecedents of the applicant; (c) availability of parking place commensurate with the seating capacity; (d) the possible adverse impact on law and order; (e) vicinity (200 metres) of the place to educational or religious institutions; (f) the entertainment did not in any way incite religious feelings; (g) the materials used for the structure did not pose any kind of fire hazard; (h) the proposed entertainment did not promote public gambling or the premises shall not be used as a gaming house or not encourage prostitution or allow the use of narcotic substances or permit any other illegal activity; (i) the licensee shall not organize or allow performance of shows which were immoral, obscene or indecent and ensured

39 JT 2018 (2) SC 68 : AIR 2018 SC 731 : (2018) 4 SCC 372.

40 *Section 31 - Power to make orders for regulation of traffic and for preservation of order in public places, etc.*

(1) The Commissioner and the District Magistrate, in areas under their respective charges or any part thereof, may make, alter or rescind orders not inconsistent with this Act, for,- ….

(w) (i) licensing or controlling places of public amusement or entertainment;

(ii) prohibiting the keeping of places of public amusement or entertainment or assembly, in order to prevent obstruction, inconvenience, annoyance, risk, danger or damage to the residents or passengers in the vicinity;

(iii) regulating the means of entrance and exit at places of public amusement or entertainment or assembly and providing for the maintenance of public safety and the prevention of disturbance thereat;

(x) (i) licensing or controlling with such exceptions as may be specified, the musical, dancing, mimetic, or theatrical or other performances for public amusement, including melas and tamashas;

(ii) regulating in the interest of public order, decency or morality or in the interest of general public, the employment of artists, and the conduct of the artists and the audience at such performances;

(iii) prior scrutiny of such performance by a Board appointed by the Government or by an Advisory Committee appointed by the Commissioner or the District Magistrate in this behalf;

(iv) regulating the hours during which and the places at which such performances may be given…."

that there was no obscenity or indecency in dress, movement or gesture or that the performers indecently exposed their person; (j) the licensee would not permit any obscene or objectionable posters or pictures to be exhibited; (k) the proposed premises did not cause obstruction, inconvenience, annoyance, risk, danger or damage to the residents or to passerby of such premises; and (l) all adequate precautions had been taken in the premises in respect of which the licence was to be granted to provide for the safety, convenience and comfort of the persons attending the programmes therein. The licensing authority on being satisfied and subject to the provisions of the Order, may grant a licence to the applicant in the prescribed form on such terms and conditions and for such period subject to such restrictions as the licensing authority may determine. No licence was to be granted for a period exceeding one year and a licence could be renewed for a period not exceeding one year at a time. If the licensing authority refused to grant licence in any case, it was required to record reasons in writing and the order was to be communicated to the applicant. Moreover, licensee could conduct any show or public entertainment only between 10.00 hrs. and 23.30 hrs. which could be extended by the licensing authority at its discretion beyond 23.30 hrs. on special occasions not exceeding three such occasions in a year for each licence. Finally, additional conditions could be imposed by the licensing authority during the period of licence for reasons to be recorded in writing and communicated to the licensee.

Clause 8 of the impugned Order contained provisions for seating arrangements: the licensee shall not accommodate more than twenty persons per nine square meters in the place of public entertainment exclusive of the entrance, passage, corridor, gangway and stage shall be deducted for the purpose of calculating the seating accommodation; there shall be an open space of not less than five feet wide on any two sides of the premises where live band or discotheque was performed; there shall be at least one emergency exit in addition to the normal doorway fitted with doors which open outwards; there shall be openings sufficiently wide enough to ensure good ventilation or there shall be provision for sufficient good air conditioner; one W.C. and one urinal separate for men and women each for every fifty persons or less shall be provided; and any live band performance within the licensed premises for conducting live band shall be conducted on a stage which shall be properly demarcated from the seating area. There shall be no inter-mingling of performers with customers/ guests on or off the stage. There shall be a distance of at least five feet between the stage and first row of seating area. Clause 9 of the Order contained provisions for a notice board: A board of suitable size shall affix or cause to be affixed at some conspicuous place at the place of public entertainment on which the name and address of the licensee and the period of licence shall be written in Kannada and English by every licensee who was required to specify the seating capacity/maximum capacity of the premises conducting live band, cabaret, discotheque; and exhibit at a prominent place in the premises a photo copy of the licence.

Abhay Manohar Sapre J held that the validity of section 31 of the Act had not been challenged but the same was valid. The learned judge found no fault with the source of power of the commissioner of police and the district magistrate under section 31 of the Act to issue the Order for regulation of traffic and preservation of order in

public places. The activities of displaying "live band music", "cabaret dance" and "discotheque" in the restaurants were covered by the expression "public entertainment" defined in section 2(15) of the Act. It was held that the three activities were subjected to the rigours of the Order as these performances were displayed in a restaurant where public had an access and, therefore, in the larger public interest, these performances were to be controlled, regulated and supervised by imposing reasonable restrictions in law under clause (6) of article 19 of the Constitution and there was no illegality in imposing the restrictions. The conditions specified in sub-clauses (a) to (l) of clause 7, 8 and 9 of the Order were well conceived conditions in public interest. They were intended to ensure the safety and welfare of the general public, regularly visiting such restaurants to take food and witness the live performances of the artists in them. Sapre, J pointed out that had these safety measures not been adhered to by the owners of the restaurants while running their restaurants, the general public would become vulnerable to the risk of subjecting themselves to the happening of any untoward incident endangering their life and safety. The learned judge also held that the expression "in the interest of the general public" was of wide import comprehending in it "public order, public health, public security, morals, economic welfare of the community and lastly objects mentioned in Part IV of the Constitution". The conditions stipulated in clauses 7, 8 and 9 of the impugned Order were to be complied with by the restaurant owners before obtaining licences and they have to continue to comply with them during the currency of the licence on regular basis for the benefit, safety and welfare of the customers and the residents of the area. Finally, it was held that a check was imposed on the exercise of power by the licensing authority while granting or refusing the licence to record and supply reason for the decision which could always be challenged in a court. This requirement eliminates exercise of power arbitrarily.

The court also repelled the argument of arbitrariness and discrimination, upholding the impugned Act and the Order in the following words:[41]

> We are … unable to find any case of arbitrariness or discrimination having been made out by the appellant so as to attract the rigor of Article 14 of the Constitution.
> Indeed, the Order 2005 does not create any discrimination between the two alike. The restaurants which are engaged in displaying the three performances specified in Clause 2(b), (d) and (j) of the Order 2005 are under legal obligation to take licence under Clause 3.
> Learned counsel for the appellant, however, pointed out the proviso to Clause 3 that it is this proviso which creates a discrimination inasmuch as there does not appear to be any justifiable reason to exclude those restaurants from obtaining the licence which are conducting Yakshagana, Bayalata (field drama) or Bharat Natyam, folk Art, Music recital, vocal or instrumental like Veena or Mrudana etc.

41 (2018) 4 SCC 372 at 398. The decision in the present case may be compared with *M/s. Dwarka Prasad Laxmi Narain* v. *State of U.P.*, AIR 1954 SC 224 and *State of Tamil Nadu* v. *A.N. Parsuraman*, AIR 1990 SC 40.

> We do not find any merit in this submission though look attractive at its first blush. First, it is for the Police Commissioner to decide in its discretion having regard to the totality of entire fact situation as to what should be brought within the ambit of the Order 2005 and what should be left out from its clutches. Second, there appears reasonable distinction between the two performances because as rightly urged by the respondent, the performances specified in the proviso, are not usually performed in restaurants but are performed in theaters or/and auditoriums as one time performance by the artists whereas the three performing items namely - Cabaret, Discotheque and Live Band Music are the activities which are regularly performed and attract more crowd and lastly the items specified in proviso even if performed in restaurants does not involve any kind of indecency or obscenity whereas other three performances may unless controlled. In our view, proviso seems more clarificatory in nature.

While dismissing the petition and upholding the Act and the Order, the court directed the commissioner of police to verify and ensure strict compliance of the licence conditions, including all the conditions of the 2005 Order in relation to all the licensees and also *suo motu* directed the commissioner to ensure that no noise pollution was caused to the residents of the nearby area due to any of the three performances in any restaurant and that remedial steps were taken for that purpose. This direction was issued because the court did not find any specific clause/condition dealing with control of noise pollution which was bound to be created due to regular display and performance of the three activities in the restaurants thereby causing disturbance, annoyance and inconvenience to the near residents of the nearby area.

In another case,[42] the question was whether the Karnataka Money Lenders Act, 1961 (ML Act) and the Karnataka Pawn Brokers Act, 1961 (PB Act), as amended, providing that the security deposit furnished by the money lenders and pawn brokers in terms of sections 7-A of ML Act and 4-A of the PB Act shall not carry interest, were constitutional. The main business of both money lenders and pawn brokers was to lend money to individuals with the only difference that a pawn broker was authorized to accept valuable articles like gold, gold ornaments, *etc.* for security of the loan. Licence was required for both for running the business. The court drew a distinction between two kinds of provisions: one where there was no provision prohibiting the payment of interest on security deposits and the other where the law expressly prohibited the payment of interest on security deposits. In the first case, a division bench of Karnataka High Court had held that in the absence of any prohibition on payment of interest, non-payment of interest would be arbitrary and violative of article 14.[43] Distinguishing that case, the Supreme Court in the present case held that since there was an express prohibition on payment of interest, the same could not be

42 *State of Karnataka* v. *Karnataka Pawn Brokers Assn.* (2018) 6 SCC 363 : AIR 2018 SC 1441; also see *Khatoon* v. *State of U.P.*, AIR 2018 SC (Supp) 135 : JT 2018 (2) SC 305.

43 *Manakchand Motilal* v. *State of Karnataka*, I.L.R 1991 Kant 1928.

considered to be arbitrary as there were many instances where no interest was payable. Moreover, stringent conditions were desirable in public interest on the activities of the money lenders who knew about the non-payment of interest on security deposits before starting the business. They accept the condition voluntarily and nobody forces any person to engage in the trade of money lending or pawn broking. The impugned provisions, therefore, could not be held to be unreasonable.

Discrimination and arbitrariness

It has been held by the Supreme Court that the provisions of section 4(3)(b) of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 providing that the chairman and other members of the tribunal shall hold office at the pleasure of the state government was inconsistent with the provisions of article 14 of the Constitution of India, being manifestly arbitrary and contrary to rule of law. Any termination of service of the member by any party to the dispute directly interfered with impartiality and independence expected from the members which was arbitrary under article 14.[44]

Discriminatory conditions of bail

In *Nilesh Tarachand Shah* v. *Union of India*,[45] the question was whether section 45(1) of the Prevention of Money Laundering Act, 2002 (PML Act) was constitutionally valid? Section 45(1) of the Act states that "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless: (i) the public prosecutor has been given an opportunity to oppose the application for release on bail and (ii) if the bail application is opposed by the public prosecutor, the court is satisfied that there were reasonable grounds for believing that the accused was not guilty of such offence and that he was not likely to commit any offence while on bail." It was contended that the imposition of the above conditions was arbitrary and discriminatory, violative of articles 14 and 21 of the Constitution of India. There is a clear anomaly under the PML Act with regard to grant of anticipatory bail to an accused before his arrest which would be governed by the provisions of Code of Criminal Procedure, 1973 (CrPC) and grant of bail after arrest which would be governed by section 45(1) of the PML Act. Thus, even for offences covered in Part A of the Schedule to the PML Act, a person can always apply for anticipatory bail and remain on bail throughout the trial whereas a person who has been arrested will be covered by section 45(1) and seek bail in accordance with that provision. This would be an anomalous situation and clearly discriminatory and arbitrary under articles 14 and 21 of the Constitution of India.

R.F. Nariman, J pointed out several legislations specified in Part A of the Schedule to the PML Act to strike down section 45(1) on the ground of arbitrariness and discrimination. Thus, the conditions for grant of bail prescribed under section

44 *State of Bihar* v. *M/s. Brahmaputra Infrastructure* (2018) 17 SCC 444.

45 (2018) 11 SCC 1; see also *Eastern Coalfields Ltd*. v. *Pravita Biswas*, AIR 2018 SC 301.

45(1) of the PML Act have also been specified under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) but under those Acts, reasonable grounds for believing that the accused is not guilty of an offence is in relation to an offence under the very Act in which such section occurs, *e.g.* section 20(8) of the TADA and section 37 of the NDPS Act. Compared to these, the provision of section 45(1) of the PML Act deals not only with offences under the PMLAct but also the offences mentioned under Part A of the Schedule to that Act, which further means offences under 28 different legislations with no relationship of any kind in them with the object of the PML Act, *i.e*. to prevent money laundering and provide for confiscation of property derived from, or involved in, money laundering. In view of this, Nariman, J held:[46]

> Obviously, the twin conditions laid down in Section 45 would have no nexus whatsoever with a bail application which concerns itself with the offence of money laundering, for if Section 45 is to apply, the Court does not apply its mind to whether the person prosecuted is guilty of the offence of money laundering, but instead applies its mind to whether such person is guilty of the scheduled or predicate offence. Bail would be denied on grounds germane to the scheduled or predicate offence, whereas the person prosecuted would ultimately be punished for a completely different offence - namely, money laundering. This, again, is laying down of a condition which has no nexus with the offence of money laundering at all, and a person who may prove that there are reasonable grounds for believing that he is not guilty of the offence of money laundering may yet be denied bail, because he is unable to prove that there are reasonable grounds for believing that he is not guilty of the scheduled or predicate offence. This would again lead to a manifestly arbitrary, discriminatory and unjust result which would invalidate the Section.

Similarly, section 45(1) deals with offences contained in Part A of the Schedule to the PML Act on the basis of term of imprisonment, *i.e*. three years, which in fact has no nexus with the object of the PMLAct. In this connection, Nariman, J observed:[47]

> It is important to notice that Section 45 classifies the predicate offence under Part A of the Schedule on the basis of sentencing…. (T)he classification of three years or more of offences contained in Part A of the Schedule must have a reasonable relation to the object sought to be achieved under the 2002 Act... (T)he 2002 Act was enacted so that property involved in money laundering may be attached and brought back into the economy, as also that persons guilty of the offence of money laundering must be brought to book. It is interesting to note that even in the recent 2015 amendment, the Legislature has used the

46 *Nilesh Tarachand Shah* v. *Union of India*, *id.*at 34-35.

47 *Id.* at 35-36.

> value involved in the offence contained in Part B of the Schedule as a basis for classification. If, for example, the basis for classification of offences referred to and related to offences under the 2002 Act with a monetary limit beyond which such offences would be made out, such classification would obviously have a rational relation to the object sought to be achieved by the Act i.e. to attach properties and the money involved in money laundering and to bring persons involved in the offence of money laundering to book. On the other hand, it is clear that the term of imprisonment of more than 3 years for a scheduled or predicate offence would be a manifestly arbitrary and unjust classification, having no rational relation to the object sought to be achieved by an Act dealing with money laundering….
>
> An extremely heinous offence, such as murder, punishable with death or life imprisonment, which is now contained in Part A of the Schedule may yield only 5,000/- as proceeds of crime. On the other hand, an offence relating to a false declaration under Section 132 of the Customs Act, punishable with a sentence of upto 2 years, which is an offence under Part B of the Schedule, may lead to proceeds of crime in crores of rupees. In short, a classification based on sentence of imprisonment of more than three years for an offence contained in Part A of the Schedule, which is a predicate offence, would have no rational relation to the object of attaching and bringing back into the economy large amounts by way of proceeds of crime. When it comes to Section 45, it is clear that a classification based on sentencing qua a scheduled offence would have no rational relation with the grant of bail for the offence of money laundering, as has been shown in the preceding paragraphs of this judgment….(O)ffences based on sentencing of the scheduled offence would have no rational relation to the object of the 2002 Act and to the granting of bail for offences committed under the Act, and, therefore, have to be annulled on the basis of the equal protection clause.

Nariman, J also pointed out that there are many offences under the Indian Penal Code such as sections 232 and 238, which deal with counterfeiting of Indian coin and import or export of counterfeited Indian coin, are punishable with life imprisonment but they have not been included in Part A of the Schedule to the PML Act and a person arrested for these offences may approach the court for bail as per the Code of Criminal Procedure where conditions could be imposed only by the court and section 45(1) of the PML Act will not be applicable. In such cases, the money involved may run in crores of rupees but section 45(1) of PML Act will not be attracted. As against the above, a person who counterfeits government stamps under section 255 is included in Part A of the Schedule to PM Act, which is also punishable with life imprisonment. If such person is to apply for bail, the twin conditions contained in section 45(1) would apply to him. This is clearly discriminatory. There were many such examples.

From yet another angle, Nariman, J pointed out the anomaly created by section 45(1) of the PML Act with regard to offences under NDPSAct in the following words:[48]

48 *Id.* at 37.

> Sections 19, 24, 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 are all sections which deal with narcotic drugs and psychotropic substances where a person is found with, what is defined as, "commercial quantity" of such substances. In each of these cases, under Section 37 of the NDPS Act, a person prosecuted for these offences has to meet the same twin conditions which are contained in Section 45 of the 2002 Act. Inasmuch as these Sections attract the twin conditions under the NDPS Act in any case, it was wholly unnecessary to include them again in paragraph 2 of Part A of the Schedule, for when a person is prosecuted for an offence under Sections 19, 24, 27A or 29 of the NDPS Act, together with an offence under Section 4 of the 2002 Act, Section 37 of the NDPS Act would, in any case, be attracted when such person is seeking bail for offences committed under the 2002 Act and the NDPS Act.
>
> Also, the classification contained within the NDPS Act is completely done away with. Unequals are dealt with as if they are now equals. The offences under the NDPS Act are classified on the basis of the quantity of narcotic drugs and psychotropic substances that the accused is found with, which are categorized as: (1) a small quantity, as defined; (2) a quantity which is above small quantity, but below commercial quantity, as defined; and (3) above commercial quantity, as defined. The sentences of these offences vary from 1 year for a person found with small quantity, to 10 years for a person found with something between small and commercial quantity, and a minimum of 10 years upto 20 years when a person is found with commercial quantity. The twin conditions specified in Section 37 of the NDPS Act get attracted when bail is asked for only insofar as persons who have commercial quantities with them are concerned. A person found with a small quantity or with a quantity above small quantity, but below commercial quantity, punishable with a one year sentence or a 10 year sentence respectively, can apply for bail under Section 439 of the Code of Criminal Procedure without satisfying the same twin conditions as are contained in Section 45 of the 2002 Act, under Section 37 of the NDPS Act. By assimilating all thesethree contraventions and bracketing them together, the 2002 Act treats as equal offences which are treated as unequal bythe NDPS Act itself, when it comes to imposition of the further twin conditions for grant of bail. This is yet another manifestly arbitrary and discriminatory feature of the application of Section 45.

Similar anomaly exists when one considers, for instance, the provisions of the Biological Diversity Act, 2002. Nariman, J observed:[49]

> A reference to paragraph 23 of Part A of the Schedule would also show how Section 45 can be used for an offence under the Biological

49 *Id.* at 37-38.

> Diversity Act, 2002. If a person covered under the Act obtains, without the previous approval of the National Biodiversity Authority, any biological resources occurring in India for research or for commercial utilization, he is liable to be punished for imprisonment for a term which may extend to 5 years under Section 55 of the Act. A breach of this provision, when combined with an offence under Section 4 of the 2002 Act, would lead to bail being obtained only if the twin conditions in Section 45 of the 2002 Act are satisfied. By no stretch of imagination can this kind of an offence be considered as so serious as to lead to the twin conditions in Section 45 having to be satisfied before grant of bail, even assuming that classification on the basis of sentence has a rational relation to the grant of bail after complying with Section 45 of the 2002 Act.

Nariman, J did not accept the argument that since under section 24 of the PML Act, the burden of proof in any proceeding relating to proceeds of crime is upon the person charged with the offence of money laundering, and in the case of any other person, the court may presume that such proceeds are involved in money laundering, the principle of innocence of the accused does not exist under the PML Act but Nariman, J did not accept this argument. Nariman, J declared section 45(1) of the PML Act to be unconstitutional as it violates articles 14 and 21 of the Constitution insofar as it imposes two conditions for release on bail. The learned judge rejected the argument that section 45(1) of the PML Act could be upheld on the ground of compelling state interest in the following words:[50]

> We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature.

Discriminatory freedom of sex

A Constitution Bench of the Supreme Court considered the question of arbitrariness and discrimination in a matter relating to freedom of sex with reference to section 377, IPC which criminalises unnatural sex. Dipak Misra, CJI, partially quashing the provision as unconstitutional on the ground of arbitrariness and discrimination, observed:[51]

50 *Id.* at 40.

51 *Navtej Singh Johar* v. *Union of India*, *supra* note 1 at 4390 (of AIR).

> A perusal of Section 377 IPC reveals that it classifies and penalizes persons who indulge in carnal intercourse with the object to protect women and children from being subjected to carnal intercourse. That being so, now it is to be ascertained whether this classification has a reasonable nexus with the object sought to be achieved. The answer is in the negative as the non-consensual acts which have been criminalized by virtue of Section 377 IPC have already been designated as penal offences under Section 375 IPC and under the POCSO Act. Per contra, the presence of this Section in its present form has resulted in a distasteful and objectionable collateral effect whereby even consensual acts which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) owning to some inherent characteristics defined by their identity and individuality, have been woefully targeted. This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the Constitution…. In view of the law laid down in *Shayara Bano*[52] and given the fact that Section 377 criminalises even consensual sexual acts between adults, it fails to make a distinction between consensual and non-consensual sexual acts between competent adults. Further, Section 377 IPC fails to take into account that consensual sexual acts between adults in private space are neither harmful nor contagious to the society. On the contrary, Section 377 trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction. Needless to say, the Section also interferes with consensual acts of competent adults in private space. Sexual acts cannot be viewed from the lens of social morality or that of traditional precepts wherein sexual acts were considered only for the purpose of procreation. This being the case, Section 377 IPC, so long as it criminalises consensual sexual acts of whatever nature between competent adults, is manifestly arbitrary.

While agreeing with Misra, CJI, R.F. Nariman, J expressed a similar view:[53]

> We find that Section 377, in penalizing consensual gay sex, is manifestly arbitrary. Given modern psychiatric studies and legislation which recognizes that gay persons and transgenders are not persons suffering from mental disorder and cannot therefore be penalized, the Section must be held to be a provision which is capricious and irrational. Also, roping in such persons with sentences going upto life imprisonment is clearly excessive and disproportionate, as a result of which, when applied to such persons, Articles 14 and 21 of the Constitution would clearly be violated. The object sought to be achieved by the provision,

52 *Shayara Bano* v. *Union of India*, AIR 2017 SC 4609.

53 *Navtej Singh Johar* v. *Union of India*, *supra* note 51 at 4427, 4433-34.

> namely to enforce Victorian mores upon the citizenry of India, would be out of tune with the march of constitutional events that has since taken place, rendering the said object itself discriminatory when it seeks to single out same-sex couples and transgenders for punishment.
> After 2013, when Section 375 was amended so as to include anal and certain other kinds of sexual intercourse between a man and a woman, which would not be criminalized as rape if it was between consenting adults, it is clear that if Section 377 continues to penalize such sexual intercourse, an anomalous position would result. A man indulging in such sexual intercourse would not be liable to be prosecuted for rape but would be liable to be prosecuted under Section 377. Further, a woman who could, at no point of time, have been prosecuted for rape would, despite her consent, be prosecuted for indulging in anal or such other sexual intercourse with a man in private under Section 377. This would render Section 377, as applied to such consenting adults, as manifestly arbitrary as it would be wholly excessive and disproportionate to prosecute such persons under Section 377 when the legislature has amended one portion of the law in 2013, making it clear that consensual sex, as described in the amended provision, between two consenting adults, one a man and one a woman, would not be liable for prosecution. If, by having regard to what has been said above, Section 377 has to be read down as not applying to anal and such other sex by a male-female couple, then the Section will continue to apply only to homosexual sex. If this be the case, the Section will offend Article 14 as it will discriminate between heterosexual and homosexual adults which is a distinction which has no rational relation to the object sought to be achieved by the Section - namely, the criminalization of all carnal sex between homosexual and/or heterosexual adults as being against the order of nature. Viewed either way, the Section falls foul of Article 14.

Echoing similar view, D.Y. Chandrachud, J held section 377, IPC to be violative of article 14 observing thus:[54]

> At this point, we look at some of the legislative changes that have taken place in India's criminal law since the enactment of the Penal Code. The Criminal Law (Amendment) Act 2013 imported certain understandings of the concept of sexual intercourse into its expansive definition of rape in Section 375 of the Indian Penal Code, which now goes beyond penile–vaginal penetrative intercourse. It has been argued that if 'sexual intercourse' now includes many acts which were covered under Section 377, those acts are clearly not 'against the order of nature' anymore. They are, in fact, part of the changed meaning of sexual intercourse itself. This means that much of Section 377 has not only

54 *Id.* at 4450-51.

> been rendered redundant but that the very word 'unnatural' cannot have the meaning that was attributed to it before the 2013 amendment. Section 375 defines the expression rape in an expansive sense, to include any one of several acts committed by a man in relation to a woman. The offence of rape is established if those acts are committed against her will or without the free consent of the woman. Section 375 is a clear indicator that in a heterosexual context, certain physical acts between a man and woman are excluded from the operation of penal law if they are consenting adults. Many of these acts which would have been within the purview of Section 377, stand excluded from criminal liability when they take place in the course of consensual heterosexual contact. Parliament has ruled against them being regarded against the 'order of nature', in the context of Section 375. Yet those acts continue to be subject to criminal liability, if two adult men or women were to engage in consensual sexual contact. This is a violation of Article 14.

Chandrachud, J went one step further in holding that section 377, IPC was also violative of article 15 of the Constitution. He observed:[55]

> A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1). That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination.
>
> The approach adopted the Court in *Nergesh Meerza*,[56] is incorrect
>
> A provision challenged as being *ultra vires* the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded

55 *Id.* at 4456, 4463.

56 *Air India* v. *Nergesh Meerza*, AIR 1981 SC 1829.

> on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex….
>
> By criminalizing consensual sexual conduct between two homosexual adults, Section 377 has become the basis not just of prosecutions but of the persecution of members of the affected community. Section 377 leads to the perpetuation of a culture of silence and stigmatization. Section 377 perpetuates notions of morality which prohibit certain relationships as being against the 'order of nature.' A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and violates the guarantee of non-discrimination in Article 15(1).

Indu Malhotra, J agreed with other learned judges to hold that section 377, IPC was violativeof articles 14 and 15 of the Constitution. Malhotra, J held:[57]

> Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on any sound or rational principle, since the basis of criminalisation is the "sexual orientation" of a person, over which one has "little or no choice". Further, the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended, giving way to the scope for misuse against members of the LGBT community. Thus, apart from not satisfying the twin-test under Article 14, Section 377 is also manifestly arbitrary, and hence violative of Article 14 of the Constitution….
>
> Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their "sexual identity and character".
>
> The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination, and is equally entitled to the protection afforded by Article 15.

Gender equality: *Adultery de-criminalised*

How the court's perception changes with the perception of individual judges is manifest from the decision of the apex court in a matter relating to adultery. What was once considered by the court as a "protective" discrimination for the benefit of women has now been treated as "discrimination" and against "dignity" of women; the provision being the same but judges being different and lapse of 65 years. Article 15(1) of the Constitution of India prohibits discrimination by the State against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of that article, however, permits the State to make any special provisions for women and children. In *Yusuf Abdul Aziz* v. *State of Bombay*,[58] Supreme Court had held that in

57 *Navtej Singh Johar* v. *Union of India*, supra note 1 at 4518, 4520 (of AIR).

