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CONSTITUTIONAL LAW – I

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I INTRODUCTION

IT IS TRITE that substantial amount of constitutional litigations in India, from the early days to the present, concerns with interpretation and enforcement of fundamental rights guaranteed under Part – III of the Constitution. It is certainly not an exaggeration to state that it is through progressive interpretation by the judiciary, the fundamental rights are being infused with new lease of life. They have been kept abreast with the time so as to be effectively used as touchstones to examine the validity of state actions aimed at meeting the emerging needs and challenges of governance in changing times.

In fact, the true spirit, essence, contemporary relevance and vitality of fundamental rights cannot be understood except in the light of judicial interpretations and expositions. This survey succinctly captures and analyses the interpretations and expositions of law relating to fundamental rights by different benches of the Supreme Court of India in the cases decided in 2023.

II RIGHT TO EQUALITY

The Constitution of India seeks to secure equality, *inter alia*, by permitting only reasonable classifications and prohibiting even non-classificatory arbitrary and unreasonable state actions. In the survey year, in some cases, these provisions came to be invoked to challenge certain state actions.

Reasonable classification

Under section 10 (26-AAA) of the Income Tax Act, 1961, which was inserted in 2008, 'Sikkimese' are exempted from payment of income tax in respect of: (i) income from any source accrues or arises in the State of Sikkim, and (ii) income accrues or arises "by way of dividend or interest on securities."

The proviso to the said provision, however, excludes 'Sikkimese woman' who marries a non-sikkimese individual on or after April 1, 2008 from claiming the benefit under the exemption clause. Further, 'Sikkimese' for the purpose of this exemption is defined in the explanation to the said provision. The said definition does not include the old Indian settlers settled in Sikkim prior to its merger with

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India on April 26, 1975 but whose names were not recorded in the register, before such merger, as 'Sikkim Subjects' under the Sikkim Subjects Regulation, 1961. Though they were otherwise eligible to be registered as such, they were not registered because they refused to give up Indian citizenship, which was one of the conditions under the aforesaid Regulation to register as 'Sikkim subjects'. It may be pertinent to note that subsequent to the merger of Sikkim with Union of India, all 'Sikkim subjects' were deemed to be Indian citizens.

In *Assn. of Old Settlers of Sikkim* v. *Union of India*,[1] a writ petition was filed under article 32 of the Constitution challenging constitutional validity of section 10 (26-AAA) of the Income Tax Act, 1961 to the extent it excludes: (i) 'Sikkimese woman', who marries non-sikkimese individual after the cut-off date, and (ii) old Indian settlers who have not registered as 'Sikkim subjects' on or before the specified date.

A two judge-bench of the Supreme Court, after considering the history of integration of the Sikkim into Union of India and the evolution of the law relating to income tax exemptions to Sikkimese, held that section 10 (26-AAA) is unconstitutional to the extent it excludes the old Indian settlers settled in Sikkim prior to its merger with India merely because they were not registered as 'Sikkim Subjects' before such merger. The bench held that the classification between them and those who are considered as 'Sikkimese' in the explanation to the said clause is not a reasonable classification as it does not have any rational nexus with the object and purpose of granting exemption from payment of income tax.

The bench also struck down the proviso to section 10 (26-AAA), which excluded 'Sikkimese woman' who marries a non-sikkimese individual on or after April 1, 2008 from claiming the benefit of exemption. While noting that the 'Sikkimese man', who marries a non-sikkimese individual, is not excluded from claiming exemption, the bench held that it is a gender based discrimination that clearly violates articles 14, 15 and 21 of the Constitution. The bench also held that the cut-off date of April 1, 2008 is fixed without any justification.

In *Baharul Islam* v. *Indian Medical Association*,[2] the constitutional validity of the Assam Rural Health Regulatory Authority Act, 2004 enacted by the Assam Legislature was challenged both on the ground that state legislature lacked competence to enact the law as well as on the ground that the provisions thereof violate articles 14 and 21 of the Constitution. Under the said Act holders of Diploma in Medicine and Rural Health Care were allowed to register and practice medicine only in rural areas. An authority was created for the purpose of providing registration to such diploma holders and to regulate their practice. It was also entrusted with the task of regulating the medical institutions established for awarding such diplomas. One of the grounds of challenge was that the Act violates articles 14 and 21 of the Constitution as it allows the holders of such diploma to practice only in rural areas. It "discriminates between patients living in

1 (2023) 5 SCC 717.

