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CONSTITUTIONAL LAW – I

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I INTRODUCTION

The constitutional rights, in particular fundamental rights, are the most powerful tools in the hands of the people to question any of the state actions if they feel aggrieved by it. On a holistic reading of the Preamble and the operative provisions of the Constitution, it is abundantly clear that these rights are not granted to the people by anyone but they are, in fact, what are retained by "[W]e the People of India", while creating structures and institutions and conferring on them powers necessary to govern the country. As these rights are part of the fundamental governing law of the land, they have distinct sanctity in the legal system of the country.

These rights are often invoked by the aggrieved persons to challenge the state actions (and sometimes even the actions of the non-state actors) in courts of law. It would not be an exaggeration to claim that most of the constitutional litigation in the country revolves around fundamental rights. In the survey year too, the apex court adjudicated several such litigations. Some had given rise to very interesting constitutional questions. This survey presents the reflective analysis of the judgments rendered by the apex court in such cases in 2022.

II GENERAL PRINCIPLES OF EQUALITY

The Constitution of India promises to 'secure' to all its citizens "equality of status and of opportunity." In order to achieve these goals, several operative provisions have been made in Part – III and Part – IV of the Constitution. In Part – III, articles 14 to 18 deal with right to equality. Though articles 29 (2) and 30 (2) also deal with certain facets of right to equality, those provisions have been included under the category of 'cultural and educational rights.'

Article 14 contains general principle of equality whereas articles 15 and 16 contain principles of non-discrimination and also provisions for protective discrimination. Article 17 was designed to eliminate one of the most pronounced forms of structural inequality present in the Indian society. Article 18 prevents the

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state from conferring titles that would have created undesirable hierarchies or differentiations among individuals in the society.

In the scheme of equality provisions enshrined in Part – III, it is important, at the outset, to understand the general principle of equality contained in article 14. It is considered to be a genus of which articles 15 to 18 are species. In India, to test whether a state action violates the general principle of equality, the Supreme Court of India has evolved two doctrines: (i) reasonable classification test, and (ii) arbitrariness test. As and when state actions are challenged on the ground of violation of general principle of equality, depending on the matter or grounds of challenge, courts apply either or both these tests to determine their validity. In the year under survey, the apex court was required to do the same in a number of cases.

Reasonable classification

Any classification made by the state for any purpose is considered to be reasonable if the said classification passes the twin tests: (i) Intelligible differentia, and (ii) Rational nexus with the object sought to be achieved.

In *Dental Council of India* v. *Biyani Shikshan Samiti*[1] a classification of dental colleges established prior to and after the issuance of a notification by the Dental Council of India for differential treatment was challenged before the apex court in an appeal. The said notification substituted one of the provisions in the Dental Council of India (Establishment of New Dental Colleges, Opening of New or Higher Course of Studies or Training and Increase of Admission Capacity in Dental Colleges) Regulations, 2006. According to the substituted provision, all dental colleges to be established after the issue of notification are required to be attached to medical colleges. There were no such requirements for dental colleges established prior to that date. Thus, the substituted provision was challenged on the ground of violation of right to equality guaranteed under article 14 of the Constitution. A two judge bench of the apex court, while refuting the challenge, opined that "the colleges established prior to the impugned notification and the colleges established/to be established after the impugned notification would form two separate classes. The differential treatment for different classes would not be hit by Article 14 of the Constitution of India." The bench, however, did not adequately address the question as to whether the said classification has a rational nexus with the object sought to be achieved by the Act. It only expressed its view that the new requirement has nexus with the object sought to be achieved. It is not same as saying that the classification has rational nexus. If the new requirement has the nexus with the object, then what is the rational basis for exempting the old colleges from complying with the new requirement? The pertinent question that should have been answered was whether classification between the old and new colleges has any rational nexus with the object sought to be achieved and not whether the new requirement has any rational nexus with the said object. Theseare

1 (2022) 6 SCC 65.

two different questions, mistaking them to be one and the same tantamount to mistaking apples for oranges.

Manifest arbitrariness

In a number of cases, state actions including legislations were challenged on the ground of 'manifest arbitrariness'. In *Dental Council of India* v. *Biyani Shikshan Samiti*,[2] the apex court once again reiterated that the burden to prove that the state action is manifestly arbitrary is on the party who challenges the validity of such actions on the said ground.

In *Ashish Shelar* v. *Maharashtra Legislative Assembly*,[3] several writ petitions were filed under article 32 challenging a resolution adopted by the Maharashtra Legislative Assembly on July 5, 2021, *inter alia*, on the ground that it violated their rights under articles 14 and 21 of the Constitution. Through the said resolution, the Assembly had adopted a motion suspending twelve of its members for a period of one year on the ground of 'objectionable behavior' in the Assembly. One of the main contentions of the petitioners was that their suspension was done otherwise than in accordance with the provisions of Maharashtra Legislative Assembly Rules, 1985 (herein after 'Rules'). Other contentions included: (ii) there was no material on record to indicate that the suspended members were part of the unruly mob, (iii) non-compliance with principles of natural justice, (iv) period for which suspension is ordered is not only excessive and unnecessary, it also undermines the democratic values enunciated in the Constitution. In the overall context of the matter, it was argued, suspension for a longer period is worse than expulsion of a member.

Respondent on the other hand contended that: (i) Rules were not binding on the House, (ii) It is not open to question the decision of the house on the ground of procedural irregularity in any court, (iii) the court can only look into whether the house had jurisdiction to adopt the resolution in question, (iv) legislatures are not expected to assign reasons in support of the resolution as the same is not subject to judicial review, and (v) quantum of period of suspension is non-justiciable.

A three judge bench of the apex court, considered their pleas. Rule 53 of the said Rules authorizes the Speaker, in cases where member(s) conduct in a 'grossly disorderly' manner, to instantaneously order their withdrawal from the meetings of the Assembly for the reminder of the day. If the disorderly conduct is repeated again by such member(s) in the same session, Speaker has the authority to suspend them for the reminder of the entire session. Apart from Rule 53, which prescribes graded approach to be adopted, the House could proceed under Part XVIII of the Rules if the alleged conduct of member(s) amounts to breach of privileges. Under this part, Committee of Privileges needs to be constituted to enquire into the matter and the persons concerned need to be heard in the process. In the instant case, neither of these provisions was invoked. The Minister for Parliamentary

2 *Ibid*.

3 (2022) 12 SCC 273.

Affairs moved a motion for suspending the members for contempt of the house. On the very same day, the Speaker allowed the motion to be put to vote and it was passed by the majority immediately.

While examining the constitutional validity of impugned motion, the three judge bench, in its unanimous decision, categorically held that the sweep of article 21, read with articles 14 and 19, is wide enough "to govern the action of dismembering a Member from the House" either by expulsion or suspension.[4] If the action of expulsion or suspension is "manifestly arbitrary", it is open to be challenged on the ground of violation of articles 14 and 21.

Further, while reiterating that the Rules framed under article 208 of the Constitution constitute "procedure established by law" for the purpose of article 21, it opined that "even though the legislature has the prerogative to deviate from the rules including to alter the rules; until then, and even otherwise, it is expected to adhere to the 'express substantive stipulation' (which is not mere procedure) in the Rules."[5] The Rules framed under article 208 contain both substantive and procedural provisions. By virtue of article 212 (1) of the Constitution, courts cannot examine the validity of proceedings in the Legislature of a State on the ground of mere 'procedural irregularity'. The said provision does not, however, protect the actions that are grossly illegal or irrational from judicial scrutiny. Taking into account the legal position, the bench observed:[6]

> [i]f the legislature intended to depart from mechanism predicated in Rule 53, it ought to have expressly provided for that dispensation. If it had done that by a law or in the form of Rules framed under Article 208 of the Constitution, the legality and constitutionality thereof could have been tested. Suffice it to note, in absence thereof, it would inevitably be exercise of power without an express grant in that regard. In such a case, the exercise of power can only be implied or inherent and limited to the logic of general necessity by way of self-protective or self-defensive action reasonably necessary for proper exercise of the functions of the House during the ongoing Session. Anything in excess then for a day or the remainder of the ongoing Session, would not be necessary much less rational exercise of inherent power of the Assembly. Even, Rule 53 bestows authority in the Speaker to take action against the Member only for ensuring orderly functioning of the House. Same logic must apply to the exercise of inherent limited power by the House, even if it may not be *de facto* under Rule 53.

In the opinion of the court the action of suspension of members for a period beyond what was necessary for smooth functioning "indubitably, suffer from the vice of being grossly irrational measure adopted against the erring Member and

4 *Id*., para 55.
5 *Id*., para 40.
6 *Id*., para 80.

also substantively illegal and unconstitutional."[7] The court in particular held that "one-year suspension is worse than "expulsion", "disqualification" or "resignation" — insofar as the right of the constituency to be represented before the House/Assembly is concerned."[8] The bench accordingly set aside the impugned resolution.

In *Noel Harper* v. *Union of India*,[9]certain changes introduced to the Foreign Contribution (Regulation) Act, 2010 by the Foreign Contribution (Regulation) Amendment Act, 2020 were challenged, in several writ petitions filed under article 32, on the ground that they are manifestly arbitrary, unreasonable and violative of fundamental rights guaranteed under articles 14, 19, and 21 of the Constitution. In particular, sections 7, 12 (1-A), 12A and 17(1) were specifically impugned. In brief, section 7, as amended, completely prohibited 'transfer' (without defining it) of foreign contribution to any person or organization; section 12 (1-A) read with section 17 mandated that all foreign contribution shall be received only in an account designated as "FCRA Account", which shall be opened only at the designated branch of the State Bank of India at New Delhi; and section 12A empowered the Central Government to require the organizations to submit the *Aadhaar*number of all its office-bearers, directors or key functionaries as identification proof at the time of seeking permissions or approvals under certain provisions of the Act.

While dealing with challenges to specific provisions, the three judge bench of the apex court, in general, observed that "[R]eceiving foreign donation cannot be an absolute or even a vested right"[10] and "It is open to a sovereign democratic nation to completely prohibit acceptance of foreign donation on the ground that it undermines the constitutional morality of the nation, as it is indicative of the nation being incapable of looking after its own affairs and needs of its citizens."[11] It also advised the charitable associations to "focus on donors within the country, to obviate influence of foreign country owing to foreign contribution."[12] In its opinion, "[T]here is no dearth of donors within our country."[13]

Further, the bench also considered the objectives of the Principal Act that seeks to regulate acceptance and utilization of foreign contributions. Noting that the regulation is important for protecting "national interests", the court dealt with specific challenges. In the opinion of the bench, section 7 of the Act, as amended, is "neither…arbitrary nor discriminatory much less manifestly arbitrary."[14] It was of the view that the provision provides for reasonable classification and the same

7 *Id*., para 52.
8 *Id*., para 62.
9 (2023) 3 SCC 544.
10 *Id*., para 115.
11 *Id*., para 90.
12 *Id*., para 116.
13 *Ibid*.
14 *Id*., para 120.

has rational nexus with the object sought to be achieved. It does not even violate rights under articles 19(1)(c), 19(1)(g) or 21 of the Constitution of India. Rights under article 19(1)(c) and 19(1)(g) are not absolute and for the purpose of article 21, the impugned section 7 serve as "procedure established by law". The bench, however, was not moved by the argument that the measure adopted is not "least restrictive". It simply stated that the argument is "of no avail."[15]

As regards challenge to provisions contained in section 12 (1-A) and section 17 is concerned, the bench upheld the argument of the respondents that the requirement of opening "FCRA Account" only in the designated branch of the designated bank is required to strictly regulate the inflow of foreign contributions and to oversee its utilization. After considering the smooth processes put in place for opening such account, the bench upheld the provision.

The bench, however, read down section 12A, which empowered the central government to require submission of *Aadhaar* number of office-bearers or functionaries, who are Indians. Since the provision itself contemplates submission of a copy of passport or overseas citizen of India card in case of foreigners, the bench stated that even Indians should be allowed to submit copy of passports as identification proof. There shall be no mandatory requirement of submission of *Aadhaar*.

In *M.P. Power Management Co. Ltd.* v. *Sky Power Southeast Solar India (P) Ltd.*,[16] a two judge bench of the apex court considered the questions as to whether a state action in a non-statutory contractual matter can be challenged on the ground of arbitrariness. The bench answered the question in the affirmative. It was of the view that since the state has the "duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible."[17] It, however, made it clear that "every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action."[18] The bench provided certain illustrations of state actions that can be termed as arbitrary. According to the bench, following state actions clearly bear the insignia of arbitrariness:[19]

(i) Actions based on no principle,

(ii) Actions having no rational basis but based on the whims and caprice of the authority concerned,

(iii) Actions lacking in good faith and actuated by oblique motive,

(iv) Actions that shows lack of application of mind and due regard to public interest and rights of parties,

(v) Actions that are wholly unreasonable.

15 *Id.*, para 122.

16 (2023) 2 SCC 703.

17 *Id.*, para 82.12.

18 *Ibid.*

19 *Id.*, para 75.

These illustrations concretize the abstract test of arbitrariness to some extent. These are much needed indicators for courts in India to properly apply the arbitrariness test.

Equal pay for equal work

In *State of Madhya Pradesh* v. *R.D. Sharma*,[20] the apex court, in passing, commented on the status of the constitutional principle of 'equal pay for equal work'. It opined that though it is a constitutional goal to be achieved, it is not an enforceable fundamental right vested in any employee. Further, it reiterated that:[21]

> [t]he equation of post and determination of pay scales is the primary function of the executive and not the judiciary and therefore ordinarily courts will not enter upon the task of job evaluation which is generally left to the expert bodies like the Pay Commissions.

It is true that evaluation of the job and equation of post is not the job of the courts. The courts should not get into it as they may not have the expertise to undertake such an exercise. It is also true that under the Constitution securing "equal pay for equal work" is one of the objectives imposed on the 'state' in Part – IV and it is not recognized as a fundamental right in Part – III.It may, however, be possible to read this as a facet of right to equality under article 14. There are already many examples of judiciary reading directive principles into fundamental rights and enforcing them under that garb.

Equal treatment of unequals

In *Sunil Kumar Rai* v. *State of Bihar*,[22] A notification issued by the Bihar Government authorizing the issuance of Scheduled Tribes Certificate to members of the 'Lohar' community was challenged, under article 32, by persons facing prosecution under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 initiated at the behest of certain members of the said community. The said community is not included in the Constitution (Scheduled Tribes) Order, 1950 (as amended from time to time) issued by the President under article 342 of the Constitution. Only the 'Lohara' and 'Lohra' communities are included in the said order at entry 21. While issuing the impugned notification, the government placed reliance on the Hindi translation of the Constitution (Scheduled Tribes) Order, 1950, wherein the word "Lohara" has been translated as "Lohar". The apex court, taking note of the fact that the "Lohar" community is included in the list of Other Backward Classes for the State of Bihar, set aside the impugned notification. It also relied on the earlier decisions where this was clarified. It was of the opinion that wrong issuance of the certificate led to equal treatment of unequals, which is forbidden under article 14 of the Constitution of India. It also underscored the point that in case of variance between the English and the Hindi versions of the aforestated Order, the former shall be treated as the authoritative text.