58 AIR 1954 SC 321.

view of the provision of clause (3) of article 15, section 497, IPC, which penalised a man for having committed adultery on a woman and exempted the woman for being punished as an abettor, was protected, despite the general provision of equality contained in clause (1) of article 15. There had been no deviation in this line of argument till the decision in *Joseph Shine* v. *Union of India*,[59] in which a Constitution Bench, delivering four separate judgments, unanimously held section 497, IPC and section 198, CrPC, as violative of articles 14, 15 and 21 of the Constitution. Dipak Misra, CJI felt that section 497 affected the dignity and equality of a woman as it treated the husband as the master of his wife and this provision gave legal sovereignty to one sex over the other sex. Misra, CJI, overruling all decisions which ran contrary to his views, observed:[60]

> (T)he provision treats a married woman as a property of the husband. It is interesting to note that Section 497 IPC does not bring within its purview an extra marital relationship with an unmarried woman or a widow. The dictionary meaning of adultery is that a married person commits adultery if he has sex with a woman with whom he has not entered into wedlock. As per Black's Law Dictionary, 'adultery' is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. However, the provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 IPC. Section 198 CrPC deals with a person aggrieved. Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 IPC and in the absence of husband, some person who had care of the woman on his behalf at the time when such offence was committed with the leave of the court. It does not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person, as we find, is absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate. We are constrained to think so, as it does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband. Indubitably, she can take civil action but the husband is also entitled to take civil action. However, that does not save the provision as being manifestly arbitrary. That is one aspect of the matter. If the entire provision is scanned being Argus-eyed, we notice that on the one hand, it protects a woman and on the other, it does not protect the other

59 *Supra* note 2.

60 *Id.* at 4912 (of AIR).

> woman. The rationale of the provision suffers from the absence of logicality of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary.

While concurring with Dipak Misra, CJI and terming the law contained in section 497, IPC as archaic and amounting to denial of substantive equality and violative of article 14, R.F. Nariman, J observed:[61]

> What is apparent on a cursory reading of these ingredients is that a married man, who has sexual intercourse with an unmarried woman or a widow, does not commit the offence of adultery. Also, if a man has sexual intercourse with a married woman with the consent or connivance of her husband, he does not commit the offence of adultery. The consent of the woman committing adultery is material only for showing that the offence is not another offence, namely, rape….
> Further, the real heart of this archaic law discloses itself when consent or connivance of the married woman‘s husband is obtained – the married or unmarried man who has sexual intercourse with such a woman, does not then commit the offence of adultery. This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the ¯licensor, namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third-party male has seduced‘ her, she being his victim. What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today‘s constitutional morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today‘s day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary. That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt…. Also, manifest arbitrariness is writ large even in cases where the offender happens to be a married woman whose marriage has broken down, as a result of which she no longer cohabits with her husband, and may in fact, have obtained a decree for judicial separation against her husband, preparatory to a divorce being granted. If, during this period, she has sex with another man, the other man is immediately guilty of the offence.
> The aforesaid provision is also discriminatory and therefore, violative of Article 14 and Article 15(1). As has been held by us hereinabove, in

61 *Id.* at 49373-8

> treating a woman as chattel for the purposes of this provision, it is clear that such provision discriminates against women on grounds of sex only, and must be struck down on this ground as well. Section 198, CrPC is also a blatantly discriminatory provision, in that it is the husband alone or somebody on his behalf who can file a complaint against another man for this offence. Consequently, Section 198 has also to be held constitutionally infirm.

D.Y. Chandrachud, J held that section 497 was discriminatory between a married man and a married woman to her detriment on the ground of sex which was prohibited by article 15. Moreover, that section placed a woman within marriage and the man with whom she shared a sexual relationship outside marriage on a different footing. He rejected the argument that section 497 aimed at protecting the sanctity of marriage. The hypothesis forming the basis of the law on adultery is the subsistence of a patriarchal order, based on a notion of morality which fails to accord with the values on which the Constitution is founded; section 497 was destructive and deprives a woman of her agency, autonomy and dignity, the learned judge ruled. He further held that "the principle must not be determined by majoritarian notions of morality which are at odds with constitutional morality". Chandrachud, J observed:[62]

> Marriage as a social institution has undergone changes. Propelled by access to education and by economic and social progress, women have found greater freedom to assert their choices and preferences. The law must also reflect their status as equals in a marriage, entitled to the constitutional guarantees of privacy and dignity.
>
> Neither the state nor the institution of marriage can disparage it. By reducing the woman to the status of a victim and ignoring her needs, the provision penalizing adultery disregards something which is basic to human identity. Sexuality is a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It has a constitutional foundation as intrinsic to autonomy. It is in this view of the matter that we have concluded that Section 497 is violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21.
>
> The provision seeks to only redress perceived harm caused to the husband. This notion is grounded in stereotypes about permissible actions in a marriage and the passivity of women. Fidelity is only expected of the female spouse. This anachronistic conception of both, a woman who has entered into marriage as well as the institution of marriage itself, is antithetical to constitutional values of equality, dignity and autonomy.

62 *Id.* at 4973, 4976, 4977.

Indu Malhotra, J, concurring with other judges, agreed with the view that a law could have been justified at the time of its enactment but with the passage of time it may have become outdated and discriminatory with the evolution of society and changed circumstances. The learned judged observed:[63]

> The time when wives were invisible to the law, and lived in the shadows of their husbands, has long since gone by. A legislation that perpetuates such stereo-types in relationships, and institutionalizes discrimination is a clear violation of the fundamental rights guaranteed by Part III of the Constitution.
>
> Section 497 is a penal provision for the offence of adultery, an act which is committed consensually between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution.
>
> The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life, should be protected from public censure through criminal sanction. The autonomy of the individual to take such decisions, which are purely personal, would be repugnant to any interference by the State to take action purportedly in the 'best interest' of the individual.
>
> Adultery undoubtedly is a moral wrong qua the spouse and the family. The issue is whether there is a sufficient element of wrongfulness to society in general, in order to bring it within the ambit of criminal law?
>
> The element of public censure, visiting the delinquent with penal consequences, and overriding individual rights, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offence is punishable with imprisonment.
>
> The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices.
>
> The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction, the State must consider whether the civil remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State.

What would be the impact of this decision on Indian society? In a country like India, where morality is one of the guiding factors in human conduct, the man and animal have now been placed at par, with free choice of sex. The implications of this decision would be far-reaching in this country. Significantly, the learned judges tried to seek assistance for their view across frontiers but they could get only a mixd regime which did not help them. The court did not consider the consequence of such sexual relationship in case a child was born. Who would be considered to be the father of the

63 *Id.* at 4995, 4996, 4997, 4998.

child? As of now, section 112 of the Indian Evidence Act, 1872 provides for conclusive proof of legitimacy of a child born during marriage even if the child is born out of wedlock relationship. But then reality would be otherwise.

Validity of the practice banning women between the age of 10-50 from entering a temple

A petition under article 32 of the Constitution prayed for directions against the Government of Kerala, Devaswom Board of Travancore, Chief Thanthri of Sabarimala temple and the district magistrate of Pathanamthitta to ensure entry of female devotees between the age group of 10 to 50 years to the Lord Ayyappa Temple at Sabarimala in Kerala which had been denied to them on the basis of certain custom and usage; to declare rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 framed under section 4 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 as unconstitutional being violative of articles 14, 15, 25 and 51A(e) of the Constitution of India and to pass directions for the safety of women pilgrims.[64] After detailed analysis of cases, Dipak Misra, CJI held the impugned rule *ultra vires* the Act, being arbitrary and discriminatory to women.The Chief Justice observed that "The dualism that persists in religion by glorifying and venerating women as goddesses on one hand and by imposing rigorous sanctions on the other hand in matters of devotion has to be abandoned. Such a dualistic approach and an entrenched mindset results in indignity to women and the degradation of their status."[65] While R.F. Nariman and D.Y. Chandrachud, JJ agreed with the Chief Justice by their separate judgements, Indu Malhotra, J dissented. Malhotra, J was of the opinion that in a secular polity, issues of deep religious faith and sentiment must not ordinarily by interfered with by the courts. The learned judge was very specific in dismissing the PIL on the ground of lack of *locus standi* since the petitioner association and its members were not devotees of Lord Ayyappa and they were not aggrieved persons. Rejecting the argument about violation of article 14 of the Constitution, Malhotra, J observed:[66]

> Religious customs and practises cannot be solely tested on the touchstone of Article 14 and the principles of rationality embedded therein. Article 25 specifically provides the equal entitlement of every individual to freely practise their religion. Equal treatment under Article 25 is conditioned by the essential beliefs and practises of any religion. Equality in matters of religion must be viewed in the context of the worshippers of the same faith.
>
> The twin-test for determining the validity of a classification under Article 14 is:
>
> • The classification must be founded on an intelligible differentia; and

64 *Indian Young Lawyers Assn.* v. *State of Kerala*, supra note 3. For a detailed discussion of this case, see *infra*, "Right to Religious Freedom". In a review petition, a nine-judge bench, has referred this case for re-consideration to a larger bench: *Kantaru Rajeevaru* v. *Indian Young Lawyers Assn*., *supra* note 3.

65 *Indian Young Lawyers Association* v. *State of Kerala*, *supra* note 3 at 1665 (of AIR).

66 *Id.* at 1815-16.

> • It must have a rational nexus with the object sought to be achieved by the impugned law.
>
> The difficulty lies in applying the tests under Article 14 to religious practises which are also protected as Fundamental Rights under our Constitution. The right to equality claimed by the Petitioners under Article 14 conflicts with the rights of the worshippers of this shrine which is also a Fundamental Right guaranteed by Articles 25, and 26 of the Constitution. It would compel the Court to undertake judicial review under Article 14 to delineate the rationality of the religious beliefs or practises, which would be outside the ken of the Courts. It is not for the courts to determine which of these practises of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like *Sati*.
>
> The prayers of the Petitioners if acceded to, in its true effect, amounts to exercising powers of judicial review in determining the validity of religious beliefs and practises, which would be outside the ken of the courts. The issue of what constitutes an essential religious practise is for the religious community to decide.

The learned judge also held that the words "places of public resort" under clause (2) of article 15 did not include Sabarimala temple. While concluding, Malhotra, J held:[67]

> (i) The Writ Petition does not deserve to be entertained for want of standing. The grievances raised are non-justiciable at the behest of the Petitioners and Intervenors involved herein.
>
> (ii) The equality doctrine enshrined under Article 14 does not override the Fundamental Right guaranteed by Article 25 to every individual to freely profess, practise and propagate their faith, in accordance with the tenets of their religion.
>
> (iii) Constitutional Morality in a secular polity would imply the harmonisation of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practise their faith and belief in accordance with the tenets of their religion, irrespective of whether the practise is rational or logical.
>
> (iv) The Respondents and the Intervenors have made out a plausible case that the *Ayyappans* or worshippers of the Sabarimala Temple satisfy the requirements of being a religious denomination, or sect thereof, which is entitled to the protection provided by Article 26. This is a mixed question of fact and law which ought to be decided before a competent court of civil jurisdiction.
>
> (v) The limited restriction on the entry of women during the notified age group does not fall within the purview of Article 17 of the Constitution.
>
> (vi) Rule 3(b) of the 1965 Rules is not *ultra vires* Section 3 of the 1965 Act, since the *proviso* carves out an exception in the case of public worship in a temple for the benefit of any religious denomination or sect thereof, to manage their affairs in matters of religion.

67 *Id.* at 1839.

III RESERVATION IN ADMISSIONS AND PUBLIC EMPLOYMENT

Validity of institutional preference in admissions to medical courses

The callous action of the state in pushing the individuals to the court even in matters already settled is indeed disturbing and courts are not making the state liable for such conduct. In *Vishal Goyal* v. *State of Karnataka*,[68] the apex court had struck down as unconstitutional the requirement of "Karnataka origin"[69] in admissions to MS/MD/medical postgraduate diploma courses, relying on *Pradeep Jain*.[70] In *Pradeep Jain*, reservation of certain percentage of seats (for the time being up to 70 per cent subject to review every three years by Indian Medical Council/ Indian Dental Council) by prescribing residential requirement for admission to MBBS/BDS course was held to be valid under article 14 of the Constitution of India but not for post-graduate medical courses such as MS/MD because excellence at the post-graduate level could not be allowed to be compromised. It was also observed that institutional preference was permissible except in super speciality courses such as neuro-surgery and cardiology. Despite this clear verdict, similar question again cropped up in *Dr. Kriti Lakhina* v. *State of Karnataka*.[71] Forty-four doctors, having obtained their MBBS/ BDS degrees from the State of Karnataka with high merit, were aspiring for admission to post-graduate medical courses in 2018 in the State of Karnataka but they were not eligible to apply as per the prescribed condition for admission to post-graduate medical and dental courses in respect of government quota seats in the state. The eligibility condition prescribed in the bulletin allowed only those candidates who fulfilled the condition of "Karnataka origin" and had studied for MBBS or BDS degree in a medical or dental college situated in Karnataka or affiliated to any university established by law and recognised by Medical Council of India and had qualified in NEET. As the doctors (petitioners) were not of "Karnataka origin", they were ineligible to apply for admission. Uday Umesh Lalit, J held that the bulletin of information struck down in Pradeep Jain was identical with the bulletin involved in the present case and in view of the earlier decision, the matter was no longer *res integra* and the same was fully covered by that decision. Quashing the bulletin, Lalit, J directed the respondents to modify the bulletin and admit the petitioners. This decision stands in direct contrast

68 (2014) 11 SCC 456; see S N Singh, "Constitutional Law – I (Fundamental Rights)", L *ASIL* 239 at 267-68 (2014).

69 "Karnataka origin" meant a candidate who had studied in the State of Karnataka for a minimum of ten years as on 31st March 2018, commencing from 1st standard to MBBS/BDS and must have appeared and passed either SSLC/10th standard or 2nd PUC/12th standard examination from Karnataka State or the candidate should have studied and passed 1st or 2nd year Pre-University Examination or 11th or 12th standard examination within the State of Karnataka from an educational institution run or recognized by the state government or MBBS/BDS from a professional educational institution located in Karnataka….

70 *Pradeep Jain* v. *Union of India* (1984) 3 SCC 654. This decision was slightly modified in *Reita Nirankari* v. *Union of India* (1984) 3 SCC 706, with regard to the States of Andhra Pradesh and Jammu and Kashmir as there were special constitutional provisions for these states.

71 2018 (5) SCALE 329 : (2018) 17 SCC 453.

to *Dr. Sandeep s/o Sadashivrao* v. *Union of India*,[72] in which residential requirement of an identical nature was upheld by the apex court with respect to admissions to D.M. and M.Ch. courses in the States of Andhra Pradesh and Telangana on the basis of overriding provisions of clause (10) of article 371-D of the Constitution of India. Dipak Misra, J lamented at this state of affairs but did not muster enough courage to strike down clause (10) of article 371-D.

In *Rajdeep Ghosh* v. *State of Assam*,[73] Arun Mishra, J, held that the decision in *Dr. Kriti Lakhina*, which dealt with MD/MD/medical postgraduate diploma courses, was "of no applicability with respect to basic MBBS/BDS/Ayurveda courses." In the present case, the challenge was to the constitutional validity of rule 3(1)(c) of the Medical Colleges and Dental Colleges of Assam (Regulations of Admission into 1st year MBBS/BDS Courses) Rules, 2017 which prescribed eligibility for the state quota seats. The eligibility prescribed was that (a) candidate must be a citizen of India; (b) permanent residence in Assam (minimum of 20 years of residence by the father/mother or the candidate) except sons/daughters of officers of All India Services allotted to Assam; (c) candidate must have studied in all classes from VII to XII in Assam and must pass the qualifying examination or its equivalent examination from any institute situated within the State of Assam but if a candidate had studied outside Assam from class VII onwards because of his/her father/mother being posted outside Assam as a Assam state government employee or as a central government employee or as an employee of a corporation/agency/instrumentality under the government of Assam or central government on deputation/transfer/regular posting, the period for which father/mother was working outside the State of Assam was relaxable for such candidate; and (d) candidate must be between 17-25 years of age.

The petitioners challenged the validity of rule 3(1)(c) contending that they had been residing within the State of Assam for a considerable period of time and had studied in Assam but had not passed either class XII or both class XI and XII examinations as prescribed under the rule and, therefore, they were not eligible for admission to MBBS/BDS course against state quota seats. It was contended that the petitioners fulfilled all other conditions of eligibility and the denial of state quota only on the ground that they had completed their class XI and XII from outside the State of Assam was irrational, unreasonable and arbitrary. It was further contended that a student has to execute a bond that after completing MBBS/BDC course, he/she has to service within the state for five years in rural areas, failing which Rs. thirty lakh was to be paid by him/her. This would ensure that a candidate obtaining the degree serves within the state.The classification made was hostile and had no nexus with the object sought to be achieved. It was contended that if a parent of a candidate was in private employment or employed with any other state government, or doing a private job outside the state, the children of such employees could not be discriminated. Rejecting the argument, Arun Mishra, J held:[74]

72 JT 2015 (11) SC 321; see S N Singh, "Constitutional Law – I (Fundamental Rights)" LII *ASIL* 203 at 208-09 (2016) and LI *ASIL* 237 at 274-75 (2015)..

73 AIR 2018 SC 3832 at 3851 :(2018) 17 SCC 524 at 552.

74 *Id.* at 3851-52 (of AIR).

> (I)t is permissible to lay down the essential educational requirements, residential/domicile in a particular State in respect of basic courses of MBBS/BDS/Ayurvedic. The object sought to be achieved is that the incumbent must serve the State concerned and for the emancipation of the educational standards of the people who are residing in a particular State, such reservation has been upheld by this Court for the inhabitants of the State and prescription of the condition of obtaining an education in a State. The only distinction has been made with respect to postgraduate and post-doctoral superspecialty course.
> Rule3(1)(c) of the Rules of 2017 lays down the requirement of obtaining education in the State and relaxation has been given to the wards of the State Government employees or Central Government employees or to an employee of Corporation/Agency/instrumentality under the Government of Assam or the Central Government, whether on deputation or transfer on regular posting from obtaining education from class VII to XII for the period his/her father or mother is working outside the State. As urged on behalf of the petitioners the employees of other State Government but residents of Assam, similar relaxation ought to have been made cannot be accepted. Thus, their exclusion cannot be said to be irrational and arbitrary. The wards of the employees in the service of other States like Government employees of Arunachal Pradesh, in our opinion, form a totally different class. When the wards are obtaining education outside and the parents are working in Arunachal Pradesh as Government employee or elsewhere, they are not likely to come back to the State of Assam. As such Government of Assam holds that they should provide preference to State residents/ institutional preference cannot be said to unintelligible criteria suffering from vice of arbitrariness in any manner whatsoever, thus, Rule3(1)(c) framed by the Government of Assam is based on an intelligible differentia and cannot be said to be discriminatory and in violation of Article14.

The argument regarding exclusion of wards of private employees working outside the state was not found to be irrational or illegal by Mishra, J as such wards were not likely to return to the state once their parents have moved out of the state. Dismissing the petitions, Mishra, J stated that the students obtaining coaching outside the state of Assam could very well afford seats in the open category or under the All India quota seats from the State of Assam and the criteria laid down in rule 3(1)(c) could not be considered to be *ultra vires* article 14 of the Constitution of India.The learned judge did not deal with the argument of the petitioners that they had to give a bond of service for five years after getting the degree or pay Rs. thirty lakh to the state if they failed to honour the bond.

Application of creamy layer principle to SC/ST

A nine-judge bench in *Indra Sawhney*,[75] had clearly held that the test or requirement of social and educational backwardness cannot be applied to scheduled castes and scheduled tribes, who indubitably fell within the expression "backward class of citizens." Likewise, *Chinnaiah*,[76] referred to the scheduled castes as being the most backward among the backward classes as the presidential list contains only those castes or groups or parts thereof, which have been regarded as untouchables and the scheduled tribes only refers to those tribes in remote backward areas who are socially extremely backward. Without any reference to *Chinnaiah*, the Supreme Court in *M. Nagaraj* v. *Union of India*[77] had *inter alia* stated that the state had to collect quantifiable data showing backwardness of the scheduled castes and the scheduled tribes for giving reservation in promotions to these categories of persons in public employment

In *Jarnail Singh* v. *Lachhmi Narayan Gupta*,[78] the question was whether the judgment in *Nagaraj* needed to be revisited on the ground that it was contrary to the law laid down in *Indra Sawhney* and *Chinnaiah*. The court held that when *Nagaraj* required the States to collect quantifiable data on backwardness, insofar as scheduled castes and scheduled tribes were concerned, this was contrary to the *Indra Sawhney* and declared to be bad. With regard to the application of the principle of creamy layer, the court held:[79]

> (W)hen it comes to the creamy layer principle, it is important to note that this principle sounds in Articles 14 and 16(1), as unequals within the same class are being treated equally with other members of that class….
>
> The whole object of reservation is to see that Backward Classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public

75 *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477 at 561, as *per* Jeevan Reddy, J., speaking for himself and three other Judges.

76 *E.V. Chinnaiah* v. *State of A.P.*, 2004 (9) SCALE 316 at 332, *per* Hegde, J.

77 (2006) 8 SCC 212. In *B.K. Pavitra* v. *Union of India*, AIR 2017 SC 820, a two-judge bench of the apex court, relying on *M. Nagaraj* case, had quashed under articles 14 and 16 sections 3 and 4 of the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act, 2002 doing away with the 'catch up' rule and providing consequential seniority to persons belonging to scheduled castes and scheduled tribes against roster points. The state had not complied with the three requirements indicated in the *Nagaraj* case. Subsequently, the state enacted the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, 2018, the constitutional validity of which was upheld by a two-judge bench of the Supreme Court in *B.K. Pavitra* v. *Union of India*, AIR 2019 SC 2723 as the Act was held to be *Nagaraj* and *Jarnail Singh* compliant, *per* the observation of D.Y. Chandrachud, J. The court did not find anything wrong even with the provision giving retrospective seniority from 1978.

78 *Supra* note 18.

79 *Id.* at 424 and 424, 425—26 (of SCC).

> sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a Court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India. The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons who are contained within the group or sub-group in the Presidential Lists continue to be within those Lists. It is only when it comes to the application of the reservation principle under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.
>
> We do not think it necessary to go into whether Parliament may or may not exclude the creamy layer from the Presidential Lists contained under Articles 341 and 342. Even on the assumption that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within these Lists, it is clear that Constitutional Courts, applying Articles 14 and 16 of the Constitution to exclude the creamy layer cannot be said to be thwarted in this exercise by the fact that persons stated to be within a particular group or sub-group in the Presidential List may be kept out by Parliament on application of the creamy layer principle. One of the most important principles that has been frequently applied in constitutional law is the doctrine of harmonious interpretation. When Articles 14 and 16 are harmoniously interpreted along with other Articles 341 and 342, it is clear that Parliament will have complete freedom to include or exclude persons from the Presidential Lists based on relevant factors. Similarly, Constitutional Courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the principles of equality under Articles 14 and 16 of the Constitution of India….
>
> Therefore, when *Nagaraj* applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342. We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited….

The court pointed out that *Nagaraj* had been followed since 2006 and the tests laid down in that case for judging the constitutional validity of an amendment on the ground of violation of basic structure were approved by a nine-judge bench in *I.R.*

Coelho (Dead) by LRs. v. *State of Tamil Nadu*.[80] The court held that the "entirety of the decision, far from being clearly erroneous, correctly applies the basic structure doctrine to uphold constitutional amendments on certain conditions which are based upon the equality principle as being part of basic structure. Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in *Nagaraj* on the inadequacy of representation, which can be tested by the Courts. We may further add that the data would be relatable to the concerned cadre." With regard to quantifiable data on backwardness, the court noted that the proportionality to the population of scheduled castes and scheduled tribes was not something occuring in article 16(4-A), which must be contrasted with article 330. While referring to article 46, the court held:[81]

> (I)t is easy to see the pattern of Article 46 being followed in Article 16(4) and Article 16(4-A). Whereas backward classes in Article 16(4) is equivalent to the weaker sections of the people in Article 46, and is the overall genus, the species of Scheduled Castes and Scheduled Tribes is separately mentioned in the latter part of Article 46 and Article 16(4-A). This is for the reason… that the Scheduled Castes and the Scheduled Tribes are the most backward or the weakest of the weaker sections of society, and are, therefore, presumed to be backward. Shri Dwivedi's argument that as a member of a Scheduled Caste or a Scheduled Tribe reaches the higher posts, he/she no longer has the taint of either untouchability or backwardness, as the case may be, and that therefore, the State can judge the absence of backwardness as the posts go higher, is an argument that goes to the validity of Article 16(4-A). If we were to accept this argument, logically, we would have to strike down Article 16(4-A), as the necessity for continuing reservation for a Scheduled Caste and/or Scheduled Tribe member in the higher posts would then disappear. Since the object of Article 16(4-A) and 16(4-B) is to do away with the nine-Judge Bench in *Indra Sawhney* when it came to reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes, that object must be given effect to, and has been given effect by the judgment in *Nagaraj*. This being the case, we cannot countenance an argument which would indirectly revisit the basis or foundation of the constitutional amendments themselves, in order that one small part of *Nagaraj* be upheld, namely, that there be quantifiable data for judging backwardness of the Scheduled Castes and the Scheduled Tribes in promotional posts. We may hasten to add that Shri Dwivedi's argument cannot be confused with the concept of ‾creamy layer which… applies to persons within the Scheduled Castes or the Scheduled Tribes who no longer require reservation, as opposed to

80 (2007) 2 SCC 1, paras. 61, 105 and 142.

81 (2018) 10 SCC 396 at 429-31,

> posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes.
>
> The learned Attorney General also requested us to lay down that the proportion of Scheduled Castes and Scheduled Tribes to the population of India should be taken to be the test for determining whether they are adequately represented in promotional posts for the purpose of Article 16(4-A). He complained that *Nagaraj* ought to have stated this, but has said nothing on this aspect. According to us, *Nagaraj* has wisely left the test for determining adequacy of representation in promotional posts to the States for the simple reason that as the post gets higher, it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards. This is for the simple reason that efficiency of administration has to be looked at every time promotions are made. As has been pointed out by B.P. Jeevan Reddy, J.'s judgment in *Indra Sawhney*, there may be certain posts right at the top, where reservation is impermissible altogether. For this reason, we make it clear that Article 16(4-A) has been couched in language which would leave it to the States to determine adequate representation depending upon the promotional post that is in question. For this purpose, the contrast of Article 16(4-A) and 16(4-B) with Article 330 of the Constitution is important….
>
> It can be seen that when seats are to be reserved in the House of the People for the Scheduled Castes and Scheduled Tribes, the test of proportionality to the population is mandated by the Constitution. The difference in language between this provision and Article 16(4-A) is important….
>
> (T)he conclusion in *Nagaraj* that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in *Indra Sawhney* is held to be invalid to this extent.