2 2023 SCC OnLine SC 79.

rural areas and those living in urban areas, implying that the persons who live in urban areas are entitled to standard treatment and those who live in rural areas are entitled to sub-standard treatment."[3]

Though the bench mainly focused on the issue of legislative competence and declared that the Assam legislature did not have the competence to enact the impugned Act, it also endorsed the argument that the provisions thereof are discriminatory. Noting that the state has an obligation under article 47 to improve public health, it observed:[4]

> While the State has every right to devise policies for public health and medical education, with due regard to peculiar social and financial considerations, these policies ought not to cause unfair disadvantage to any class of citizens. The citizens residing in rural areas have an equal right to access healthcare services, by duly qualified staff. Policies for enhancing access to rural healthcare must not shortchange the citizens residing in rural areas or subject them to direct or indirect forms of unfair discrimination on the basis of their place of birth or residence.

In *Ramesh Chandra Sharma* v. *State of U.P.*,[5] reasonableness of the classification made between *pushtaini* landowners and *gair-pushtaini* landowners for awarding compensation at different rates for the land acquired under the Land Acquisition Act, 1984 was considered. The state sought to justify the classification on the ground that the same was based on residence i.e., *pushtaini* landowners were residing on the lands acquired whereas *gair-pushtani* owners were not. The court observed that though the classification, *prima facie*, appears to be reasonable, "the devil lies in the details". The court could see through that classification was made based entirely on the assumption that only the owners of *pushtaini* land permanently reside on such land and only for them it is the primary source of income. No empirical data was produced to substantiate the assumption. Holding that the burden of proof lies on the state to justify the classification, the court declared that the classification between *pushtaini* and *gair-pushtaini* landowners is neither based on intelligible differentia nor does it have any rational nexus with the object sought to be achieved.

In *Mathews J. Nedumpara* v. *Union of India*,[6] the classification of advocates as senior advocates and other advocates under section 16 of the Advocates Act, 1961 was challenged on the ground that it is untenable in view of article 14 of the Constitution of India. A three-judge bench of the Supreme Court rejected the argument and upheld the classification holding that it is reasonable. It observed:[7]

3 *Id*., para 17.
4 *Id.*, para 82.
5 (2024) 5 SCC 217.
6 (2024) 1 SCC 1.
7 *Id*., para 18.

> The seniority of advocates is premised on a standardised metric of merit aimed at forwarding the standards of the profession. Thus, the classification of advocates and the mechanism to grant seniority to advocates is not based on any arbitrary, artificial or evasive grounds.

Independent election commission to uphold equality in a democracy

In *Anoop Baranwal* v. *Union of India*,[8] a five-judge bench of the apex court dealt with four writ petitions filed under article 32 of the Constitution primarily challenging the process of appointment of the Chief and Puisne Election Commissioners in India. While considering all the pleas raised in these petitions holistically (which may have been covered in detail in the chapter on 'Constitutional Law - II' in this survey), the bench observed that "a fiercely independent, honest, competent and fair Election Commission"[9] is indispensable for maintaining rule of law and upholding right to equality in a democracy. In its opinion, "[A]n Election Commission which does not ensure free and fair poll as per the rules of the game, guarantees the breakdown of the foundation of the rule of law."[10] Further, if the election commission treats political parties, which are similarly circumstanced, unevenly it "unquestionably breaches the mandate of Article 14."[11] Thus, it categorically held that the prevalent system under which Chief and Puisne Election Commissioners are selected exclusively, without any 'objective yardstick', by the executive is flawed.

Arbitrary and unreasonable state actions

Whether the banks, by following the 'Master Directions on Frauds' issued by the Reserve Bank of India, can classify the accounts of borrowers as 'fraud' without complying with the principles of natural justice was a short question arose before the two-judge bench in *SBI* v. *Rajesh Agarwal*.[12] The bench answered the question in the negative while holding that "[C]lassification of the borrower's account as fraud under the Master Directions on Frauds virtually leads to a credit freeze for the borrower…(which) could be fatal for the borrower leading to its 'civil death' in addition to the infraction of their rights under Article 19(1)(g) of the Constitution."[13] The bench rightly opined that classification of the account of borrower as fraud is akin to 'blacklisting', which, as per the settled law, cannot be done without complying with the principle of *audi alteram partem*.

The bench also observed, in general, that "[A]n administrative action can be tested for constitutional infirmities under Article 14 on four grounds: (i) unreasonableness or irrationality; (ii) illegality; (iii) procedural impropriety; and (iv) proportionality."[14] It was, however, quick to add that "the scope of such

8 (2023) 6 SCC 161.
9 *Id.*, para 218.
10 *Id.*,para 219.
11 *Id.*, para 220.
12 (2023) 6 SCC 1.
13 *Id.*, para 55.
14 *Id.*, para 84.

judicial review is limited to ascertaining the deficiency in the decision-making process, and not the correctness of the choice made by the administrator."[15] The bench, perhaps, wanted to make it obviously clear that 'judicial review' does not extend to 'merits review' but, the truth is, it is hard to maintain that position when administrative actions are required to be subjected to four-pronged proportionality analysis. It requires merits review of administrative actions at least to certain extent. In other words, proportionality review is a nuanced form of merits review.