20 2022 SCC OnLine SC 94.

21 *Id*., para 16.

22 2022 SCC OnLine SC 232.

In *Net Ram Yadav* v. *State of Rajasthan*[23] also, the court reiterated that "treatment of unequals as equals ignoring their special needs violates Article 14 of the Constitution."[24] In *Shanavi Ponnusamy* v. *Ministry of Civil Aviation*,[25] the court emphasized on the right of transgender persons to seek "equal access to all facilities to achieve full potential as human beings , including proper education, social assimilation, access to public spaces and employment opportunities."[26] Relying on its earlier decision in *National Legal Services Authority* v. *Union of India*[27]and the Transgender Persons (Protection of Rights) Act 2019, it directed the central government, in consultation with National Council for Transgender Persons, to devise a policy framework for providing reasonable accommodation of transgender persons to seek employment in 'establishments' covered under the Act.

Substantive equality of opportunity in the workplace

In *Sk. Nausad Rahaman* v. *Union of India*,[28] a decision of the high court upholding the withdrawal of Inter-Commissionerate Transfers (ICTs) for Inspectors in the Central Excise and Customs Commissionerates was challenged before the Supreme Court. The high court had upheld it on the ground that the relevant recruitment rules do not contain any provision for ICTs. Though the apex court was of the opinion that whether to allow or not to allow ICTs is a policy decision which shall not be interfered with in exercise of the power of judicial review, it duly considered the arguments based on gender equality and need for equal treatment of disabled persons. It is axiomatic to state that withdrawal of ICTs reduced the possibilities for posting of spouses in the same place and also for reasonable accommodation of employees with disabilities. After considering the arguments based on aforestated aspects, the court observed:[29]

> This Court in the exercise of judicial review cannot direct the executive to frame a particular policy. Yet, the legitimacy of a policy can be assessed on the touchstone of constitutional parameters. Moreover, short of testing the validity of a policy on constitutional parameters, judicial review can certainly extend to requiring the State to take into consideration constitutional values when it frames policies. The State, consistent with the mandate of Part III of the Constitution, must take into consideration constitutional values while designing its policy in a manner which enforces and implements those values.

23 (2022) 15 SCC 81.
24 *Id*., para 31.
25 2022 SCC OnLine SC 1581.
26 *Id*., para 3.
27 (2014) 5 SCC 438.
28 (2022) 12 SCC 1.
29 *Id*., para 46.

One such important value the court underscored was 'substantive equality' in the matter of employment for women and disabled. It, thus, emphasized:[30]

> [i]t becomes necessary for the Government to adopt policies through which it produces substantive equality of opportunity as distinct from a formal equality for women in the workplace…Measures to ensure substantive equality for women factor in not only those disadvantages which operate to restrict access to the workplace but equally those which continue to operate once a woman has gained access to the workplace. The impact of gender in producing unequal outcomes continues to operate beyond the point of access. The true aim of achieving substantive equality must be fulfilled by the State in recognising the persistent patterns of discrimination against women once they are in the workplace.

In the same vein, the court also emphasized on the need to take into account, while framing policies, the rights of disabled to live with dignity. The court accordingly made suggestion for reconsideration of the policy to provide, *inter alia*, for postings of spouses and disabled.

Another issue relating to denial of seniority to a disabled teacher on being transferred from one district to another arose before the apex court in *Net Ram Yadav* v. *State of Rajasthan*.[31] The appellant was appointed as a senior teacher in the Bikaner district in 1993. In the year 2000, the Government of Rajasthan issued a circular directing all appointing authorities "to consider the appointment/posting of persons with disabilities at or near the place for which they opt at the time of appointment/posting." After issuance of the circular, the appellant made a representation seeking transfer to his home district Alwar. He was transferred accordingly but in the seniority list, he was placed below the junior most teacher in the same rank in the Alwar district. Services rendered in the Bikaner district were not counted in fixing his seniority. This was done as per explanation to sub-rule (10) of rule 29 of the Rajasthan Educational Subordinate Service Rules, 1971.

The apex court was of the opinion that the benefit given to the disabled through the government circular would be rendered otiose if the disabled person is required to lose his/her seniority in order to avail the said benefit. Though, it did not invalidate the aforestated explanation in the Rajasthan Service Rules (as the same was not challenged in the instant case), it held that "the said Explanation can have no manner of application to handicapped candidates who seek transfer to a place near their ordinary residence in terms of a beneficial office order/circular issued for their benefit."[32] It accordingly quashed the order determining the appellant's seniority. Further, while asserting that the disabled are entitled to fundamental right to equality guaranteed under articles 14 to 16 and to freedom

30 *Id*., para 51.

31 *Supra* note 23.

32 *Id*., para 30.

guaranteed under articles 19 and 21, the bench opined that these rights shall be "interpreted liberally in relation to the disabled."[33]

III PROTECTIVE DISCRIMINATION AND AFFIRMATIVE ACTION

In a hierarchical society with graded inequality, the constitutional promise of securing "equality of status and of opportunity" to all its citizens cannot be realized by merely providing formal equality of opportunity to everyone without acknowledging existing inequalities in their social, economic, political, and educational status. It is axiomatic that providing equal opportunities to unequals often aggravates existing inequalities. Thus, in order to remove existing inequalities, the Constitution of India embodies a dynamic concept of equality. It takes within its sweep, as held by the Supreme Court in *Pradeep Jain*,[34] "every process of equalization and protective discrimination".[35]Devising and adopting progressive measures to eliminate group inequalities is very much within the constitutional scheme of equality. In other words, the idea of reasonable classification is implicit in the concept of equality embodied in the Constitution. That is precisely the reason why the Supreme Court in a catena of cases[36] opined that provisions for affirmative action or reservation contemplated under articles 15 (4) and 16 (4) of the Constitution are not exceptions but facets of right to equality. But notwithstanding such clear enunciation and reiteration of the idea, constitutional validity of reservations provided to weaker sections in education and employment are often challenged before courts on the ground that they undermine 'merit' and deny'equality'.

Reservation in AIQ of UG and PG medical courses

In the survey year, in *Neil Aurelio Nunes* v. *Union of India*,[37] reservation provided to backward classes (OBCs) and economically weaker sections (EWS) in the all-India quota (AIQ) of undergraduate and postgraduate medical courses was challenged before the Supreme Court under article 32 of the Constitution.The AIQ was introduced by the Supreme Court in *Pradeep Jain*[38] to provide domicile free admissions to undergraduate and postgraduate courses in the state-run medical and dental colleges. The percentages of AIQ were, however, varied by it in subsequent cases.[39] Currently, AIQ consists of fifteen percent in undergraduate and fifty percent in postgraduate medical seats in the state government run medical and dental colleges. In 2009, a policy decision was taken by the union government

33 *Id*., para 28.

34 *Pradeep Jain* v. *Union of India* (1984) 3 SCC 654.

35 *Id*., para 13.

36 Per R. SubbaRao J., in *T. Devadasan* v. *Union of India*, AIR 1964 SC 179; *State of Kerala* v. *N. M. Thomas* (1976) 2 SCC 310; *Indra Sawhney* v. *Union of India* (1993) Supp 3 SCC 217.

37 (2022) 4 SCC 95.

38 *Supra* note 34.

39 *Dinesh Kumar (1)* v. *Motilal Nehru Medical College* (1985) 3 SCC 22; *Dinesh Kumar (2)* v. *Motilal Nehru Medical College* (1986) 3 SCC 727; *SaurabhChaudri*v. *Union of India* (2003) 11 SCC 143.

to provide reservation for scheduled castes and scheduled tribes in the AIQ and the same was upheld by the court in *Abhay Nath*.[40] In 2021, the government extended the reservation in AIQ to OBCs and EWS effective from the academic year 2021 - 2022, which was under challenge in the instant case.

In view of the urgency, as the counselling for admissions were to be scheduled, the court passed an interim order dated January 7, 2022[41] upholding the OBC reservation. The court stated that it would pass a separate judgment later assigning the reasons in support of its decision. As regards EWS reservation, the court passed another interim order dated January 20, 2022[42] and allowed its implementation for the academic year 2021 – 2022. Since questions were also raised on the validity of the Pandey Committee criteria adopted by the government for determination of EWS, the court reserved those questions to be adjudicated separately.

On the same day i.e., on January 20, 2022, in a separate judgment in *Neil Aurelio Nunes (OBC Reservation)* v. *Union of India*,[43] the court assigned reasons in support of its decision to uphold OBC reservation. It categorically rejected the binary argument that projects reservation as a policy that undermines 'merit' and denies 'equality'. The court observed:[44]

> The crux of the above discussion is that the binary of merit and reservation has now become superfluous once this Court has recognised the principle of substantive equality as the mandate of Article 14 and as a facet of Articles 15(1) and 16(1). An open competitive exam may ensure formal equality where everyone has an equal opportunity to participate. However, widespread inequalities in the availability of and access to educational facilities will result in the deprivation of certain classes of people who would be unable to effectively compete in such a system. Special provisions (like reservation) enable such disadvantaged classes to overcome the barriers they face in effectively competing with forward classes and thus ensuring substantive equality. The privileges that accrue to forward classes are not limited to having access to quality schooling and access to tutorials and coaching centres to prepare for a competitive examination but also include their social networks and cultural capital (communication skills, accent, books or academic accomplishments) that they inherit from their family. The cultural capital ensures that a child is trained unconsciously by the familial environment to take up higher education or high posts commensurate with their family's standing. This works to the disadvantage of individuals who are first-generation learners and

40 *Abhay Nath* v. *University of Delhi* (2009) 17 SCC 705.

41 *Supra* note 37.

42 *Neil Aurelio Nunes (EWS Reservation)* v. *Union of India* (2022) 4 SCC 64.

43 (2022) 4 SCC 1.

44 *Id*., para 33.

> come from communities whose traditional occupations do not result in the transmission of necessary skills required to perform well in open examination. They have to put in surplus effort to compete with their peers from the forward communities. On the other hand, social networks (based on community linkages) become useful when individuals seek guidance and advice on how to prepare for examination and advance in their career even if their immediate family does not have the necessary exposure. Thus, a combination of family habitus, community linkages and inherited skills work to the advantage of individuals belonging to certain classes, which is then classified as "merit" reproducing and reaffirming social hierarchies.

After thoroughly debunking the binary argument, the court, in particular, dealt with two questions: (i) Whether the AIQ, as per *Pradeep Jain*,[45] should be completely free of reservation?And (ii) If no, since the concept of AIQ seats is created by the court, should reservations, if any in the AIQ, be provided only pursuant to a direction of the court?

The Supreme Court answered both the questions in the negative. It clarified that in *Pradeep Jain* AIQ seats were, in fact, not completely precluded from reservation.In the opinion of the court the observations in the said judgment that the AIQ seats shall be filled purely on merit through an all-India examination "must be socially contextualised and reconceptualised according to its distributive consequences where it furthers substantive equality in terms of Articles 15(4) and 15(5) of the Constitution."[46] The observation made in the context of residence based reservation should not be interpreted to mean exclusion of vertical reservations in the AIQ to scheduled castes, scheduled tribes and socially and educationally backward classes that may be provided under article 15 (4) and (5) of the Constitution. The court also clarified that the executive is competent to provide reservation in the AIQ and it is not required to seek permission from the court before providing it. Any insistence on obtaining the prior permission of the court would amount to judicial overreach. The court also categorically held that "there is no prohibition in introducing reservation for socially and educationally backward classes (or the OBCs) in PG courses."[47]

Mandamus to increase reservation quota

Another important question regarding the role of the judiciary in providing reservation came up before the court in *State of Punjab* v. *Anshika Goyal*.[48] It was an appeal from the decision of the High Court of Punjab and Haryana,[49] which had issued a writ of mandamus directing the state, *inter alia*, to increase the reservation for sportspersons from 1% to 3% in government medical and dental colleges. The

45 *Supra* note 34.

46 *Supra* note 37, para 67.

47 *Id*., para 46.

48 (2022) 3 SCC 633.

49 *Anshika Goyal* v. *State of Punjab*, 2019 SCC OnLine P&H 6235.

Supreme Court set aside the impugned judgment of the high court. Relying on *Gulshan Prakash*,[50] *Central Bank of India*,[51] *Suresh Chand Gautam*,[52] and *Mukesh Kumar*,[53] the court reiterated that the writ of mandamus cannot be issued to provide reservation or particular percentage of reservation. It is within the province of the state to make provision for reservation and to decide the percentage of reservation. The courts cannot interfere and direct the state to make such a provision.

Reservation for local residents

In *Satyajit Kumar* v. *State of Jharkhand*,[54]certain questions relating to power of the Governor under the Constitution to modify recruitment rules, framed under article 309, to provide for cent percent reservation in public employment in favour of 'local residents' of the scheduled districts in the State of Jharkhand came to be examined. It may be noted that thirteen out of twenty four districts in the State have been declared as scheduled areas/districts by the President under sub-paragraph (2) of paragraph (6) of the fifth schedule. Through the impugned notification issued under sub-paragraph (1) of paragraph 5 of the fifth schedule, the Governor of Jharkhand had reserved, for a period of ten years, all class-3 and class-4 posts in the district cadre to the 'local residents' of the concerned scheduled districts in the State of Jharkhand. The said notification has been given overriding effect notwithstanding anything to the contrary contained in any rules made under article 309 or any other law, order or direction. Subsequently, an advertisement was issued by the government to recruit trained graduate teachers in the state. In terms of the Governor's notification, the government reserved all vacancies in the scheduled districts only to the 'local residents' of the concerned district. Both the notification and the advertisement were challenged before the High Court of Jharkhand, which declared them to be unconstitutional and set them aside.

When the case came in appeal, a two judge bench of the apex court examined the legal position in detail. Relying on plethora of decisions, most particularly the constitution bench decision rendered in *Chebrolu Leela Prasad Rao* v. *State of A.P.*,[55] it opined:

(i) The impugned notification is beyond the scope and ambit of the power vested in the Governor under sub-paragraph (1) of paragraph 5 of the fifth schedule. The opening words "notwithstanding anything in this Constitution" found in the said sub-paragraph should be read in the context and, thus, read it only empowers the governor to not apply any Act of the Parliament or the State Legislature to the scheduled areas or to apply them with such exceptions or modification notwithstanding anything contained in articles 245 and 246 of the Constitution. Those words cannot be read as

50 *Gulshan Prakash* v. *State of Haryana* (2010) 1 SCC 477.