Effect of migration on reservation from the state of origin to another state

Under article 341 of the Constitution of India, the President of India may with respect to any state or union territory specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall be deemed to be scheduled castes in relation to that state or the union territory, as the case may be. Identical provision exists for scheduled tribes under article 342. The Presidential Order issued under these provisions cannot be modified by any person or authority other than the Parliament.[82] Thus, the list of scheduled caste or scheduled tribe has to be notified state-wise/union territory-wise. If a caste/tribe has been included in the list of scheduled

82 *Bir Singh* v. *Delhi Jal Board*, AIR 2018 SC 4077 at 4093-94, 4111 : (2018) 10 SCC 312 : 2018 (10) SCALE 284.

caste or scheduled tribe in more than one state/union territory, persons belonging to that caste or tribe can claim the benefit of reservation in all those states and union territories in which that caste/tribe has been included in the list of scheduled caste or scheduled tribe.[83] If a caste or tribe is included in the list as a scheduled caste or scheduled tribe in one state, can persons belonging to that caste or tribe claim the benefit of reservation in admissions to educational institutions or public employment in another state or union territory on their migration to other state/union territory. The question was answered, on a reference, by a Constitution Bench in *Bir Singh.*[84] It was held by Ranjan Gogoi, J, on behalf of majority, as follows:[85]

> Unhesitatingly, therefore, it can be said that a person belonging to a Scheduled Caste in one State cannot be deemed to be a Scheduled Caste person in relation to any other State to which he migrates for the purpose of employment or education. The expressions "*in relation to that State or Union Territory*" and "*for the purpose of this Constitution*" used in Articles 341 and 342 of the Constitution of India would mean that the benefits of reservation provided for by the Constitution would stand confined to the geographical territories of a State/Union Territory in respect of which the lists of Scheduled Castes/ScheduledTribes have been notified by the Presidential Orders issued from time to time. A person notified as a Scheduled Caste in State'A' cannot claim the same status in another State on the basis that he is declared as a Scheduled Caste in State'A'.
>
> If the list of Scheduled Castes/Scheduled Tribes in the Presidential Orders under Article 341/342 is subject to alteration only by laws made by Parliament, operation of the lists of Scheduled Castes and Scheduled Tribes beyond the classes or categories enumerated under the Presidential Order for a particular State/Union Territory by exercise of the enabling power vested by Article16(4) would have the obvious effect of circumventing the specific constitutional provisions in Articles 341/342. In this regard, it must also be noted that the power under Article16(4) is not only capable of being exercised by a legislative provision/enactment but also by an Executive Order issued under Article166 of the Constitution. It will, therefore, be in consonance with the constitutional scheme to understand the enabling provision under Article16(4) to be available to provide reservation only to the classes or categories of Scheduled Castes/Scheduled Tribes enumerated in the Presidential orders for a particular State/Union Territory within the geographical area of that State and not beyond. If in the opinion of a State it is necessary to extend the benefit of reservation to a class/ category of Scheduled Castes/Scheduled Tribes beyond those specified

83 *Melvin Chiras Kujur* v. *State of Maharashtra*, 2016 (3) SCALE 684.

84 *Bir Singh* v. *Delhi Jal Board*, *supra* note 82.

85 *Id.* at 4092, 4094 (of AIR).

> in the Lists for that particular State, constitutional discipline would require the State to make its views in the matter prevail with the central authority so as to enable an appropriate parliamentary exercise to be made by an amendment of the Lists of Scheduled Castes/Scheduled Tribes for that particular State. Unilateral action by States on the touchstone of Article16(4) of the Constitution could be a possible trigger point of constitutional anarchy and therefore must be held to be impermissible under the Constitution.

While agreeing with the above view of the majority, R. Banumathi, J held:[86]

> It is now settled law that a person belonging to Scheduled Caste/ Scheduled Tribe in State 'A' cannot claim the same status in another State 'B' on the ground that he is declared as a Scheduled Caste/ Scheduled Tribe in State 'A'. The expressions "in relation to that State or Union Territory" and "for the purpose of this Constitution" used in Articles 341 and 342 of the Constitution of India are to be meaningfully interpreted. A given caste or tribe can be a Scheduled Caste or a Scheduled Tribe in relation to that State or Union Territory for which it is specified. Thus, the person notified as a Scheduled Caste in State 'A' cannot claim the same status in another State on the basis that he was declared Scheduled Caste in State 'A'. Article 16(4) has to yield to the Constitutional mandate of Articles 341 and 342.

With regard to National Capital Territory of Delhi (NCT of Delhi), Gogoi, J held that pan India rule in force was in accord with the constitutional scheme relating to services under the Union and the states/union territories. The services under the NCT of Delhi are general central services and members of Delhi administrative subordinate services were the feeder cadre services for the central civil services group 'B'. In view of this, the recruitment to all positions/services in connection with the affairs of the Union (central services) is on all-India basis and reservation provided is a pan-India reservation, irrespective of wherever the establishment might be located, *i.e.* NCT of Delhi or in a state or within the geographical areas of a union territory. R. Banumathi, J did not agree with majority on this point. Banumathi, J pointed out that when the union territories like Chandigarh, Dadra and Nagar Haveli and NCT of Delhi have separate Presidential Orders notifying scheduled castes and scheduled tribes for each one of them, calling for application for appointment to group 'B' and group 'D' posts from the scheduled castes and scheduled tribes from all over India was not in accordance with constitutional scheme. The learned judge further held:[87]

> (S)ervices under the Union Territories though they are Central Government services, they are services under the respective Union Territories and not under the direct control of Union of India/different Ministries. Procedure for recruitment to the various posts for the

86 *Id.* at 4113

87 *Id.* at 4128.

> services of Union Territories are different as followed by respective Union Territories. The persons appointed for the services of Union Territories might be governed by CCS (CCA) Rules; but they are employees of respective Union Territories. The appointing authorities are the authorities under the administration of Union Territories and not under the Ministries of Union of India. Central Civil Services are the services directly under Union of India. Contrarily, various services under the Union Territories are the services under the respective Union Territories. Such services under Union Territories cannot be said to be Central Civil Services that is services under Union of India to extend the benefit of PAN India reservation for recruitment to the services under respective Union Territories including Union Territory of Delhi.

Banumathi, J finally concluded:[88]

> *Marri Chandra Shekhar Rao*[89] and *Action Committee*[90] are applicable to the States and they are applicable with equal force to the Union Territories including Union Territory of Delhi. There cannot be any distinction between the States and the Union Territories. Likewise, there can be no distinction between Union Territory of Delhi and other Union Territories. When Presidential Orders of Scheduled Castes/Scheduled Tribes are notified for various Union Territories including Union Territory of Delhi extending PAN India reservation to the employment falling under the services of Union Territories including Union Territory of Delhi, will be against the Constitutional scheme and the law laid down in Marri Chandra Shekhar Rao and Action Committee.
> Since there is centralised recruitment upto Group 'B' (Gazetted) services conducted by UPSC for the Central Civil Services posts in the States/ Union Territories of India, there has to be necessarily PAN India reservation for Scheduled Castes/Scheduled Tribes for those recruitment conducted by UPSC. Sofaras Group 'B' and Group 'C' posts falling under services of Union Territories including Union Territory of Delhi for which recruitment is conducted by the respective Union Territories, benefit of reservation in employment (Article 16(4)) is to be extended only to those Scheduled Castes/Scheduled Tribes specified in the Presidential Order of the respective Union Territories. Insofar as the posts recruited by the Staff Selection Board of the respective Union Territories including the Union Territory of Delhi, there cannot be PAN India reservation for Group 'B', Group 'C' and Group 'D' posts falling under the services of various Union Territories and such PAN India

88 *Id*. at 4132-33.

89 *Marri Chandra Shekhar Rao* v. *Dean, Seth G.S. Medical College* (1990) 3 SCC 130.

90 *Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra* v. *Union of India* (1994) 5 SCC 244.

> reservation would be against the constitutional scheme and *Marri Chandra Shekhar Rao* and *Action Committee*.

The majority view does not seem to be convincing on this issue because if the majority view is accepted as correct, it would make the Presidential Orders issued for the union territories of Chandigarh, Dadra and Nagar Haveli and NCT of Delhi notifying therein scheduled castes and scheduled tribes meaningless and to that extent, the Presidential Orders issued under articles 341 and 342 become redundant. This cannot be accepted as the correct interpretation of constitutional provisions. The views of Banumathi, J on this issue are more convincing.

Admission of a candidate belonging to SC/ST/OBC under reserved category if a meritorious candidate of that category has opted a reserved seat

If a candidate belonging to SC/ST/OBC has secured marks in the admission/ entrance test held for admission to a course which is not less than the last candidate in the general category but in order to get a college/course of his/her choice opts for a reserved category seat, the seat left by such reserved category candidate continues to be a general category seat and the same has to be offered only to a reserved category candidate; the vacant seat cannot be filled up by a general category candidate and any such admission cannot be treated as in excess of permissible 50% reservation.[91]

Persons with low vision can't be denied reservation in admission to MBBS course

It was held by the Supreme Court in *Purswani Ashutosh v. Union of India*[92] that low visibility has been prescribed as a benchmark disability under the provisions of the Rights of Persons with Disabilities Act, 2016 and the Medical Council of India was bound by the same. Consequently, the court directed that the petitioner with low vision was entitled to admission to MBBS course if he was covered in the merit in the category of persons with disability. This decision will have far reaching ramifications for medical courses admissions for persons with low vision as the reservation provided for persons with disability under section 24 of the Act in respect of higher education will include technical education also.

In *Disabled Rights Group* v. *Union of India*,[93] A.K. Sikri, J passed the following directions regarding reservation for persons with benchmark disabilities:[94]

> No doubt, some progress is made in this behalf after the filing of this present petition and monitoring of the case by this Court, there is a need for complying with this provision to full extent. Accordingly, we direct that all those institutions which are covered by the obligations provided under Section 32 of the Disabilities Act, 2016 shall comply

91 *Tripurari Sharan* v. *Ranjit Kumar Yadav*, AIR 2018 SC 366 : (2018) 2 SCC 656 : JT 2018 (1) SC 287. For this view, the court relied upon the decision in *Ritesh R. Sah* v. *Dr.Y.L. Yamul* (1996) 3 SCC 253.

92 AIR 2018 SC 3999 : 2018 (10) SCALE 228; also see *Rajiva Raturi* v. *Union of India* (2018) 2 SCC 413.

93 (2018) 2 SCC 394.

94 *Id.* at 400, 409.

> with the provisions of Section 32 while making admission of students in educational courses of higher education each year. To this end, they shall submit list of the number of disabled persons admitted in each course every year to the Chief Commissioner and/or the State Commissioner (as the case may be). It will also be the duty of the Chief Commissioner as well as the State Commissioner to enquire as to whether these educational institutions have fulfilled the aforesaid obligation. Needless to mention, appropriate consequential action against those educational institutions, as provided under Section 89 of the Disabilities Act, 2016 as well as other provisions, shall be initiated against defaulting institutions.
>
> (W)e also direct that insofar as law colleges are concerned, intimation in this behalf shall be sent by those institutions to the Bar Council of India (BCI) as well. Other educational institutions will notify the compliance, each year, to the UGC. It will be within the discretion of the BCI and/or UGC to carry out inspections of such educational institutions to verify as to whether the provisions are complied with or not.

IV DISTRIBUTION OF STATE LARGESSE

The judicial trend regarding distribution of state largesse is towards restraint in the exercise of power of judicial review.[95] It has unequivocally been held by the Supreme Court that public auction is not the only way to dispose of public property.[96] The methodology for disposal of natural resources is an economic policy, entailing intricate economic choices and the courts lack the necessary expertise to make them. The court cannot evaluate the efficacy of auction *vis-à-vis* other methods of disposal of natural resources. It also been held that it is for the government to decide as a matter of policy as to the manner in which mining leases are to be granted but the legality of the decision of the government could be examined by the court in exercise of its power of judicial review.[97] It is also well settled that no public property can be disposed secretly by private negotiations[98] or at a lower price for the benefit of private persons. It has also been held by the Supreme Court that a government owned corporation should not be treated differently than others in the matter of allotment of

95 *Tata Cellular* v. *Union of India* (1994) 6 SCC 651; *JSW Infrastructure Ltd.* v. *Kakinada Seaports Ltd.*, JT 2017 (3) SC 216; *Sam Built Well Pvt. Ltd.* v. *Deepak Builders*, 2017 (14) SCALE 275 : AIR 2018 SC 1844; *T.N. Generation and Distribution Corpn. Ltd.* v. *CSEPDI-TRISHE Consortium* (2017) 4 SCC 318; *Reliance Telecom Ltd*. v. *Union of India*, AIR 2017 SC 337 : (2017) 4 SCC 269 : JT 2017 (1) SC 603. For a discussion of these cases, see S N Singh, "Constitutional Law – I (Fundamental Rights)", LIV *ASIL* 169 at 180-190 (2017).

96 *Odisha IIDC Ltd*. v. *Pitabasa Mishra* (2018) 3 SCC 732; *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* (2012) 10 SCC 1; see S N Singh, "Constitutional Law – I (Fundamental Rights", XLVIII *ASIL*173 at 181-84 (2012).

97 *Goa Foundation* v. *Union of India* (2014) 6 SCC 590.

98 *Jaykrishna Industries Ltd*. v. *State of Maharashtra*, 2017 (13) SCALE 406; see *also Indian Oil Corpn.* v. *Shashi Prabha Shukla*, 2017 (14) SCALE 395.

property on lease.[99] While considering the giving of a contract or a licence, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition.[100] The observations of P.N. Bhagwati, J in *R.D. Shetty*,[101] were reiterated in *Powai Panchsheel Coop. Hsg. Society* v. *Maharashtra Housing Area Dev. Authority*,[102] wherein the court quashed the allotment of flats made by the respondent in favour of three private societies while ignoring the offer of the appellant without any justified reason. The above principles were applied by the Supreme Court in some cases reported during the year.

Natural resources, public lands and public goods such as bungalows/official residences are public property and the doctrine of equality was applicable in their allotment. A chief minister was at par with other citizens and he/she cannot be allotted a government bungalow/official residence for life free of cost. The provisions of the U.P. Ministers (Salaries, Allowance and Miscellaneous Provisions) Act, 1981, as amended in 2016, allowing the former chief ministers to keep the official bungalows for life as special class of citizens was *ultra vires* article 14 of the Constitution and struck down by the court.[103]

In *M/s. Ajar Enterprises Private Limited* v. *Satyanarayan Somani*,[104] the Supreme Court examined the issue of distribution of natural resources and laid down the limits of discretion of the state holding that:[105]

> Undoubtedly, disposal of natural resources by auction is not a mandatory principle for, as the Constitution Bench held,[106] individual statutes may provide for modalities of transfer by alternate modes which subserve public interest.... The choice of methods is not left to the unbridled discretion of a public authority. Where a public authority exercises an executive prerogative, it must nonetheless act in a manner which would

99 *State of H.P.* v. *Ravinder Kumar Sankhayan*, 2018 (5) SCALE 217.

100 *Indian Oil Corpn*.v. *Shashi Prabha Shukla* (2012) SCC 85.

101 *R.D. Shetty* v. *International Airport Authority* (1979) 3 SCC 497 at 505, agreeing with the view of Mathew, J in *V. Punnen Thomas* v. *State of Kerala*, AIR 1969 Ker 81: "The Government, is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

102 AIR 2018 SC (Supp) 1141 : 2018 (14) SCALE 60 : JT 2018 (10) SC 433 : (2019) 2 SCC 294.

103 *Lok Prahari* v. *State of U.P*., AIR 2018 SC 2209 : (2018) 6 SCC 1 : 2018 (7) SCALE 8 : JT 2018 (5) SC 1; also see *Lok Prahari* v. *Union of India*, 2018 (5) SCALE 748 : (2018) 16 SCC 696 benefits and privileges for holding constitutional offices/authorities/high public offices such as M.Ps. and M.L.As. and their associates and ex-MPs and ex-MLAs conferred by law was, however, held to be permissible.

104 (2018) 12 SCC 756 : 2017 (10) SCALE 346.

105 *Id*. at 785 (of SCC).

106 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* (2012) 10 SCC 1, in which the court had held: "The legislature and the executive are answerable to the Constitution and it is there where the judiciary, the guardian of the Constitution, must find the contours to the powers of disposal of natural resources, especially Article 14 and Article 39(b)" of the Constitution of India.

> subserve public interest and facilitate the distribution of scarce natural resources in a manner that would achieve public good. Where a public authority implements a policy, which is backed by a constitutionally recognised social purpose intended to achieve the welfare of the community, the considerations which would govern would be different from those when it alienates natural resources for commercial exploitation. When a public body is actuated by a constitutional purpose embodied in the Directive Principles, the considerations which weigh with it in determining the mode of alienation should be such as would achieve the underlying object. In certain cases, the dominant consideration is not to maximize revenues but to achieve social good such as when the alienation is to provide affordable housing to members of the Scheduled Castes or Tribes or to implement housing schemes for Below the Poverty Line (BPL) families. In other cases where natural resources are alienated for commercial exploitation, a public authority cannot allow them to be dissipated at its unbridled discretion at the cost of public interest.

In the above case, Ujjain Development Authority (UDA) executed a lease deed giving large piece of land for thirty years in 1982 to IISCO, Steel Authority of India (SAIL) (a subsidiary of a Government of India) for construction and development of a residential colony for its employees; the allotment was not for commercial exploitation to a developer. The term of lease could be extended for two further periods of 30-30 years. At the time of every extension, the lease rent could be increased by 50%. IISCO was ordered to be wound up in 2003 by the High Court of Judicature at Calcutta. The official liquidator invited offers for the purchase of assets of IISCO including the leased land. UDA issued a notice to the official liquidator informing that it had cancelled the lease and would re-enter upon the land for the breach of the lease conditions. UDA asked the official liquidator to return the land. A single judge of the Calcutta High Court while exercising company jurisdiction accepted the highest offer submitted by an individual by the name of Narendra Jain. The official liquidator informed UDA that the leasehold rights had already been sold, together with other assets of the company. The appellant was nominated by the purchaser as the entity to whom the assets were to be transferred. According to the appellant, the possession of land and assets was handed over to it. The appellant requested UDA to mutate and transfer the land in its favour for the residuary period. UDA declined to do so on the ground that the lease had been cancelled and had re-entered upon the land. On an application of the appellant, a single judge of the Calcutta High Court directed the official liquidator to conclude the sale and execute a conveyance in favour of the purchaser. The single judge held that the termination of the lease and re-entry by UDA were of no consequence and UDA was not entitled to seek possession of the land from the official liquidator. Consequently, the official liquidator assigned all the leasehold rights of IISCO in favour of the appellant. The appeal filed by UDA was also dismissed by a division bench of the high court holding that since the properties were sold only for the residuary part of the first term of the lease, no case for interference

was made out. In 2011, the appellant wrote to UDA seeking a renewal of the lease for a period of thirty years on a lease rent enhanced by fifty per cent over the existing lease rent. The UDA renewed the lease in 2012 for a period of thirty years from 2012 to 2042. After a public notice, the leasehold land was converted as free hold.

A public interest litigation was instituted before the High Court of Madhya Pradesh challenging the deed of renewal made in 2012 and the agreement for transfer done in 2011. The petition also sought a direction to UDA for allotment of the land by auction and for an enquiry into alleged acts of corruption by the officers of UDA. During the pendency of the writ proceedings, UDA executed a deed of conveyance in July, 2013 by which the land was converted to freehold. The High Court cancelled the deed of renewal done in 2012 by UDA in favour of the appellant and directed that possession of the land be taken over. On appeal, the Supreme Court pointed out that a close reading of the clause for renewal make it abundantly clear that there was no absolute or indefeasible right of renewal. The court, upholding the decision of the high court, observed:[107]

> There was no absolute or indefeasible right to renewal either in IISCO or in Ajar, which succeeded to the leasehold interest. As a matter of fact, when UDA decided to renew the lease, it was duty bound to evaluate all aspects bearing upon the public interest which included (i) the purpose for which the land was granted under the original lease agreement; (ii) the extent to which the purpose had been fulfilled; (iii) whether the original purpose underlying the grant of the land would be subserved by the renewal sought by a commercial developer; (iv) the market value of the land; (v) the revenue which would be generated for the activities of UDA if the land would be transferred on commercial terms that would realise the best price. UDA choose to blink at its obligations by conferring a largesse on Ajar. It did so on the hypothesis that after the Calcutta High Court had rejected its objections to the assignment of the leasehold interest, it was precluded from doing anything other than to renew the lease. Clearly this was a misreading of the judgment of the Calcutta High Court. The issue as to whether the lease should be renewed was a matter distinct from whether the original assignment of the lease in favour of IISCO to Ajar was valid. The mere acquisition by Ajar of the leasehold interest for the remainder of the term together with the benefits of the original lease covenants, did not ipso jure entitle Ajar to renewal of the lease. UDA was complicit in renewing the lease and granting an undeserved windfall on a commercial developer. Fraud, it is well-settled unravels everything. The subsequent conversion of the land to freehold in September 2013 cannot enure to the benefit of Ajar since the underlying basis of the entire transaction stands vitiated by fraud. There can be no manner of

107 *M/s. Ajar Enterprises Private Limited* v. *Satyanarayan Somani, supra* note 104 at 786.

doubt about the principle which accepts the sanctity of contracts. Equally, no court can be a hapless spectator when a public authority forsakes the trust with which valuable resources such as land under its control are impressed. Land is a scarce public resource. When public bodies are vested with control over land – in this case over land which was acquired for facilitating planned development, no authority can claim an immunity from its accountability to matters of public interest.

In *Goa Foundation* v. *Sesa Sterlite Ltd*.,[108] the issue was whether the State of Goa was justified in not adopting the auction route for the grant of mining leases and simply granting a second renewal for mining. After a detailed analysis of the cases decided on the subject, Lokur, J summarised the principles governing the allocation of natural resources thus:[109] (1) It was not obligatory, constitutionally or otherwise, that a natural resource (other than spectrum) must be disposed of or alienated or allocated only through an auction or through competitive bidding; (2) Where the distribution, allocation, alienation or disposal of a natural resource was to a private party for a commercial pursuit of maximising profits, auction was more preferable method of such allotment; (3) A decision to not auction a natural resource was liable to challenge and subject to restricted and limited judicial review under article 14 of the Constitution; (4) A decision to not auction a natural resource and sacrifice maximisation of revenues might be justifiable if the decision was taken, *inter alia*, for the social or the public or the common good; and (5) Unless the alienation or disposal of a natural resource was for the common good or a social or welfare purpose, it could not be dissipated in favour of a private entrepreneur virtually free of cost or for a consideration not commensurate with its worth without attracting articles 14 and 39(b) of the Constitution.

By applying the above principles, Lokur, J held that the State of Goa was obliged to grant fresh mining leases in accordance with law and not second renewals to the mining lease holders; though it was under no constitutional obligation to grant fresh mining leases through the process of competitive bidding or auction; the second renewal of the mining leases granted by the State of Goa was done in a haste to maximise revenue and the same was liable to be set aside and quashed and the state was directed to take all necessary steps to expedite recovery of the amounts said to be due from the mining lease holders pursuant to the show cause notices issued to them and pursuant to other reports available with the state including the report of special investigation team and the team of chartered accountants.

The above two decisions were relied upon in *J.S. Luthra Academy* v. *State of Jammu and Kashmir*,[110] by Dr. D.Y. Chandrachud, J who held that the state was bound to act in consonance with the principles of equality and public trust and ensure that no action detrimental to public interest was taken; state should always adopt a rational method for disposal of public property, ensuring that non-discriminatory method was

108 (2018) 3 SCC 218 : AIR 2018 SC (Supp) 1269.

109 *Id.* at 256 (of SCC).

110 2018 (14) SCALE 449 : AIR 2018 SC 5367 : JT 2018 (11) SC 271 : (2018) 18 SCC 65.

adopted for distribution and alienation, which would result in public interest.The learned judge culled out the principles on the basis of judicial pronouncements thus:[111] "(i) Generally, when any land is intended to be transferred by the state, or any state largesse is to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people.The state must ensure that it receives adequate compensation for the allotted resource. However, non-floating of tender or non-conducting of public auction would not be deemed in all cases to be an arbitrary exercise of executive power. The ultimate decision of the executive must be the result of a fair decision making process and (ii) The allocation must be guided by the consideration of the common good as per Article 39(b), and must not be violative of Article14. This does not necessarily entail auction of the resource; however, allocation of natural resources to private persons for commercial exploitation solely for private benefit, with no social or welfare purpose, attracts higher judicial scrutiny and may be held to be violative of Article14 if done by non-competitive and non-revenue maximizing means."

In this case, four kanals of land were given to the appellant, without calling for any tenders or holding any public auction, for running an academy @ Rs. eight lacs per kanal but the price for only two had been taken while giving the remaining two kanals free of cost. In fact, the academy was running on wakf land which the wakf board wanted for its own use and, therefore, the academy had to be shifted from the wakf land. The learned judge found sufficient justification for allotment of land to the academy without going through the process of tender or public auction. The learned judge held:[112]

> Thus, in our considered opinion, the State Government proceeded to allot the land in favour of the Appellant keeping in mind the public interest in the education of hundreds of children as well as considering the urgency of the matter and it cannot be said that the action was not backed by a social or welfare purpose. It is worth emphasizing that the test of Article 14 must be applied from the perspective of substantive rather than formal equality, and must be mindful of the effect of the action or rule that is being tested. While under ordinary circumstances, the usual practice of allocation of sites on the basis of advertisements or auction was being followed, the instant situation warranted a deviation from the standard procedure to prevent prejudicing the future of the children studying at the Academy. In our view, taking a holistic view of the matter, the action taken by the State Government did not suffer from the vice of arbitrariness insofar as it was backed by a welfare purpose.
>
> In addition, we do not find any reason to reject the contention of the State Government that the allotment of 4 Kanals of land to the Appellant was in the nature of an exchange, in as much as the State Government

111 *Id.* at 457 (of SCALE).

112 *Id.* at 458-59.

> wanted to evict the Appellant who was running a school at Wakf land situated in the main city area. Such a decision seems to have been taken by the State Government to avoid any unrest in the locality or city. In such circumstances, we do not find any arbitrariness in the decision taken by the State in allotting 4 Kanals of property. On the other hand, we are of the opinion that the action of the State was fair, reasonable, transparent, unbiased, without favourtism and nepotism.

Relying on *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*,[113] however, the learned judge made it clear that two kanals given free of cost was bad in law and, therefore, the court directed the appellant to pay the remaining cost for the land.

The land acquired by the state cannot be returned to the persons from whom it was acquired even if the land is not required by the state for the purpose for which it was acquired. In *Mansukhbhai Dhamjibhai Patel* v. *State of Gujarat*,[114] the land of the appellants was acquired in 1981 by the state government for the purpose of construction of a dam. A resolution of the government permitted re-grant of the land where land was considered to be of no use for public purpose. In 2011, the appellants approached the high court for release of the land in view of resolution but the request was not acceded to by the state despite the direction of the high court. The appellants challenged the decision of the state in not returning their land. The apex court, relying on an earlier decision,[115] held that once the land had been acquired, article 14 of the Constitution was attracted and the land could not be returned to the owners; the land could not be disposed of without applying the doctrine of public trust in the matter of disposal of government land. The court clarified that the disposal of property vested in the state could only be consistent with article 14 of the Constitution. The court held that the government's policy was in violation of law. The court, however, made it clear that the state was free to frame an appropriate policy within a stipulated time as per law for rehabilitation of the displaced persons who had been rendered landless on account of acquisition. This decision raises a significant question: When the land could not be used for three decades and there was no proposal to construct a dam for which land had been acquired and the land owners had been deprived of the usufructs of the land for such a long time, what was wrong in returning the land to the owners? The land owners were not being shown any favours by return of their own land. How did public interest suffer in this process? Justice and fairness was in favour of the land owners and there was nothing against public interest. Can the state acquire land for one purpose and use it for a different purpose? Will it not be contrary to the entire land acquisition process and illegal? How could then the court hold that the policy was in violation of law? Who had approached the court for a ruling on the validity of the resolution? None had challenged the government's resolution which had allowed

113 *Supra* note 106.

114 (2018) 2 SCC 642.