Further, the bench while elaborating on the third ground specifically stated that "[T]he principles of natural justice….constitute an important facet of procedural propriety envisaged under Article 14."[16] The principles of natural justice "act as guarantee against arbitrariness."[17] Non-compliance with them amounts to violation of article 14 of the Constitution.

These propositions were further explicated in great detail by the same bench in *Madhyamam Broadcasting Ltd.* v. *Union of India*.[18] In this case the bench was considering a challenge to an order passed by the Ministry of Information and Broadcasting (MIB), Government of India, revoking the uplinking and downlinking permission granted to "Media one" – a news and current affairs television channel run by the Madhyamam Broadcasting Limited (MBL). The reason for revoking permission was that the Ministry of Home Affairs has denied 'security clearance' for MBL, which is a precondition for issuing permission. The reasons and relevant materials relied upon for denying of 'security clearance' were, however, not communicated to MBL. It approached the high court alleging, *inter alia*, violation of principles of natural justice.

In the writ proceedings before the high court, it was contended, on behalf of the respondent, that "security clearance was denied on the basis of intelligence inputs, which are 'sensitive and secret in nature'"[19] and same were not disclosed "as a matter of policy and in the interest of national security".[20] In the high court, both the single judge and the division bench in a letter patent appeal upheld the contentions of the Union of India.

The two-judge bench of the apex court, considering the importance of the matter and the contentions of the parties, comprehensively addressed all the issues arose in the case. At first, it focused on (re)stating the legal principles applicable to the case. After extensively analyzing precedents, it succinctly enunciated the principles emerging from them:[21]

15 *Ibid*.
16 *Id*., para 85.
17 *Id.*, para 36.
18 (2023) 13 SCC 401.
19 *Id.*, para 14.
20 *Ibid*.
21 *Id.*, para 86.

(i) The party affected by the decision must establish the decision was reached by a process that was unfair without complying with the principles of natural justice;[22]

(ii) The State can claim that the principles of natural justice could not be followed because issues concerning national security were involved;[23]

(iii) The courts have to assess if the departure was justified. For this purpose, the State must satisfy the Court that *firstly*, national security is involved; and *secondly*, whether on the *facts of the case*, the requirements of national security outweigh the duty of fairness. At this stage, the court must make its decision based on the component of natural justice that is sought to be abrogated; and

(iv) While satisfying itself of the national security claim, the courts must give due weightage to the assessment and the conclusion of the State…However, the courts must review the assessment of the State to the extent of determining whether it has proved through cogent material that the actions of the aggrieved person fall within the principles established above.[24]

In addition, the bench also unequivocally advocated for the use of proportionality standard even "to assess the reasonableness of limitations on procedural rights as well."[25] Noting that the standard has so far been used in India only to test validity of limitations on substantive rights, the bench observed that as far as validity of limitations on procedural rights are concerned, "[Co]urts have been using a vague and unstructured standard of the reasonableness test…".[26] The bench indicated that the vague and unstructured reasonableness test shall be replaced with proportionality, which is a more structured standard for assessing the reasonableness. It also pointed out that there is nothing to preclude its application to test the reasonableness of limitations even on procedural rights.

After having, thus, (re)stated the legal principles, the bench carefully considered the facts, sequence of events and the material placed on record (in sealed cover) and made the following observations:

(i) Non-disclosure of relevant material relied upon for denying the 'security clearance' and the unreasoned order passed by the MIB infringed the right of MBL to fair hearing.

(ii) The procedure that was followed, when subjected to four-pronged tests of proportionality standard, was unreasonable and was not in compliance with articles 14 and 21 of the Constitution. The non-disclosure does not, in particular, satisfy the 'suitability' prong of the four-pronged test.

22 *Id*., para 86.1.
23 *Id*., para 86.2.
24 *Id*., para 86.4.
25 *Id*., para 56.
26 *Id*., para 60.