51 *Central Bank of India* v. *SC/ST Employees Welfare Assn.* (2015) 12 SCC 308.

52 *Suresh Chand Gautam* v. *State of U.P.* (2016) 11 SCC 113.

53 *Mukesh Kumar* v. *State of Uttarakhand* (2020) 3 SCC 1.

54 2022 SCC OnLine SC 954.

55 (2021) 11 SCC 401.

conferring upon the Governor absolute and unfettered power to violate provisions contained in Part III of the Constitution.[56]

(ii) In exercise of the power under sub-paragraph (1) of paragraph 5 of the fifth schedule, the Governor can only modify an Act of Parliament or the State Legislature in its application to scheduled areas but not subordinate legislations including the recruitment rules framed under article 309 of the Constitution.[57]

(iii) Providing cent percent reservation in the district cadre to 'local residents' of the concerned scheduled districts violates rights of non-residents under article 16 (2) of the Constitution of India. Cent percent reservation is impermissible under the constitutional scheme.

(iv) It is only the Parliament, which has the power under article 16 (3) read with article 35 (a)(i) of the Constitution to prescribe residential requirement to seek employment in any state.

The bench accordingly held the impugned notification and the advertisement unconstitutional and *ultra vires* articles 14, 16(2), 16(3) and 35(a)(i) of the Constitution of India. However, in view of the facts and circumstances of the case, it did not completely set aside the appointments already made. It directed the government to prepare fresh merit list after allowing the non-residents to apply based on the score they have secured.

Special provisions (including 'reservation') for EWS

Towards the end of the survey year, an important case concerning validity of affirmative action provisions made in favour of the Economically Weaker Sections (EWS) of citizens came to be decided by a five-judge bench of the apex court in *Janhit Abhiyan* v. *Union of India (EWS Reservation)*.[58] In this case, the challenge was to the Constitution (One Hundred and Third Amendment) Act, 2019, which amended articles 15 and 16 of the Constitution. New clauses were added to both these provisions *viz*., clause (6) to article 15 and another clause (6) to article 16. These new clauses empowered the state to make any special provision for the advancement of EWS[59] including provisions in relation to their admission to any educational institutions (other than the minority educational institutions).[60] In order to ensure their admission to educational institutions, the state may also provide for reservation subject to a maximum of ten per cent. Similarly, the state may also provide for maximum of ten per cent reservation to them in appointments or posts as well.[61]

These ten percent reservations contemplated both in the matter of admission to educational institutions and appointments or post are in addition to the existing

56 *Id*., paras 91 and 94.
57 *Id*., para 94.
58 (2023) 5 SCC 1.
59 Art. 15 (6) (a).
60 Art. 15 (6) (b).
61 Art. 16 (6).

reservations provided in favour of Scheduled Castes (SCs), Scheduled Tribes (STs), and Socially and Educationally Backward classes (SEBCs) or Backward classes (BCs), as the case may be, under articles 15 (4), 15(5), and 16 (4) of the Constitution.

These special provisions in favour of EWS contemplated under the newly inserted clauses are, subject to certain significant exceptions, in lines with similar provisions in favour of SCs, STs, SEBCs/BCs contemplated under the aforementioned pre-existing clauses of articles 15 and 16. That is apparently the reason why even the economically weaker among them have been explicitly excluded from the EWS category. Thus, this category only includes those economically weaker sections, who do not belong to SCs, STs, SEBCs/BCs. In other words,these special provisions are meant for the advancement of those who are socially and may be even educationallyforward but economically backward.

Four questions, all revolving around basic structure doctrine, arose for determination of the bench:

(i) Whether reservation based solely on economic criteria violates the basic structure of the Constitution of India?

(ii) Whether exclusion of economically weaker among SCs, STs, SEBCs/BCs from the EWS category violates the equality code and, thus, the basic structure doctrine?

(iii) Whether ceiling limit of fifty per cent reservation is part of the basic structure of the Constitution? If so, whether providing additional reservation up to ten per cent to economically weaker sections violates it?

(iv) Whether amendment by extending EWS reservation to private unaided education institutions breaches the basic structure of the Constitution?

The bench by 3:2 majority answered all the four questions in the negative and upheld the Constitution (One Hundred and Third Amendment) Act, 2019 in *toto*. Each of the three judges constituting majority *viz*., Dinesh Maheshwari, Bela M. Trivedi, and J.B. Pardiwala, JJ., wrote a separate judgment. Though, Bela M. Trivedi, and J.B. Pardiwala, JJ., in their respective judgments, have fully agreed with the decision of Dinesh Maheshwari, J., they chose to write separate judgments for different reasons. Bela M. Trivedi, J., wrote a separate judgment with an usual refrain, which the apex judges often repeat, that "having regard to the importance of the constitutional issues involved, I deem it appropriate to pen down my few views, in addition…"[62]. J.B. Pardiwala, J. on the other hand, agreed only with the final decision of Dinesh Maheshwari, J. but not with the reasoning assigned by him. He said: "I would like to assign my own reasons as I have looked into the entire issue from a slightly different angle."[63] He, however, did not provide any reason as to why he did not endorse the reasoning in the judgment of Dinesh Maheshwari, J.

62 *Id*., para 189.

63 *Id*., para 226.

This polyvocality among the judges constituting simple majority in multi-member benches seriously undermine the authority of reasoning assigned in support of the decision they all agreed to.It is a matter of serious concern but not very apt to be discussed here.

What is important to be noted here is that in the opinion of the majority the reservation based solely on 'economic criteria' is permissible and it does not violate the basic structure of the Constitution. The exclusion of the economically weaker among the SCs, STs, SEBCs/BCs from the EWS category also does not violate the basic structure as the same is based on reasonable classification. According to Dinesh Maheshwari, J. such "exclusion is inevitable for the true operation and effect of the scheme of EWS reservation."[64]He was also of the view thatall vertical reservations are based on mutual exclusions and "sans such exclusion, reservation by way of the amendment in question would only lead to an incongruous and constitutionally invalid situation."[65]

The majority was also of the opinion that fifty per cent ceiling limit on reservation only applies to vertical reservations contemplated under articles 15(4), 15(5) and 16(4) of the Constitution. Moreover that ceiling limit is not very sacrosanct and in past, several benches have also opined so. Thus, additional ten per cent reservation to EWS under articles 15 (6) and 16 (6) does not violate the basic structure of the Constitution. Lastly, they also held that the amendment in question does not violate the basic structure doctrine by extending EWS reservation in the matter of admission to private unaided educational institutions.

In the bench, Uday U. Lalit, C.J., and S. Ravindra Bhat, J., constituted minority.They produced a common judgment authored by S. Ravindra Bhat J. They did not agree with the majority on all counts. They agreed with the majority on the question whether 'economic criteria' can be the sole basis of reservation. In their opinion, "[E]conomic emancipation is a facet of economic justice which the preamble, as well as articles 38 and 46 promise to all Indians."[66] Thus, if economic deprivation is made the basis, as the social discrimination was made the basis earlier, for providing reservation, the same "does not alter, destroy or damage the basic structure of the Constitution."[67]

They were, however, categorical that the reservation or affirmative action based solely on the 'economic criteria' is permissible only for the purpose of article 15 and not for the purpose of providing reservation in appointments and posts under article 16. This is one aspect on which they differed with the majority. In their opinion, reservations under article 16 are based on the principle of representation. 'Inadequacy of representations' of the (socially) backward classes is the principal basis for providing reservations under article 16 (4). Unlike that,

64 *Id*., para 137.
65 *Id*., para 143.
66 *Id*., para 553.
67 *Ibid*.

the introduction of reservation for EWSs under article 16 (6) is not premised on their lack of representation in the services under the state. Conditions laid down for providing reservations to (socially) backward classes under article 16 (4) are more stringent than conditions laid down for providing reservation to EWSs under article 16 (6). In other words, the reservation in favour of backward classes under article 16 (4) is premised on two conditions: (i) social backwardness, and (ii) inadequacy of representation. Whereas reservation contemplated under article 16 (6) in favour of EWSs is based solely on economic backwardness. 'Inadequacy of representation' is a relevant condition under article 16 (4) but it is irrelevant under article 16 (6). Thus, they opined:[68]

> [t]he absence of this condition implies that persons who benefit from the EWS reservations can, and in all probability do belong to classes or castes, which are "forward" and are represented in public service, adequately. This additional reservation, by which a section of the population who are not socially backward, and whose communities are represented in public employment, violates the equality of opportunity which the Preamble assures, and Article 16(1) guarantees.

As was rightly pointed out the central idea of reservation under article 16 is ensuring adequate representation of all sections in public employment. But since reservation for EWSs is based solely on economic backwardness, it can be provided notwithstanding whether or not the said class is already adequately represented in the services under the state. It completely defies logic and defeats the central purpose of reservation in employment. The majority view, thus, needs to be reconsidered.

S. Ravindra Bhat, J. and Uday U. Lalit, C.J., have also vehemently disagreed with the majority even on the question of validity of exclusion of economically weaker among the SCs, STs, SEBCs/BCs from the EWS category on the ground that they are already covered under the pre-existing clauses of articles 15 and 16. In their opinion, classification of the poorest section of the society into two segments – one belonging to further disadvantageous groups *viz*., SCs, STs, SEBCs/BCs and other, who do not belong to those groups and do not suffer from those disabilities and disadvantages – isnot a reasonable classification. Exclusion of the former from the EWS category violates the equality code and, thus, the basic structure of the Constitution. In holding so, they also noted that there is nothing on record to suggest that "keeping out those who qualify for the benefit of this economic-criteria reservation, but belong to this large segment constituting 82% of the country's population (SC, ST and OBC together), will advance the object of economically weaker sections of society."[69]

68 *Id*., para 561.

69 *Id*., para 519.

While holding that articles 15 (6) and 16 (6) are invalid for being violative of the 'equality code', which is part of the basic structure of the Constitution, they observed:[70]

> [f]or the first time, the constituent power has been invoked to practice exclusion of victims of social injustice, who are also amongst the poorest in this country, which stands in stark contradiction of the principle of egalitarianism and social justice for all.

Their point of view is that reservation based on economic criteria cannot be denied to major segment of economically weaker sections,who belong to SCs, STs, SEBCs/BCs and, thus, suffer from many other disadvantages and disabilities in addition being economically backward. This position too is very fair and persuasive.Just because vertical reservations provided to SCs, STs, SEBCs/BCs are mutually exclusive, it does not follow that EWS reservation, which is also a vertical reservation, can or should be exclusive to others, who do not belong to SCs, STs, SEBCs/BCs. Since reservations to SCs, STs, SEBCs/BCs are based on the same criteria i.e., 'social backwardness', it may be justifiable to create mutually exclusive groups depending on their degree of social backwardness. Every socially backward class is included in one or the other category. No socially backward class misses out on reservation based on social backwardness. The criteria for EWS reservation, on the other hand, is different i.e., economic backwardness. All those who meet the criteria constitute one exclusive group. Articles 15 (6) and 16 (6) excludes from the group majority of those who meet the criteria. Exclusion of any class that meets the criteria amounts to 'under classification' as the differentia between included and excluded classes is neither intelligible nor has any rational nexus with the object sought to be achieved.

Further, as regards the question of validity of extension of reservation to private unaided educational institutions, S. RavindraBhat, J. and Uday U. Lalit, C.J., agreed with the majority and held that it does not violate basic structure. They, however, did not express any conclusive opinion on the question of violation of fifty per cent ceiling limit as they did not want to pre-judge the issue that is pending before another larger bench. They were very cautious and did observe self-restraint that was necessary. Though the majority has taken a clear position that fifty percent ceiling does not apply to reservations contemplated under articles 15 (6) and 16 (6), the issue is likely to be re-agitated once again before the larger bench.

IV FACETS OF RIGHT TO FREEDOM

The right to freedom is a composite right. The Constitution of India recognizes several facets of this right in articles 19 to 22. Some are recognized in absolute terms and others are recognized subject to certain explicit limitations. Some facets of right to freedom came be invoked in verities of facts and circumstances before the apex court in the current survey year.

70 *Id.*, para 502.

Freedom of movement

In *Deepak* v. *State of Maharashtra*,[71] the appellant had challenged the constitutional validity of the externment order passed against him under section 56 (1)(a)(b) of the Maharashtra Police Act, 1951 on the ground that it violated his freedom of movement guaranteed under article 19(1)(d) of the Constitution. By the said order, the appellant was directed to remove himself from the district Jalna for a period of two years. For passing the said order, the competent authority relied upon: (i) five cases registered against the appellant, and (ii) confidential in-camera statements of two witnesses. Out of the five cases registered against him, at the time of passing the order, one was under investigation; three were pending before different courts and he had been acquitted in the fifth case. The court categorically emphasized that since an order of externment infringes the fundamental right to movement guaranteed under Article 19(1)(d), it is valid only if the said order stands the test of reasonableness. After examining the records of the case, the court found that the authority, while passing the order, has not taken into account an earlier order passed by the judicial magistrate rejecting the proposal to detain the appellant under section 151 (3) of the Code of Criminal Procedure for a period of 15 days on the basis of the same offences. Further, there was no reason assigned to order his externment for the maximum period of two years permissible under the law. The court, thus, opined that the order of externment passed in the instant case amounts to imposing unreasonable restriction on freedom of movement and accordingly set aside the same.

Freedom to establish educational institutions

The right to practice any profession, or to carry on any occupation, trade or business guaranteed under article 19(1)(g) of the Constitution includes right to establish educational institution. In *Pharmacy Council of India* v. *Rajeev College of Pharmacy*,[72] the apex court considered the question whether the imposition of moratorium, through an executive resolution, on opening of educational institutions for a certain period amounts to violation of the said right. In the instant case, the Pharmacy Council of India, by its resolution/communication dated July 17, 2019, had imposed a moratorium on the opening of new pharmacy colleges for a period of five yearsapparently to prevent mushrooming of such colleges. Another reason assigned was that non-imposition of such moratorium will lead to unemployment. The said resolution, however, carved out many exemptions. It was made inapplicable to government institutions and institutions in the north-eastern region. It was also made inapplicable to states and union territories having less than 50 institutions notwithstanding the size of such state or union territory. Resolution also allowed institutions, whose applications were pending for consideration to reapply. Strangely, the resolution allowed the existing institutions to apply for increase in intake.

71 2022 SCC OnLine SC 99.

72 (2023) 3 SCC 502.

What is important to be noted is that the decision to impose moratorium was taken by the executive decision without any legal backing. It is not authorized under the Pharmacy Act, 1948.