115 *V. Chandrasekaran* v. *Administrative Officer* (2012) 12 SCC 133.

re-grant of land. In fact, when the land acquired by the state was not used for three decades, the appellants could have approached the court for getting the land acquisition quashed as held by the Supreme Court in a few cases.[116]

V RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

Freedom of artistic creations in films

Three writ petitions filed under article 32 of the Constitution of India relating to exhibition of film were dismissed by the apex court, with Dipak Misra, CJI as a member of the bench in all cases. The films in question were: "An Insignificant Man", "Padmavat" and "Aiyaary" and the central board of film certification (CBFC) had allowed their exhibition. In the case of "An Insignificant Man", the court exhibited complete reluctance in intervening on the plea that the film could damage the petitioner's reputation as was clear from the clip shown on some of the TV channels. The creativity of an author, artist or actor was accepted by the court as a part of freedom of speech and expression in the following words:[117]

> (A) film or a drama or a novel or a book is a creation of art. An artist has his own freedom to express himself in a manner which is not prohibited in law and such prohibitions are not read by implication to crucify the rights of expressive mind. The human history records that there are many authors who express their thoughts according to the choice of their words, phrases, expressions and also create characters who may look absolutely different than an ordinary man would conceive of. A thought provoking film should never mean that it has to be didactic or in any way puritanical. It can be expressive and provoking the conscious or the sub-conscious thoughts of the viewer. If there has to be any limitation, that has to be as per the prescription in law.
> The Courts are to be extremely slow to pass any kind of restraint order in such a situation and should allow the respect that a creative man enjoys in writing a drama, a play, a playlet, a book on philosophy, or any kind of thought that is expressed on the celluloid or theater, etc.

The court was not impressed by the argument that the film could be used as evidence in the impending litigation against the petitioner. This view was reiterated in case of film "Padmavat" in *Viacon 18 Media Pvt. Ltd*. v. *Union of India*.[118] In this case, petition was filed for staying the orders passed by the States of Gujarat and Rajasthan prohibiting the exhibition of the film "Padmavat" in their states. The court noted that the CBFC had given approval for exhibition of the film after certain cuts made on the recommendations of an expert committee and two disclaimers by the

116 *Karnail Kaur* v. *State of Punjab*, AIR 2015 SC 2041.

117 *Nachiketa Walhekar* v. *CBFC* (2018) 1 SCC 778 at 779-80.

118 2018 (1) SCALE 382 :(2018) 1 SCC 76; also see *Manohar Lal Sharma* v. *Union of India* (2018) 1 SCC 770 : AIR 2018 SC 86; *Manohar Lal Sharma* v. *Sanjay Leela Bhansali* (2018) 18 SCC 492.

producers. The court, issuing a stay order against the prohibitory orders of the two states, held:[119]

> For the present, we are considering the prayer for grant of interim relief, i.e., whether the notifications/orders prohibiting the exhibition of the film should be stayed or not. The creative content is an insegregable aspect of Article 19(1) of the Constitution. Needless to emphasise, this right is not absolute. There can be regulatory measures. Regulatory measures are reflectible from the language employed under Section 5B of the Act and the guidelines issued by the Central Government. Once the parliamentary legislation confers the responsibility and the power on a statutory Board and the Board grants certification, non-exhibition of the film by the States would be contrary to the statutory provisions and infringe the fundamental right of the petitioners….(I)t is the duty and obligation of the State to maintain law and order in the State. We may also note here with profit that the guidelines are to be kept in mind by CBFC….
>
> If a substantial ground is established in law by the States, there may be a different perception, for we are passing an interim order, considering the prima facie case and having due regard to the fundamental conception of right of freedom of speech and expression.

In case of the film "Aiyaary",[120] the court accepted the above two decisions but did not accept the decision in *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra*,[121] in which the court had refused to quash the prosecution of a poet under section 292, IPC (obscenity) while at the same time quashed the charge against the printer and publisher for having published the poem written by the poet. The argument in the present case was that the film contained scenes which would tarnish the image of the society and its members forever and the same could also be used in an impending prosecution against them. The court refused to grant stay order against the exhibition of the film which had already obtained a certificate from CBFC. It also refused to direct the producer and director to add a disclaimer so that no member of the society would be ultimately affected. The court held that that was a function falling within the jurisdiction of the CBFC and not the court; disclaimer cannot be ordered by the court just for asking, the principles of natural justice are applicable.

In all the above cases, though the court did not expressly say that it was protecting the commercial interest of the producers and directors of the films, the fact was that that was the net result of the decisions. The fundamental rights to reputation and privacy have no meaning in view of the above decisions to which the court did not pay adequate attention.

119 *Id*. at 387-88 (of SCALE).

120 *Adarsh Cooperative Housing Society Ltd.* v. *Union of India,* 2018 (4) SCALE 390 : (2018) 17 SCC 516.

121 AIR 2015 SC 2612 : (2015) 6 SCC 1; see S N Singh, "Constitutional Law – I (Fundamental Rights)", LI *ASIL* 213 at 277-78 (2015).

Freedom in writing

All the above cases were relied upon by Dipak, CJI in *N. Radhakrishnan*,[122] in which a petition under article 32 of the Constitution was filed for issue of a writ to regulate and prohibit those who control/manage/publish both on print and electronic media platforms, from publishing the novel "Meesha" meaning Moustache which appeared in Malayalam weekly, *Mathrubhumi* published from Kozikhode, Kerala and circulated throughout the country and abroad, containing insensitive, incriminating and defamatory articles which could disrupt the peaceful co-existence of various communities and religions in the country on the ground that the literary work was insulting and derogatory to temple going women who were presented in bad light and had a disturbing effect on the community and the sentiments of a particular faith/community. It was contended that the petition had been filed for the protection of the legitimate interest of the women community; the publication in *Mathrubhumi* had the proclivity and potentiality to disturb the public order, decency or morality and it defamed the women community, all of which are grounds for the State to impose reasonable restrictions under article 19(2) on the fundamental right of freedom of speech and expression. It was further argued that after the publication of the incriminating material, women visiting temples were subjected to ridicule and embarrassment through various social media platforms and these were bound to have an adverse effect on the liberty, freedom and empowerment of women.

The objectionable dialogue from the book "Meesha" read:[123] "Why do these girls take bath and put on their best when they go to the temple?" a friend who used to join the morning walk until six months ago once asked. "To Pray", I said."No", he said. "Look carefully, why do they need to put their best clothes in the most beautiful way to pray? They are unconsciously proclaiming that they are ready to enter into sex", he said. I laughed. "Otherwise," he continued, "why do they not come to the temple four or five days a month? They are letting people know that they are not ready for it. Especially, informing those Thirumenis (Brahmin priests) in the temple. Were they not the masters in these matters in the past?" Quoting his own observations made in the above cases, Dipak Misra, CJI held:[124]

> Literature symbolizes freedom to express oneself in multitudinous ways. One should never forget that only when creativity is not choked, it helps the society to be able to accept the thoughts and ideas of a free mind.
>
> Literature can act as a medium to connect to the readers only when creativity is not choked or smothered. The free flow of the stream of creativity knows no bounds and imagination brooks no limits. A writer or an artist or any person in the creative sphere has to think in an unfettered way free from the shackles that may hinder his musings and

122 *N. Radhakrishnan* v. *Union of India*, AIR 2018 SC 4154 : 2018 (10) SCALE 717 : (2018) 9 SCC 725.

123 *Id.* at 4169 (of AIR).

124 *Id.* at 4161.

> ruminations.The writers possess the freedom to express their views and imagination and readers too enjoy the freedom to perceive and imagine from their own viewpoint. Sans imagination, the thinking process is conditioned.
>
> Creative voices cannot be stifled or silenced and intellectual freedom cannot be annihilated. It is perilous to obstruct free speech, expression, creativity and imagination, for it leads to a state of intellectual repression of literary freedom thereby blocking free thought and the fertile faculties of the human mind and eventually paving the path of literary pusillanimity. Ideas have wings. If the wings of free flow of ideas and imagination are clipped, no work of art can be created. The culture of banning books directly impacts the free flow of idea and is an affront to the freedom of speech, thought and expression. Any director veiled censorship or ban of book, unless defamatory or derogatory to any community for abject obscenity, would create unrest and disquiet among the intelligentsia by going beyond the bounds of intellectual tolerance and further creating danger to intellectual freedom thereby gradually resulting in "intellectual cowardice" which is said to be the great estenemy of a writer, for it destroys the free spirit of the writer. It shall invite a chilling winter of discontent. We must remember that we live not in a totalitarian regime but in a democratic nation which permits free exchange of ideas and liberty of thought and expression. It is only by defending the sacrosanct principles of free speech and expression or, to borrow the words of Justice Louis Brande is, "the freedom to think as you will and to speak as you think" and by safeguarding the unfettered creative spirit and imagination of authors, writers, artists and persons in the creative field that we can preserve the basic tenets of our constitutional ideals and mature as a democratic society where the freedoms to read and write are valued and cherished.

Dismissing the writ petition, the Chief Justice sermonised the readers and admirers of literature and art to exhibit a certain degree of adherence to the unwritten codes of maturity, humanity and tolerance so that the freedom of expression reigns supreme and is not inhibited in any manner. He further observed, "It would usher in a perilous situation, if the constitutional courts, for the asking or on the basis of some allegation pertaining to scandalous effect, obstruct free speech, expression, creativity and imagination. It would lead to a state of intellectual repression of literary freedom." The Chief Justice did not find the language used in the aforesaid dialogue to be obscene or defamatory or derogatory and hurtful to the temple going women.

All the above four cases clearly depict the one-sided thought and rationale applied in judicial process, without even caring to consider the approach of a common man. The decision in *N. Radhakrishnan* is the best example of how the judges wish a reader should read a book or novel or see any artistic creation. There is no doubt that creativity of an author cannot subvert the freedom of all others who are likely to be adversely affected by the work of the author. One may closely analyse the dialogue

used in the novel, "Look carefully, why do they (women) need to put their best clothes in the most beautiful way to pray? *They are unconsciously proclaiming that they are ready to enter into sex*". Women bear best clothes on several occasions. Do they proclaim that they are ready to enter into sex whenever they bear best of clothes? Can there be more humiliating and defamatory conversation than the above for women? Such disgraceful, objectionable and humiliating dialogue was treated by the court as author's creativity. If such a dialogue is in the listening of a woman, could she not take recourse to criminal process to get the culprits punished? By no amount of logic one would agree with Dipak Misra, CJI and his views are clearly one-sided.

Freedom of expression in matters of sex

Section 377, IPC criminalises unnatural sex. One of the questions considered by a Constitution Bench of the Supreme Court in *Navtej Singh Johar* v. *Union of India*,[125] was whether the offence under that provision was proportionate to the freedom given under article 19(1)(a) of the Constitution of India and the permissible restrictions mentioned in clause (2) to that article. Dipak Misra, CJI observed:[126]

> Section 377 IPC does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner. Section 377 IPC also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus, an archaic law which is incompatible with constitutional values cannot be allowed to be preserved….

VI FREEDOM OF PEACEFUL ASSEMBLY

In *Mazdoor Kisan Shakti Sangathan* v. *Union of India*,[127] Supreme Court decided an important question pertaining to the scope of freedom to assemble peaceably and without arms guaranteed to the citizens under sub-clause (b) of clause (1) to article 19 of the Constitution of India. When a prohibitory order under section 144, CrPC is in force for 60 days, can another similar order be passed before the expiry of 60 days? The assistant commissioner of police, New Delhi District passed an order prohibiting the following activities without written permission in the areas of Parliament House, North and South Block, Central Vista Lawns together with its surrounding localities and areas: holding of any public meeting; assembly of five or more persons; carrying of fire-arms, banners, placards, lathis, spears, swords, sticks, brickbats *etc*.; shouting of slogans; making of speeches, *etc*.; processions and demonstrations; and picketing or dharnas in any public place within the area specified in the schedule and site plan appended to the order. The orders covered large areas of central Delhi. Before the

125 *Supra* note 1.

126 *Id.* at 4392-93 (of AIR).

127 AIR 2018 SC 3476 : 2018 (9) SCALE 134 : (2018) 17 SCC 324.

expiry of 60 days, another identical order was passed. It was contended that this amounted to arbitrary exercise of power and these orders virtually declared the entire central Delhi areas as prohibited area for holding public meetings and dharnas or peaceful protests. These orders were challenged by filing a writ petition in Supreme Court. Likewise, an order was passed by the National Green Tribunal, New Delhi (NGT) prohibiting all the activities of dharna, protest, agitations, assembling of people, public speeches, using of loud speakers, *etc*. at Jantar Mantar road, New Delhi with a view to prevent air and noise pollution. The NGT also ordered shifting of the protestors, agitators and the people holding dharnas to the alternative site at Ramlila Maidan, Ajmeri Gate, Delhi. Anticipatory action permissible under the section was also permissible under clauses (2) and (3) of article 19. Both clauses empower the legislature to make laws placing reasonable restrictions on the exercise of the rights in the interest of public order which has to be maintained in advance and, therefore, it was competent for a legislature to empower an authority to take anticipatory action in emergency for the purpose of maintaining public order. The duty to maintain law and order must be performed and not avoided by prohibiting or restricting the normal activities of the citizen. Sikri, J held:[128]

> We may state at the outset that none of the parties have joined issue insofar as law on the subject is concerned. Undoubtedly, holding peaceful demonstrations by the citizenry in order to air its grievances and to ensure that these grievances are heard in the relevant quarters, is its fundamental right. This right is specifically enshrined under Article 19(1)(a) and 19(1)(b) of the Constitution of India. Article 19(1)(a) confers a very valuable right on the citizens, namely, right of free speech. Likewise, Article 19(1)(b) gives right to assemble peacefully and without arms. Together, both these rights ensure that the people of this country have right to assemble peacefully and protest against any of the actions or the decisions taken by the Government or other governmental authorities which are not to the liking. Legitimate dissent is a distinguishable feature of any democracy. Question is not as to whether the issue raised by the protestors is right or wrong or it is justified or unjustified. The fundamental aspect is the right which is conferred upon the affected people in a democracy to voice their grievances. Dissenters may be in minority. They have a right to express their views. A particular cause which, in the first instance, may appear to be insignificant or irrelevant may gain momentum and acceptability when it is duly voiced and debated. That is the reason that this Court has always protected the valuable right of peaceful and orderly demonstrations and protests.
>
> The Supreme Court has also gone beyond upholding the right to protest as a fundamental right and has held that the State must aid the right to

128 *Id*. at 3500, 3501, 3503 (of AIR).

> assembly of the citizens. In the Constitution Bench Judgment, *Himat Lal K. Shah* v. *Commissioner of Police, Ahmedabad,*[129] while dealing with the challenge to the Rules framed under the Bombay Police Act regulating public meetings on streets, held that the Government has power to regulate which includes prohibition of public meetings on streets or highways to avoid nuisance or disruption to traffic and thus, it can provide a public meeting on roads, but it does not mean that the government can close all the streets or open areas for public meetings, thus denying the fundamental right which flows from Article 19(1)(a) and (b).
>
> The right to protest is, thus, recognised as a fundamental right under the Constitution. This right is crucial in a democracy which rests on participation of an informed citizenry in governance. This right is also crucial since it strengthens representative democracy by enabling direct participation in public affairs where individuals and groups are able to express dissent and grievances, expose the flaws in governance and demand accountability from State authorities as well a powerful entities. This right is crucial in a vibrant democracy like India but more so in the Indian context to aid in the assertion of the rights of the marginalised and poorly represented minorities.

Sikri, J tried to bring about a balance between the right guaranteed under sub-clause (b) of article 19(1) and the restrictions that could be imposed on that right under clause (3) of article 19. According to him, there was no absolute prohibition from holding public meetings, processions, demonstrations, *etc*.; they were to be restricted in larger public interest. Before any group of persons or person wanted to carry out any processions and dharnas, it has to take prior written permission and whenever such a request was made, the authority had to examine the same keeping in view its likely effect, *viz.* whether it would cause any obstruction to traffic or danger to human safety or disturbance to public tranquillity. Such an order made under Section 144, CrPC would be valid. Repeated issue of orders amounted to banning of dharnans, *etc*. which was not permissible. Sikri, J, however, desired the following guidelines for exercise of power:[130]

> (T)he Commissioner of Police, New Delhi and other official respondents can frame proper guidelines for regulating such protests, demonstrations, etc. As noted above, the orders issued under Section 144 prohibit certain activities in the nature of demonstrations etc. 'without permission', meaning thereby permission can be granted in certain cases. There can, therefore, be proper guidelines laying down the parameters under which permission can be granted in the Boat Club area. It can be a very restrictive and limited use, because of the

129 (1973) 1 SCC 227.

130 AIR 2018 SC 3476 at 3510.

> sensitivities pointed out by the respondents and also keeping in mind that Ramlila Maidan is available and Jantar Mantar Road in a regulated manner shall be available as well, in a couple of months. Thus, the proposed guidelines may include the provisions for regulating the numbers of persons intending to participate in such demonstrations, prescribing the minimum distance from the Parliament House, North and South Blocks, Supreme Court, residences of dignitaries etc. within which no such demonstrations would be allowed; imposing restrictions on certain routes where normally the Prime Minister, Central Ministers, Judges etc pass through; not permitting any demonstrations when foreign dignitaries are visiting a particular place or pass through the particular route; not allowing firearms, lathis, spears, swords, etc. to be carried by demonstrators; not allowing them to bring animals or pitch tents or stay overnight; prescribing time limits for such demonstrations; and placing restrictions on such demonstrations, etc. during peak traffic hours. To begin with, authorities can permit those processions and demonstrations which are innocuous by their very nature. Illustratively, school children carrying out procession to advance some social cause or candle march by peace loving group of persons against a social evil or tragic incident. These are some of the examples given by us to signify that such demonstrations can be effectively regulated by adopting various measures instead of banning them altogether by rejecting every request for such demonstrations. We, therefore, feel that in respect of this area as well the authorities can formulate proper and requisite guidelines. We direct the Commissioner of Police, New Delhi, to undertake this exercise, in consultation with other authorities, within two months from today.

In *Bimal Gurung* v. *Union of India*,[131] the President of Gorkha Janmukti Morcha (GJM) had approached the Supreme Court under article 32 of the Constitution of India for transfer of investigation of all First Information Reports lodged against the petitioner and other members of GJM, to any independent investigation agency.GJM, a registered political party, has been at the forefront of Gorkhaland agitation since 2007. In order to contain the agitation, the Gorkhaland Territorial Administration Act, 2011 was enacted to provide for the establishment of a Gorkhaland Territorial Administration for three sub-divisions, Darjeeling, Kalimpong, Kurseong and some mouzas of Siliguri subdivision in the district of Darjeeling, State of West Bengal. In 2017, Minister of Education, Government of West Bengal announced that Bengali would be compulsory in all schools in West Bengal. This was viewed by Gorkhas as an encroachment on their language, *i.e.* Nepali/Gorkhali. Against this announcement, massive protests and agitations were launched by GJM and Gorkhas and there were many incidents of bomb blasts which led to registration of more than 300 FIRs against the members of GJM including the petitioner under a number of legislations. During

131 AIR 2018 SC 1459 : (2018) 15 SCC 480.

the protests, many persons died as a result of police firing. All the cases were under investigation of the state police which were sought to be transferred to an independent agency.

In order to decide the controversy at hand, Ashok Bhushan, J stated the scope of freedoms under sub-clauses (a) and (b) of clause (1) of article 19 of the Constitution of India:[132]

> Article 19 of the Constitution of India guarantees some of most important fundamental rights to the citizens. Article 19 protects important attributes of personal liberty. Right to freedom of speech and expression as guaranteed under Article 19(1)(a) and the right to assemble peaceably and without arms as protected by Article 19(1)(b) are the rights which in reference to the present case have importance. The right of freedom of speech and expression coupled with right to assemble peaceably and without arms are rights expression of which are reflected in carrying demonstration on several occasions. Freedom to air ones view is the life line of any democratic institution. The word freedom of speech must be broadly construed to include right to circulate ones view by word or mouth or through audio visual instrument. Right of public speech is one form of expression which is also a part of freedom of speech and expression. Demonstrations are also a mode of expression of the rights guaranteed under Article 19(1)(a). Demonstrations whether political, religious or social or other demonstrations which create public disturbances or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, are not covered by protection under Article 19(1). A demonstration might take the form of an assembly and even then the intention is to convey to the person or authority to whom the communication is intended the feelings of the group which assembles. From the very nature of things a demonstration may take various forms; "it may be noisy and disorderly", for instance stone-throwing by a crowd may be cited as an example of a violent and disorderly demonstration and this would not obviously be within Article 19(1)(a) or (b).
> (I)t is clear that Article 19(1) (a) and (b) gives constitutional right to all citizens freedom of speech and expression which includes carrying out public demonstration also but public demonstration when becomes violent and damages the public and private properties and harm lives of people it goes beyond fundamental rights guaranteed under Article 19(1) and becomes an offence punishable under law.

VII FREEDOM TO CARRY ON TRADE AND BUSINESS

In *Union of India* v. *Moolchand Khairati Ram Trust*,[133] the question was whether a hospital allotted land by the government at concessional rate could be imposed with

132 *Id.* at 1470, 1472 (of AIR).

133 (2018) 8 SCC 321 : AIR 2018 SC 5426.

a condition of 10% in IPD and 25% in OPD services to be provided free of cost to patients of economically weaker sections and whether the aforesaid conditions amounted to restriction under article 19(6) to carry on profession, trade or business under article 19(1)(g) of the Constitution of India? The question related to hospitals of Delhi, *viz.* Moolchand Kharaiti Ram Trust, St. Stephens Hospital, Sitaram Bhartiya Institute and Foundation for Applied Research in Cancer. Explaining a charitable purpose, Arun Mishra, J observed:[134]

> [It] is apparent that charitable is the public purpose for the benefit of the needy people, who cannot pay for benefits received. The Internal Revenue Code may define it separately for its purposes what is charitable so as to claim the benefit under the Act.The charitable trust is a trust which is for the benefit of general public. Charitable is a kind and generous in giving money or other help to those in need as defined in Webster's New World Dictionary and Black's Law Dictionary. The Halsbury's Laws of England discussed the meaning of charity, which provides that if there is no statutory definition of charitable purposes, to be a charitable purpose, it must satisfy certain tests. It must be for the public benefit and available to a sufficient section of the community. The reference to charity should be construed in their technical legal sense. For income tax purpose, the charity may be defined in the Act and in that light, the interpretation of the Act has to be made. Public benefit is an essential ingredient of charitable activities.There are two distinct requirements, the purpose itself must be beneficial and not harmful to the public. In paragraph 509 of Halsbury's Laws of England, it has been discussed that it is difficult to believe that a trust would be held charitable if the poor are excluded from its benefits.

Mishra, J pointed out the obligation of a hospital to provide medical services to needy persons free of cost in consideration of the land allotted to them at concessional rates. He observed:[135]

> In the wake of globalisation, we are in a regime of Intellectual Property Rights. Even these rights have to give way to the human rights. It is an obligation of the Government to provide life-saving drugs to have-nots at affordable prices so as to save their lives, which is part of Article 21of the Constitution of India. It is equally an obligation of the State to devise such measures that have-nots are not deprived of the very treatment itself. Administering medicines is also a part of medical therapy. Thus, in our considered opinion members of the medical profession owe a constitutional duty to treat the have-nots. They cannot refuse to treat a person who is in dire need of treatment by a particular medicine or by a particular expert merely on the ground that he is not

134 *Id.* at 5443-44 (of AIR).

135 *Id.* at 5447.

> in a position to afford the fee payable for such an opinion/treatment. The moment it is permitted, the medical profession would become purely a commercial activity, it is not supposed to be so due to its nobleness. Thus, in our opinion, when the Government land had been obtained for charitable purpose of running the hospital, the Government is within its right to impose such an obligation.

All the four hospitals, whose cases were considered by the court in the present case, had been allotted land by DDA at concessional rate, not by any auction and they were under a duty to comply with the terms and conditions of allotment which included free medical treatment to a percentage of patients of economically weaker sections. Moreover, the terms and conditions of allotment were subject to alternation at the discretion of DDA. These hospitals allotted government land were not expected to do free service but at the same time they were under an obligation to act in public interest, being the recipients of government largesse at concessional rates.

It was contended on behalf of the hospitals that the imposition of the condition of free treatment of patients of economically weaker sections (10% in IPD and25% in OPD services) violated their freedom to carry on trade and business guaranteed under article 19(1)(g) of the Constitution of India and same was not covered under clause (6) of that article; no law had been enacted to impose the condition in question. Rejecting the argument, Arun Mishra, J very rightly held that the condition of free treatment was not a restriction envisaged under clause (6) of article 19 and, therefore, no law was required to be enacted for this purpose as per existing policy/rules/statutory provisions. The learned judge held:[136]

> For deciding the aforesaid submission pivotal question arises whether imposition of condition tantamounts to a restriction imposed within the purview of Article 19(6) of the Constitution. In our considered opinion the High Court has erred in law in holding that such stipulation could have been imposed only by a statutory law. In our considered opinion, it is not a restriction on the right to carry on medical profession, the medical profession has obligated itself by such conditions by very nature of its professional activity and when the State land is being held which is for the public good with no profit motive, such land is held for the charitable purpose of public good. The charitable purpose would include... the aforesaid obligation of free treatment to the persons of economically weaker strata of the society. It is not a restriction but the very purpose of existence of medical profession and very purpose of policy/Rules to grant land to institutions without publicactions that would have fetched market rate and does not amount to putting any fetter practice the medical profession or to carry on occupation. On due consideration of the very object of the medical activity its professional and other obligations for the proper treatment of the

136 *Id.* at 5458-59.

> persons of economically weaker sections of the society deprived of the fruits of development. The benefits of various welfare schemes hardly reach to them inspite of efforts made, economic disparity is writ large and persists. They cannot afford such treatment and thus in lieu of holding land of Government at concessional rate and enjoying huge occupancy benefits inter alia for aforesaid reasons, the hospitals can be asked to impart free treatment as envisaged in the Government order. The hospitals now-a-days have five star facilities. The entire concept has been changed to make commercial gains. They are becoming unaffordable. The charges are phenomenally high, and at times unrealistic to the service provided. The dark side of such hospitals can be illuminated only by sharing obligation towards economically weaker sections of the society. It would be almost inhuman to deny proper treatment to the poor owing to economic condition and when hospitals claim that they are doing charity at their own level, we find impugned order dated 2.2.2012 is simply an expression to the aforesaid activity which has been given a channelized form.
>
> We are of the considered opinion that there was no necessity of enacting a law, as the policy/rules under which the land has been obtained, the hospitals were obligated to render free treatment as the land was allotted to them for earning no profit and held in trust for public good. Similar is the provision in the rules of 1981 and apart from that the regulations framed by the Medical Council of India also enjoins upon the medical profession to extend such help and in view of the object of the hospitals, trust, and missionaries it is apparent that there was no necessity of any legislation and the Government was competent to enforce in the circumstances, the contractual and statutory liability and on common law basis.
>
> The right to carry on the medical profession has not been restricted, however, what was enjoined upon the respondent hospitals to perform otherwise had been given a concrete shape. Thus, it was permissible to issue circular in the exercise of power under Article 162 of the Constitution. It was urged on behalf of hospitals that they were doing a charitable work at their own, thus, it could not be said to be a restriction within the meaning contemplated under Article 19(6) for which a law was required. No new restriction has been imposed for the first time under Article 19(6) of the Constitution of India, as such in our opinion, there was no necessity for enacting a law, such guidelines could be issued under the executive powers.