(iii) Though 'national security' is one of the legitimate grounds for limiting procedural rights/safeguards, no blanket immunity can be claimed from disclosure of relevant materials/investigative reports. In the instant case, the claim of national security was raised in a cavalier manner and no attempt was made to explain "how non-disclosure would be in the interest of national security."[27] While underscoring that no claim of national security can be made out of thin air, it was pointed out that "[T]here must be material backing such an inference. The material on the file and the inference drawn from such material have no nexus."[28]

(iv) Even on substantive grounds, non-renewal of permission on the ground of lack of security clearance is violative of freedom of press as the reason for denial of security clearance are not germane to any of the grounds stipulated in article 19 (2). The alleged grounds for denial of security clearance were: (i) anti-establishment stance of the media, (ii) MBL's shareholders link with JEI-H. There was no material placed on record to demonstrate the latter and the former cannot be a ground to deny security clearance or permission to run a media channel.

Accordingly, the bench allowed the appeal and directed the MIB to renew permission. The judgment once again makes it abundantly clear that freedom of speech and expression, which is one of the most cherished rights in a democracy, cannot be curtailed on the ground of perceived national security considerations. The judgment is also noteworthy for two other reasons:

(i) It sets a template for proper application of four-pronged test of proportionality standard. This judgment can be cited as a best illustration on how to use the proportionality standard for examining the validity of limitations either on substantive or on procedural rights.

(ii) It examines, using the structured proportionality standard, the validity of 'sealed cover procedure' as well as the 'public interest immunity claims' and clearly indicates that, in comparison, the latter "constitute less restrictive means", while serving the same purpose as that of the former. It also points out that "while public interest immunity claims conceivably impact the principles of natural justice, sealed cover proceedings infringe the principles of natural justice and open justice…".[29] It clearly discourages use of 'sealed cover' procedure, which is becoming a common practice in India.

In *Orissa Administrative Tribunal Bar Assn.* v. *Union of India*,[30] the decision to abolish the Orissa Administrative Tribunal (OAT) was challenged, *inter alia*, on the ground that it was made arbitrarily and without compliance with the principles of natural justice (article 14) and abolition leads to denial of access to justice

27 *Id.*, para 113.
28 *Id.*, para 115.
29 *Id.*, para 195.2.7.
30 (2023) 18 SCC 1.

(article 21). The two-judge bench of the apex court countenanced neither of the grounds. The bench opined that the decision is not arbitrary as it is not based on any irrelevant and extraneous consideration. It also held that as the decision to abolish OAT is a policy decision, there was no requirement to comply with principles of natural justice by providing an opportunity to be heard to OAT Bar Association or to the litigants before making such decision.

As far access to justice, the court acknowledged that it is "a crucial and indispensable right under the Constitution of India"[31] but, in its opinion, "it cannot be interpreted to mean that every village, town, or city must house every forum of adjudication created by statute or the Constitution."[32] It rejected the argument of denial of access to justice by stating that the litigants are not left without a forum for adjudication of their disputes after the abolition of OAT. The litigants can always approach the Orissa High Court for adjudication of their disputes. Having regard to the multiple virtual benches the Orissa High Court has set-up in multiple cities and towns, it is more accessible than OAT.

III LIFE, LIBERTY AND DIGNITY

Right to life and personal liberty is a composite right. It includes all the freedoms guaranteed under article 19 (1) and the residue. Many other corollary or concomitant rights have also been derived from the said right. Their true meanings and scopes are often contested before the court.

Interpretation and interrelationship between articles 19 and 21

In *Kaushal Kishor* v. *State of U.P.*,[33] a five-judge bench of the Supreme Court considered five important questions concerning contours of two fundamental rights and the interplay between them. The rights in question were, *one*, freedom of speech and expression guaranteed under article 19 (1) (a), and, *two*, right to life and personal liberty guaranteed under article 21 of the Constitution. Separate challenges to two (rather derogatory and disparaging) speeches made by two ministers in two different states – Kerala and Uttar Pradesh – have led to creation of the Constitution bench to authoritatively decide the following questions of law:[34]

(i) Are the grounds of restrictions on freedom of speech and expression specified in article 19 (2) exhaustive? Or can the said right be restricted on any other ground by placing reliance on other fundamental rights?

(ii) Whether the fundamental rights under articles 19 and 21 have horizontal application? Or, in other words, can they be claimed against non-state actors/entities?

(iii) Whether article 21 of the Constitution requires the state to affirmatively protect the rights guaranteed therein even against threats by private individuals or agency?

31 *Id.*, para 130.

32 *Ibid*.

33 (2023) 4 SCC 1.

34 *Id.*, para 6.

(iv) In view of the principle of 'collective responsibility' envisaged in the Constitution, whether a statement made by a Minister, concerning the affairs of the state or government, is attributable vicariously to the whole government?

(v) Whether a statement made by a Minister, if inconsistent with any of the fundamental rights guaranteed under Part – III, constitute violation of such right and is, thus, actionable as 'constitutional tort'?