A two-judge bench of the apex court, relying on several earlier decisions, set aside the impugned resolution on the ground that the reasonable restrictions on a fundamental right can be imposed "only by a law and not by an execution instruction."[73]

As the bench set aside the resolution on the short ground, it did not consider submissions regarding the validity of various exemptions carved out in the said resolution. It may, however, be noted that some of the exemptions are apparently arbitrary and unreasonable having no rational nexus with the object sought to be achieved. For example, it is beyond one's comprehension how establishment of new pharmacy colleges would lead to unemployment whereas increasing the intake of the existing colleges would not lead to it. Had the validity of these exceptions were tested on the touchstone of article 14 they could not have survived the scrutiny of the bench.Thus, it is obvious that such moratorium with such exceptions, even if imposed by a law, cannot be sustained.

Freedom to practice profession

In *Aravinth* v. *Ministry of Health and Family Welfare*,[74] certain provisions of the National Medical Commission (Foreign Medical Graduate Licentiate) Regulations, 2021 and National Medical Commission (Compulsory Rotating Medical Internship) Regulations, 2021, which stipulated requirements to be fulfilled by foreign medical graduates seeking registration to practice medicine in India, were challenged in a writ petition before the high court. These requirements included: (i) minimum duration of the course, which shall not be less than 54 months, (ii) minimum of 12 months internship in the same foreign medical institution, where a person has acquired the degree; (iii) registration with the professional regulatory body to practice medicine in the country, where degree is acquired; (iv) another internship in India on par with Indian medical graduates etc., The petitioner, who moved the high court, was not a foreign medical graduate but was one who was desirous of acquiring a medical degree from a foreign educational institution. The high court dismissed the petition. When the matter came up before the Supreme Court, a two-judge bench examined the issue in the context of historical background and upheld the validity of both the regulations. It observed:[75]

> The Regulations impugned by the appellant may appear superficially to be rigorous or tough. But these Regulations are a product of, (i) past experience; and (ii) necessity of times. Experts in the field of education believe (and justifiably so) that over ambitious parents, hapless children, exploitative and unscrupulous (and sometimes unlettered) founders of infrastructure-deficient educational

73 *Id*., para 54.

74 (2022) 14 SCC 280.

75 *Id*., para 10.

> institutions, paralysed regulatory bodies and courts with misplaced sympathy, have all contributed (not necessarily in the same order) to the commercialisation of education and the decline of standards in the field of education, in general and medical education, in particular. We may be able to appreciate this, if we have a look at the history of evolution of statutory measures taken to regulate the recognition and registration of foreign medical degrees in India.

The bench was not persuaded by the argument that "the country needs more doctors and that by restricting the registration of foreign medical graduates, the fundamental right of the professionals under Article 19(1)(g) and the fundamental right of the citizens under Article 21 are impaired".[76] While rejecting the argument, it observed "[I]t is true that the country needs more doctors, but it needs really qualified doctors and not persons trained by institutions abroad, to test their skills only in their motherland."[77]

Bodily integrity and forced vaccination

In order to combat COVID – 19 and to prevent the spread of the virus that has threatened the humankind all over the world, several drastic measures were taken by international organizations and national governments. Developing vaccines and granting emergency approvals for their use was one of the significant measures. Some countries have even made it mandatory to take vaccines (vaccine mandate) for certain class of citizens or for availing certain goods and services. Such measures met with challenges in certain jurisdictions. In India,the writ jurisdiction of the apex court under article 32 of the Constitution was invoked in *Jacob Puliyel* v. *Union of India*[78]to challenge the vaccine mandate and seeking direction, *inter alia*, to the concerned authorities to publicize segregated clinical trial data to enable the people to make informed decision on vaccination.

The preliminary objection raised by the respondent on the maintainability of the writ petition was brushed aside by the apex court stating that though the executive policy decision, especially concerning public health, cannot ordinarily be interfered with in judicial review, as a constitutional invigilator, it has a duty to examine such policies when they are questioned on the ground of violation of fundamental rights. Accordingly, it proceeded to examine the vaccination policy. It may be noted that though the union government has maintained that the vaccination is voluntary, several state governments have denied access to certain goods and services for those who were not vaccinated, thereby, making it mandatory to avail them. The apex court categorically held that by virtue of the'right to bodily integrity',protected under the aegis of article 21, no person can be compelled to be vaccinated.[79] The right to personal autonomy recognized under

76 *Id*., para 59.
77 *Ibid*.
78 2022 SCC OnLine SC 533.
79 *Id*., para 50 (a).

the said provision "encompasses the right to refuse to undergo any medical treatment in the sphere of individual health."[80] It was, however, quick to add that:[81]

> [i]f there is a likelihood of such individuals spreading the infection to other people or contributing to mutation of the virus or burdening of the public health infrastructure, thereby affecting communitarian health at large, protection of which is undoubtedly a legitimate State aim of paramount significance in this collective battle against the pandemic, the Government can regulate such public health concerns by imposing certain limitations on individual rights that are reasonable and proportionate to the object sought to be fulfilled.

Having regard to the prevailing facts and circumstances and the evidence that suggested that both vaccinated and unvaccinated are "susceptible to transmission of the virus at similar levels, it opined that the restrictions imposed on the unvaccinated individuals are not proportionate. But the court made it clear that if there is a change in the situation, the executive is free to "take suitable measure for prevention of infection and transmission of the virus in public interest, which may also take the form of restrictions on unvaccinated people in future…. Such restrictions will be subject to constitutional scrutiny."[82]

Thus, in the opinion of the court, the compulsory vaccination is unconstitutional but it is permissible to impose suitable restrictions on the unvaccinated if the situation so warrants. The necessity and suitability are, of course, subject to judicial review.

As regards the disclosure of clinical trial data is concerned, the court having noted what is already published, directed the authorities to publish, as per the statutory requirements, the data of ongoing and future trials of the vaccines without undue delay and without compromising the privacy of individual subjects.

This decision is one of the clear illustrations of how constitutional validity of state action depends on contexts. Thus, the decisions on such questions are often context specific. What is impermissible in a given facts and circumstances may become permissible in another. Thus, the facts and circumstances, in which the constitutional questions arise, must always be borne in mind while answering such questions.

Right to reproductive autonomy

The right of reproductive autonomy, which is a facet of right to privacy, is equally available to both married and unmarried women. A three judge bench of the apex court categorically held so in *X* v. *State (NCT of Delhi)*.[83] In this case, a question as to whether an unmarried woman, who became pregnant as a result of consensual relationship, can seek termination of her pregnancy after twenty weeks arose for consideration. The reason for approaching the court at such a later stage

80 *Id*., para 50 (b).
81 *Id*., para 50 (c).
82 *Id*., para 63.
83 (2023) 9 SCC 433.

was that “her partner had refused to marry her at the last stage” and, under the circumstances, she did not want to carry the pregnancy owing to “social stigma and harassment” that an unmarried woman would face as a single parent.

Under the Medical Termination of Pregnancy Act, 1971, which was amended in 2021, if the pregnancy is not exceeding twenty weeks, it may be terminated by a registered medical practitioner if s/he is of the opinion that continuation of the pregnancy would pose risk to the life of the pregnant woman or cause grave injury to her physical or mental health, or that the child may be born with serious physical or mental abnormality. In cases, where the length of the pregnancy exceeds twenty weeks but not exceed twenty-four weeks, only certain category of women prescribed under the Rules are allowed to seek termination on similar grounds. Rule 3-B, of the Medical Termination of Pregnancy (Amendment) Rules, 2021 prescribes categories of women who are eligible to seek termination of pregnancy for a period upto twenty-four weeks. One such category is women, whose marital status change “during the ongoing pregnancy (widowhood and divorce).” Literally, it does not include the unmarried woman whose relationship status with her partner change during the ongoing pregnancy. The apex court chose not to interpret the provision literally. It called it a “restrictive and narrow interpretation.” In its view, such an interpretation would render the provision “perilously close to holding it unconstitutional, for it would deprive unmarried women of the right to access safe and legal abortions between twenty and twenty-four weeks if they face a change in their material circumstances, similar to married women.”[84]

Further, the court noted that whereas the original Act was largely concerned with ‘married women’, the amendments made in 2021 erased the distinction between married and unmarried women in the matter of access to “safe and legal abortions”. It was, thus, of the opinion that the interpretation of rule 3-B should be consistent with the purposes of the enabling Act. The court observed:[85]

> The object of Section 3(2)(b) of the MTP Act read with Rule 3-B is to provide for abortions between twenty and twenty-four weeks, rendered unwanted due to a change in the material circumstances of women. In view of the object, there is no rationale for excluding unmarried or single women (who face a change in their material circumstances) from the ambit of Rule 3-B. A narrow interpretation of Rule 3-B, limited only to married women, would render the provision discriminatory towards unmarried women and violative of Article 14 of the Constitution… The law should not decide the beneficiaries of a statute based on narrow patriarchal principles about what constitutes “permissible sex”, which create invidious classifications and excludes groups based on their personal circumstances. The rights of reproductive autonomy, dignity, and privacy under Article 21 give an unmarried woman the right of choice

84 *Id*., para 124.
85 *Id*., para 127.

on whether or not to bear a child, on a similar footing of a married woman.

It accordingly interpreted rule 3-B so as to be in conformity with the purpose of the enabling Act and the Constitution. As a result, the words "change in the marital status" in rule 3-B (c) in effect would mean "change in relationship status" in case of unmarried women.

Right to perform last rites

It has been time and again reiterated by the apex court, in a catena of cases, that right to life guaranteed under article 21 of the Constitution includes right to be treated with dignity. This right is available not only to the living person but also to his/her body after the death.It thus, includes right of the next kin to perform the last rites of the deceased according to the religious tenets or belief. But sometimes enforcement of this seemingly innocuous right poses serious challenges as in *Mohammad Latief Magrey* v. *Union Territory of Jammu and Kashmir*.[86]In this case a question relating to right of a father to perform the last rites of his deceased son, who was killed in a police encounter arose before the Supreme Court. He was one of the four persons killed in an encounter that took place on November 15, 2021 and buried on the same day. His father was informed the next day. He requested for the body to be exhumed and handed over for performance of the last rites in his native place. The authorities, citing possible disturbance of law and order as a reason, have refused to do so in his case even though they have exhumed and handed over bodies of two others killed in the same encounter to their relatives for performing their last rites. It is under these circumstances, the father of the deceased approached the high court asking direction for disinterment. A single judge bench, in its order dated May 27, 2022, allowed the writ petition and directed the authorities to exhume the body at the earliest and hand it over to the father. The authorities were allowed to impose any terms and conditions in respect of exhumation, transportation and burial. However, considering the lapse of time, the court also stated that in case the body is highly putrefied and is not in deliverable state, the petitioner and his close relatives shall be permitted to perform the last rites according to their religious traditions and belief in the same graveyard, where the body is already buried. In that situation, bench directed that "the State shall pay to the petitioner a compensation of Rs. 5 lakhs for deprivation of his right to have the dead body of his son and give him decent burial as per family traditions, religious obligations and faith which the deceased professed when he was alive."[87] A letters patent appeal was filed before the division bench against the said order. The division bench modified the order. It only allowed the father and the close relative of the deceased (maximum 10 persons) to perform the last rites of the deceased in the same graveyard. It also directed the appellant to pay the compensation awarded by the single judge. It is against this order the father of the deceased had

86 2022 SCC OnLine SC 1203.

87 *Id*., para 19.

approached the apex court. The case came to be decided on September 12, 2022. A two-judge bench of the apex court elucidated the dilemma involved in the case:[88]

> It goes without saying that the right to live a dignified life as enshrined under Article 21 of the Constitution is not only available to a living person but also to the "dead". Even a dead person has the right of treatment to his body with respect and dignity... These rights are not only for the deceased but, his family members also have a right to perform the last rites in accordance with the religious traditions. We are of the view that it would have been appropriate and in fitness of things to hand over the dead body of the deceased to the family members, more particularly, when a fervent request was made for the same. It is of course true that for any compelling reasons or circumstances or issues relating to public order etc. more particularly in cases of encounter with the militants the agency concerned may decline to part with the body. These are all very sensitive matters involving security of nation and as far as possible the court should not interfere unless substantial & grave injustice has been done.

In the facts and circumstances of the case, after considering several factors such as further lapse of time since burial; opinion of experts on the state of the body, and also the fact that the body was buried by the authorities with respect and dignity with the help of Auqaf Committee, the bench opined that "the body may not be in a deliverable state. It will be too much at this stage to disinter the body. The dead should not be disturbed and some sanctity should be attached to the grave."[89] It also upheld the award of compensation. Further, speaking generally on the law relating to disinterment, it observed:[90]

> After a body has been buried, it is considered to be in the custody of the law; therefore, disinterment is not a matter of right. The disturbance or removal of an interred body is subject to the control and direction of the court. The law does not favour disinterment, based on the public policy that the sanctity of the grave should be maintained. Once buried, a body should not be disturbed. A court will not ordinarily order or permit a body to be disinterred unless there is a strong showing of necessity that disinterment is within the interests of justice. Each case is individually decided, based on its own particular facts and circumstances.

The bench also noticed the legislative gap relating to disinterment in India except the provision contained in section 176(3) of the Code of Criminal Procedure, the scope of which is very limited. Thus, it directed the Union of India to consider

88 *Id.*, para 54.
89 *Id.*, para 53.
90 *Id.*, para 56.

enactment of legislation on exhumation so that the situations like the one arose in the case may be tackled.

Right to wear *hijab* in educational institutions

A dispute regarding right to wear *hijab*(headscarf) in the premises of an educational institution arose in the Government Pre-University College for Girls in a small town called Kundapur in the Udupi District of the State of Karnataka. In the State, it is not mandatory for pre-university colleges to prescribe uniforms for students. However, rule 11 of the Karnataka Educational Institutions (Classification, Regulation and Prescription of Curricula, etc.) Rules, 1995 provides that "Every recognized educational institution may specify its own set of uniform". Since it is not mandatory, very few pre-university colleges in the State have prescribed uniforms for students.The aforementioned Government Pre-University College for Girls in Kundapuris one of them. It is the College Development Committee of the said college, which had prescribed the uniform.The said Committee is not a statutory body. It has its base in the circular issued by the government in 2014.

The dispute arose when, on one fine day two girl students wearing *hijab* were stopped by some teachers at the gate of the college and were asked to take off their *hijab*. Since they refused, they were denied entry into the college. Their claim was that "they have been wearing *hijab*…ever since they joined the college…. in the past they had never faced any objection from anyone, including the college administration..."[91] It is pertinent to note that these students were not refusing to wear the uniform. They were wearing *hijab*in addition to it. The college authorities claim seems to be that the students were required not only to wear uniform but also to wear it in a manner prescribed i.e., without any thing in addition.