Right of an advocate to practise

It is the fundamental right of an advocate to practise his/her legal profession and this right has further been given statutory recognition under section 30 of the

137 AIR 2018 SC 498 : (2018) 2 SCC 674.

Advocates Act, 1961, which provides that "Subject to the provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends,- (i) in all courts including the Supreme Court; (ii) before any tribunal or person legally authorised to take evidence on oath; and (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise." In *Macquarie Bank Ltd*. v. *Shilpi Cable technologies Ltd*.,[137] a question arose whether a demand notice of an unpaid operational creditor could be issued by a lawyer on behalf of the operational creditor. Section 8(1) of the Insolvency and Bankruptcy Code, 2016 prescribes that an operational creditor may, on the occurrence of a default, deliver copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed. The Supreme Court drew a distinction between the "delivered" and "issued" in the following words:[138]

> (T)he first thing that is to be noticed is that Section 8 of the Code speaks of an operational creditor delivering a demand notice. It is clear that had the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorized agent. In fact, in Forms 3 and 5 ... it is clear that this is the understanding of the draftsman of the Adjudicatory Authority Rules, because the signature of the person "authorized to act" on behalf of the operational creditor must be appended to both the demand notice as well as the application under Section 9 of the Code. The position further becomes clear that both forms require such authorized agent to state his position with or in relation to the operational creditor. A position with the operational creditor would perhaps be a position in the company or firm of the operational creditor, but the expression "in relation to" is significant. It is a very wide expression … which specifically includes a position which is outside or indirectly related to the operational creditor. It is clear, therefore, that both the expression "authorized to act" and "position in relation to the operational creditor" go to show that an authorized agent or a lawyer acting on behalf of his client is included within the aforesaid expression.

R.F. Nariman, J held that the expression "practise" was of extremely wide import including all preparatory steps leading to the filing of an application before a tribunal. Section 30 of the Advocates Act, 1961 dealt with fundamental right under article 19(1)(g) to practise a profession. A conjoint reading of section 30 of the Advocates Act and sections 8 and 9 of the Insolvency and Bankruptcy Code together with the rules and forms made under the Code clearly indicated that a notice sent by a lawyer on behalf of the operational creditor was in order.

138 *Id.* at 522-23 (of AIR).

VIII RIGHT TO LIFE AND PERSONAL LIBERTY

In the field of human rights protection, the efforts of the apex court in closely monitoring the progress of cases pertaining to fake encounters, use of excessive retaliatory force by police and armed forces personnel and extra-judicial executions in the State of Manipur has been commendable during the year. In *Extra-judicial Execution Victim Families Assn.* v. *Union of India*,[139] the court had noted that 1528 persons had been killed in fake encounters by police and armed forces personnel in the state. Some information about the fake encounters/use of excessive retaliatory force had been gathered by a commission appointed under the Commissions of Inquiry Act, 1952 (32 cases); as a result of writ petitions filed before the high court (37 cases) and the report of national human rights commission (NHRC) (20). FIRs were directed to be registered in those cases and compensation was also awarded to the victims' families. The court expressed its unhappiness at the working of NHRC and also inadequate staff with it. The Supreme Court directed the constitution of SIT for investigation and prosecution of the cases. During the current year, the court passed a number of directions in the case.[140]

Right to reputation

An individual has a fundamental right to his reputation which cannot be violated with mala fide considerations. In *S. Nambi Narayanan* v. *Siby Mathews*,[141] the appellant was a scientist of repute in Indian Space Research Organisation (ISRO). He was arrested by SIT headed by the respondent on the allegations of espionage on the ground that certain official secrets and documents of ISRO had been leaked out by the scientists including the appellant. In a thorough investigation carried out by the CBI, it was proved that the allegation against the appellant were completely false and the CBI recommended action against the guilty police officials including the respondent, Siby Mathews. As the state government decided not to take any action against the guilty police officials, petition was filed before the High Court of Kerala. The division bench dismissed the petition, overruling the decision of the single judge. In appeal, before the Supreme Court, it was pleaded that appellant's illegal and mala fide arrest and prosecution "had a catastrophic effect on his service career as a leading and renowned scientist at ISRO thereby smothering his career, life span, savings, honour, academic work as well as self-esteem and consequently resulting in total devastation of the peace of his entire family which is an ineffaceable individual loss, and the second, irreparable and irremediable loss and setback caused to the technological advancement in Space Research in India." Dipak Misra, CJI, accepted the plea of the appellant and observed:[142]

> (T)he entire prosecution initiated by the State police was malicious and it has caused tremendous harassment and immeasurable anguish

139 (2017) 8 SCC 415; see also *Extra-judicial Execution Victim Families Assn.* v. *Union of India* (2016) 14 SCC 536.

140 *Extra-Judicial Execution Victim* v. *Union of India* (2018) 16 SCC 462.

141 AIR 2018 SC 5112 : (2018) 10 SCC 804 : 2018 (11) SCALE 171.

142 *Id.* at 5123-24 (of AIR).

> to the appellant. It is not a case where the accused is kept under custody and, eventually, after trial, he is found not guilty. The State police was dealing with an extremely sensitive case and after arresting the appellant and some others, the State, on its own, transferred the case to the Central Bureau of Investigation. After comprehensive enquiry, the closure report was filed. An argument has been advanced by the learned counsel for the State of Kerala as well as by the other respondents that the fault should be found with the CBI but not with the State police, for it had transferred the case to the CBI. The said submission is to be noted only to be rejected. The criminal law was set in motion without any basis. It was initiated, if one is allowed to say, on some kind of fancy or notion. The liberty and dignity of the appellant which are basic to his human rights were jeopardized as he was taken into custody and, eventually, despite all the glory of the past, he was compelled to face cynical abhorrence. This situation invites the public law remedy for grant of compensation for violation of the fundamental right envisaged under Article 21 of the Constitution. In such a situation, it springs to life with immediacy. It is because life commands self-respect and dignity.

Misra, CJI further held that the appellant's fundamental right to dignity and reputation had been gravely violated. The learned Chief Justice, while awarding compensation of Rs. 50 lacs to the appellant and giving him liberty to file civil suit for higher compensation, if so advised, observed:[143]

> (T)here can be no scintilla of doubt that the appellant, a successful scientist having national reputation, has been compelled to undergo immense humiliation. The lackadaisical attitude of the State police to arrest anyone and put him in police custody has made the appellant to suffer the ignominy. The dignity of a person gets shocked when psycho-pathological treatment is meted out to him. A human being cries for justice when he feels that the insensible act has crucified his self-respect. That warrants grant of compensation under the public law remedy. We are absolutely conscious that a civil suit has been filed for grant of compensation. That will not debar the constitutional court to grant compensation taking recourse to public law. The Court cannot lose sight of the wrongful imprisonment, malicious prosecution, the humiliation and the defamation faced by the appellant.

Right to life includes right to dignity

The Supreme Court made an important observation in the context of implementation of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996. Madan B. Lokur, J observed that a life of dignity was a fundamental right given to all persons including construction workers. In order to effectively implement the Act, the court issued detailed directions.

143 *Id.* at 5125-26.

In *Joseph Shine* v. *Union of India*,[144] while de-criminalising section 497, IPC, Dipak Misra, CJI, relying on his own judgment in another case,[145] held that women had to be regarded as equal partners in the lives of men and perform equal role in the society. Misra, CJI was of the view that criminalizing adultery meant State invasion into private life of individuals. According to him, criminalizing adultery offended two facets of article 21, *viz*. dignity of husband and wife and privacy associated with a relationship between the two. While striking down section 497 read with section 498, IPC, as violative of article 21, Dipak Misra, CJI observed:[146]

> (T)he Court, with the passage of time, has recognized the conceptual equality of woman and the essential dignity which a woman is entitled to have. There can be no curtailment of the same. But, Section 497 IPC effectively does the same by creating invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamounts to subordination of women. Therefore, we have no hesitation in holding that the same offends Article 21 of the Constitution.

In *Indian Young Lawyers Assn*. v. *Union of India*,[147] D.Y. Chandrachud, J explained human dignity with reference to exclusion of women between age group of 10 to 50 from entering Lord Ayyappa temple at Sabarimala thus:[148]

> Human dignity postulates an equality between persons. The equality of all human beings entails being free from the restrictive and dehumanizing effect of stereotypes and being equally entitled to the protection of law. Our Constitution has willed that dignity, liberty and equality serve as a guiding light for individuals, the state and this Court. Though our Constitution protects religious freedom and consequent rights and practices essential to religion, this Court will be guided by the pursuit to uphold the values of the Constitution, based in dignity, liberty and equality. In a constitutional order of priorities, these are values on which the edifice of the Constitution stands. They infuse our constitutional order with a vision for the future – of a just, equal and dignified society. Intrinsic to these values is the anti-exclusion principle. Exclusion is destructive of dignity. To exclude a woman from the might of worship is fundamentally at odds with constitutional values.
>
> It was briefly argued that women between the ages of ten and fifty are not allowed to undertake the pilgrimage or enter Sabarimala on the ground of the 'impurity' associated with menstruation. The stigma

144 *Supra* note 2.

145 *Voluntary Health Association of Punjab* v. *Union of India* (2013) 4 SCC 1.

146 *Supra* note 144 at 4920 (of AIR).

147 *Supra* note 3.

148 *Id*. at 1761. (of AIR)

> around menstruation has been built up around traditional beliefs in the impurity of menstruating women. They have no place in a constitutional order. These beliefs have been used to shackle women, to deny them equal entitlements and subject them to the dictates of a patriarchal order. The menstrual status of a woman cannot be a valid constitutional basis to deny her the dignity of being and the autonomy of personhood. The menstrual status of a woman is deeply personal and an intrinsic part of her privacy. The Constitution must treat it as a feature on the basis of which no exclusion can be practised and no denial can be perpetrated. No body or group can use it as a barrier in a woman's quest for fulfilment, including in her finding solace in the connect with the creator.

Right to life with dignity includes right to die with dignity

The Constitution Bench decision in *Common Cause (A Regd.) Society* v. *Union of India*,[149] is most significant pronouncement of the apex court as it recognises that the right of a person to live with dignity includes right to die with dignity by executing a will during his/her life time as to the manner in which he/she would like to die when he/she is terminally ill or is in a persistent vegetative state. In *Gian Kaur*,[150] a Constitution Bench had considered the question whether right to life under article 21 included right to die in the context on section 306, IPC which criminalises abetment to suicide. It was held that section 306 was an independent offence and neither section 306 nor section 309 (attempt to suicide) were constitutionally invalid as the right to life did not include right to die. In *Aruna Ramachandrqa Shanbaug*,[151] the court upheld the constitutional validity of passive euthanasia under article 21 of the Constitution of India, *i.e*. withdrawal of life support system of a patient in permanent vegetative state. Taking a clue from an earlier decision[152] that law in a changing society should march in tune with the changed ideas and ideologies, Dipak Misra, CJI asserted the power of the court to interpret constitutional provisions liberally. The learned Chief Justice held that individual dignity was a facet of right to life under article 21; it included right to die with dignity. The Chief Justice observed:[153]

> (T)he "right to live with human dignity" would mean existence of such a right upto the end of natural life which would include the right to live a dignified life upto the point of death including the dignified procedure of death. While adverting to the situation of a dying man who is terminally ill or in a persistent vegetative state where he may be permitted to terminate it by a premature extinction of his life, the Court observed that the said category of cases may fall within the ambit of

149 *Supra* note 6.

150 *Gian Kaur* v. *State of Punjab*, AIR 1996 SC 946 : (1996) 2 SCC 648.

151 *Aruna Ramachandra Shanbaug* v. *Union of India*, AIR 2011 SC 1290; S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVII *ASIL* 171 at 196-198 (2011).

152 *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*, AIR 1986 SC 1571.

153 AIR 2018 SC 1665 at 1726-28.

> "right to die with dignity" as part of the right to live with dignity when death due to the termination of natural life is certain and imminent and the process of natural death has commenced, for these are not cases of extinguishing life but only of accelerating the conclusion of the process of natural death which has already commenced. These quitur of this exposition is that there is little doubt that a dying man who is terminally ill or in a persistent vegetative state can make a choice of premature extinction of his life as being a facet of Article 21 of the Constitution. If that choice is guaranteed being part of Article 21, there is no necessity of any legislation for effectuating that fundamental right and more so his natural human right. Indeed, that right cannot be an absolute right but subject to regulatory measures to be prescribed by a suitable legislation which, however, must be reasonable restrictions and in the interests of the general public.In the context of the issue under consideration, we must make it clear that as part of the right to die with dignity in case of a dying man who is terminally ill or in a persistent vegetative state, only passive euthanasia would come within the ambit of Article 21and not the one which would fall within the description of active euthanasia in which positive steps are taken either by the treating physician or some other person. That is because the right to die with dignity is an intrinsic facet of Article 21. The concept that has been touched deserves to be concretised, the thought has to be realized. It has to be viewed from various angles, namely, legal permissibility, social and ethical ethos and medical values….
> (T)he Court has a duty to interpret Article 21 in a further dynamic manner and it has to be stated without any trace of doubt that the right to life with dignity has to include the smoothening of the process of dying when the person is in a vegetative state or is living exclusively by the administration of artificial aid that prolongs the life by arresting the dignified and inevitable process of dying. Here, the issue of choice also comes in. Thus analysed, we are disposed to think that such a right would come within the ambit of Article 21 of the Constitution.

After deliberating on the right of self-determination, social morality, medical ethicality and state interest, the Chief Justice dealt with the question of advance directive, *i.e.* advance medical directive in case of patients who become unable to express their wish at the time of taking the decision. Thus, a person could make his choice about his death at the time he is capable of making the choice, *viz*. execute a living will. This would serve a fruitful purpose of availing ones right to die with dignity. For this purpose, the Chief Justice issued very detailed directions: only adults could write the advance directive voluntarily (living will), containing characteristics of an informed consent stating clearly as to when medical treatment may be withdrawn or no specific medical treatment shall be given which might delay the process of death. The Chief Justice also issued several directions regarding the contents of the advance directive, its recording and preservation, the person by whom and when it

could be given effect to, composition of medical board and its powers and duties, effect of refusal by the board and revocation or inapplicability of advance directive.[154] In three other separate judgments delivered by Dr. A.K. Sikri, Dr. D.Y. Chandrachud and Ashok Bhushan, JJ, the directions passed by the Chief Justice regarding advance directive (living will) were accepted holding that the right to die with dignity was a facet of right to live with dignity under article 21 of the Constitution of India.

Right to freedom of sex

In *Suresh Koushal*,[155] a two-judge bench of the Supreme Court had held that section 377, IPC, which criminalised unnatural sex (carnal intercourse against the order of nature), was constitutionally valid. But the advocates of 'freedom of sex' virtually revolted against the judgment and, after having lost the review and curative petitions, ultimately came up with fresh petitions under article 32 of the Constitution of India challenging the constitutional validity of the provision.[156] The Constitution Bench came up with four separate but concurring judgments, judges quoting copiously each other or themselves from earlier decisions rendered by them.[157] A cursory look at all these decisions indicate that during last 2-3 years, the judiciary has changed the entire legal foundation of this country, appearing as if every legal principle and theory that existed prior to these decisions was absured, devoid of logic and reason; the laws were archaic and unscientific and lagged behind in the modern day developments across the globe. What was considered as "morality" by a common man in the normal course has no place; everything has to be tested with the concept of "constitutional morality", be it religion, sex, privacy or anything else. Dipak Misra, CJI (also on behalf of A.K. Khanwilkar, J) emphasised the dynamic and progressive nature of the Constitution to accentuate that rights under the Constitution are also dynamic and progressive and they evolve with the evolution of society with the passage of time. The constitutional courts have to recognise that these rights would become a dead letter without their dynamic, vibrant and pragmatic interpretation. The learned Chief Justice further observed:[158]

> (I)f consensual carnal intercourse between a heterosexual couple does not amount to rape, it definitely should not be labelled and designated as unnatural offence under Section 377 IPC. If any proclivity amongst the heterosexual population towards consensual carnal intercourse has

154 *Id.* at 1734-39, 1849-51 and 1887-88.

155 *Suresh Koushal* v. *Naz Foundation*, *supra* note 9.

156 *Navtej Singh Johar* v. *Union of India*, *supra* note 1.

157 See *Justice K.S. Puttaswamu* v. *Union of India*, AIR 2017 SC 4161 : (2017) 10 SCC 1 : 2017 (8) SCALE 38 : JT 2017 (9) SC 141 (right to privacy); *National Legal Services Authority* v. *Union of India*, AIR 2014 SC 1863 (rights of LGBT); *Shakti Vahini* v. *Union of India*, *supra* note 4; *Shafin Jahan* v. *Ashokan K M*, *supra* note 4 (right to choose a partner); *Common Cause (A Registered Society)* v. *Union of Union*, *supra* note 6 (right to die with dignity by writing a living will); *Shayara Bano* v. *Union of India*, AIR 2017 SC 4609 (validity of triple talak); *Govt. of NCT of Delhi* v. *Union of India*, 2018 (8) SCALE 72 (powers of elected government in Delhi *vis-à-vis* Lt. Governor of Delhi); *Shreya Singhal* v. *Union of India*, AIR 2015 SC 1523 (validity of section 66A of Information Technology Act, 2000), *etc.*

158 *Navtej Singh Johar* v. *Union of India*, *supra* note 1 at 4387 (of AIR).

> been allowed due to the Criminal Law (Amendment) Act, 2013, such kind of proclivity amongst any two persons including LGBT community cannot be treated as untenable so long as it is consensual and it is confined within their most private and intimate spaces….
>
> At the very least, it can be said that criminalisation of consensual carnal intercourse, be it amongst homosexuals, heterosexuals, bi-sexuals or transgenders, hardly serves any legitimate public purpose or interest. Per contra, we are inclined to believe that if Section 377 remains in its present form in the statute book, it will allow the harassment and exploitation of the LGBT community to prevail. We must make it clear that freedom of choice cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of majoritarian perception.

Dipak Misra, CJI ultimately held that section 377, IPC was unconstitutional in so far as it penalises any consensual activity – homosexuals (man and man), heterosexuals (man and a woman) or lesbians (woman and woman) - between two adults but if a man or woman engages in any kind of sexual activity with an animal, section 377 was constitutional and operative. Likewise any sexual activity between two individuals without consent of any one of them would remain an offence. The decision in *Suresh Koushal*[159] to that extent was overruled. Other judges in the bench agreed with this view of the Chief Justice by delivering their separate judgments. It would be apt to state that we are just only one step away from some of the other countries where sex even with animals is legal. May be, with the passage of time and global developments, this luxury may also be available soon to the Indian citizens. Section 377 would then become unconstitutional in its totality.

No habeas corpus petition maintainable when a person is in custody by order of magistrate

In *Pragya Singh Thakur* v. *State of Maharashtra*,[160] it had been held by the Supreme Court that when a person was in judicial custody by an order of a magistrate, a petition for habeas corpus did not lie. This principle was applied in *Tasneem Rizwan Siddiquee*,[161] in which the respondent was in police custody by a remand order passed by the magistrate in connection with a criminal case under investigation for offences under section 420, IPC and sections 66 and 72 of the Information Technology Act, 2000. In view of the settled law, the court dismissed the petition filed by the wife of the detained person.

159 *Suresh Koushal* v. *Naz Foundation*, *supra* note 9.

160 (2011) 10 SCC 445; also see *Saurabh Kumar* v. *Jailor, Koneila Jail* (2014) 13 SCC 436; *Manubhai Ratilal Patel* v. *State of Gujarat* (2013) 1 SCC 314; S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVII *ASIL* 171 at 205 (2011).

161 *State of Maharashtra* v. *Tasneem Rizwan Siddiquee*, AIR 2018 SC 4167.

Right to privacy: Data Protection: Validity of Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016

The right to privacy under article 21 of the Constitution of India was recognised unanimously by a nine-judge bench of the Supreme Court in *K.S. Puttaswamy*.[162] D.Y. Chandrachud, J, however, had clearly held that like other fundamental freedoms protected by Part III, including the right to life and personal liberty under article 21, privacy was not an absolute right. A law encroaching upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of article 21, an invasion of privacy must be justified on the basis of a law stipulating a procedure which was fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.[163]

In *Justice K.S. Puttaswamy* v. *Union of India*,[164] the question was whether any of the provisions of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (Aadhaar Act) was invalid under article 21 of the Constitution of India in the light of law declared in the earlier judgment on privacy. In the process of enrolment for issue of Aadhaar no., besides details about an applicant, biometric data in the form of iris and fingerprints is also collected.The question was whether the Aadhaar Act violates right to privacy and was unconstitutional on this ground. A.K. Sikri, J, speaking for the majority, held that all matters pertaining to an individual could not be treated as being an inherent part of right to privacy; only those matters over which there would be a reasonable expectation of privacy are protected by article 21.The Aadhaar scheme, legislative backing, *i.e.* the Aadhaar Act, serves legitimate state aim to ensure that social benefit schemes reach the deserving community. The failure to establish identity of an individual was a major hindrance for successful implementation of the programmes as it was becoming difficult to ensure that subsidies, benefits and services reach the unintended beneficiaries in the absence of a credible system to authenticate identity of beneficiaries. Repelling the argument about right to dignity as a facet of right to privacy being violated by the Aadhaar Act, Sikri, J held:[165]

> It may be highlighted that the petitioners are making their claim on the basis of dignity as a facet of right to privacy. On the other hand, Section 7 of the Aadhaar Act is aimed at offering subsidies, benefits or services to the marginalised section of the society for whom such welfare schemes have been formulated from time to time. That also becomes an aspect of social justice, which is the obligation of the State stipulated

162 *Justice K.S. Puttaswamy* v. *Union of India*, *supra* note 157.

163 *Justice K.S. Puttaswamy* v. *Union of India*, *ibid*.

164 *Justice K.S. Puttaswamy* v. *Union of India*, *supra* note 6.

165 *Id.* at 2114-15 (of AIR).

> in Para IV of the Constitution. The rationale behind Section 7 lies in ensuring targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In discharge of its solemn Constitutional obligation to enliven the Fundamental Rights of life and personal liberty (Article 21) to ensure Justice, Social, Political and Economic and to eliminate inequality (Article 14) with a view to ameliorate the lot of the poor and the Dalits, the Central Government has launched several welfare schemes. Some such schemes are PDS, scholarships, mid day meals, LPG subsidies, etc. These schemes involve 3% of the GDP and involve a huge amount of public money. Right to receive these benefits, from the point of view of those who deserve the same, has now attained the status of fundamental right based on the same concept of human dignity, which the petitioners seek to bank upon. The Constitution does not exist for a few or minority of the people of India, but "We the people". The goals set out in the Preamble of the Constitution do not contemplate statism and do not seek to preserve justice, liberty, equality an fraternity for those who have the means and opportunity to ensure the exercise of inalienable rights for themselves. These goals are predominantly or at least equally geared to "secure to all its citizens", especially, to the downtrodden, poor and exploited, justice, liberty, equality and "to promote" fraternity assuring dignity. Interestingly, the State has come forward in recognising the rights of deprived section of the society to receive such benefits on the premise that it is their fundamental right to claim such benefits. It is acknowledged by the respondents that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a right based approach. As a consequence, right of everyone to adequate food no more remains based on Directive Principles of State Policy (Art 47), though the said principles remain a source of inspiration. This entitlement has turned into a Constitutional fundamental right.

The question considered in the present case was whether the Aadhaar project creates or has tendency to create surveillance state and was, thus, unconstitutional on this ground? Sikri, J held that neither Aadhaar nor the provisions of the Aadhaar Act tended to create a surveillance state when one looks to the manner in which the Aadhaar project operates. The collection of data is purpose blind as the Authority does not collect purpose, location or details of transaction. The information collected remains in silos; merging of silos is prohibited. The agency requesting for authentication is provided answer only in '*Yes*' or '*No*' about the authentication of the person concerned without exposure to internet. Security measures, as per the provisions of section 29(3) read with section 38(g) and regulation 17(1)(d) of the Authentication Regulations, are strictly followed. Sikri, J tried to remove the apprehensions of the petitioners by striking down or reading down or clarifying some of the provisions, *viz*.authentication records should not to be kept beyond a period of six months, as stipulated in regulation

27(1) of the Authentication Regulations; the provision permitting records to be archived for a period of five years was held to be bad in law; metabase relating to transaction, provided in regulation 26 in the present form was held to be impermissible and needed suitable amendment; section 33(1) of the Aadhaar Act was read down by clarifying that an individual, whose information was sought to be released, shall be afforded an opportunity of hearing; section 33(2) of the Act was struck down; portion of section 57 of the Aadhaar Act enabling body corporate and individual to seek authentication was held to be unconstitutional. Moreover, Sikri, J also impressed upon the respondents, to bring out a robust data protection regime in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications.

With regard to inclusion of children under the Aadhaar scheme, Sikri, J held that the consent of their parents/guardians was mandatory; on attaining majority, such children shall have the option to exit from the Aadhaar project if they so chose in case they did not intend to avail the benefits of the scheme; for admission of children to schools, Aadhaar would not be compulsory as the admission in a school was neither a service nor subsidy and children between 6 and 14 years of age had a fundamental right to education under article 21A of the Constitution; benefits to children between 6 to 14 years under *Sarv Shiksha Abhiyan* shall not require mandatory Aadhaar enrolment and for availing the benefits of other welfare schemes covered by section 7 of the Aadhaar Act, enrolment number can be insisted subject to the consent of the parents but no child shall be denied benefit of any of the schemes if she is not able to producethe Aadhaar number and the benefit shall be given by verifying the identity on the basis of any other documents.

Sikri, J also held that rule 9 of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 and the notifications issued thereunder which mandates linking of Aadhaar with bank accounts and the circular dated March 23, 2017 issued by the Department of Telecommunications mandating linking of mobile number with Aadhaar were illegal and unconstitutional. But the learned judge held section 139AA of the Income Tax Act, 1961 to be valid as it did not violate right to privacy as judged in the context of permissible limits for invasion of privacy, *viz*.: (i) the existence of a law; (ii) a 'legitimate State interest'; and (iii) such law should pass the 'test of proportionality'.

Ashok Bhushan, J, likewise, held that the requirement under Aadhaar Act to give one's demographic and biometric information did not violate fundamental right of privacy; the Aadhaar Act requiring demographic and biometric information from a resident for Aadhaar number pass three-fold test as laid down in *Puttaswamy*, could not be said to be unconstitutional; the collection of data, its storage and use did not violate fundamental right of privacy; Aadhaar Act did not create an architecture for pervasive surveillance; the Aadhaar Act and Regulations provide protection and safety of the data received from individuals; the state while enlivening right to food, right to shelter *etc*. envisaged under article 21 cannot encroach upon the right of privacy of beneficiaries nor the former can be given precedence over the latter.

In his dissenting opinion, Dr. D.Y. Chandrachud, J held that in its current form, the Aadhaar framework does not sufficiently assuage the concerns arising from the operation of the Aadhaar project; the entire programme, since 2009, suffers from constitutional infirmities and violations of fundamental rights. The enactment of the Aadhaar Act did not save the Aadhaar project. The Aadhaar Act, the rules and regulations framed under it, and the framework prior to the enactment of the Act were unconstitutional; to enable the government to initiate steps for ensuring conformity with the judgment, the learned judge directed under article 142 of the Constitution that the existing data which has been collected shall not be destroyed for a period of one year during which period, the data shall not be used for any purpose whatsoever. At the end of one year, if no fresh legislation was enacted by the union government in conformity with the principles enunciated in the judgment, the data shall be destroyed.The learned judge declared the Aadhaar Act to be unconstitutional for failing to meet the necessary requirements to have been certified as a Money Bill under article 110(1) of the Constitution of India.