The five-judge bench produced two separate judgments. V. Ramasubramanian J., authored the majority judgment for himself and on behalf of three other judges and B. V. Nagarathna J., authored a separate judgment, wherein she partly concurred with the majority and partly dissented.

The *first* question was answered unanimously by the bench. It was of the opinion that the grounds specified in article 19 (2) of the Constitution are exhaustive and the freedom of speech and expression cannot be restricted on any other ground even by invoking other fundamental rights. Further relying on plethora of decisions, it was observed that even in cases where two or more rights appear to conflict with each other or seeking primacy over one another, the court has to resolve such conflicts "by applying well established legal tools." No new ground can be created to restrict freedom of speech and expression.

B. V. Nagarathna J., while agreeing with the majority on the question, has added that the speeches that are derogatory, disparaging and vitriolic have little social value and are not required for exposition of any idea. Thus, such speeches do not, in the first place, "fall within the protective perimeter of Article 19 (1) (a)". When such speeches violate the rights under article 21 of the Constitution, the question of balancing does not arise at all. In her considered opinion, "the permissible content of the right to freedom of speech and expression, ought to be tested on the touchstone of fraternity and fundamental duties as envisaged under our Constitution."[35]

On the *second* question, the majority view was that the fundamental rights under articles 19 and 21 can be enforced not only against the state and its instrumentalities but also against other persons. In other words, according to the majority, articles 19 and 21 can be enforced even horizontally. The majority reached this conclusion after considering the legal position in other jurisdictions and the judicial precedents in India on the question of horizontal application of fundamental rights. It is, however, pertinent to note that the precedents considered by majority only relate to horizontal application of article 21 of the Constitution. None of the precedents cited on the question relates to horizontal application of article 19. The majority judgment did not even consider the possible implications of giving horizontal effect to article 19 of the Constitution.

B. V. Nagarathna J., disagreed with the majority on the question. In her opinion, the fundamental rights under articles 19 and 21 of the Constitution do not

35 *Id.*, para 244.

operate horizontally except those rights which also have statutory recognition. The writ petitions cannot be entertained to enforce articles 19 and 21 against non-state actors. The only exception is the *habeas corpus* petition. She, however, added that the rights in Part – III of the Constitution are inalienable human rights selected from "what were previously natural rights and were later termed as common law right."[36] Merely because some of these natural/common law rights are recognized under the Constitution as fundamental rights, identical rights under the natural/common law do not get obliterated nor does the corresponding remedies available under such law. Part – III of the Constitution is not the sole repository of such rights. In case of violation of such natural/common law rights by private persons or entities, aggrieved persons can seek appropriate remedies under such laws as they operate horizontally. She categorically stated that "[T]he object of elevating certain natural and common law rights, as Fundamental Rights under the Constitution was to make them specifically enforceable against the State and its agencies…"[37] Recognizing fundamental rights as enforceable "between citizens *inter se* would set at naught and render redundant, all the tests and doctrines forged by this Court to identify "State" for the purpose of entertaining claims of fundamental rights violations."[38]

Even as regards the *third* question, majority and minority expressed differing opinions. The majority answered the question clearly in the affirmative. Having regard to the language of the provision and, in particular, the absence of the expression 'state', majority held that the state has two obligations under article 21: "(i) not to deprive a person of his life and liberty except according to procedure established by law; and (ii) to ensure that the life and liberty of a person is not deprived even otherwise."[39] The state, thus, has an affirmative duty to protect the life and personal liberty whenever there is a threat to them "even by a non State actor".[40] The majority, however, did not clearly enunciate what does this affirmative duty entail, what constitutes breach of such a duty and what remedies can be availed if such a duty is breached.

B. V. Nagarathna J., on the other hand, opined that article 21 only cast a negative duty upon the state not to deprive a person of "his life and personal liberty except according to procedure established by law". According to her, affirmative duty of the state arises only in the following contexts:[41]

(i) Where inaction on the part of the State, to contain a hostile situation between private actors, could have had the effect of depriving persons of their right to life and liberty;[42]

36 *Id.*, para 254.
37 *Ibid*.
38 *Id.*, para 268.7.
39 *Id.*, para 86.
40 *Id.*, para 113.
41 *Id.*, para 283.
42 *Id.*, para 283.1.