The very next day *i.e.,* on February 4, 2022, these students approached the Deputy Commissioner of the district with a request to issue direction "to the college authorities to let them enter their college and complete their studies."[92] The Deputy Commissioner did not issue any order or direction but the Government of Karnataka issued an order on February 5, 2022, which, *inter alia*, provided that:[93]

> In colleges that come under the Pre-University Education Department's jurisdiction, the uniforms mandated by the College Development Committee, or the Board of Management, should be worn. In the event that the management does (*sic*) mandate a uniform, students should wear clothes that are in the interests of unity, equality and public order.

91 *Infra* note 94, para 214.

92 *Id*., para 216.

93 Government Order No. EP14 SHH 2022, Bangaluru, Dated: Feb. 5, 2022.

94 (2023) 2 SCC 1.

95 *Id*., para 29.

This led those students and many others to file writ petitions in the High Court of Karnataka challenging the said government order. Those writ petitions were dismissed by the high court. Special leave petitions against the said order were filed before the Supreme Court. In addition, two writ petitions were also filed under article 32 of the Constitution. They were heard by a two judge bench consisting of Hemant Gupta and Sudhanshu Dhulia JJ., in *Aishat Shifa (Hijab Case-2 J.)* v. *State of Karnataka*.[94]Hemant Gupta J., framed as many as eleven questions. Majority of these questions involved interpretation and/or application of constitutional provisions *viz*., articles 19 (1) (a), 21, 21-A, 25, 39 (f), 41, 46, 51-A (e) and (f), and article 145 (3) of the Constitution of India. In his opinion, none of those questions were substantial questions of law that require interpretation of the Constitution and, thus, a two judge bench was competent to answer them. But his judgment does not contain anything to indicate that all these questions were no longer *res integra*. His reasoning was cryptic: "[t]he issues raised do not become a substantial question of law as to the interpretation of the Constitution only for the reason that the right claimed by the appellants is provided under the Constitution."[95]It is true that every casewhere a constitutional provision is invoked does not involve 'substantial questionof law as to the interpretation of the Constitution.' Many constitutional questions are no longer *res integra*. They have been examined and answered in earlier cases. Thus, they are not considered as 'substantial questions of law'. But in the instant case, there is nothing to indicate that each and every question raised has been squarely answered in one or the other case decided before. Assuming that these are not 'substantial question of law as to the interpretation of the Constitution', Hemant Gupta J., proceeded to examine these questions and answered each of these eleven questions in favour of the respondent State and dismissed the appeals and writ petitions. According to him, the State is well within its power to prohibit wearing of any "apparent symbol of religious beliefs" including *hijab*in schools maintained by it irrespective of whether wearing such symbol is considered as "religious practice" or "essential religious practice" by believers of such religion.[96] Such prohibition does not violate any of the fundamental rights of the students.They are "required to follow the discipline of the school in the matter of uniform. They have no right to be in the school in violation of the mandate of the uniform prescribed under the statute and the Rules."[97] In reaching the said conclusion, he did not duly consider the fact that the students, in the instant case, were not refusing to wear the uniform, their only demand was that they should be allowed to wear *hijab* (headscarf) over the uniform.

Another important aspect to be noted is that while examining the question whether prohibition on wearing *hijab* violates right to privacy, he does not employ the four-fold test laid down in *Justice K. S. Puttaswmay* v. *Union of India*.[98]

96 *Id*.,para 134.

97 *Id*., para 177.

98 (2017) 10 SCC 1.

Sudhanshu Dhulia J., on the other hand, disagreed with the decision. He chose to rely on the decision of the Supreme Court rendered in *Bijoe Emmanuel*,[99]which according to him is:[100]

> [t]he guiding star which will show us the path laid down by the well-established principles of our constitutional values, the path of understanding and tolerance, which we may also call as "reasonable accommodation"…

In his opinion, it was the most relevant decision to rely upon "both on facts as well as on law".[101]Hemant Gupta J. had refused to rely on this very same judgment on the ground that "[T]he said judgment is of no help to the arguments raised as it does not deal with secular schools only."[102]In *Bijoe Emmanuel,* three girl children, who belonged to the faith called Jehovah's Witnesses, were expelled from the school for not singing the national anthem during the morning prayers. They used to stand up for the national anthem and show due respect for it like other children but they were not singing the anthem as they believed that "their faith forbid them to sing for anyone else but Jehovah." They initially approached high court challenging their expulsion and as they did not get any relief, they approached the Supreme Court. The court held that not singing the national anthem, while respectfully standing up for it, does not amount to showing disrespect to it. Expulsion of those students, under the circumstances, violates their fundamental right to freedom of speech and expression guaranteed under article 19 (1) (a) of the Constitution.

In the opinion of Sudhanshu Dhulia J., reasonable accommodation is what needs to followed in this case as was done in *Bijoe Emmanuel*. Right to wear *hijab* is not too much to ask for in a democracy. What weighed with him more is the apprehension that if the girl students are prohibited from wearing *hijab* in educational institutions, they might end up not reaching the schools at all. He observed:[103]

> The unfortunate fallout of the *hijab* restriction would be that we would have denied education to a girl child. A girl child for whom it is still not easy to reach her school gate. This case here, therefore, has also to be seen in the perspective of the challenges already faced by a girl child in reaching her school. The question this Court would put before itself is also whether we are making the life of a girl child any better by denying her education merely because she wears a *hijab*!

Sudhanshu Dhulia J., thus, allowed all the appeals and writ petitions. But in view of the divergent views expressed by the judges, the matter was directed to be placed before the Chief Justice of India to be referred to an 'appropriate bench.'

99 *Bijoe Emmanuel* v. *State of Kerala* (1986) 3 SCC 615.

100 *Supra* note 94, at 258.

101 *Ibid*.

102 *Id*., para 125.

103 *Id*., para 310.

It is important to note that the disagreement between Hemant Gupta and Sudhanshu Dhulia JJ.,is not only on the final decision but also on the questions of law that arose in the case. Sudhanshu Dhulia J., did not seem to think that all the eleven questions framed by Hemant Gupta J., are relevant to be answered to decide the case. His approach was entirely different. He has taken a holistic view of the matter. It seems to be a right approach. The question is not whether prescription of uniform would serve any important purpose but whether prohibition on wearing *hijab* over the uniform would significantly further the said purpose? Or does it have unintended consequences that are incompatible with the larger goal of educating and empowering girl children?In constitutional adjudication, if the context is missed, the essence may get diluted. It may be pertinent to recall what Benjamin N. Cardozo said: "Courts have often been led into error in passing upon the validity of a statute, not from misunderstanding of the law, but from misunderstanding of the facts."[104] It is axiomatic to state that it squarely applies even when the courts examine the validity of executive actions. One can only hope that when the matter is taken up by the appropriate bench, it is not going to "miss the wood for the tree."

Safeguards against preventive detention

The Constitution accords certain safeguards to persons detained under preventive detention laws. These safeguards have the status of fundamental rights under article 22 (4) to (7) of the Constitution. These safeguards include the right to be informed of the grounds of detention and the right to be afforded an opportunity at the earliest to make a representation against such detention order. By virtue of these rights, the detenue is entitled to receive all the documents relied upon by the detaining authority while passing an order of detention. Non supply of those documents amounts to violation of the aforestated rights. In *State of Manipur* v. *Buyamayum Abdul Hanan alias Anand*,[105] the decision of the high court quashing the detention order was challenged before the Supreme Court. The high court had quashed it on the ground that copies of the documents supplied to the detenue were not legible as a result he was denied the right to make an effective representation against the detention order. It is a settled law that "supply of legible copies of the documents relied upon by the detaining authority is a *sine qua non* for making an effective representation."[106] In the Supreme Court, the appellant state, without disputing the settled proposition of law, only contended that the detenue did not ask for the legible copies from the detaining authority. He only raised the issue before the high court for the first time. The apex court did not countenance this argument. It was of the opinion that non-supply of the legible copies of the relevant document has deprived the detenue his right to make an effective representation and thus his detention is "illegal and not in accordance

104 Benjamin N. Cardozo, *The Nature of Judicial Process* 80-81 (Fifth Indian Reprint, Universal Law Publishing Co. Pvt. Ltd., 2004)

105 2022 SCC OnLine SC 1455.

106 *Id*., para 14.

with the procedure contemplated under law"[107] In its considered view, "the right of personal liberty and individual freedom which is probably the most cherished is not, in any manner, arbitrarily to be taken away from him even temporarily without following the procedure prescribed by law…"[108]

V CRIMINAL LAW THROUGH THE PRISM OF FUNDAMENTAL RIGHTS

Constitutional roots of procedural safeguards

Several provisions of the Code of Criminal Procedure, 1973 were designed to legislatively expound the constitutional safeguard that no person's liberty shall be taken away except in accordance with the law that is just, fair and reasonable. This has been underscored by the apex court in several cases. In *Satender Kumar Antil* v. *CBI*,[109] a two judge bench of the apex court considered several provisions of the Code dealing with arrest (sections 41, 41-A and 60-A); issue of warrant/ summons (section 87); execution of bond (section 88); procedure to be followed when investigation cannot be completed in twenty-four hours (section 167); forwarding of cases to magistrate (section 170); issue of process (section 204); commitment of case to court of session (section 209); power to adjourn proceedings (section 309); suspension of sentence during pendency of appeal and release on bail (section 389); maximum period of detention of undertrials (section 436-A); grant of bail in non-bailable cases (section 437); special powers of high court or court of session to grant bail (section 439), and amount of bond (section 440) in the light of judicial precedents. The bench was of the opinion that these provisions are enacted on the basis of "inviolable right enshrined under Articles 21 and 22 of the Constitution of India"[110] and, thus, they shall be interpreted and enforced in the light of rights guaranteed under the said articles. In particular, it was of the view that the provisions relating to bail shall be interpreted and enforced in the light of 'presumption of innocence', which is a facet of article 21. It further said that the principle "bail is the rule and jail is the exception" also has its roots in article 21 of the Constitution.

Further, the bench also emphatically reinforced the necessity to comply with sections 41, 41-A of the Code and the guidelines issued in *Arnesh Kumar*,[111] while exercising the power of arrest. The bench also classified all offences into four categories and outlined the procedure to be followed by the police and the court in cases where an accused person is not arrested during investigation, and s/he is extending complete cooperation during the investigation.

A three judge bench of the apex court, again in *Mohammed Zubair* v. *State of NCT of Delhi,*[112] emphasized on the need to scrupulously follow without exception

107 *Id*., para 21.
108 *Id*., para 24.
109 (2022) 10 SCC 51.
110 *Id*., para 20.
111 *Arnesh Kumar* v. *State of Bihar* (2014) 8 SCC 273.
112 *Infra* note 151.

the provisions of the Code and the guidelines laid down in *Arnesh Kumar* while exercising the power of arrest. It opined:[113]

> Arrest is not meant to be and must not be used as a punitive tool because it results in one of the gravest possible consequences emanating from criminal law: the loss of personal liberty. Individuals must not be punished solely on the basis of allegations, and without a fair trial. When the power to arrest is exercised without application of mind and without due regard to the law, it amounts to an abuse of power. The criminal law and its processes ought not to be instrumentalized as a tool of harassment.

There is no gainsaying that the procedural safeguards envisaged under the Code are intended to protect individual liberties from arbitrary curtailment. It is because of these safeguards the criminal procedure conforms to the Constitution. In other words, these safeguards are just the legislative exposition of constitutional mandates. They have their basis firmly rooted in the Constitution. Unless these safeguards are scrupulously observed, individual freedoms stand negated in the process of administration of criminal justice. However, in India, some of the procedural safeguards have not been made available to persons accused of under certain special legislations. The Prevention of Money Laundering Act, 2002 (PMLA) is one such law.

Constitutional validity of PMLA

The PMLA was brought into force with effect from July 1, 2005. Since then it has been amended several times. The latest amendments were made in 2019 through the Finance (No. 2) Act, 2019. This amendment, by adding an explanation to section 3, effectively enlarged the scope of the offence of money laundering. Under the new definition mere 'possession' of proceeds of crime is sufficient to constitute the offence. The requirement of projecting or claiming it to be untainted property no longer exists. Further, in addition to mere possession, the definition of 'money laundering' also includes act of 'concealment' of proceeds of crime or its 'acquisition' or its 'use' or act of 'projecting' it as or 'claiming' it to be untainted property. Each of these acts amounts to money laundering. Whoever takes part in any such acts, whether or not they are party to the commission of predicate offence, can be prosecuted for money laundering. The *mensrea* requirement under the provision is some what unclear.

Under the Act, the officers of the Enforcement Directorate (ED) have enormous power to deal with the money laundering. The director or an authorized officer not below the rank of deputy director can, under certain circumstances and after complying with certain specified requirements, provisionally attach any property in the possession of any person if such officer has reason to believe that it is proceeds of crime. The order of provisional attachment can be passed even when there is no pre-registered criminal case relating to scheduled predicate offence. The adjudicating authority under the Act can confirm this provisional attachment

113 *Id*., para 30.

and, on successful conclusion of the trial, order confiscation of the property. The officers of the ED also have power to conduct survey of any place, enter and search any building or vehicle, break open the locks of any door, locker, almirah *etc*. During the course of investigation, they can summon any person to give evidence or produce any record. Every person so summoned is obliged to state the truth and produce the documents required. Failure to give information or giving false information is made punishable under the Act. The ED officers also have the power to seize any property or records, examine on oath any person, search him or her and arrest if necessary. All or any of these can be done without a formal FIR registered for commission of a predicate offence in the schedule. The registration of FIR relating to predicate offence is a pre-requisite only for initiating prosecution for the offence of money laundering under section 3 and not for taking aforestated (preventive) measures.

Further section 24 of the Act provides for shifting the burden of proof with regard to involvement of proceeds of crime in money-laundering. According to the provision, in any proceeding relating to proceeds of crime either before the Adjudicating Authority or the Court, it can be presumed that "such proceeds of crime are involved in money-laundering". In case of persons charged with offence of money-laundering, it is mandatory to make such presumptions (legal presumption) and in case of other persons, the authority or the special court, as the case may be, has discretion either to presume or not to presume (factual presumption). It is axiomatic to state that the presumption can be rebutted. The burden to rebut the same is on the person against whom such presumption is made.

The Act also provides for establishment of special courts with jurisdiction to try offence of money laundering as well as predicate offences in the schedule. The Act imposes stringent bail conditions that effectively negate the principle "bail is a rule, jail is an exception". Some leniency is, however, shown in favour of certain accused persons or in cases where sum of money alleged to have been laundered is less than rupees one crore.

In the year under survey, in *Vijay Madanlal Choudhary* v. *Union of India*,[114] a three-judge bench of the apex court heard a batch of writ petitions and appeals challenging the validity and interpretation of certain provisions of the PMLA as well as the procedure followed by the Directorate of Enforcement while enquiring into/investigating offences under the Act.