The question of right to privacy was considered by a Constitution Bench of the Supreme Court with respect to sexual privacy in *Navtej Singh Johar* v. *Union of India*.[166] While considering the provisions of section 377, IPC, D.Y. Chandrachud, J observed:[167]

> The exercise of the natural and inalienable right to privacy entails allowing an individual the right to a self-determined sexual orientation. Thus, it is imperative to widen the scope of the right to privacy to incorporate a right to 'sexual privacy' to protect the rights of sexual minorities. Emanating from the inalienable right to privacy, the right to sexual privacy must be granted the sanctity of a natural right, and be protected under the Constitution as fundamental to liberty and as a soulmate of dignity….
>
> Privacy creates "tiers of 'reputable' and 'disreputable' sex", only granting protection to acts behind closed doors. Thus, it is imperative that the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces on account of their sexuality and appearance. If one accepts the proposition that public places are heteronormative, and same-sex sexual acts partially closeted, relegating 'homosexual' acts into the private sphere, would in effect reiterate the "ambient heterosexism of the public space." It must be acknowledged that members belonging to sexual minorities are often subjected to harassment in public spaces. The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference.

166 *Supra* note 1.

167 *Id.* at 4466, 4467 (of AIR).

In three separate other judgments delivered by Dipak Misra, CJI and R.F. Nariman and Indu Malhotra, JJ, , all judges unanimously held section 377 as unconstitutional in sofaras consensual sex between adults was concerned as the provision was violative of right to privacy, among other grounds. Malhotra, J had held:[168]

> Section 377 insofar as it curtails the personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with a partner of their choice, in a safe and dignified environment, is violative of Article 21. It inhibits them from entering and nurturing enduring relationships. As a result, LGBT individuals are forced to either lead a life of solitary existence without a companion, or lead a closeted life as "*unapprehended felons*".
>
> Section 377 criminalises the entire class of LGBT persons since sexual intercourse between such persons, is considered to be carnal and "against the order of nature". Section 377 prohibits LGBT persons from engaging in intimate sexual relations in private.
>
> The social ostracism against LGBT persons prevents them from partaking in all activities as full citizens, and in turn impedes them from realising their fullest potential as human beings….
>
> The right to privacy is not simply the "right to be let alone", and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference.
>
> Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation, which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence….
>
> A subjective notion of public or societal morality which discriminates against LGBT persons, and subjects them to criminal sanction, simply on the basis of an innate characteristic runs counter to the concept of Constitutional morality, and cannot form the basis of a legitimate State interest.

Consensual sexual activity between two adults di-criminalised

The consensual sexual activity between two adults [homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman)] has now ceased to be an offence.[169] Such sexual activity is punishable under section 377,

168 *Id.* at 4521, 4523.

169 *Navrej Singh Johar* v. *Union of India*, *supra* note 1 (section 377 – Unnatural offences).

IPC and the same had been upheld earlier by the Supreme Court.[170] This view is now overruled. Dipak Misra, CJI had observed that "The natural identity of an individual should be treated to be absolutely essential to his being. What nature gives is natural. That is called nature within. Thus, that part of the personality of a person must be respected and not despised or looked down upon."[171]

Right to speedy and fair investigation

An accused has a right to speedy investigation[172] but he has no right as to the manner of investigation or mode of prosecution.[173] This principle was applied by the majority in *Bhima Koregaon* case,[174] in which the court refused to change the investigating agency. It is well established principle that justice should not only be done but must also be seen to have been done. This principle was applied by a three-judge bench of the apex court in *Mohan Lal* v. *State of Punjab*,[175] in which it was held that the accused was entitled to acquittal as the informant and investigating officer was the same person. In this case, the question was that if the informant and the investigating officer were to be the same person, will the principles of justice, fair play and a fair investigation in a criminal prosecution be said to have been complied with and is it necessary for the accused to demonstrate prejudice, especially under laws such as NDPS Act, carrying a reverse burden of proof. Navin Sinha, J held:[176]

> A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary powers in the police which may well lead to false implication also. Investigation in such a case would then become an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.
> (I)nvestigation in a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on part of the accused.

170 *Suresh Kumar Koushal* v. *Naz Foundation*, *supra* note 9.

171 *Navrej Singh Johar* v. *Union of India*, *supra* note 169 at 421 (of SCALE).

172 *Dilawar* v. *State of Haryana* (2018) 16 SCC 521 : AIR 2018 SC 2269; also see *Rakesh Kumar Paul* v. *State of Assam* (2017) 15 SCC 67 : AIR 2017 SC 3948..

173 *Sanjiv Rajendra Bhatt* v. *Union of India* (2016) 1 SCC 1.

174 *Romila Thapar* v. *Union of India*, *supra* note 13.

175 2018 (9) SCALE 663.

176 *Id*. at 669.

Sinha, J was emphatic in observing:[177]

> In a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during investigation, but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would therefore be a foregone conclusion.

While setting the appellant at liberty and allowing the appeal on the ground that the prosecution was vitiated on account of investigation being unfair, Sinha, J observed:[178]

> (T)he importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.

For fair investigation of cases, Ashok Bhushan, J in *Bimal Gurung* v. *Union of India*,[179] had summarised the law as follows:[180]

> The law is thus well settled that power of transferring investigation to other investigating agency must be exercised in rare and exceptional cases where the Court finds it necessary in order to do justice between

177 *Id*. at 670.

178 *Id*. at 673.

179 AIR 2018 SC 1459 : (2018) 15 SCC 480.

180 *Id*. at 1469 (of AIR).

> the parties to instil confidence in the public mind, or where investigation by the State Police lacks credibility. Such power has to be exercised in rare and exceptional cases. In *K.V. Rajendran* v. *Superintendent of Police, CBCID South Zone*,[181] this Court has noted few circumstances where the Court could exercise its constitutional power to transfer of investigation from State Police to CBI such as: (i) where high officials of State authorities are involved, or (ii) where the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, or (iii) where investigation prima facie is found to be tainted/biased.

The court noted that in this case, the situation in districts of Darjeeling and Kalimpong were deteriorating and insurgency and violent agitations were continuing unabated. The protest were not peaceful and democratic. The allegations made in the FIRs could not be rejected as false and concocted; there was sufficient material to indicate the severe damage to live and property. It could not be imagined that state police had destructed the property including police vehicles only for the purpose of implicating the petitioner and his supporters. Several persons including policemen died and many were injured. The offences alleged were of very serious nature. In view of this, the court held that transfer of investigation of very large number of cases (371) enmass was neither practicable nor justified. Even in 31 cases in which the petitioner had been named, there were no special grounds on which those cases could be considered for transferring the investigation. As the leader of GJM, the petitioner was heading the agitation against the state demanding a separate statehood and the state was under an obligation to maintain law and order and to protect life and property of the citizens by taking necessary steps to contain such agitation and restore the peace. The cases were not registered on account of any bias of the police to persecute the petitioner and his supporters. The court pointed out that in most of the cases, where the court exercised its power to transfer cases to CBI, the petitions were filed by the victims and investigations were faulty. The court held that the present case was not a fit case where investigation could be transferred to CBI.

Speedy trial of cases

In order to ensure speedy trial of criminal cases, A.K. Ganguly, J had passed directions in *Imtiyaz Ahmad* v. *State of U.P.*[182] But there has been no change in the matter. In one case,[183] A.K. Goel J again emphasised the need of speedy trial of cases which keep pending on account of stay orders passed by the courts. In this case, criminal trial against the officials of Municipal Corporation of Delhi under the Prevention of Corruption Act, 1988 was initiated allegedly for causing wrongful loss

181 (2013) 12 SCC 480.

182 AIR 2012 SC 642; also see S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVII *ASIL* 173 at 202-06 (2012).

183 *Asian Resurfacing of Road Agency (P) Ltd.* v. *CBI* (2018) 16 SCC 299; also see *Krishnakant Tamrakar* v. *State of M.P.*, 2018 (5) SCALE 248; *Ratan Singh* v. *State of M.P.* (2018) 18 SCC 692

to the MCD by using fake invoices of oil companies relating to transportation of bitumen for use in dense carpeting works of roads in Delhi during the years 1997 and 1998. The accused kept the trial pending by moving one court or the other. Goel J observed:[184]

> It is well accepted that delay in a criminal trial, particularly in the PC Act cases, has deleterious effect on the administration of justice in which the society has a vital interest. Delay in trials affects the faith in Rule of Law and efficacy of the legal system. It affects social welfare and development. Even in civil or tax cases it has been laid down that power to grant stay has to be exercised with restraint. Mere prima facie case is not enough. Party seeking stay must be put to terms and stay should not be incentive to delay. The order granting stay must show application of mind. The power to grant stay is coupled with accountability.
>
> Wherever stay is granted, a speaking order must be passed showing that the case was of exceptional nature and delay on account of stay will not prejudice the interest of speedy trial in a corruption case. Once stay is granted, proceedings should not be adjourned and concluded within two-three months.
>
> The wisdom of legislature and the object of final and expeditious disposal of a criminal proceeding cannot be ignored. In exercise of its power the High Court is to balance the freedom of an individual on the one hand and security of the society on the other. Only in case of patent illegality or want of jurisdiction the High Court may exercise its jurisdiction. The acknowledged experience is that where challenge to an order framing charge is entertained, the matter remains pending for long time which defeats the interest of justice.

While declaring the law as to framing of charges, Goel J made the following observations:[185]

> (W)e declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 Cr.P.C. or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to re-appreciate the matter. Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly

184 (2018) 16 SCC 299 at 320.

185 *Id.* at 324-25.

> long period. Though no mandatory time limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated. Mandate of speedy justice applies to the PC Act cases as well as other cases where at trial stage proceedings are stayed by the higher court i.e. the High Court or a court below the High Court, as the case may be. In all pending matters before the High Courts or other courts relating to PC Act or all other civil or criminal cases, where stay of proceedings in a pending trial is operating, stay will automatically lapse after six months from today unless extended by a speaking order on above parameters. Same course may also be adopted by civil and criminal appellate/revisional courts under the jurisdiction of the High Courts. The trial courts may, on expiry of above period, resume the proceedings without waiting for any other intimation unless express order extending stay is produced. The High Courts may also issue instructions to this effect and monitor the same so that civil or criminal proceedings do not remain pending for unduly period at the trial stage.

Fair trial of criminal cases

There is no need to emphasise that trial of cases must be fair and to ensure that the Supreme Court transferred a rape and murder case from the State of Jammu and Kashmir to the State of Punjab as there was serious allegation that in the former state trial of criminal case was not likely to be fair.[186] This case involved the abduction, rape and murder of an eight year old girl in Kathua in the State of Jammu and Kashmir (popularly known as the Kathua rape and murder case). The incident had led to serious and untoward incidents in Kathua including some obstructions created by the bar association of Kathua. Under these circumstances, the question was how to ensure fair trial of the case including protection of the accused persons and the witnesses. The court, while passing several directions for the trial of the case by the district and sessions judge, Pathankot, Punjab, observed:[187]

> Needless to say, a fair trial is a sacrosanct principle under Article 21 of the Constitution of India and a 'fair trial' means fair to the accused persons, as well as to the victims of the crime. In the instant case, direct victims are the family members of the deceased, although ultimately collective is the victim of such crime. The fair trial commands that there has to be free atmosphere where the victims, the accused and the witnesses feel safe. They must not suffer from any kind of phobia while attending the court. Fear and fair trial are contradictory in terms and they cannot be allowed to co-exist.

186 *Mohd. Akhtar* v. *State of J & K* (2018) 5 SCC 497.

187 *Id.* at 502.

> Concept of 'fair trial', needs no special emphasis and it takes within its sweep the conception of a speedy trial and the speedy trial meets its purpose when the trials are held without grant of adjournment as provided under the provisions contained in Section 309 Cr.P.C.

Procedure in cases of absolute bar against grant of anticipatory bail in cases under the Atrocities Act

Can any unilateral allegation of mala fide be a ground to prosecute officers who dealt with the matter in the official capacity and if such allegation was falsely made what is the protection available against such abuse. This question came to be considered and decided by the Supreme Court in *Subhash Kashinath Mahajan* v. *State of Maharashtra*.[188] The allegation could lead to arrest and prosecution of the person with serious consequences on his right to liberty even on a false complaint. Is this a just and fair procedure under article 21 of the Constitution of India or could there be procedural safeguards so that the Atrocities Act, 1989 is not abused for extraneous considerations? It is well known fact that the benevolent legislations, enacted to protect the interests of women (section 498-A, IPC)[189] and scheduled castes and scheduled tribes [Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (the Atrocities Act)] containing very stringent provisions, are being misused in a big way. The decision of the Supreme Court in the above case came to the rescue of the victims of misuse of power of arrest where the court used the words "acknowledged abuse of law of arrest in cases under the Atrocities Act".

In this case, the appellant-accused was the director of technical education in the State of Maharashtra and the complainant was an employee there. The appellant was accused of the offences punishable under various sections of the Atrocities Act and sections 182, 192, 193, 203 and 219 read with 34 of the Indian Penal Code, 1860 (IPC) in the following facts and circumstances: Dr. Satish Bhise and Dr. Kishor Burade, both non-scheduled castes, were seniors to the complainant who made adverse entry in the complainant's annual confidential report to the effect that his integrity and character was not good. The complainant lodged FIR with Karad Police Station against the two officers under the Atrocities Act. The investigating officer applied to the appellant for sanction under section 197, CrPC against the two officers who refused the same. Because of this, 'C' summary report was filed against Bhise and Burade which was not accepted by the court. The complainant then lodged the present FIR against the appellant. According to the complainant, only the state government could grant sanction and not the appellant and, therefore, he committed the offences under the Atrocities Act alleged in the FIR by illegally dealing with the matter of sanction. The appellant, after getting anticipatory bail, applied to the High Court under section 482, CrPC for quashing the proceedings on the ground that he had merely passed a bonafide administrative order in his official capacity. His action in doing so did not amount to an offence under the Atrocities Act. On rejection of the petition, the appellant

188 *Supra* note 17.

189 *Rajesh Sharma* v. *State of U.P*. (2018) 10 SCC 472; also see *Social Action Forum for Manav Adhikar* v. *Union of India* (2018) 10 SCC 443.

moved the Supreme Court. Adarsh Kumar Goel J, on behalf of the division bench, held:[190]

> (J)urisdiction of this Court to issue appropriate orders or directions for enforcement of fundamental rights is a basic feature of the Constitution. This Court, as the ultimate interpreter of the Constitution, has to uphold the constitutional rights and values. Articles 14, 19 and 21 represent the foundational values which form the basis of the rule of law. Contents of the said rights have to be interpreted in a manner which enables the citizens to enjoy the said rights. Right to equality and life and liberty have to be protected against any unreasonable procedure, even if it is enacted by the legislature. The substantive as well as procedural laws must conform to Articles 14 and 21. Any abrogation of the said rights has to be nullified by this Court by appropriate orders or directions. Power of the legislature has to be exercised consistent with the fundamental rights. Enforcement of a legislation has also to be consistent with the fundamental rights. Undoubtedly, this Court has jurisdiction to enforce the fundamental rights of life and liberty against any executive or legislative action. The expression 'procedure established by law' under Article 21 implies just, fair and reasonable procedure.[191]
> This Court is not expected to adopt a passive or negative role and remain bystander or a spectator if violation of rights is observed. It is necessary to fashion new tools and strategies so as to check injustice and violation of fundamental rights. No procedural technicality can stand in the way of enforcement of fundamental rights.[192] There are enumerable decisions of this Court where this approach has been adopted and directions issued with a view to enforce fundamental rights which may sometimes be perceived as legislative in nature. Such directions can certainly be issued and continued till an appropriate legislation is enacted. Role of this Court travels beyond merely dispute settling and directions can certainly be issued which are not directly in conflict with a valid statute. Power to declare law carries with it, within the limits of duty, to make law when none exists.

Goel J further held:[193]

> (I)t is necessary to express concern that working of the Atrocities Act should not result in perpetuating casteism which can have an adverse impact on integration of the society and the constitutional values. Such concern has also been expressed by this Court on several occasions.

190 *Id*. at 482-83.

191 *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248, paras.82 to 85.

192 *Bandhua Mukti Morcha* v. *Union of India* (1984) 3 SCC 161, para. 13.

193 *Supra* note 17 at 495, 497.

> Secularism is a basic feature of the Constitution. Irrespective of caste or religion, the Constitution guarantees equality in its preamble as well as other provisions including Articles 14-16. The Constitution envisages a cohesive, unified and casteless society….
> We are thus of the view that interpretation of the Atrocities Act should promote constitutional values of fraternity and integration of the society. This may require check on false implications of innocent citizens on caste lines.

Goel, J also referred to the provisions of rule 12(4)[194] of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 which was argued to show as to the incentive provided therein to lodge complaint and misuse the provisions of the Act. The learned judge observed that the Atrocities Act was also prone to misuse on account of monetary incentive being available merely for lodging a case under Rule 12(4) of the rules. Such incentive may encourage not only genuine victims but, there being no safeguard even against a false case being registered only to get the monetary incentive, such false cases may be filed without any remedy to the affected person.

On the issue of absolute bar to the grant of anticipatory bail contained in section 18 of the Atrocities Act, Goel, J held:[195]

> Exclusion of anticipatory bail has been justified only to protect victims of perpetrators of crime. It cannot be read as being applicable to those who are falsely implicated for extraneous reasons and have not committed the offence on prima facie independent scrutiny. Access to justice being a fundamental right, grain has to be separated from the chaff, by an independent mechanism. Liberty of one citizen cannot be placed at the whim of another. Law has to protect the innocent and punish the guilty. Thus considered, exclusion has to be applied to genuine cases and not to false ones. This will help in achieving the object of the law….
> (T)he restriction in Section 18 is only at the stage of consideration of matter for anticipatory bail and no such restriction is available while the matter is to be considered for grant of regular bail. Theoretically it is possible to say that an application under Section 438 of the Code may be rejected by the Court because of express restrictions in Section 18 of the Act but the very same court can grant bail under the provisions

194 Rule 12 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 reads: "(4) The District Magistrate or the Sub Divisional Magistrate or any other Executive Magistrate shall make arrangements for providing immediate relief in cash or in kind or both to the victims of atrocity, their family members and dependents according to the scale as in the schedule annexed to these Rules (Annexure-I read with Annexure-II). Such immediate relief shall also include food, water, clothing, shelter, medical aid, transport facilities and other essential items necessary for human beings."

195 *Supra* note 17 at 498-512.

of Section 437 of the Code, immediately after the arrest. There seems to be no logical rationale behind this situation of putting a fetter on grant of anticipatory bail whereas there is no such prohibition in any way for grant of regular bail. It is, therefore, all the more necessary and important that the express exclusion under Section 18 of the Act is limited to genuine cases and inapplicable where no prima facie case is made out….

It is well settled that a statute is to be read in the context of the background and its object. Instead of literal interpretation, the court may, in the present context, prefer purposive interpretation to achieve the object of law. Doctrine of proportionality is well known for advancing the object of Articles 14 and 21. A procedural penal provision affecting liberty of citizen must be read consistent with the concept of fairness and reasonableness….

In the present context, wisdom of legislature in creating an offence cannot be questioned but individual justice is a judicial function depending on facts. As a policy, anticipatory bail may be excluded but exclusion cannot be intended to apply where a patently malafide version is put forward. Courts have inherent jurisdiction to do justice and this jurisdiction cannot be intended to be excluded. Thus, exclusion of Court's jurisdiction is not to be read as absolute….

Applying the above well known principle, we hold that the exclusion of Section 438 Cr.P.C. applies when a prima facie case of commission of offence under the Atrocities Act is made. On the other hand, if it can be shown that the allegations are prima facie motivated and false, such exclusion will not apply….

Presumption of innocence is a human right. No doubt, placing of burden of proof on accused in certain circumstances may be permissible but there cannot be presumption of guilt so as to deprive a person of his liberty without an opportunity before an independent forum or Court….

In view of the above, an accused is certainly entitled to show to the Court, if he apprehends arrest, that case of the complainant was motivated. If it can be so shown there is no reason that the Court is not able to protect liberty of such a person. There cannot be any mandate under the law for arrest of an innocent. The law has to be interpreted accordingly.

We have already noted the working of the Act in the last three decades. It has been judicially acknowledged that there are instances of abuse of the Act by vested interests against political opponents in Panchayat, Municipal or other elections, to settle private civil disputes arising out of property, monetary disputes, employment disputes and seniority disputes. It may be noticed that by way of rampant misuse complaints are 'largely being filed particularly against Public Servants/quasi judicial/judicial officers with oblique motive for satisfaction of vested interests'….

> Innocent citizens are termed as accused, which is not intended by the legislature. The legislature never intended to use the Atrocities Act as an instrument to blackmail or to wreak personal vengeance. The Act is also not intended to deter public servants from performing their bona fide duties. Thus, unless exclusion of anticipatory bail is limited to genuine cases and inapplicable to cases where there is no prima facie case was made out, there will be no protection available to innocent citizens. Thus, limiting the exclusion of anticipatory bail in such cases is essential for protection of fundamental right of life and liberty under Article 21 of the Constitution….
>
> Accordingly, we have no hesitation in holding that exclusion of provision for anticipatory bail will not apply when no prima facie case is made out or the case is patently false or mala fide. This may have to be determined by the Court concerned in facts and circumstances of each case in exercise of its judicial discretion. In doing so, we are reiterating a well established principle of law that protection of innocent against abuse of law is part of inherent jurisdiction of the Court being part of access to justice and protection of liberty against any oppressive action such as mala fide arrest. In doing so, we are not diluting the efficacy of Section 18 in deserving cases where Court finds a case to be prima facie genuine warranting custodial interrogation and pre-trial arrest and detention….
>
> It is thus patent that in cases under the Atrocities Act, exclusion of right of anticipatory bail is applicable only if the case is shown to be bona fide and that prima facie it falls under the Atrocities Act and not otherwise. Section 18 does not apply where there is no prima facie case or to cases of patent false implication or when the allegation is motivated for extraneous reasons.

Goel, J applied the principles laid down in *Lalita Kumari*[196] according to which in exceptional cases, even in respect of cognizable offences, a preliminary inquiry must be held and the cases under the Atrocities Act fall in that category of exceptional cases. In view of this, the learned judge directed that "in absence of any other independent offence calling for arrest, in respect of offences under the Atrocities Act, no arrest may be effected, if an accused person is a public servant, without written permission of the appointing authority and if such a person is not a public servant, without written permission of the Senior Superintendent of Police of the District. Such permissions must be granted for recorded reasons which must be served on the person to be arrested and to the concerned court. As and when a person arrested is produced before the Magistrate, the Magistrate must apply his mind to the reasons recorded and further detention should be allowed only if the reasons recorded are found to be valid. To avoid false implication, before FIR is registered, preliminary

196 *Lalita Kumari* v. *State of U.P.* (2014) 2 SCC 1.

enquiry may be made whether the case falls in the parameters of the Atrocities Act and is not frivolous or motivated."

Goel J concluded thus:[197] (i) Proceedings in the present case are clear abuse of process of court and are quashed; (ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide; (iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention; (iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated; and (v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.

Right to marry or have live-in relationship

The Supreme Court has held that every individual has a right under article 21 of the Constitution of India to marry with anyone of his/her choice. In *Shafin Jahan* v. *Asokan K.M*.[198] a habeas corpus petition was filed by the father of the petitioner purporting to free her. The petitioner appeared before the court and asserted that she was major and had chosen to marry a person of different religion by embracing her husband's religion on her own will. She also stated that she was not willing to go to her parental house. Dipak Misra, CJI held that the petition was an abuse of the court's jurisdiction. The learned Chief Justice further held that constitutionally guaranteed fundamental rights and human rights had primacy over social and moral values. The court was not impressed by the argument that marriage was merely a strategy to transport her out of India and that she was marrying a person with radical and extremist orientation; that was matter of investigation, the court held. Allowing the girl's appeal, Misra, CJI observed:[199]

> It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy;

197 *Supra* note 17 at 513. It is to be noted that directions (iii), (iv) and (v) issued in this case were recalled by a full-bench of the Supreme Court in the review petition by constituting a new bench altogether: *Union of India* v. *State of Maharashtr*a, 2019 (13) SCALE 280.

198 *Supra* note 4.

199 *Id.* at 396-97 (of SCC).

> and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right.Thus, we would like to call it in dispensable preliminary condition. Non-acceptance of her choice would simply mean creating discomfort to the constitution alright by a Constitutional Court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script.The individual signature is the insignia of the concept.

The decision in the above case was relied upon in *Nandakumar* v. *State of Kerala*,[200] in which the a habeas corpus petition was filed for production of a girl who was 19 years old and who claimed to have married a person on her own will. The court refused to go into the question as to the age of the husband who allegedly was below 21 years. A.K. Sikri J held that a person had the freedom to marry or be in live-in relationship with any person of her choice.

Directions to control child abuse

In *Alakh Alok Srivastava* v. *Union of India*,[201] the Supreme Court issued many directions for speedy trial and monitoring of the trials under the Protection of Children under the Sexual Offences Act, 2012 ('the POCSO Act') in a childfriendly court in letter and spirit of the Act: the high courts were required to ensure that the cases registered under the POCSO Act were tried and disposed of by the special courts and the presiding officers of the said courts were sensitized in the matters of child protection and psychological response; special courts be established and assigned the responsibility to deal with cases under the POCSO Act; instructions be issued to the special courts to fast track the cases by not granting adjournments and following the procedure laid down in the POCSO Act and complete the trial in a time-bound manner or within a specific time frame under the Act; Chief Justices of the high courts were requested to constitute a committee of three judges to regulate and monitor the progress of the trials under the POCSO Act; the high courts where three judges were not available, the Chief Justices of the said courts shall constitute one judge committee; the director general of police or the officer of equivalent rank of the states were directed to constitute a special task force to ensure that the investigation was properly conducted

200 *Supra* note 5.

201 *Supra* note 24; also see *Sampurna Behura*v. *Union of India* (2018) 4 SCC 433; *Videos of Sexual Violence and Recommendations, In Re* (2018) 15 SCC 551.

and witnesses were produced on the dates fixed before the trial courts and adequate steps be taken by the high courts to provide child friendly atmosphere in the special courts keeping in view the provisions of the POCSO Act so that the spirit of the Act was observed.

Directions to control mob lynching

In *Tehseen S. Poonawalla* v. *Union of India*,[202] the Supreme Court issued detailed directions which were in the nature of (i) preventive including steps to be taken by the central government as well as the state governments to curb and stop dissemination of irresponsible and explosive messages, videos and other material on various social media platforms which have a tendency to incite mob violence and lynching of any kind and direction to the police to register FIR under section 153A, IPC and/or other relevant provisions of law against persons who disseminate irresponsible and explosive messages and videos having content which is likely to incite mob violence and lynching of any kind; (ii) remedial including registration of FIR in cases of mob lynching and ensure that the investigation is carried out effectively and the charge-sheet in such cases is filed within the statutory period from the date of registration of the FIR or arrest of the accused, preparation of lynching/mob violence victim compensation scheme in the light of section 357A, CrPC within one month from the date of the judgment, giving due regard to the nature of bodily injury, psychological injury and loss of earnings including loss of opportunities of employment and education and expenses incurred on account of legal and medical expenses and also provision for interim relief to be paid to the victim(s) or to the next of kin of the deceased within a period of thirty days of the incident of mob violence/lynching. The court emphasised that the trial of mob violence and lynching cases shall preferably be concluded within six months from the date of taking cognizance and to set a stern example in such cases, upon conviction of the accused person(s), the trial court must ordinarily award maximum sentence as provided for various offences under the provisions of the IPC. The trial court must also take such measures, as it deems fit, for the protection and concealing the identity and address of the witnesses. The victim(s) or the next of kin of the deceased in cases of mob violence and lynching shall receive free legal aid and engage any advocate of his/her choice from amongst those enrolled in the legal aid panel under the Legal Services Authorities Act, 1987 and they shall be given timely notice of any court proceedings and entitled to be heard at the trial in respect of applications such as bail, discharge, release and parole filed by the accused persons. They shall also have the right to file written submissions on conviction, acquittal or sentencing; and (iii) punitive and executive including initiation of disciplinary proceedings against the concerned officials if it was found that (i) such official(s) did not prevent the incident, despite having prior knowledge of it, or (ii)

202 *Supra* note 21. In this connection, reference may be made to the detailed directions regarding victim compensation and their rehabilitation and expeditious trial of rape and other cases relating to Muzaffarnagar violence which had taken place on 27.08.2013 in village Kawal, tehsil Jasnsath, District Muzaffarnagar: *Mohd. Haroon* v. *Union of India*, 2014 (4) SCALE 86 : JT 2014 (4) SC 361; see S N Singh, Constitutional Law – I (Fundamental Rights)", L *ASIL* 239 at 335-36 (2014).

where the incident had already occurred, such official(s) did not promptly apprehend and institute criminal proceedings against the culprits. With a view to instil a sense of fear for law amongst the people who involve themselves in mob lynching, the court also recommended to the Parliament to create a separate offence for lynching and provide adequate punishment for the same.