(ii) Where the State had failed to carry out its obligations under a statute or a policy or scheme, and such failure could have had the effect of depriving persons of their right to life and liberty.[43]

If the state has undertaken a statutory obligation, then it is duty bound to fulfill it. Its failure to do so "could have the effect of depriving a citizen of his right to life and personal liberty."[44] In the past, courts have issued writs of *mandamus* to enforce such obligations. In such cases references may have also been made to article 21 of the Constitution. In her opinion, such references shall not be "construed as an acknowledgement by the court of an affirmative duty… to protect the rights of a citizen…against…threat by the acts or omission of another citizen or private agency."[45]

The *fourth* question came to be answered in the negative by the majority. It opined that "the concept of collective responsibility is essentially a political concept" and according to it "[E]ach individual Minister is responsible for the decisions taken collectively by the Council of Ministers… the flow of stream in collective responsibility is from the Council of Ministers to the individual Ministers. The flow is not the reverse…"[46] Thus, the concept of collective responsibility cannot be invoked to make the Council of Ministers vicariously responsible for a statement by an individual minister even if such statement relates to affairs of the state or made for protecting the government. It may, however, be noted that the very premise relied upon by the majority that "the flow of stream in collective responsibility is from the Council of Ministers to the individual Ministers" does not seem to have textual basis in the Constitution. Neither article 75 (3) nor article 164 (2) of the Constitution indicate "flow of stream" in that direction. It is, of course, relevant to note that collective responsibility envisaged under the said provisions is only to the House of People or the Legislative Assembly, as the case may be, but not to court or any other authority.

B. V. Nagarathna J., differed with the majority even on this question as well. *Firstly*, she made a classification between statements made by a minister in his/her 'personal' capacity and 'official' capacity. In her opinion, in case of the former, the question of vicarious responsibility of the government does not arise at all. In case of the latter i.e., where the statement is made by a minister in official capacity, the government can be held vicariously responsible by invoking the principle of collective responsibility if the following conditions are satisfied:

(i) If the statement so made is "traceable to any affairs of the state or for protecting the Government",[47] and

(ii) If the statement represents not just the personal view of the minister but also of the government.[48]

43 *Id.*, para 283.2.
44 *Id.*, para 284.
45 *Id.*, para 283.3.
46 *Id.*, para 149.
47 *Id.*, para 286.
48 *Ibid*.

On the *fifth* question, views of both the majority and the minority are broadly in consonance. Both held that every statement inconsistent with any of the fundamental right made by any minister does not amount to violation of such right and become actionable as constitutional tort. Both held that only in certain circumstances/cases, such statements may become actionable. They, however, differed on the specific circumstances/cases in which such statements become actionable as constitutional tort.

According to the majority, ministers may make statements in different places, in different forms, in different contexts and on different subjects. All statements made by a minster, even if it is inconsistent with any of the fundamental right, may not necessarily become actionable either as tort or as constitutional tort. Tortious liability arises only if, in pursuance of such a statement, any action is taken by the public servants causing any harm or loss to a person/citizen. Mere statement made by a minister, if not followed-up with any action leading to any harm or injury to any person, is not actionable.

B. V. Nagarathna J., in her separate opinion, expressed her skepticism on the efficacy of the very concept of constitutional tort in deterring the harmful behaviors "by forcing the perpetrator to internalize the costs of their actions."[49] Because, according to her, "the entity saddled with the cost, is not the same as the entity who is to be deterred." She called this as an 'absurdity' that threatens the idea of corrective justice embodied in the law of tort. In holding so, she does not seem to have acknowledged the position under common law that the employer (i.e., the 'state' in case of constitutional tort) is entitled to recover the cost from the employee concerned. It is not that in case of constitutional tort only the state pays the cost and the real tort feasor is exonerated from all liabilities. Thus, this very premise needs to be reconsidered.

However, based on the above premise, she categorically opined that "[I]t is not prudent to treat all cases where a statement made by a public functionary resulting in harm or loss to a person/citizen, as constitutional torts." In imposing tortious liability, "the nature of the resultant harm or loss" shall be duly considered. She was also wary of the practice of awarding monetary compensation for breach of fundamental rights in constitutional tort cases. She emphasized on the need for "a clear, cogent and comprehensive legal framework based on judicial precedent, which would clarify what harm or injury is actionable as a constitutional tort." In the absence of such a legal framework, the practice of awarding monetary compensation shall be confined only to "cases where there are brutal violations of fundamental rights…"[50]

In her opinion, in cases where statements made by a minister or any public functionary is inconsistent with the view of the government but results in any harm or loss to any person, such minister or public functionary could be proceeded against only in his/her individual capacity. Such cases shall not be treated as

49 *Id*., para 303.