Several provisions of the Act were challenged on the ground that they are arbitrary and, thus, unconstitutional. The bench unanimously upheld all theimpugned provisions. The bench did not even countenance the argument that the definition of the offence of money laundering has been expanded by way of adding an explanation to section 3 of the Act. It was of the view that it is only clarificatory in nature. On the face of it, it does not appear to be so. The original definition of the offence of money laundering under section 3 had three components:

114 2022 SCC OnLine SC 929.

(i) Predicate offence, (ii) Proceeds of crime, and (iii) Projecting or claiming the proceeds of crime as untainted. Under the said definition, mere possession or concealment of proceeds of crime would not have amounted to money laundering unless the same was projected to be untainted property. The original definition used the word 'and' in between the second and the third components. The word 'and' is a conjunctive. The explanation added to section 3 in 2019 commands that the said word should be read as 'or', which is disjunctive. Undoubtedly when a conjunctive is read as disjunctive, it enlarges the scope of the offence. It eliminated the requirement of projecting the proceeds of crime as untainted property. Now, mere possession or concealment of proceeds of crime would amount to money laundering. Thus, the conclusion of the bench that "the Explanation is in the nature of clarification and not to increase the width of the main definition…"[115] is incomprehensible.

What is important to be noted is that the amendment Act expands the scope of the definition, not by amending the main provision but by adding an explanation to it. Further, the enlargement of definition not only expanded the scope of the offence of money laundering but also effectively obliterated the distinction between the 'predicate offence' and the 'offence of money laundering'.The moment any 'property' (proceeds of crime) is derived by committing any predicate offence (scheduled offence) that in itself, without anything more, amounts to money laundering as mere 'possession' of proceeds of crime is sufficient to constitute an offence. For example, if a public servant receives bribe for discharging any of his/ her official duty, it is an offence under the Prevention of Corruption Act, 1988 and the mere possession of the bribe so received amounts to an offence of money laundering. When the essential ingredients of one offence (predicate offence) are sufficient, without anything more, to constitute another offence, punishing the person for both violates the spirit of right against double jeopardy. This aspect was neither argued nor considered by the bench.

The bench unanimously upheld all the impugned provisions - some with and many without any qualifications. On perusal of the judgment, it is clear that the bench,broadly speaking, gave three reasons to uphold the validity of impugned provisions: (i) Provisions contain inbuilt safeguards, (ii) these provisions have rational nexus with the object of the legislation which is not only prosecution and punishment of money-laundering but also its prevention, (iii) discretionary powers under various provisions of the Act have been conferred on high officials, who are unlikely to abuse them.

Though the three judge bench rendered only one unanimous judgment, it is very lengthy. It may not be desirable to undertake a comprehensive analysis of the same in this survey. It requires an extensive and exclusive paper to be written. It may, however, be pertinent to make certaingeneral observations.Firstly, the procedure envisaged under the PMLA do not appear to be just, fair and reasonable. It may be in conformity with article 21 of the Constitution as interpreted in *A.K.*

115 *Id*., para 252.

Gopalan[116] but not in *Maneka Gandhi*.[117] Provisions relating to presumptions, admissibility of confessions before the officers of the ED (who, despite exercising many police powers, are not considered to be 'police officers') and non-supply of the Enforcement Case Information Report (ECIR) are all problematic. These provisions negate the core contents of right to fair investigation and trial. The observation of the bench on the negation of right to be presumed innocent is also concerning. The bench, though accepted that the right to be presumed innocent is a human right, it was of the view that said right can be interdicted by a law made by the Parliament or the Legislature of a State. It is trite that PMLA is not the only legislation that negates the said right. There are many other legislations that contain similar provisions. In the past also the different benches of the apex court have upheld such provisions. The reason is that the said right has not been expressly recognized under the Constitution of India. This legal position needs to be revisited. Pertinent questions that need to be considered are:

(i) Whether the right to be presumed innocent is not a part of the right to fair trial, which is derived from article 21of the Constitution in the post *Maneka* era?

(ii) When the state, by virtue of article 20 (3), cannot compel an accused person "to be a witness against himself", is it constitutionally permissible for it to compel a person to prove his innocence by presuming him/her to be guilty?

If one were to contend that the right to be presumed innocent is not an integral part of right to fair trial, then what is actually left of right to fair trial? When the state with all its might and resources cannot prove a person guilty, it is *prima facie*unfair to expect such person to prove his innocence after presuming him/her to be guilty.

Further, by virtue of article 20 (3) of the Constitution of Indian, the state cannot compel a person to be a witness against himself. To hold that though the state cannot compel a person to be a witness against himself, it can presume him to be guilty and compel him to prove his innocence is a travesty of constitutional safeguard against compelled self-incrimination. Presuming a person to be guilty (albeit on proof of certain foundational facts) seems to beat least as bad as (if not more)compelling a person to be a witness against himself.

The right to be presumed innocent is not just a human right. It should be recognized as a fundamental right implicit in articles 20 (3) and 21 of the Constitution of India.

Another important issue of concern is the assumption courts often make that the discretion vested in high officials is unlikely to be abused. It is, at best, a value judgment. Based on such assumptions, courts in India often uphold laws conferring extensive discretionary powers on high officials and also defer to their

116 1950 SCC OnLine SC 17.

117 (1978) 1 SCC 248.

decisions made in exercise of such discretionary powers. In doing so, courts seem to ignore *in toto* Lord Acton's words of abiding wisdom, which are apt to be recalled here. He was a critic of the doctrine of 'Papal infallibility' (meaning Pope cannot err in matters of faith or morals) promulgated by Pope Pius IX. In a letter he wrote to Anglican bishop in 1887 criticizing the doctrine, Lord Acton observed:[118]

> I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way, against the holders of power, increasing as the power increases… Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority, still more when you super add the tendency or the certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it.

As has been rightly said, no office, howsoever high it is, sanctifies the holder of it. It is in the interest of liberties of citizens that the conferment of extensive discretionary powers must be checked and the exercise of discretionary power by any authority, howsoever high or low the position s/he holds, shall be subjected to same level of scrutiny without any favourable presumptions in favour of holders of so called high offices.

Testing penal provisions on the touchstone of 'substantive due process' standards

A question as to whether the provisions of the *Benami* Transactions (Prohibition) Amendment Act, 2016, which contain penal sanctions, can be applied retroactively arose in *Union of India* v. *Ganpati Dealcom (P) Ltd.*,[119] before a three-judge bench of the apex court. It was argued on behalf of the Union of India that the amendment Act did not make any substantive additions, it only lays down new procedure to implement the *Benami* Transactions (Prohibition) Act, 1988 and, thus, it can be implemented retroactively. The apex court, after examining the drastic changes and additions made through the amendment Act, rejected the argument. It also noted that the aforestated argument was based on the assumption that provisions contained in section 3 (1) and section 5 of the unamended Act are constitutionally valid. It opined that simply because the constitutionality of those provisions was never challenged before the court of law, it cannot be assumed that they are constitutionally valid. Section 3 (1) prohibited *benami* transactions and prescribed punishment for entering into such transactions and section 5 provided for confiscation of property which is a subject matter of *benami*transactions. The bench held that the unamended section 3 (1) had serious lacunae and it was "overly oppressive, fanciful and manifestly arbitrary, thereby violating the 'substantive due process' requirement of the Constitution."[120]

118 Quoted in J. N. Figgis and R. V. Laurence (eds.) *Historical Essays and Studies* (London: Macmillan, 1907).

119 (2023) 3 SCC 315.

120 *Id*., para 62.

What is striking to be noted is the observation that "Indian jurisprudence has matured through years of judicial tempering, and the country has grown to be a jurisdiction having 'substantive due process'".[121] It is a very contentious proposition. On the question whether substantive due process is part of the Indian Constitution, divergent views have been expressed by the apex court in the past. It is suffice here to refer to the views of R.F. Nariman and D. Y. Chandrachud JJ., on the question. They were both part of a nine-judge bench in *Justice K. S. Puttaswamy* v. *Union of India*,[122] R. F. Nariman, in his separate judgment, reiteratedhis earlier view expressed in *Mohd. Arif*[123]that "the wheel has turned full circle and substantive due process is now part and parcel of Article 21."[124] On the other hand, D. Y. Chandrachud, who authored the leading judgment in the case, took a different stance. He opined:[125]

> Particularly having regard to the constitutional history surrounding the deletion of that phrase in our Constitution, it would be inappropriate to equate the jurisdiction of a constitutional court in India to entertain a substantive challenge to the validity of a law with the exercise of substantive due process under the US Constitution. Reference to substantive due process in some of the judgments is essentially a reference to a substantive challenge to the validity of a law on the ground that its substantive (as distinct from procedural) provisions violate the Constitution.

In view of these conflicting views, the question needs to be referred to a larger bench to be answered authoritatively. Judicial inconsistency on such a substantive constitutional question of law does not augur well for the growth of law. The legal system of the country cannot afford to have such uncertainties on such crucial questions, which have larger implications on legal system as a whole.

Further, the three judge bench in *Ganpati Dealcom (P) Ltd*.,[126] has also dealt with the question of constitutional validity of unamended section 5 of the *Benami* Transactions (Prohibition) Act, 1988. It was of the opinion that section 5 was "conceived as a half-baked provision" and it leaves the essential details to be prescribed through a delegated legislation. It was, thus, held to be unconstitutional. It also held that confiscation of property contemplated under section 5 is punitive in nature.

Since both the unamended sections 3 and 5 were declared unconstitutional, provisions inserted to substitute them through the amendment Act were considered to be new provisions and the offences created thereunder were considered to be new offences. Accordingly, the bench held that the substituted provisions in

121 *Id*., para 47.
122 (2017) 10 SCC 1.
123 *Mohd.Arif* v. *Supreme Court of India* (2014) 9 SCC 737.
124 *Supra* note 98, para 477.
125 *Id*., para 296.
126 (2023) 3 SCC 315.

section 3 and 5are applicable only prospectively. Applying them retroactively would render right against *ex post facto* law guaranteed under article 20 (1) of the Constitution nugatory.

Right to default bail under GUJCTOC Act, 2015

Section 20 of the Gujarat Control of Terrorism and Organised Crime Act, 2015 (GUJCTOC Act, 2015) modifies provisions of section 167 of the Code of Criminal Procedure in their application to offences punishable under GUJCTOC Act, 2015. According to the modified provisions, persons accused of commission of any offence under the GUJCTOC Act, 2015 are entitled to default bail after the expiry of ninety days if the investigation was not completed within the said period and no extension of time was sought for completing the investigation. The period of investigation can be extended to one hundred and eighty days by the special court after considering "the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for detention of the accused beyond the said period of ninety days."

As per the law laid down in *Sanjay Dutt*,[127] it is mandatory to produce the accused before the court at the time of consideration of the report of the public prosecutor seeking extension of time for investigation. In *Sanjay Dutt*, the apex court was dealing with an identical provision contained in Terrorist and Disruptive Activities (Prevention) Act, 1987, which is also a special law. This case was relied upon in *Jigar* v. *State of Gujarat*[128]to challenge the legality of extension granted by the special court, under the GUJCTOC Act, 2015, without procuring the presence of the accused at the time of considering the report of the public prosecutor. A two judge bench of the apex court held that the extension granted without procuring the presence of the accused either physically or through videoconference is "illegal and stand vitiated". It observed:[129]

> The logical and legal consequence of the grant of extension of time is the deprivation of the indefeasible right available to the accused to claim a default bail. If we accept the argument that the failure of the prosecution to produce the accused before the Court and to inform him that the application of extension is being considered by the Court is a mere procedural irregularity, it will negate the proviso added by sub-section (2) of Section 20 of the 2015 Act and that may amount to violation of rights conferred by Article 21 of the Constitution. The reason is the grant of the extension of time takes away the right of the accused to get default bail which is intrinsically connected with the fundamental rights guaranteed under Article 21 of the Constitution… In fact, procedural safeguards play an important role in protecting the liberty guaranteed by Article 21. The failure to procure the presence of the accused either physically

127 *Sanjay Dutt*v. *Stat*e (1994) 5 SCC 410.

128 (2023) 6 SCC 484.

129 *Id*., para 45.

> or virtually before the Court and the failure to inform him that the application made by the Public Prosecutor for the extension of time is being considered, is not a mere procedural irregularity. It is gross illegality that violates the rights of the accused under Article 21.

The apex court, in the instant case, has rightly underscored the importance of procedural safeguards. Article 21 does not confer an absolute right to life or personal liberty. What it guarantees is procedural fairness for deprivation of life or personal liberties. Thus, violation of procedure amounts to violation of the right itself. The requirement of compliance with procedure cannot be understated at all when it comes to deprivation of life or personal liberties. It may be instructive to recall the words of Felix Frankfurter J., of the Federal Supreme Court of United States, to understand the importance of procedural safeguards. He, in *McNable* v. *United States*,[130] very succinctly stated that "the history of liberty has largely been the history of observance of procedural safeguards."[131]

The bench, in the instant case, has truly appreciated and upheld the essence of article 21 and rightly set aside the order granting extension in violation of procedure. It also declared that under the circumstances, the accused are entitled to default bail.

Further, the bench also examined the validity of sub-section (5) of section 20 of the GUJCTOC Act, 2015. It prohibited granting of bail to the accused, if he/she was on "bail in an offence under this Act, or under any other Act on the date of the offence in question." Noting that an identical provision contained in Maharashtra Control of Organized Crimes Act, 1999 was invalidated in *Bharat Shanti Lal Shah,*[132] the bench declared that sub-section (5) of section 20 of the GUJCTOC Act, 2015 infringes articles 14 and 21 of the Constitution and, thus, invalid.

Double jeopardy

Protection against double jeopardy is both a fundamental and a statutory right in India. It has been accorded the status of a fundamental right under article 20 (2) of the Constitution and section 300 of the Code of Criminal Procedure (Cr.P C.) accords statutory protection against double jeopardy. The fundamental difference between the two is that article 20 (2) covers only cases of *autrefois convict* (previously convicted) but not cases of *autrefois acquit* (previously acquitted) whereas section 300 Cr.P C. accords protection against both. In other words, article 20 (2) accords only a limited protection. It prohibits subsequent prosecution only where the accused has been both prosecuted and punished for the same offence earlier. Section 300 Cr.P C., on the other hand, bars subsequent prosecution if the accused had been tried by the competent court previously for the same offence or on same facts irrespective of whether the previous trial resulted in conviction or acquittal. Clause (2) to (5) contains certain exceptions. In *T.P.*

130 318 U.S. 332 (1943)

131 *Id.*, pg. 347.

132 *State of Maharashtra* v. *Bharat Shanti Lal Shah* (2008) 13 SCC 5.