The above decision was followed in K*odungallur Film Society* v. *Union of India*[203] and *Shakti Vahini* v. *Union of India*.[204] While K*odungallur Film Society* was as a sequel to the violence against exhibition of the film "Padmavat", *Shakti Vahini* prayed for directions for preventing honour crimes. In these cases, detailed directions were issued by the court to deal with mob violence and destruction of public and private property. The directions were in the nature of structural and preventive measures, remedies to minimize the impending mob violence, liability of person causing violence, responsibility of police officials and payment of compensation. A very significant question that needs to be considered is whether there is any compliance with these directions. What has been the net outcome of such a judicial activism?

Rights of victims of crime to appeal against acquittal without seeking leave to appeal

Under articles 20, 21 and 22 of the Constitution of India, rights of only arrested, under-trials and convicted persons have been expressly recognised but there is no express mention of the right of the victims of crime. The courts have leaned towards the rights of victims by awarding monetary compensation,[205] victim compensation schemes in force by virtue of the mandate of section 357A, CrPC, issued directions for holding in camera proceedings in cases relating to sexual offences, providing for a screen between the accused and the victim and placed restrictions on the cross examination of witnesses. There also exit some provisions under the CrPC for the victims protection, *e.g.* chapter XXIA dealing with plea bargaining; Parliament has recognised the rights of a victim to participate in a mutually satisfactory disposition of the case. This is a great leap forward in the recognition of the right of a victim to participate in the proceedings of a non-compoundable case. Similarly, the CrPC has been amended, introducing the right of appeal to the victim of an offence, in certain circumstances such as right of appeal incorporated in the proviso to section 372, CrPC. The question in *Mallikarjun Kodagali (Dead) represented through Legal Representatives* v. *State of Karnataka*[206] was whether a 'victim' as defined in the CrPC has a right of appeal in view of the proviso to section 372 of the CrPC against an order of acquittal in a case where the alleged offence took place prior to 31.12.2009 (the date from which the new provision was enforced) but the order of acquittal was

203 (2018) 10 SCC 713 : 2018 (13) SCALE 607; also see *Koshy Jacob* v. *Union of India* (2018) 11 SCC 756.

204 *Supr*a note 4. The directions were wider than those issued in *In Re: Destruction of Public and Private Properties* v. *State of Andhra Pradesh* (2009) 5 SCC 212.

205 See *Hari Singh* v. *Sukhbir Singh*, AIR 1988 SC 2127; *Bodhisattwa Gautam* v. *Subhra Chakroborty*, AIR 1996 SC 922; *Ankush Shivaji Gaikwad* v. *State of Maharashtra* (2013) 6 SCC 770.

206 AIR 2018 SC 5206 : (2019) 2 SCC 752.

passed by the trial court after that date or whether leave to appeal is to be obtained from the Supreme Court? Madan B. Lokur, J held:[207]

> Among the steps that need to be taken to provide meaningful rights to the victims of an offence, it is necessary to seriously consider giving a hearing to the victim while awarding the sentence to a convict. A victim impact statement or a victim impact assessment must be given due recognition so that an appropriate punishment is awarded to the convict. In addition, the need for psycho-social support and counselling to a victim may also become necessary, depending upon the nature of the offence. It is possible that in a given case the husband of a young married woman gets killed in a fight or a violent dispute. How is the young widow expected to look after herself in such circumstances, which could be even more traumatic if she had a young child? It is true that a victim impact statement or assessment might result in an appropriate sentence being awarded to the convict, but that would not necessarily result in 'justice' to the young widow - perhaps rehabilitation is more important to her than merely ensuring that the criminal is awarded a life sentence. There is now a need, therefore, to discuss these issues in the context of social justice and take them forward in the direction suggested by some significant Reports that we have had occasion to look into and the direction given by Parliament and judicial pronouncements.

Allowing the appeal and setting aside the judgment and orders passed by the high court, the apex court remitted the matters back to the high court to hear and decide the appeal filed by Kodagali against the judgment and order of acquittal passed by the district and sessions judge, Lokur, J, on behalf of the majority, held:[208]

> (I)t is quite obvious that the victim of an offence is entitled to a variety of rights. Access to mechanisms of justice and redress through formal procedures as provided for in national legislation, must include the right to file an appeal against an order of acquittal in a case such as the one that we are presently concerned with. Considered in this light, there is no doubt that the proviso to Section 372 of the Cr.P.C. must be given life, to benefit the victim of an offence.
>
> Under the circumstances, on the basis of the plain language of the law and also as interpreted by several High Courts and in addition the resolution of the General Assembly of the United Nations, it is quite clear to us that a victim as defined in Section 2(wa) of the Cr.P.C. would be entitled to file an appeal before the Court to which an appeal ordinarily lies against the order of conviction. It must follow from this

207 *Id.* at 5210 (of AIR).

208 *Id.* at 5225-26.

> that the appeal filed by Kodagali before the High Court was maintainable and ought to have been considered on its own merits. As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar. The language of the proviso to Section 372 of the Cr.P.C. is quite clear, particularly when it is contrasted with the language of Section 378(4) of the Cr.P.C. The text of this provision is quite clear and it is confined to an order of acquittal passed in a case instituted upon a complaint. The word 'complaint' has been defined in Section 2(d) of the Cr.P.C. and refers to any allegation made orally or in writing to a Magistrate. This has nothing to do with the lodging or the registration of an FIR, and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 of the Cr.P.C. is concerned.

Directions issued for the elderly persons

The need of protection of elderly persons needs no emphasis. The Constitution of India under article 39 makes a reference to public assistance in cases of unemployment, old age, sickness and disablement. There is, however, no reference to the health and shelter of elderly persons and their dignity and sustenance due to their age. Referring to the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and taking note of the plight of the elderly persons, Madan B. Lokur J in *Ashwani Kumar* v. *Union of India*,[209] issued many directions for the protection of the rights of elderly persons under article 21: (i) The Union of India will obtain necessary information from all the state governments and the union territories about the number of old age homes in each district of the country and file a status report in this regard; (ii) The Union of India will also obtain from all the state governments the medical facilities and geriatric care facilities that are available to senior citizens in each district and file a status report in this regard; (iii) On the basis of the information gathered by the Union of India as detailed in the status reports, a plan of action be prepared for giving publicity to the provisions of the MWP Act and making senior citizens aware of the provisions of the Act and the constitutional and statutory rights of senior citizens; (iv) Section 30 of the MWP Act enables the Government of India to issue appropriate directions to the state governments to carry out and execute the provisions of the MWP Act. The central government must exercise its power in this regard and issue appropriate directions to the state governments for the effective implementation of the provisions of the MWP Act. Alongside this, the central government must, in terms of section 31 of the MWP Act, conduct a review for the purposes of monitoring the progress in implementation of the MWP Act by the state governments; and (v) Government of India should have a relook at various existing schemes and overhaul them with a view to bring about convergence and avoid multiplicity, particularly, the governments must revisit the grant of pension to the elderly so that it was more realistic

209 AIR 2018 SC (Supp) 2541 at 2553-54.

depending upon the availability of finances and the economic capacity of the governments.

IX PREVENTIVE DETENTION

Under section 3(4) of the National Security Act, 1980, when a detention order is passed by an officer to prevent any person from acting in any manner prejudicial to the defense of India, the relations of India with foreign powers or the security of India, he shall forthwith report the fact to the state government together with grounds of detention. In *Hetchin Haokip* v. *State of Manipur*,[210] the appellant's husband was arrested on 30.05,2017 for offences under section 400, IPC and 25(1-C) of the Arms Act, 1959 for being a member of the cadre of KLA organisation and possession of fire arms. On 12.07.2017, the district magistrate passed detention order against him, apprehending his release on bail. On 17.07.2017, the detenu was supplied with ground of detention which was approved by the state government on 20.07.2017. The detention order was challenged on the ground that the district magistrate had failed to communicate to the state government the detention order "forthwith" as prescribed in section 3(4) of the Act. Dr. D.Y. Chandrachud, J held that a preventive detention law has to be construed strictly. According to him, "forthwith" did not mean instantaneous; it meant only without undue delay and within a reasonable time which has to be ascertained from the facts of a case. In the present case, the district magistrate did not furnish any reason for the delay of five days in reporting the matter to the state government and, therefore, the detention order was quashed. The learned judge also rejected the view of the high court that no prejudice would be caused to the detenu if the order was communicated to the state government within twelve days.

In another case,[211] Dr. D.Y. Chandrachud, J, overruling two earlier decisions[212] and relying on a three-judge bench decision[213] held that if the detention order did not specify the period of detention, the order was still valid.

X RIGHT TO RELIGIOUS FREEDOM

Protection of temples of archaeological and historical importance

It had been held by the Supreme Court that "religion is the foundation for the value-based survival of human beings in a civilised society. The force and sanction behind civilised society depend on moral values."[214] The places of archaeological and historical importance including places of religious importance can be protected without violating any constitutional provision of Part III. In *Sarika* v. *Shri Mahakaleshwar Temple Committee*,[215] Arun Mishra, J held that it was the constitutional obligation of

210 AIR 2018 SC 3419 : 2018 (9) SCALE 56.

211 *Secy. to Govt. of T.N.* v. *Kamala,* AIR 2018 SC (Supp) 1099 : JT 2018 (4) SC 136.

212 *Commissioner of Police* v. *Gurbux Anandram Bhiryani*, 1988 (Supp) SCC 568 and *S. Santha* v. *Secy. to Govt., Chennai*, 2010 (3) MWN (Cr.) 42.

213 *T. Devaki* v. *Govt. of Tamil Nadu*, AIR 1990 SC 1086 : (1990) 2 SCC 456. It was held that if the period of detention was not mentioned in the detention order, the same shall be taken to be for the maximum period prescribed under the legislation.

214 *Aruna Roy* v. *Union of India* (2002) 7 SCC 365.

215 JT 2018 (5) SC 299 : (2018) 17 SCC 112.

the government to invest funds for the protection and preservation of not only ancient monuments and structures including temples of archaeological and historical importance but also of the sanctum sanctorum and the deity of spiritual importance. Moreover, the government has to provide shelter places, basic amenities to pilgrims, maintenance of law and order, *etc*. during festivals and melas without any fear of violation of the concept of secularism. In this case, the question related to the protection of the Jyotirlingam at Mahakaleshwar temple at Ujjain. Mishra, J, while issuing detailed directions for the preservation of the Jyotirlinga, observed:[216]

> There is a constitutional obligation to preserve the religious practices of all religions, culture and there is also a corresponding duty to act in that direction. Similarly, such acts which are necessary for the preservation of such historical monuments/deities. State is duty bound to spend the amount so that not only the archaeological, historical and ancient monuments are preserved but sanctum sanctorum, as well as the deity otherwise no useful purpose would be served by spending so much amount on Simhastha/Kumbh Melas in case deity, is itself permitted to be deteriorated as it has happened at other places particularly nearby Omkareshwar Jyotirlingam by offerings and rubbing it etc. has deteriorated and now barricades have been erected around the lingam and nobody is permitted to touch it. Same is true with respect to other important temples of which reports have been filed. It is apparent from the reports published about Omkareshwar that the administration had banned offering of milk, ghee, water, curd and other traditional materials to save the Jyotirlingam from further erosion. It is regrettable that we have not been able to preserve and protect our Jyotirlingas of immense importance and there was a proposal to install new Lingam at Omkareshwar in place of original. In 2006, also there was a report of erosion of Mahakaleshwar Jyotirlingam at Ujjain and it was feared that Jyotirlingam owing to the two vertical carvings had enough chances of splitting into three pieces in future. On the strength of a report of known scientist referred to therein, who had observed Jyotirlinga since 1953, in his opinion, if due care was not taken we will have to cut a sorry figure in future. Mahakaleshwar is the oldest Jyotirlingam out of dwadash (twelve) Jyotirlingams in the country. The main cause of constant erosion of Lingam was water and other impure material.

Freedom of faith and management of religious affairs

Subject to certain restrictions, article 25 guarantees freedom to profess, practice and propagate religion and article 26 guarantees freedom to establish and maintain institutions for religious and charitable purposes and manage its own affairs in matters of religion. There have been controversy in the past as to which activity should be considered to be religious covered under article 26 and which one should be treated

216 *Id.* at 131.

as secular subject to the power of the state under article 25(2)(a). The question in *K.S. Varghese* v. *St. Peter's & Paul's Syrian Orthodox Church*,[217] was whether temporal matters such as the appointment of a person to perform religious service or practice was a secular or religious matter. Arun Mishra, J, relying on *Adi Saiva Sivachariyargal Nala Sangam* v. *State of Tamil Nadu*,[218] held that the appointment of a person to perform religious service or practice was not a spiritual matter but a temporal or secular matter. The appointment of vicar, priest, deacons, *etc*. and for managing the affairs of the churches of Malankara Syrian Orthodox church was not a spiritual matter under article 26 of the Constitution. This view was reiterated by Banumathi, J. in *Mathews Mar Koorilos* v. *M. Pappy*.[219]

Payment of compensation for damage/destruction of religious places is not violative of art. 27

Article 27 of the Constitution of India prohibits the state from compelling any person to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. In *State of Gujarat* v. *Islamic State Relief Committee of Gujarat*,[220] a PIL had been filed before the High Court of Gujarat praying for directions to the State of Gujarat to survey the mosques, dargahs, graveyards, khankahs and other religious places and institutions desecrated, damaged/destroyed during communal riots of 2002 in the state and restore them within specified time-limit. The High Court of Gujarat accepted the prayer and issued necessary directions. On appeal to the Supreme Court, it was pointed out that any payment by the state would violate article 27 of the Constitution. The court did not accept the argument holding that in view of earlier decisions,[221] if only a small part of the tax collected in India was being spent, article 27 was not violated as the object of that provision was to maintain secularism. The court also held that in earlier cases, the court had directed the formulation of scheme for the religious places in the State of Orissa. The court recognised its limited role to grant compensation in public law while exercising its power of judicial review.

Removal of a mosque from unauthorised place

In *Abhishek Shukla* v. *High Court of Judicature, Allahabad*,[222] a full-bench of the High Court of Allahabad directed the removal of a masjid called "Masjid High Court" built by a wakf by encroaching on the land belonging to the court holding that freedom of religion did not permit a person to occupy unauthorisedly public land or land belonging to others and erect structures on the same. The court held that the freedom of religion was subject to restriction prescribed in articles 25-27 of the Constitution of India.

217 (2017) 15 SCC 333.

218 (2016) 2 SCC 725.

219 2018 (10) SCALE 351 : (2018) 9 SCC 672 : AIR 2018 SC 4033.

220 AIR 2018 SC (Supp) 596 : (2018) 13 SCC 687.

221 *Prafull Goradia* v. *Union of India* (2011) 2 SCC 568; *Archbishop Raphael Cheenath S.V.A. (3)* v. *State of Orissa* (2009) 17 SCC 90.

222 AIR 2018 All 32.

What constitutes a 'religious denomination' under article 26?

Article 26 of the Constitution guarantees to every religious denomination the right (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law. These rights are subject to public order, morality and health. A Constitution Bench considered whether the devotees of Lord Ayyappa were merely Hindus and did not constitute a separate religious denomination. Delineating the necessary conditions for being called a 'religious denomination', Dipak Misra, CJI, after analysing a large number of precedents,[223] held:[224]

> (F)or any religious mutt, sect, body, sub-sect or any section thereof to be designated as a religious denomination, it must be a collection of individuals having a collective common faith, a common organization which adheres to the said common faith, and last but not the least, the said collection of individuals must be labeled, branded and identified by a distinct name.
>
> Though, the respondents have urged that the pilgrims coming to visit the Sabarimala temple being devotees of Lord Ayyappa are addressed as Ayyappans and, therefore, the third condition for a religious denomination stands satisfied, is unacceptable. There is no identified group called Ayyappans. Every Hindu devotee can go to the temple. We have also been apprised that there are other temples for Lord Ayyappa and there is no such prohibition. Therefore, there is no identified sect. Accordingly, we hold, without any hesitation, that Sabarimala temple is a public religious endowment and there are no exclusive identified followers of the cult.
>
> Coming to the first and the most important condition for a religious denomination, i.e., the collection of individuals ought to have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, there is nothing on record to show that the devotees of Lord Ayyappa have any common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are just Hindus and do not constitute a separate

223 *S.P. Mittal* v. *Union of India*, AIR 1983 SC 1, in which the court had laid down the following principles:- "It is settled position in law … that the words "religious denomination" take their colour from the word `religion'. The expression "religious denomination" must satisfy three requirements – (1) it must be collection of individuals who have a system of belief or doctrine which they regard as conducive to their spiritual well-being, i.e., a common faith; (2) a common organisation; and (3) designation of a distinctive name. It necessarily follows that the common faith of the community should be based on religion and in that they should have common religious tenets and the basic cord which connects them, should be religion and not merely considerations of caste or community or societal status."

224 *Indian Young Lawyers Assn.* v. *State of Kerala*, *supra* note 3 at 1685-86 (of AIR).

> religious denomination. For a religious denomination, there must be new methodology provided for a religion. Mere observance of certain practices, even though from a long time, does not make it a distinct religion on that account.

R.F. Nariman, J likewise rejected the argument that Sabarimala temple belongs to a religious denomination. He held:[225]

> (T)hree things are necessary in order to establish that a particular temple belongs to a religious denomination. The temple must consist of persons who have a common faith, a common organization, and are designated by a distinct name. In answer to the question whether Thanthris and worshippers alike are designated by a distinct name, we were unable to find any answer. When asked whether all persons who visit the Sabarimala temple have a common faith, the answer given was that all persons, regardless of caste or religion, are worshippers at the said temple. From this, it is also clear that Hindus of all kinds, Muslims, Christians etc., all visit the temple as worshippers, without, in any manner, ceasing to be Hindus, Christians or Muslims. They can therefore be regarded, as has been held in *Sri Adi Visheshwara*,[226] as Hindus who worship the idol of Lord Ayyappa as part of the Hindu religious form of worship but not as denominational worshippers. The same goes for members of other religious communities….
>
> (W)e are clearly of the view that there is no distinctive name given to the worshippers of this particular temple; there is no common faith in the sense of a belief common to a particular religion or section thereof; or common organization of the worshippers of the Sabarimala temple so as to constitute the said temple into a religious denomination. Also, there are over a thousand other Ayyappa temples in which the deity is worshipped by practicing Hindus of all kinds. It is clear, therefore, that Article 26 does not get attracted to the facts of this case.
>
> This being the case, even if we assume that there is a custom or usage for keeping out women of the ages of 10 to 50 from entering the Sabarimala temple, and that this practice is an essential part of the Thanthris‘ as well as the worshippers‘ faith, this practice or usage is clearly hit by Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965.

Nariman, J held that all women had a right under article 25(1) which could not be restricted by age. He held:[227]

> (T)he fundamental right of women between the ages of 10 and 50 to enter the Sabarimala temple is undoubtedly recognized by Article 25(1).

225 *Id.* at 1725-26.

226 *Sri Adi Visheshwara of Kashi Vishwanath Temple, Var*anasi v. *State of U.P.* (1997) 4 SCC 606.

227 *Indian Young Lawyers Assn.* v. *State of Kerala*, *supra* note 3 at 1727 (of AIR).

> The fundamental right claimed by the Thanthris and worshippers of the institution, based on custom and usage under the selfsame Article 25(1), must necessarily yield to the fundamental right of such women, as they are equally entitled to the right to practice religion, which would be meaningless unless they were allowed to enter the temple at Sabarimala to worship the idol of Lord Ayyappa. The argument that all women are not prohibited from entering the temple can be of no avail, as women between the age group of 10 to 50 are excluded completely. Also, the argument that such women can worship at the other Ayyappa temples is no answer to the denial of their fundamental right to practice religion as they see it, which includes their right to worship at any temple of their choice. On this ground also, the right to practice religion, as claimed by the Thanthris and worshippers, must be balanced with and must yield to the fundamental right of women between the ages of 10 and 50, who are completely barred from entering the temple at Sabarimala, based on the biological ground of menstruation.

D.Y. Chandrachud, J emphasised on broadening the content of liberty and dignity and the role of the court as an enforcer of constitutional doctrine. He agreed with the Chief Justice and R.F. Nariman, J that devotees of Lord Ayyappa were not a religious denomination. He brought in the concept of "untouchability" in the exclusion of women between the prescribed age group holding that article 25 was subject to article 17 and their exclusion, based on their menstrual status, from entering the temple had no place in the Constitution which is based on the principles of liberty and dignity.

Enforceability of fundamental rights under article 25(1) against the Travancore Devaswom Board

The Supreme Court in *Indian Young Lawyers Assn*.,[228] held that Travancore Devaswom Board, being "other authority" under article 12 of the Constitution of India, was amenable to enforcement of fundamental right under article 25(1). The freedom under that article is available to every person irrespective of gender or any physiological factors, specifically attributable to women. "Women of any age group have as much a right as men to visit and enter a temple in order to freely practise a religion as guaranteed under Article 25(1)", observed Dipak MisraCJI, holding that:[229]

> We have no hesitation to say that such an exclusionary practice violates the right of women to visit and enter a temple to freely practise Hindu religion and to exhibit her devotion towards Lord Ayyappa. The denial of this right to women significantly denudes them of their right to worship… (T)he right guaranteed under Article 25(1) is not only about inter-faith parity but it is also about intra-faith parity. Therefore, the right to practise religion under Article 25(1), in its broad contour, encompasses a non-discriminatory right which is equally available to both men and women of all age groups professing the same religion.

228 *Ibid.*

229 *Id.*at 1686-87, 1689, 1692.

> (T)he notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple for the simple reason that public morality must yield to constitutional morality.
>
> In no scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple as devotees and followers of Hindu religion and offer their prayers to the deity. In the absence of any scriptural or textual evidence, we cannot accord to the exclusionary practice followed at the Sabarimala temple the status of an essential practice of Hindu religion.
>
> By allowing women to enter into the Sabarimala temple for offering prayers, it cannot be imagined that the nature of Hindu religion would be fundamentally altered or changed in any manner. Therefore, the exclusionary practice, which has been given the backing of a subordinate legislation in the form of Rule 3(b) of the 1965 Rules, framed by the virtue of the 1965 Act, is neither an essential nor an integral part of the Hindu religion without which Hindu religion, of which the devotees of Lord Ayyappa are followers, will not survive.

In view of the above, Misra, CJI held that the impugned rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 banning the entry of women of the age group of 10 to 50 years, was a clear violation of the right of such women guaranteed under article 25(1) to practise their religious belief. It is the right of devotees of any caste of Hindus to enter into a temple and offer prayers, irrespective of gender and/or age group, seeking entry to a temple. In the present case, the women were Hindus and there was no viable or legal limitation on their right to enter into the Sabarimala temple as devotees of Lord Ayyappa and offer their prayers to the deity. The Chief Justice held that article 25(1) was subject only to the restrictions provided under that article, *viz*. public order, morality and health and other provisions of Part III. While considering the concept of "morality" used in article 25, Dipak Misra, CJI did not consider the concept from the point of a "religious morality" but confined to "constitutional morality" in the sense of adherence to the norms of the Constitution as had been held in some cases.[230] Misra, CJI held:[231]

> The term "morality occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. We must remember that when there is a

230 *State* (*Government of NCT of Delhi)* v. *Union of India*, 2018 (8) SCALE 72 and *Navtej Singh Johar* v. *Union of India*, *supra* note 1.

231 *Indian Young Lawyers Assn.* v. *State of Kerala*, *supra* note 229 at 1688.

> violation of the fundamental rights, the term "morality" naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the principles and basic tenets of the concept of this constitutional morality that gets support from the Constitution.

It is indeed difficult to accept that the framers of the Constitution would have ever kept in mind 'constitutional morality', as interpreted by the Supreme Court in some cases, as a limitation on the fundamental right to religious freedom. Since the freedom under article 25(1) relates to religion, the limitation on that freedom cannot traverse beyond religion and get sucked into constitutional norms as the court thinks. The interpretation given by the Supreme Court seems quite strange and untenable. Had the framers of the Constitution thought of constitutional morality as a limitation on the right to freedom of religion, they would have clearly said so. Chief Justice patently committed a grave error by holding that the word "public" has been used in article 25(1) to qualify three words "order, morality and health". The observations of the Chief Justice are noticeable:[232]

> The right guaranteed under Article 25(1) has been made subject to, by the opening words of the Article itself, public order, morality, health and other provisions of Part III of the Constitution. All the three words, that is, order, morality and health are qualified by the word "public." Neither public order nor public health will be at peril by allowing entry of women devotees of the age group of 10 to 50 years into the Sabarimala temple for offering their prayers. As regards public morality, we must make it absolutely clear that since the Constitution was not shoved, by any external force, upon the people of this country but was rather adopted and given by the people of this country to themselves, the term public morality has to be appositely understood as being synonymous with constitutional morality.
>
> Having said so, the notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple for the simple reason that public morality must yield to constitutional morality.

What constitutes an essential practice for a particular religion

For the first time, in *Shirur Mutt*,[233] the Supreme Court had held that what constitutes an essential part of a religion would be ascertained with reference to the tenets and doctrines of that religion itself. In view of this, Dipak Misra, CJI sought to ascertain whether the practice of exclusion of women of the age group of 10 to 50

232 *Id.* at 1689.

233 *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Srirur Mutt*, AIR 1954 SC 282 : 1954 SCR 1005.

years was equivalent to a doctrine of Hindu religion or a practice that could be regarded as an essential part of the Hindu religion and whether the nature of Hindu religion would be altered without the said exclusionary practice. The learned Chief Justice answered this question in the negative observing thus:[234]

> Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the non-essential part or practices.
>
> This view of ours is further substantiated by the fact that where a practice changes with the efflux of time, such a practice cannot be regarded as a core upon which a religion is formed. There has to be unhindered continuity in a practice for it to attain the status of essential practice. It is further discernible from the judgment of the High Court in *S. Mahendran* that the Devaswom Board had accepted before the High Court that female worshippers of the age group of 10 to 50 years used to visit the temple and conduced poojas in every month for five days for the first rice feeding ceremony of their children. The Devaswom Board also took a stand before the High Court that restriction of entry for women was only during Mandalam, Makaeavilakku and Vishnu days. The same has also been pointed out by learned Senior Counsel, Ms. Indira Jaising, that the impugned exclusionary practice in question is a 'custom with some aberrations' as prior to the passing of the Notificationin 1950, women of all age groups used to visit the Sabarimala temple for the first rice feeding ceremony of their children. Therefore, there seems to be no continuity in the exclusionary practice followed at the Sabarimala temple and in view of this, it cannot be treated as an essential practice.