50 *Id*., para 306.

constitutional torts. Only the cases where such statements are attributable to the government, in terms of the answer given by her to the question no. 4, can be treated as constitutional tort. In other words, only the cases where the statements made by a minister or a public functionary reflect the views of the government or are endorsed by it can be dealt with as constitutional torts. Even in such cases, invocation of the writ jurisdictions of the high courts or the Supreme Court for granting damages shall be an exception rather than a rule. Jurisdiction of the competent court shall be invoked for seeking appropriate remedies.

Sexual minorities: Right to marry and establish family

In *Supriyo @ Supriya Chakraborty* v. *Union of India*,[51] a five-judge bench of the Supreme Court was called upon to consider various questions relating to rights of sexual minorities, more particularly, their right to marry and establish family and/or to form 'civil unions' and to adopt children. The petitioners relied upon articles 14, 15, 19, 21 and 25 to claim these rights.

The five-judge bench consisting of D.Y. Chandrachud, C.J. and Sanjay Kishan Kaul, S. Ravindra Bhat, Hima Kohli and P.S. Narasimha, JJ., delivered four different judgments expressing varying opinions on these questions. Ravindra Bhat J., authored judgment for himself and also on behalf of Hima Kohli J., and other three judges authored separate judgments concurring on some aspects and disagreeing on others.

The bench was unanimous on three aspects: *First*, there is no fundamental right to marry under the Indian Constitution, *second*, the Special Marriages Act, 1954 (SMA) cannot be 'read up' to include marriages between queer persons within its framework., and *third*, transgender or intersex persons, who are in heterosexual relationships, however, have the right to marry under the existing laws including personal laws.

D.Y. Chandrachud, C.J., while refusing to recognize right to marry as a fundamental right, opined that such recognition would mean that "even if Parliament and the State legislatures have not created an institution of marriage…. they would be obligated to create an institution because of the positive postulate encompassed in the right to marry."[52] He also pointed out that in none of the earlier cases the Supreme Court had recognized right to marry. What is recognized in *Shafin Jahan*,[53] *Shakti Vahini,*[54] and other cases is essentially a right to choose a marital partner and not right to marry. They are two different things. All the other judges also have broadly agreed with this conclusion. S. Ravindra Bhat, J., observed that marriage existed prior to emergence of state and now it exists independent of it. The state cannot be compelled by the court to create a social or legal status by recognizing right to marry as a fundamental right. He also opined that recognition of positive right to marry cannot be operationalized against both state and non-

51 2023 SCC OnLine SC 1348.

52 *Id*., para 182.

53 *Shafin Jahan* v. *Ashokan K.M.* (2018) 16 SCC 368.

54 *Shakti Vahini* v. *Union of India* (2018) 7 SCC 192.

state agencies. P.S. Narasimha, J., opined that there is "no unqualified right to marriage recognized under the Constitution",[55] there is only a 'fundamental freedom.'

Further, after having held that there is no fundamental right to marry under the Indian Constitution, the bench unanimously held that the Special Marriage Act, 1954 cannot be interpreted to include marriages between queer persons. D.Y. Chandrachud, C.J., observed that it requires reading words into the provisions of SMA (a process known as 'reading-up' in statutory interpretations. In this case, some judges incorrectly referred to it as 'reading-down') that would in effect amounts to encroachment into legislative domain. In exercising power of judicial review, the court "must steer clear of matters, particularly those impinging on policy, which fall in the legislative domain".[56] Others too have agreed with him.

As regards the question of rights of transgender/intersex persons to marry, the bench opined that the laws governing marriages in India need to be interpreted harmoniously with the Transgender Persons (Protection of Rights) Act, 2019. Further, noting that there is difference between 'sex', 'gender' and 'sexual orientation', D.Y. Chandrachud, C.J., observed:[57]

> A transgender person may be heterosexual or homosexual or of any other sexuality. If a transgender person is in a heterosexual relationship and wishes to marry their partner (and if each of them meets the other requirements set out in the applicable law), such a marriage would be recognized by the laws governing marriage.

All the other judges have agreed with him either explicitly or implicitly. In addition to the above, the five-judge bench, in this case, dealt with many other aspects on which there was no unanimity.

The bench by 4:1 majority (Sanjay Kishan Kaul, J., dissenting) had refused to strike down the Special Marriages Act, 1954 as unconstitutional for not including within its framework non-heterosexual marriages.

D.Y. Chandrachud, C.J., opined that SMA is a progressive legislation. If it is struck down on the ground of non-inclusion of non-heterosexual marriages, it would defeat the purpose of such a progressive legislation, which enables inter-faith couple to enter into marriage. In his opinion, invalidating such a law"would take India back to the pre-independence era where two persons of different religions and caste were unable to celebrate love in the form of marriage."[58] S. Ravindra Bhat, and P.S. Narasimha, JJ., agreed with him. Sanjay Kishan Kaul, J., in his dissenting opinion, held that SMA is violative of article 14 of the Constitution in so far as it excludes explicitly non-heterosexual marriages. The main objective of the SMA is to facilitate inter-faith marriages. The classification between

55 Supra note 51, para 4.

56 *Id*, para 340 (h).