Gopalakrishnan v. *State of Kerala*,[133]the apex court had an opportunity to delve on these provisions. After the brief analysis of case law, the court succinctly elucidated the three conditions for invoking article 20 (2):[134]

> *Firstly*, there must have been previous proceeding before a court of law or a judicial tribunal of competent jurisdiction in which the person must have been prosecuted. The said prosecution must be valid and not null and void or abortive. *Secondly*, the conviction or acquittal in the previous proceeding must be in force at the time of the second proceeding in relation to the same offence and same set of facts, for which he was prosecuted and punished in the first proceeding. *Thirdly*, the subsequent proceeding must be a fresh proceeding, where he is, for the second time, sought to be prosecuted and punished for the same offence and same set of facts.

Interestingly, the court expanded the constitutional protection against double jeopardy to cases of *autrefois acquit* by invoking article 21 of the Constitution. It opined:[135]

> [p]rotection against double jeopardy is also included under the scope of Article 21 of the Constitution of India. Prosecuting a person for the same offence in same series of facts, for which he has previously either been acquitted or has been convicted and undergone the punishment, affects the person's right to live with dignity.

It is an interesting development. With this expansion, protection against double jeopardy in cases of *autrefois acquit* is no longer only a statutory protection. This right now has acquired a constitutional status and, thus, it cannot be withdrawn through ordinary legislative process.

VI RIGHT TO RELIGION

Right to perform death ceremonies according to religious tenets

Whereas right to decent burial is recognized as part of right to life guaranteed under article 21 of the Constitution of India, the right to perform funeral or death ceremonies according to one's religious tenets flows from article 25, which guarantees right to religion. As noted by the Calcutta High Court, "[T]raditions and cultural aspects are inherent to the last rites of a person's dead body."[136] The COVID – 19 pandemic, which created havoc in the world, has posed challenges even for performance of funeral rites and ceremonies according to religious tenets for those who have died during the period. The modalities set out by the Union Government for disposal of dead bodies imposed several restrictions. In

133 (2022) 14 SCC 323.

134 *Id*., para 29.

135 *Id*., para 32.

136 *Vineet Ruia* v. *Principal Secretary, Ministry of Health & Family Welfare, Govt. of West Bengal*, 2020 SCC OnLine Cal 1664.

SuratParsiPanchayat Board v. *Union of India*,[137] originally a writ petition was filed under article 226 of the Constitution before the Gujarat High Court challenging those modalities on the ground that they "do not comport with the tenets of the Zoroastrian faith." On dismissal, an appeal was filed before the Supreme Court, which made an effort to reach an acceptable solution in order to strike a balance between "the fundamental right founded on article 25" on the one hand and the "need to preserve the public health during the time of pandemic" on the other. The Solicitor General representing the respondent Union of India has also agreed to find amicable solution. Accordingly, a new protocol and standard operating procedure have been developed keeping in view both the concerns. The court, while noting that they "comports with the tenets of the Zoroastrian faith, while according with the need expressed by the Union Government for the maintenance of safety and hygiene in the context of the Covid-19 Pandemic", approved the same.

Management of Gurdwaras

The State of Haryana had enacted the Haryana Sikh Gurdwara (Management) Act, 2014 providing for establishment of Haryana Sikh Gurdwara Managing Committee - a separate juristic entity for the management of Gurdwaras and Gurdwara properties in the state. The Act substituted the scheme envisaged under the Sikh Gurdwaras Act, 1925 in the state. In *Harbhajan Singh* v. *State of Haryana*,[138] the 2014 Act was challenged, *inter alia*, on the ground that it violates the rights guaranteed under article 25 (right to freely profess, practice and propagate religion) and article 26 (freedom to manage religious affairs) of the Constitution of India. The apex court on perusal of the overall scheme of the impugned Act opined that under the Act "the affairs of the Sikh minority in the State are to be managed by the Sikhs alone, therefore, it cannot be said to be violative of any of the fundamental rights conferred under Articles 25 and 26 of the Constitution."[139]

VII RIGHT TO CONSTITUTIONAL REMEDIES AND POWERS OF THE SUPREME COURT

Maintainability of writ petitions under article 32

In *Vivek Krishna* v. *Union of India*,[140] a writ petition was filed under article 32 of the Constitution seeking a writ of mandamus or any other direction to be issued to the respondent to take appropriate measures to impose 'cooling off period' for civil servants to contest elections on any political party ticket after retirement.

A two-judge bench of the apex court, while pointing that the petition does not involve any issue relating to violation of any of the fundamental right, dismissed the same. The bench opined that "[N]obody has the fundamental right to get a mandatory order of this Court directing the appropriate Legislature to enact law or

137 (2022) 4 SCC 534.

138 2022 SCC OnLine SC 1264.

139 *Id*., para 55.

140 2022 SCC OnLine 1040.

the Executive to frame rules imposing restrictions on the eligibility of civil servant to contest elections."[141]

While dismissing the petition, the bench also reiterated that the power of the Supreme Court under article 32 is not as wide as the power of high courts under article 226 of the Constitution. Further, in order to provide greater clarity on the scope of high courts' power to issue writ of mandamus, the bench observed:[142]

> [a] writ of Mandamus cannot be issued to direct the Respondents to enact law and/or to frame rules even under the wider powers conferred under Article 226 of the Constitution. A Mandamus lies for enforcement of a fundamental right or a statutory right, or the enforcement of a fundamental duty related to enforcement of a fundamental right or a statutory right. In exceptional cases, a writ may even lie for enforcement of an equitable right. The breach or threat to breach a fundamental, statutory or may be enforceable equitable right, is the *sine qua non* for issuance of a writ of Mandamus.

In *Sunil Kumar Rai* v. *State of Bihar*,[143] the apex court allowed the writ petition filed under article 32 of the Constitution by the petitioner, who was facing prosecution under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 initiated at the behest of members of the 'Lohar' community, who have been wrongly issued the Scheduled Tribes Certificate. While dealing with the respondent's objection that the petition under article 32 is not maintainable, the court made the following observation on the contours of article 32:[144]

> Article 32 of the Constitution provides for a Fundamental Right to approach the Supreme Court for enforcement of the Fundamental Rights. The founding fathers contemplated that the very right to approach this Court when there is a violation of Fundamental Rights, should be declared as beyond the reach of Parliament and, therefore, it is as a part of judicial review that the right under Article 32 has been put in place and invoked from time to time. That in a given case, the Court may refuse to entertain a petition under Article 32 of the Constitution is solely a part of self-restraint which is exercised by the Court having regard to various considerations which are germane to the interest of justice as also the appropriateness of the Court to interfere in a particular case. The right under Article 32 of the Constitution remains a Fundamental Right and it is always open to a person complaining of violation of Fundamental Rights to approach this Court. *This is, no doubt, subject to the power of the Court to relegate the party to other proceedings.*

141 *Id.*, para 8.
142 *Id.*, para 9.
143 *Supra* note 22.
144 *Id.*, para 7. Emphasis supplied.

It is trite that the apex court often claim to have power to relegate the party, who approaches it under article 32 complaining infringement of any fundamental right, to explore and exhaust alternative remedies including approaching the high court under article 226. In this case, it even said that the fundamental right under article 32 is subject to its power "to relegate the party to other proceedings". The court so far has not indicated the source of this power – which provision of the Constitution confers power on the apex court to decline to hear petitions filed under article 32 as a matter of right. The fundamental right to move the highest court of the land at the very first instance in case of infringement of other fundamental rights is a unique feature of the Indian Constitution. According to B.R. Ambedkar, this right has an exalted position in the entire scheme of the Constitution of India. He said:[145]

> If I was asked to name any particular article in this Constitution as the most important – an article without which this Constitution would be a nullity – I could not refer to any other article except this one (article 32). It is the very soul of the Constitution and the very heart of it.

Subjecting such an important right to the discretion of benches of the apex court would defeat the fundamental purpose of conferring such a right as fundamental right. Thus, this legal position needs careful reconsideration.

In another case i.e., in *Sanjay Gupta* v. *State of U.P.,*[146] a question regarding maintainability of the writ petition filed by victims of fire tragedy under article 32 of the Constitution seeking compensation from the state and the organizer of the event (a private party) arose for consideration before the apex court. The fire incident took place on the last day of the 'India Brand Consumer Show' organized by Mrinal Events and Expositions. In that unfortunate incident 65 persons have died and more than 160 persons were injured. A preliminary objection was raised about the maintainability of writ petition under article 32 in respect of liability of private parties to pay compensationunder private law. It was contended that writ petition cannot be entertained for the purpose.

The Supreme Court, relying on earlier cases, brushed aside the contention. It noted that in individual cases, infringement of article 21 by state, private parties and state or private parties themselves have been subject-matter of consideration in writ proceedings both before the Supreme Court as well as before the high court in the past. In none of the cases, similar contentions about the maintainability of writ petitions found favour. It observed that the view taken by the courts in those cases do not call for interference. Further, after extensive survey of cases, the court also found that in three different categories of cases, compensations were awarded in the past in writ proceedings under article 32. They are: *One*, where acts of commission or omission, resulting in infringement of article 21, are attributable

145 VII *Constituent Assembly Debates* 950.
146 (2022) 7 SCC 203.

to State or its officers,[147] *two*, where such acts are attributable to "corporate entities engaging in activities having potential to affect the life and health of the people",[148] and, *three*, where such acts are attributable partly to State and partly to private parties such as organizers of events[149] as in this case.

In the instant case, based on the reports, the court found series of violations and non-compliance with statutory requirements specified under various provisions of the Uttar Pradesh Fire Prevention and Fire Safety Act, 2005, section 54 of the Electricity Act, 2003, and Section 133 of the Code of Criminal Procedure on the part of organizers as well as the State. It, thus, held that both of them are liable to pay compensation. It relied on the doctrine of *res ipsa loquitur* to brush aside the contention that the report "has not given any conclusive findings on the cause of the fire". It observed:[150]

> The maxim *res ipsa loquitur* would be applicable as organising an exhibition of such substantial magnitude without proper and adequate safety factors which may endanger the life of the visitors, has been rightly found by the Court Commissioner, an act of negligence including negligence of the officers of the State.

This decision of the apex court reinforced the position that in case of infringement of article 21 by acts of commission or omission writ proceedings under article 32 can be initiated and compensation can be awarded even against private entities.

Quashing/clubbing of FIRs in proceedings under article 32

In *Mohammed Zubair*v. *State of NCT of Delhi*,[151] the writ jurisdiction of the Supreme Court under article 32 of the Constitution was invoked by the Petitioner against whom multiple first information reports (FIRs) were filed by the police in different states on the same subject matter. He sought for quashing of the FIRs or in the alternative for clubbing them to be investigated by a single agency. A three judge bench of the apex court, while refusing to quash the FIRs, has ordered for clubbing all of them to be investigated by the special cell of the Delhi police. It observed:[152]

> [t]he machinery of criminal justice has been relentlessly employed against the petitioner. Despite the fact that the same tweets allegedly gave rise to similar offences in the diverse FIRs mentioned above, the petitioner was subjected to multiple investigations across the country. Consequently, he would be required to hire multiple advocates across districts, file multiple applications for bail, travel to multiple districts spanning two states for the purposes of

147 *Id*., para 16.
148 *Id*., para 17.
149 *Id*., para 18.
150 *Id*., para 53.
151 2022 SCC OnLine SC 897.
152 *Id*., para 27.

> investigation, and defend himself before multiple courts, all with respect to substantially the same alleged cause of action. Resultantly, he is trapped in a vicious cycle of the criminal process where the process has itself become the punishment.

Though it did not quash any FIR, the liberty was given to the petitioner to approach the high court either under article 226 of the Constitution or under section 482 of the Code of Criminal Procedure for the said relief. On perusal of the investigation proceedings, since the bench did not find any "reason or justification for the deprivation of the liberty of the petitioner to persist any further",[153] it ordered for his release on interim bail in each of the related FIRs.

It is a significant intervention of the apex court in proceedings under article 32 of the Constitution.The apex court's explicit acknowledgement that in India "criminal process itself as become the punishment" is even more significant.It is more so in cases of multiple FIRs on the same subject matter. Particularly in the age of information and communication technology, where social media posts have potential for wider reach, some of the comments or opinions shared on such platforms might attract the undue attention of the motivated busybodies. That might lead to filing of multiple FIRs in different jurisdictions. More and more such instances are coming to light these days. It is a matter of serious concern. The possibilities of multiple FIRs would have chilling effects on freedom of speech and expression. It may be desirable to evolve proper guidelines to govern registration of FIRs in such cases not only to protect such freedom but also to ensure that the criminal justice system is not abused by busybodies.

Correction of judicial decision in proceedings under article 32

In *HDFC Bank Ltd.* v. *Union of India*,[154] several writ petitions were filed challenging the directions issued by the Reserve Bank of India (RBI) to public and private banks to disclose "confidential and sensitive information pertaining to their affairs, their employees and their customers under the Right to Information Act, 2005." In this matter certain interlocutory applications were filed raising preliminary objections on the maintainability of writ petitions. Their contention was thatthe impugned directions of the RBI were based on the decision of the apex court in *RBI* v. *Jayantilal N. Mistry*[155] and, thus, the writ petitions, in effect, are challenging the final judgment and order passed in the said case. They argued, relying on *Naresh Shridhar Mirajkar*[156] and other cases, that the judicial decision cannot be challenged in proceedings under article 32 of the Constitution. Writ petitioners, on the other hand, contended that the decision in *Jayantilal N. Mistry* was rendered without taking into account recognition of right to privacy as a fundamental right and, thus, it needs to be corrected. Further, the directions issued on the basis of the said judgment are contrary to provisions contained in the Right

153 *Id*., para 21.
154 (2023) 5 SCC 627.
155 (2016) 3 SCC 525.
156 *Naresh Shridhar Mirajkar* v. *State of Maharashtra* (1966) 3 SCR 744.

to Information Act, 2005, The Reserve Bank of India Act, 1934, and also the Banking Regulation Act, 1949. The two judge bench of the apex court agreed with the contentions of the petitioner. Relying on the observations made by Ranganath Mishra J., in *A. R. Antulay*,[157] the bench opined that when the highest court of the land renders an erroneous decision, aggrieved person cannot approach any other forum to question it. In such cases, the only remedy available would be to approach the apex court under article 32 for protection of fundamental rights. In its opinion, judicial precedents suggest that "though the concept of finality of judgment has to be preserved, at the same time, the principle of *ex debito justitiae* cannot be given a go-by."[158] Thus, "[I]f the Court finds that the earlier judgment does not lay down a correct position of law, it is always permissible for this Court to reconsider the same and if necessary, to refer it to a larger Bench." But, in this case, without referring the question to a larger bench, the two-judge bench declared the preliminary objection on the maintainability of the writ petition as "not sustainable" and rejected it.