Right to change faith is a fundamental right

In *Shafin Jahan* v. *Ashokan K. M.*,[235] a girl named Ms. Akhila alias Hadiya, aged about 24 years, the only child of Ashokan K.M., had completed Bachelor of Homeopathic Medicine and Surgery (BHMS). On the basis of a complaint filed by Ashokan, FIR was registered as the whereabouts of Akhila were unknown. Later, a habeas corpus petition was filed by Ashokan before the High Court of Kerala alleging that his daughter was under illegal confinement and likely to be transported out of the country. Akhila *alias* Hadiya appeared before the high court and made a statement that she had entered into marriage with the appellant, Shafin Jahan, converting herself to Islam. The high court observed that a girl aged 24 years was weak and vulnerable to being exploited. The court, annulling the marriage, exercised the *parens patriae* jurisdiction, observing that it was concerned with the welfare of the girl of her age

234 *Indian Young Lawyers Assn.* v. *State of Kerala*, *supra* note 229 at 1692.

235 *Supra* note 4; see also *Soni Gerry* v. *Gerry Douglas* (2018) 2 SCC 197 : AIR 2018 SC 346 and *Nandakumar* v. *State of Kerala*, *supra* note 5.

and a duty was cast on it to ensure the safety of the girls brought before it. The court discharged that duty by ensuring that the custody of Akhila *alias* Hadiya be given to her parents. It directed that a police officer of the rank of sub-inspector should escort her from the hostel to her father's house and the superintendent of police should maintain surveillance over them to ensure their continued safety. The order of the high court was challenged before the apex court.

The Supreme Court dealt in great details the purpose, scope and ambit of the writ of habeas corpus. The ambit of a habeas corpus petition was to trace an individual who was stated to be missing. Once the person was traced, no further issue remained. Dipak Misra, CJI summarised the law thus:[236]

> (T)he principle of habeas corpus has been incorporated in our constitutional law and in a democratic republic like India where judges function under a written Constitution and which has a chapter of fundamental rights to protect individual liberty, the judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India; and the same exercise of power can be done in the most effective manner by issuing a writ of habeas corpus. Thus, the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the primary duty of the State to see that the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subterfuge. The role of the Court is to see that the detenue is produced before it, find out about his/her independent choice and see to it that the person is released from illegal restraint.The issue will be a different one when the detention is not illegal. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end.

The Supreme Court held that once the girl had appeared before the court and made a statement about her marriage with the appellant, the high court could not have invoked the *parens patriae* jurisdiction in the present case in which the girl was major and she had no threat from any quarter. Such a jurisdiction could be exercised by a court to meet the ends of justice in exceptional cases such as in case of a mentally ill person or a minor girl or a woman apprehending threat to her life and it was proved to the satisfaction of the court that the parties had either no parent/legal guardian or had an abusive or negligent parent/legal guardian. Misra, CJI observed that they had interacted with the girl; she did not suffer from any kind of mental incapacity or

236 *Supra* note 4 at 1946 (of AIR).

vulnerability and she was absolutely categorical in her submissions and unequivocal in the expression of her choice. Allowing the appeal, the Chief Justice held:[237]

> In the case at hand, the father in his own stand and perception may feel that there has been enormous transgression of his right to protect the interest of his daughter but his view point or position cannot be allowed to curtail the fundamental rights of his daughter who, out of her own volition, married the appellant. Therefore, the High Court has completely erred by taking upon itself the burden of annulling the marriage between the appellant and the respondent no. 9 when both stood embedded to their vow of matrimony.

While agreeing with the majority view of Misra, CJI, D.Y. Chandrachud, J, in a separate judgment, held that the high court had transgressed its power by declaring the marriage null and void while entertaining a petition for habeas corpus.

XI RIGHTS OF MINORITIES

Status of a minority educational institution

The National Commission for Minority Educational Institutions Act, 2004, confers power on the National Commission for Minority Educational Institutions to "decide all questions relating to the status of any institution as a Minority Educational Institution and declare its status as such." In *Manager, Corporate Educational Agency* v. *James Mathew*,[238] Kurian Joseph, J, held that the certificate issued to a minority educational institution by the commission was a declaration of the status of the institution. Relying on this decision, R.F. Nariman, J. held that the power of the commission to issue a certificate extended not only to the institutions established after the Act came into force but even to those which had been established prior to the enforcement of the Act.[239] In this case, a college was started as a secular institution but it wished to change into a minority educational institution. The question was whether this was permissible. The court held that fundamental rights cannot be waived and, therefore, if an institution established by a minority wishes to convert itself as a minority educational institution, this was constitutionally permissible as power of the commission was very wide "to decide all questions" "relating to" the status of any institution as a minority educational institution.[240]

Appointment of a teacher in a minority educational institution

In *Manager, Corporate Educational Agency* v. *James Mathew*,[241] the appellant minority educational institution decided to appoint a teacher of their choice ignoring

237 *Id*. at 1952.

238 AIR 2017 SC 3762 : (2017) 15 SCC 595.

239 *Sisters of Joseph of Cluny* v. *State of W.B*., 2018 (6) SCALE 63 : AIR 2018 SC 2183; see also *Paramveer Albert Ekka Memorial College* v. *State of Jharkhand* (2018) 6 SCC 788.

240 *Justice K.S. Puttaswamy* v. *Union of India*, 2017 (10) SCALE 1 at 87 (as per D.Y. Chandrachud, J) : AIR 2017 SC 4161; also see S N Singh, "Constitutional Law – I (Fundamental Rights)", LIII *ASIL* 169 (2017).

241 AIR 2017 SC 3762 : (2017) 15 SCC 595.

other senior teachers of the same community. The court held that it was within the powers of the management to select a teacher of their choice and the court cannot interfere on the ground that more meritorious and senior teachers from the same community were available.

XII JUDICIAL REMEDIES

***Locus standi* to initiate public interest litigation (PIL)**

After *S.P. Gupta*,[242] the *locus standi* of a petitioner to file a petition under article 32 in matters of public interest have been considerably relaxed provided he/she was acting bonafide *pro bono publico*. However, in her dissenting opinion, Indu Malhotra, J in *Indian Young Lawyers Assn*.,[243] not only questioned the *locus standi* of the petitioner association to file a PIL in a matter pertaining to a religious practice of debarring women in the age group of 10 to 50 years from entering the Lord Ayyappa temple at Sabarimala, Kerala since it was not an aggrieved person but also dismissed the petition on this ground. Malhotra, J held:[244]

> The right to move the Supreme Court under Article 32 for violation of Fundamental Rights, must be based on a pleading that the Petitioners' personal rights to worship in this Temple have been violated. The Petitioners do not claim to be devotees of the Sabarimala Temple where Lord Ayyappa is believed to have manifested himself as a '*Naishtik Brahmachari*'. To determine the validity of long-standing religious customs and usages of a sect, at the instance of an association/ Intervenors who are "*involved in social developmental activities especially activities related to upliftment of women and helping them become aware of their rights*", would require this Court to decide religious questions at the behest of persons who do not subscribe to this faith. The right to worship, claimed by the Petitioners has to be predicated on the basis of affirmation of a belief in the particular manifestation of the deity in this Temple.
>
> The absence of this bare minimum requirement must not be viewed as a mere technicality, but an essential requirement to maintain a challenge for impugning practises of any religious sect, or denomination. Permitting PILs in religious matters would open the floodgates to interlopers to question religious beliefs and practises, even if the petitioner is not a believer of a particular religion, or a worshipper of a particular shrine. The perils are even graver for religious minorities if such petitions are entertained….
>
> In matters of religion and religious practices, Article 14 can be invoked only by persons who are similarly situated, that is, persons belonging

242 *S.P. Gupta* v. *President of India*, AIR 1982 SC 149.

243 *Indian Young Lawyers Assn*. v. *Union of India*, *supra* note 3.

244 *Id.* at 1813-14 (of AIR). A nine-judge bench, in a review petition, has referred this case for re-consideration to a larger bench: *Kantaru Rajeevaru* v. *Indian Young Lawyers Assn*., *supra* note 3.

> to the same faith, creed, or sect. The Petitioners do not state that they are devotees of Lord Ayyappa, who are aggrieved by the practises followed in the Sabarimala Temple. The right to equality under Article 14 in matters of religion and religious beliefs has to be viewed differently. It has to be adjudged amongst the worshippers of a particular religion or shrine, who are aggrieved by certain practises which are found to be oppressive or pernicious.
>
> The right to practise one's religion is a Fundamental Right guaranteed by Part III of the Constitution, without reference to whether religion or the religious practises are rational or not. Religious practises are constitutionally protected under Articles 25 and 26(b). Courts normally do not delve into issues of religious practises, especially in the absence of an aggrieved person from that particular religious faith, or sect.

There is absolutely no doubt that what the petitioner was trying to espouse, no devotee ever tried to do before the Supreme Court. What then prompted the petitioner to approach the court for the entry of those women who themselves were not interested to uproot the practice of the temple followed for a long time? There seems to be some ulterior motive in approaching the court in the present case which could have been nipped in the bud by the court but the majority did not pay any attention to this aspect of the matter.

In *Abhishek Shukla* v. *High Court of Judicature, Allahabad*,[245] the locus standi of a practising lawyer to file a petition under article 226 as a PIL for the removal of a masjid built unauthorisedly on the land belonging to the high court was questioned but rejected by a full-bench of the High Court of Allahabad with the observation that "In the present case, there can be no doubt that the petitioner, who is a practicing lawyer, has a vital interest not only in the independence of judiciary, but also in its well being. If any illegal action is taken by any individual/anybody or for that matter, the entity like respondent no. 7, which has the effect of impairing the independence of judiciary or is against the interest of the Institution as a whole, a practicing lawyer can approach this Court under Article 226 of the Constitution of India by way of a public interest litigation for protecting the Institution in all respects."[246]

Role and limits of PIL

In *re Inhuman Conditions in 1382 Prisons*,[247] the court has accepted that there were situations when the court exceeded their jurisdiction in PILs for the welfare of the citizens on account of failure of the state and its agencies to enforce the law sincerely or there were patent illegalities or there was lacunae/gaps in law. The areas mostly covered by PIL relate to environment, social justice, violations of human rights and disregard of article 21guarantee in the Constitution of India. The judicial machinery was successfully pressed into service in PILs by the courts for the marginalised sections of society, women and children and victims of violence, in particular.The court also

245 *Supra* note 222.

246 *Id.* at 53.

247 (2018) 18 SCC 777.

pointed out the misuse of PILs in some cases. The present case is being monitored by the apex court since 2013. The court issued directions for constituting a Supreme Court Committee with a retired judge of the Supreme Court as its Chairman (with all perquisites, allowances and facilities available to a sitting judge of the Supreme Court) and Inspector General of Police, Bureau of Police Research and Development and Director General (Prisons), Tihar Jail, New Delhi, as its members to consider various issues formulated in the order of the court for improving the conditions in 1382 jails in the country including suggestions and recommendations for amendments/changes in the Model Prison Manual, 2016.

XIII AWARD OF COMPENSATION AND COST

Compensation for arbitrary action

In *United Air Travel Services* v. *Union of India*,[248] the petitioners private tour operators were engaged in conducting the travel business for Hajj and Umrah. They applied for registration and allocation of quota for the Hajj 2015 but could not be successful in the draw of lots. For the year 2016, certain exemptions from the terms and conditions of eligibility had been given to applicants like the petitioners but they were disqualified for grant of registration on the ground that they were not eligible. A perusal of the letter sent to the petitioners showed that the reason cited for disqualification was non-compliance of the very clauses of which exemption had been granted to the petitioners. The court held the rejection as arbitrary. The petitioners claimed compensation for the loss of business on account of arbitrary refusal to grant registration. Relying on *Nilabati Behera* v. *State of Orissa*,[249] the court pointed out that the "purpose of public law was not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights" Sanjay Kishan Kaul, J relied upon the following observation made in Nilabati :[250]

> (W)hen the court moulds the relief by granting 'compensation' in proceedings under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded

248 AIR 2018 SC 2264 : (2018) 8 SCC 141 : 2018 (7) SCALE 1 : JT 2018 (5) SC 17. This decision was followed in *Ruby Tour Services (P) Ltd.* v. *Union of India* (2018) 9 SCC 537.

249 (1993) 2 SCC 746.

250 *United Air Travel Services* v. *Union of India*, AIR 2018 SC 2264 at 2268 : (2018) 8 SCC 141.

> against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.

Kaul, J held that the determination of vicarious liability of the state was linked with the negligence of its officers and there was nothing new if they could be sued personally. To compensate the petitioners for the financial loss suffered by them, the court granted compensation of Rs. five lakh each.

Compensation for violation of right to life and personal liberty

In *S. Nambi Narayanan* v. *Siby Mathews*,[251] the Supreme Court awarded compensation of Rs. 50 lakh to former ISRO scientist, Nambi Narayanan. Moreover, on a petition for action against former top officials of Kerala police, the court also constituted a committee headed by D.K. Jain, retired judge of the Supreme Court, to inquire into the role of police officers in the conspiracy against Nambi Narayanan for allegedly subjecting him to torture and illegal detention in connection with the infamous ISRO espionage case. The compensation awarded by the court did not affect the right of the petitioner to seek further compensation as permissible under law.

In *Z* v. *State of Bihar*,[252] a 35 year old destitute woman, subjected to rape, wanted termination of her pregnancy which was more than 20 weeks, permissible under the Medical Termination of Pregnancy Act, 1971. The grounds were rape and HIV risk. The Supreme Court did not allow termination of pregnancy since the same was risky as per the advice of the medical board. But the court did realise that there was a grave injury to the mental health of the woman.The court awarded her compensation of Rs. 10 lakh in addition to Rs. 3 lakh already awarded by the court's order for the fault of state authorities with a further direction that she could stay in the shelter home as long as she desired and the medical authorities were directed to provide all medical facilities and medicines till the child became five years old. The compensation awarded was under public law where no other public law remedy was practicable and the award of compensation was in addition to relief under section 376, CrPC and compensation that could be claimed under private law in tort.

Application of 'polluter pays' principle

In a case pertaining to environmental protection, the Supreme Court had directed the builders for undertaking illegal constructions in Aravalli hills after 18.8.1992 (date of notification issued by State of Haryana under the Punjab Land Prevention Act, 1972 prohibiting several activities in the area) to deposit Rs. 5 crores in Aravalli Rehabilitation Fund by applying "polluter pays principle."[253]

251 2018 (11) SCALE 171 : AIR 2018 SC 5112.
252 (2018) 11 SCC 572.
253 *M.C. Mehta* v. *Union of India* (2018) 18 SCC 397.

Compensation for repair/restoration of religious places destroyed during riots

The Supreme Court in *State of Gujarat* v. *Islamic Relief Committee of Gujarat*,[254] allowed payment of compensation of up to Rs. 50 thousand or actual cost of repairing/ restoration to all authorised religious places other than those located in the middle of the roads or at any unauthorised place damaged/destroyed during communal riots in 2002 at par with similar assistance provided by the state government for damaged/ destroyed houses subject to certain conditions. The court found the scheme along with conditions to be reasonable and allowed the same.

Imposition of cost for gross abuse of judicial process

The gross abuse of the process of law was reflected in *Mahavir* v. *Union of India*,[255] in which a writ petition was filed by the petitioners before the high court after 105 years contending that compensation had not been paid and, therefore, by operation of section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Settlement Act, 2013, the land acquisition had lapsed. The petition was dismissed with cost of Rs. 50 thousands. Likewise, in *Campaign for Judicial Accountability & Reforms* v. *Union of India*,[256] the court ordered the petitioner to deposit Rs. 25 lakh as cost for filing a "frivolous, contemptuous, unwarranted and without any accountability" petition on a matter for which a petition had already been dismissed by the court.[257] The petition was for constituting a special investigation team headed by a Chief Justice aimed at scandalising highest judicial functionaries with frivolous allegations.

XIV CONCLUSION

One of the most significant *decisions* of the year under article 21 of the Constitution of India recognised the "right to die with dignity" on the basis of a living will where there was no hope of recovery, accelerating the process of death for reducing the period of suffering.[258] Passive euthanasia (withdrawal of life support system) had earlier been recognised as valid by the apex court.[259]

The strong protest against the judgment in Sabarimala case[260] is an instance of how the judiciary adopts double standards in the decision-making process. It may be remembered that during the year 2015, the Supreme Court had stayed the order of High Court of Rajasthan[261] in which a division bench had directed the

254 (2018) 13 SCC 687.

255 (2018) 3 SCC 588.

256 (2018) 1 SCC 589.

257 *Kamini Jaiswal* v. *Union of India* (2018) 1 SCC 156.

258 *Common Cause (A Regd.) Society* v. *Union of India*, *supra* note 6.

259 *Aruna Ramachandra Shanbaug* v. *Union of India* (2011) 4 SCC 454; see S N Singh, "Constitutional Law-I (Fundamental Rights)", XLVII *ASIL* 171 at 196-98 (2011).

260 *Indian Young Lawyers Association* v. *State of Kerala*, *supra* note 3.A nine-judge bench, in a review petition, has referred this case for re-consideration to a larger bench: *Kantaru Rajeevaru* v. *Indian Young Lawyers Assn*., *supra* note 3.

261 *Nikhil Soni* v. *Union of India*, 2015 Cr LJ 4951; see S N Singh. "Constitutional Law – I (Fundamental Rights)", LI *ASIL* 237 at 240-41, 291-92 (2015).

state government to register cases against those responsible for the death of any person who had practised santhara/sallekhana which the high court had considered to be unconstitutional and not a part of Jain religion. While staying the order of the High Court, H.L. Dattu, CJI, on behalf of a division bench, had observed that Jain scholars had not been consulted by the high court before it criminalised the practice of santhara/sallekhana.[262] The matter has been kept pending by the Supreme Court even till April, 2020 and there is no indication as to when it would be finally decided. It is significant to mention that this case involves issues of life and death and not any ordinary issue. One may compare this approach of the apex court with the issue raised and decided in a public interest petition filed under article 32 of the Constitution of India in *Indian Young Lawyers Association* v. *State of Kerala*,[263] raising the issue of entry of women between the age group of 10 to 50 years in Lord Ayyappa Temple at Sabarimala, Kerala. The court did not think even once that the question of entry of women between the aforesaid age group was being followed since indefinite period of time and any order contrary to the practice was bound to cause serious resentment among Hindus. It is not known as to why the court did not think it proper to consult Sankaracharyas, well-known Hindu saints and scholars of Hindu religion before deciding the case. In this case, the right to equality claimed by some women superseded all other rights such as freedom of religion of a vast majority. The case was also a victim of hurried justice, as the Chief Justice, heading the Constitution Bench, was to retire in the next five days after the judgment.

Social welfare legislations are prone to abuse by blackmailing by the alleged victims has been proved in *Subhash Kashinath Mahajan* v. *State of Maharashtra*.[264] The decision in this case raised the loudest hue and cry from the scheduled castes and scheduled tribes and voice raised by their spokespersons (politicians bent upon taking political mileage) was louder. In this case, a division bench of the apex court played an activist role in protecting the right to personal liberty of a person which was sought to be curtailed by excluding anticipatory bail provision in respect of offences falling under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. In that case, Adarsh Kumar Goel, J, on behalf of the division bench, had held that exclusion of the provisions of section 438, CrPC relating to anticipatory bail in respect of offences covered under section 18 of the Atrocities Act was not applicable to those who were falsely implicated for extraneous reasons and had not committed the offence on a prima facie independent scrutiny. Immediately after this decision, the Parliament enacted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018 inserting section 18A to nullify the interpretation given by the

262 *Dhariwal Jiwan Mehta* v. *Nikhil Soni*, SLP (C) No. 15592/2015, order of stay dated 31.08.2015.

263 *Supra* note 3.

264 *Supra* note 17.

court.[265] This disgraceful action of the politicians shows the naked exercise of legislative power for political ends in utter disregard of the basic human right of a person to enjoy his personal liberty which cannot be curtailed without a fair, just and reasonable procedure.[266] The court while reviewing either the decision or considering the constitutional validity of newly added section 18A of the Atrocities Act did not keep a proper balance between the rights of individuals guaranteed under article 21 and the rights of SC/ST given under the Atrocities Act. By no amount of logic, the amendment could be said to be in consonance with the interpretation given by the Supreme Court in a catena of earlier decisions under article 21 of the Constitution of India; the principles laid down by Goel, J in the case remain valid even after the amendment because what Goel, J had held was the safeguard provided by the constitutional mandate of article 21 which cannot be abrogated by any ordinary law such as the Atrocities Act. Another notable decision by Goel J related to delay in civil or criminal proceedings due to stay orders and directions were issued for expeditious disposal of cases.[267]

The Constitution Bench decision in *Jarnail Singh* v. *Lachhmi Narayan Gupta*,[268] is one of the leading cases reported during the year. It re-visited, on two references, *M. Nagaraj* v. *Union of India*,[269] which had laid down three conditions for giving reservation to SC/ST in promotions, viz. "backwardness", "inadequacy of representation" as prescribed under clause (4-A) of article 16 and "maintenance of efficiency of administration" as prescribed under article 335 of the Constitution.[270] R.F. Nariman J, on behalf of the Bench, held that the decision in *M. Nagaraj* was good law except that the requirement of collection of quantifiable data showing backwardness was not valid as the same ran contrary to *Indra Sawhney*,[271] in which it had been held that the scheduled castes and the scheduled tribes are the most backward among backward classes and it was, therefore, presumed that once they are included

265 Newly added section 18A reads: "*18A. No enquiry or approval required*. (1) For the purposes of this Act,— (a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or (b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code [Code of Criminal Procedure, 1973] shall apply.

(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."

One may note the speed with which the amendment was carried: The Bill introduced in Lok Sabha on 03.08.2018 and passed on 06.08.2018; passed in Rajya Sabha on 09.08.2018 and assented to by the President of India on 17.08.2018 and came to be enforced w.e.f. 20.08.2018. Moreover, the Supreme Court in *Prathvi Raj Chauhan* v. *Union of India*, 2020 (4) SCALE 198 has upheld the constitutional validity of section 18A.

266 *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248.

267 *Asian Resurfacing of Road Agency (P) Ltd.* v. *CBI* (2018) 16 SCC 299 : AIR 2018 SC 2039.

268 *Supra* note 18. Review petition filed by Union of India in this case was pending at the end of the year 2019.

269 (2006) 8 SCC 212.

270 See S N Singh, Constitutional Law – I (Fundamental Rights)", XLVIII *ASIL* 173 at 186-191 (2012).

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

in the Presidential List under articles 341 and 342 of the Constitution of India, there could be no question of showing backwardness of the Scheduled Castes and the Scheduled Tribes all over again.

The role of some judges and all the politicians in Parliament has been dismal during the year 2018 particularly with regard to the fundamental rights of the individuals. The year was unprecedented in the history of Indian judiciary when four senior-most judges of the Supreme Court revolted through a press conference[272] against the then Chief Justice of India (Dipak Misra) raising their voice against allocation of important cases, harping that "democracy will not survive" in this country. Followed by this conference, a petition[273] was filed under article 32 of the Constitution of India praying *inter alia* "a writ of mandamus to the first respondent (Supreme Court of India) to evolve the set Procedure for constituting the benches and allotment of jurisdiction to different benches in Supreme Court. The Petitioner seeks mandamus to the first respondents to have a specific rule in Supreme Court Rules that the three judges bench in Chief Justice court shall consist of the chief justice and two senior most judges and the Constitutional bench shall consist of five senior most judges or three senior most Judges and two junior most judges. The Petitioner also seeks a writ of mandamus to the first respondent to constitute: Supreme Criminal Court, Supreme PIL Court, Supreme Tax Court, Supreme Service Court, Supreme Land Dispute Court, Supreme Misc. Matter Court, etc." and also certain directions against the High Court of Allahabad. A full bench of the apex court held that in the allocation of cases and the constitution of benches, the Chief Justice had an exclusive prerogative because such an entrustment of functions was necessary for the efficient transaction of the administrative and judicial work of the court. While dismissing the petition, Dr. D.Y. Chandrachud J observed, "The ultimate purpose behind the entrustment of authority to the Chief Justice is to ensure that the Supreme Court is able to fulfil and discharge the constitutional obligations which govern and provide the rationale for its existence. The entrustment of functions to the Chief Justice as the head of the institution, is with the purpose of securing the position of the Supreme Court as an independent safeguard for the preservation of personal liberty." This decision was followed in another public interest petition filed by a senior advocate.[274] Such a press conference by the sitting judges of the Supreme Court or petitions show utter frustration of legal fraternity. It is in the interest of all of us including the institution of judiciary itself to burry this incident here for ever.

272 The press conference was held by J. Chelameswar J in the presence of Ranjan Gogoi, M B Lokur and Kurian Joseph, J J on 12.01.2018. The assignment of Judge Loya case to a three-judge bench headed by Arun Mishra J was the immediate reason for the press conference. The petition seeking registration of FIR and court monitored investigation was eventually dismissed: *Tehseen S. Poonawala* v. *Union of India* (2018) 6 SCC 72 : AIR 2018 SC 5538.

273 *Asok Pande* v. *Supreme Court of India, Thr. Its Registrar*, AIR 2018 SC (Supp) 780 : 2018 (5) SCALE 481 : JT 2018 (4) SC 154 : (2018) 5 SCC 341.

274 *Shanti Bhushan* v. *Supreme Court of India thr. Its Registrar,* AIR 2018 SC 3287 : 2018 (8) SCALE 585 : (2018) 8 SCC 396.

Yet another unprecedented development of the year, first of its kind in the history of Indian judiciary, was initiation of the process of removal of the Chief Justice of India when 71 signatures of members of Parliament belonging to seven opposition parties including Congress on 22.04.2018 listing allegations of misbehaviour against the Chief Justice Dipak Misra, submitted a petition to the Vice-President, Venkaiah Naidu, Chairman, Rajya Sabha. The Vice-President rejected the petition saying that the allegations were "neither tenable nor admissible". The decision of the Vice-President was challenged before the Supreme Court by two Rajya Sabha members of the Congress Party, Pratap Singh Bajwa and Amee Harshadray Yajnik and a five-member bench was constituted to hear the matter. But the petition was withdrawn.

A full bench of the apex court referred to the Constitution Bench the question whether the freedom under article 19(1)(a) was controlled singularly by clause (2) to that article or 21 of the Constitution of India would have any impact on the same.[275] The bench mentioned the following questions without referring any particular question(s) to the Constitution Bench but the matter in entirety: (a) When a victim files an F.I.R. alleging rape, gang rape or murder or such other heinous offences against another person or group of persons, whether any individual holding a public office or a person in authority or in-charge of governance, should be allowed to comment on the crime stating that "it is an outcome of political controversy", more so, when as an individual, he has nothing to do with the offences in question? (b) Should the "State", the protector of citizens and responsible for law and order situation, allow these comments as they have the potentiality to create a distrust in the mind of the victim as regards the fair investigation and, in a way, the entire system? (c) Whether the statements do come within the ambit and sweep of freedom of speech and expression or exceed the boundary that is not permissible? And (d) Whether such comments (which are not meant for self protection) defeat the concept of constitutional compassion and also conception of constitutional sensitivity?

The perversity of mind is reflected in some of the judgments of the Supreme Court in which basic Indian values of morality and good conduct have been given a go bye in the name of freedom, liberty, globalisation and scientific and technological developments. This trend does not suit the vast majority of Indian citizens. No doubt liberty, freedom, privacy, gender justice are valuable but at the same time, value system engrained in the blood of the citizens of this country are no less important. Sexual freedom or freedom of religion cannot supersede the value system of this country. Cases on adultery, unnatural sex, live-in relationship, religious practice of entry of women in the temple are not such issues that every other issue becomes insignificant and to a great extent, meaningless.

275 *Kaushal Kishor* v. *State of U.P.* (2018) 11 SCC 561.