The question whether a writ petition can be filed to challenge the judicial decision is an important substantial question of law involving constitutional interpretation and it has larger implications in the legal system of the country. It should not have been dealt with in a manner in which the two judge bench dealt with it. It simply brushed aside the binding decisions of the larger benches rendered in *Naresh Shridhar Mirajkar*[159] as well as *in Rupa Ashok Hurra*.[160] The decision was based on observations made in different cases, which are not *ratio* or made in different contexts. It is a matter of serious concern. It would have been better to declare the decison rendered in *Jayantilal N. Mistry*as *per incurium*by following the proper procedure. But the bench did not do so.

VIII MISCELLANEOUS

Writ petition against private unaided minority institution

The question whether the writ jurisdiction of the high court, under article 226 of the Constitution, can be invoked for adjudication of a service dispute of an employee of a private unaided minority educational institution arose before a two-judge bench of the apex court in *St. Mary's Education Society* v. *Rajendra Prasad Bhargava*.[161] The question is not *res integra*. Similar questions arose and were answered in several cases in the past. In the instant case, relying on the long line of judicial precedents, the bench answered the question in the negative. While answering the question, the bench also summarized the legal position on the broader question of maintainability of writ proceedings against private person or organization. Since the remedy available under article 226 is a public law remedy, in

157 *A.R. Antulay* v. *R.S. Nayak* (1988) 2 SCC 602.
158 *Supra* note 154, para 41.
159 *Supra* note 156.
160 (2002) 4 SCC 388.
161 (2023) 4 SCC 498.

order to invoke the writ jurisdiction under the said the provision against private person or a body, following conditions must be fulfilled:

(i) Such a person or a body must be discharging public duties or public functions imposed either by statute or otherwise, and

(ii) Impugned action must have a direct nexus with discharging of such public duties or functions.

Unless both these conditions are fulfilled, extraordinary jurisdiction of high courts under article 226 to issue prerogative writs cannot be invoked against a private person or a body. Imparting education is undoubtedly a public duty. Thus, even a private unaided minority educational institution is also amendable to writ jurisdiction. It does not follow that every action of such a private institution is amenable to writ jurisdiction. Only those actions, which have "public element as its integral part", are amendable to writ jurisdiction. In the opinion of the court service dispute arising out of an employment contract "cannot and should not be construed to be an inseparable part of the obligation to impart education".[162]

The court also clarified that under article 226, the high court can intervene in service matters only in two cases, *first*, where service conditions of an employee are regulated by statute or, *two*, where the employer is a 'state' within the wider definition of the term under article 12 of the Constitution. It, however, made clear that merely because an educational institution is affiliated to Central Board of Secondary Education (CBSE), it cannot be considered as 'state.'

Denial of remedies on the ground of delay and laches

Whether the remedies for infringement of rights can be denied only on the ground of delay and laches in approaching the court was a question that arose for consideration before the Supreme Court in *SukhDuttRatra* v. *State of H.P.*[163]It is a case relating to non-payment of compensation for the lands acquired in 1972 – 1973, when right to property was still a fundamental right under article 31 of the Constitution of India.

In this case, the respondent state utilized lands belonging to certain private parties for the construction of a road without duly acquiring them under the law and paying compensation to the owners. When some of the aggrieved parties approached the high court, a direction was issued to the state to initiate proceedings under the law for acquiring land and for payment of compensation. The state did so only in respect of those who approached the court. Subsequently some of the other similarly situated landowners approached the court and received the benefit of the aforestated direction. It is only after this the petitioners herein approached the high court in 2011. The high court dismissed the writ petition, with liberty to approach the civil courts, on the ground that "the matter involved disputed questions of law and fact for determination on the starting point of limitation, which could not be adjudicated in writ proceedings."[164] This decision was

162 *Id.*, para 75.4.

163 (2022) 7 SCC 508.

164 *Id.*, para 5.

challenged before the Supreme Court. It framed the following question for consideration:[165]

> Given the important protection extended to an individual *vis-à-vis* their private property (embodied earlier in Article 31, and now as a constitutional right in Article 300-A), and the high threshold the State must meet while acquiring land, the question remains — can the State, merely on the ground of delay and laches, evade its legal responsibility towards those from whom private property has been expropriated?

While considering the question, the apex court acknowledged that "[T]here is a welter of precedents on delay and laches which conclude either way".[166]It also took into account how the "the State has, in a clandestine and arbitrary manner, actively tried to limit disbursal of compensation as required by law, only to those for which it was specifically prodded by the courts, rather than to all those who are entitled."[167] Thus, in view of the overall facts and circumstances of the case, the court answered the question in the negative. It categorically held that "[T]he State cannot shield itself behind the ground of delay and laches in such a situation; there cannot be a 'limitation' to doing justice."[168] It also used its extraordinary powers under article 136 read with article 142 of the Constitution to direct the state to treat "subject land as a deemed acquisition and appropriately disburse compensation."[169]

Right to Property: Current status of an erstwhile fundamental right

Right to property is no longer a fundamental right under the Indian Constitution. It did not, however, completely vanish from the constitutional framework. Though the Constitution (Forty – fourth Amendment) Act, 1978 has removed the said right from Part – III, it has incorporated it under article 300-A in Part XII of the Constitution. Thus, the right to property, though not a fundamental right, is still a constitutional right. Some even argue that under article 300-A, it is better protected than ever before.[170] It has been time and again reiterated by the apex court that a person cannot be deprived of his property except under the 'authority of law'; for 'public purpose' and without 'payment of compensation'. These three requirements are part of article 300-A. In *Kalyani* v. *Municipality, SulthanBathery*,[171] certain unacquired lands were utilized for construction of a road to be owned by a Municipality. It contended that lands were voluntarily

165 *Id*., para 16.

166 *Id*., para 18.

167 *Id*., para 19.

168 *Id*., para 18.

169 *Id*., para 26.

170 See P. K. Tripathi, "Right to Property after Forty-fourth Amendment: Better Protected than Ever Before", *AIR 1980 J 49*.

171 2022) 15 SCC 803. Also see, *Jagan Singh & Co.* v. *Ludhiana Improvement Trust* (2024) 3 SCC 308.

surrendered without any consideration but no documents were produced to prove the same. The apex court held that the burden is on the Municipality to prove that the lands were surrendered voluntarily. It opined that though the construction of road would be a 'public purpose', there is no justification for non-payment of compensation. For the said reason, the action of the Municipality was considered to be "arbitrary, unreasonable and clearly violative of Article 300-A of the Constitution."[172]

In *Haryana State Industrial and Infrastructure Development Corpn. Ltd.* v. *Deepak Aggarwal*,[173] the apex court again reiterated that though right to property had ceased to be a fundamental right, "it is a human right as also constitutional right".[174] It, however, added that compulsory acquisition by scrupulous adherence to the procedures laid down by law would not violate right to property guaranteed under article 300-A of the Constitution. The principle that 'procedure established by law' under article 21 should be just, fair and reasonable does not apply to laws contemplated under article 300-A for acquisition and deprivation of property.

It is a very categorical ruling. Though the phrases 'procedure established by law' (article 21) and 'save by authority of law' (article 300-A) are capable of being construed to have similar meaning, the court has not shown any inclination to do so. They are construed differently as a result the former affords a far better protection to life and personal liberty than the latter to property. There seems to be a justification for doing so. Otherwise attributing same meaning to both these phrases perhaps would have defeated the very purpose of shifting right to property from Part – III to Part – XII of the Constitution. Fundamental rights in Part – III are supposed to have greater sanctity than other constitutional rights.

Right to contest election

In India, the largest democracy in the world, neither the right to vote nor the right to contest election is recognized as fundamental right. The legal statuses of the right to elect, the right to be elected and also the right to dispute an election were very succinctly stated by the apex court in 1982 in *JyotiBasu* v. *Debi Ghosal*[175]as follows:[176]

> A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation.

172 *Id*., para 24.
173 (2023) 6 SCC 512.
174 *Id*., para 31.
175 (1982) 1 SCC 691.
176 *Id*., para 8.

This was reiterated by the apex court in several cases. In the survey year, in *Vishwanath Pratap Singh* v. *Election Commission of India*,[177] the petitioner, who wanted to contest *RajyaSabha* election, had approached the Delhi High Court against the Election Commission, which refused to accept his nomination on the ground that there was no proposer. He sought direction to the Commission to accept his nomination without proposer. The high court rejected his petition. When he approached the apex court, it said that the petition is "entirely misconceived". Relying on the settled law, it observed:[178]

> [t]he petitioner did not have any right to contest election to the RajyaSabha in terms of the law made by the Parliament. The Representation of People Act, 1950 read with the Conduct of Elections Rules, 1961 has contemplated the name of a candidate to be proposed while filling the nomination form. Therefore, an individual cannot claim that he has a right to contest election and the said stipulation violates his fundamental right, so as to file his nomination without any proposer as is required under the Act.

The apex court not only dismissed his special leave petition, it also imposed a cost of rupees one lakh on the petitioner.

Interpretation of statues in the light of constitutional provisions

The apex court, in *Narinder Singh* v. *DiveshBhutani*,[179] while considering the question as to whether the land in question was a 'forest land' within the meaning of the Forest (Conservation) Act, 1980, delineated its general approach in interpreting forest and environmental laws. A three judge bench highlighted the constitutional provisions, doctrines and principles in the light of which laws relating to environment and forest shall be interpreted. They are: (i) States obligation under article 48A to "protect and improve the environment and to safeguard the forests"; (ii) Duty of every citizen under article 51A (g) to "protect and preserve the natural environment, including forests, rivers, lakes and wildlife etc"; (iii) fundamental right of every person under article 21 to "live in a pollution-free environment"; (iv) doctrine of public trust; (v) precautionary principle; (v) principle of sustainable development, and (vi) the concept of environmental rule of law.

Similarly in *Bengal Secretariat Cooperative Land Mortgage Bank and Housing Society Ltd.* v. *Aloke Kumar*,[180] while dealing with a dispute concerning the cooperative society, a three judge bench of the apex court again reiterated that the laws should be interpreted in the light of constitutional provisions. It referred to the Constitution (Ninety-seventh Amendment) Act, 2011, which inserted right to form co-operative societies as a fundamental right and also imposed an obligation on the state, by inserting a new directive principle, "to promote voluntary formation, autonomous functioning, democratic control and professional management of co-

177 2022 SCC OnLine SC 2213.

178 *Id*., para 7.

179 2022 SCC OnLine SC 899.

180 2022 SCC OnLine SC 1404.

operative societies."[181] It also inserted a new Part IXB into the Constitution to provide a basic framework for 'co-operative societies' in India.[182] Noting that the idea behind insertion of these provisions was to "strengthen the democratic basis and provide for a constitutional status to the co-operative societies," it opined that all the existing "laws on co-operative societies were bound to be restructured in consonance with the 97th amendment".[183] More importantly it said "If the (existing) Act or the Rules or the bye-laws do not say what they should say in terms of the Constitution, it is the duty of the Court to read the constitutional spirit and concept into the Acts."

IX CONCLUSION

In the survey year, as noted above, several important and interesting constitutional questions involving interpretation and/or enforcement of fundamental rights arose before the Supreme Court in verities of factual scenarios. Only one such question was placed before a constitutional bench consisting of five judges.[184] The bench by 3:2 majority upheld the constitutional validity of the Constitution (One Hundred and Third Amendment) Act, 2019 through which two new clauses were inserted to articles 15 and 16 to enable the state to make special provisions including reservations in favour of EWSs. The points of disagreements between the majority and the minority are, in fact, very contentious and are likely to generate more debates and discussions in the times to come. The reasons accorded by the judges, who werein minority, in support of their views are very cogent and persuasive. They seem to reflect the correct position of law. Two of the views of the majority *viz*., (i) the reservation in employment under article 16 can be provided in favour of any class without premising it on "inadequacy of representation", and (ii) the exclusion of poorest among the SCs, STs, SEBCs/BCs from the EWS category does not violate the equality code envisaged under the Constitution do not seem to reflect the correct position of law. There is a need to reflect more on these aspects. Excepting this, there is no other constitutional bench decision directly relating to fundamental rights in 2022.

All other decisions were rendered by either two or three judge benches. Some are noteworthy, in particular, 'reading up' rule 3-B of the MTP (Amendment) Rules, 2021 in order to make reproductive autonomy available equally to both married and unmarried women, which also led to saving of the provision from being struck down;[185] setting aside the motion adopted by the Maharashtra Legislative Assembly suspending twelve of its members for a period of one year as manifestly arbitrary and unreasonable;[186] insisting that the state has the "duty

181 Art. 43B of the Constitution of India.
182 Part IXB was declared unconstitutional in….
183 *Supra* note 180, para 42.
184 *Supra* note 58.
185 *Supra* note 83.
186 *Supra* note 3.
187 *Supra* note 17.
188 *Supra* note 37.

to act fairly and to eschew arbitrariness in all its actions";[187] categorical rejection of the binary argument that projects reservation as a policy that undermines 'merit' and denies 'equality',[188] and a well balanced view adopted in *Jacob Puliyel*,[189] wherein it held that though compulsory vaccination is unconstitutional but it is permissible to impose suitable restrictions on the unvaccinated if the situation so warrants. Rulings such as these have enhanced the quality of fundamental rights and also enlarged their scopes.

The survey year also witnessed an instance, where the apex court had invoked 'constitutional morality' to justify a state action.[190]

It may be pertinent to point out that some of the decisions or observations made in certain cases do not seem to be based on sound principles of law *viz*., the decision to correct an earlier decision in proceedings under article 32;[191]observation that the fundamental right under article 32 is subject to the power of the apex court "to relegate the party to other proceedings",[192] and the view expressed in *Ganpati Dealcom (P) Ltd*.,[193] that the substantive due process is part of the constitutional jurisprudence in India. These decisions and observations are either *per incuriam* or are not based on firmer footings. These propositions need to be reconsidered.

Further, there are two more decisions that are concerning. One, the decision to uphold the Prevention of Money Laundering Act, 2002 in *Vijay Mandanlal Choudhary*.[194] Some provisions contained in the Act are really problematic. They dilute the procedural safeguards to a great extent that results in denial of right to fair investigation and trial. As pointed out earlier, certain principles/precepts on which the court had based its decision themselves need to be re-examined in proper perspective. It is reassuring that a review petition has already been filed and the same has been accepted for hearing by the apex court.[195] Second is a split verdict delivered by a two judge bench in *Aishat Shifa (Hijab Case 2 J.*).[196] As a result the matter was directed to be placed before an appropriate bench for adjudication. The case involves important substantial questions of law involving constitutional interpretation. These questions need to be adjudicated sooner by a constitutional bench of appropriate strength.

189 *Supra* note 114.
190 *Supra* note 9.
191 *Supra* note 154.
192 *Supra* note 22.
193 *Supra* note 119.
194 *Supra* note 114.
195 *Karti P. Chidambaram* v *Enforcement Directorate*, R.P. (Cri.) 219/2022.
196 *Supra* note 94.