57 *Id*., para 277.

58 *Id*., para 207.

heterosexual and non-heterosexual couples does not have rational nexus with that objective.

Further, the bench by 3:2 majority (D.Y. Chandrachud, C.J., and Sanjay Kishan Kaul, J., dissenting) negated two claims of the petitioners: *One*, recognition of queer persons right to enter into 'civil union', and, *two*, unmarried non-heterosexual couples right to adopt.

The majority consisting of S. Ravindra Bhat, Hima Kohli and P.S. Narasimha, JJ., did not agree to recognize the right of queer persons to form 'civil union'. S. Ravindra Bhat, J., observed:[59]

> There are almost intractable difficulties in *creating, through judicial diktat*, a civil right to marry or a civil union, no less, of the kind that is sought by the petitioners in these proceedings. "*Ordering a social institution*" or re-arranging existing social structures, by creating an entirely new kind of parallel framework for non-heterosexual couples, would require conception of an entirely different code, and a new universe of rights and obligations.

In his opinion, the court cannot oblige the state to do so. He, however, reiterated that "all queer persons have the right to relationship and choice of partner, co-habit and live together, as an integral part of choice, which is linked to their privacy and dignity."[60] While agreeing with him, P.S. Narasimha, J., added that mandating the state to enact a law to recognize a 'civil union' violates doctrine of separation of powers.

D.Y. Chandrachud, C.J., and Sanjay Kishan Kaul, J., in their separate dissenting opinions, recognized the rights of queer persons to form civil unions and traced its source to articles 19 (1) (a), 19(1)(c), and 21 of the Constitution. D.Y. Chandrachud, C.J., very categorically stated that "[T]he state has an obligation to recognize such unions and grant them benefit under law."[61]

Even as regards adoption, S. Ravindra Bhat, J., pointed out that allowing queer couples to adopt, in the absence of legal recognition of their union, might lead to several consequences in certain circumstances. Thus, he called for the state intervention, in the form of appropriate laws and policies, to address those issues keeping in view the best interest of children and enable even queer couples to adopt.

D.Y. Chandrachud, C.J., and Sanjay Kishan Kaul, J., on the other hand, were of the opinion that unmarried non-heterosexual couples can adopt. D.Y. Chandrachud, C.J., declared Regulation 5 (3) of the Adoption Regulations, 2022 framed by the Central Adoption Resource Authority *ultra vires* the Juvenile Justice (Care and Protection of Children) Act 2015 and also articles 14 and 15 of the Constitution. He 'read down' the provision to exclude the word 'marital' to enable even the queer couple to adopt.

59 *Id*., para 69.
60 *Id*., para 70.
61 *Id*., para 340 (i).

On the whole, the decision does not foreclose the possibility of recognizing queer couples right to marry or to form civil union or to adopt children. The five-judge bench only said that it is beyond the institutional competence of the judiciary to recognize such rights. It lies within the domain of the legislatures. By virtue of articles 245 and 246 read with entry 5 of the List – III of the seventh schedule of the Constitution, both the Parliament and/or the state legislatures are competent to enact laws to recognize such rights. Now the ball is in the court of the legislature to recognize and guarantee marriage equality rights for sexual minorities in India.

Prohibition of manual scavenging

In *Balram Singh* v. *Union of India,*[62] a writ petition was filed under article 32 of the Constitution of India seeking, *inter alia*, direction to the governments of the union, states and union territories to implement the provisions of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 and the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013. It is true that notwithstanding the enactment of these legislations decades earlier, the utterly scornful and inhuman practice of manual scavenging continues to date. Thus, to use the words of B. R. Ambedkar, "the battle for reclamation of human personality", to those who are forced to undertake that meanest task, continues. A two-judge bench of the apex court observed that the evil social practice of manual scavenging is contrary to three important constitutional mandates *viz*., "prohibition of untouchability, the outlawing of forced or involuntary labour and the freedom against exploitation",[63] which are designed to assure "not only equality but fraternity amongst all people".[64] For complete eradication of the evil practice of manual scavenging and for emancipation of those who are trapped in it, the bench issued comprehensive directions. While issuing those directions the bench emphatically stated that "[T]he dignity of the individual, guaranteed by law under Article 21, must be ensured through rehabilitative processes."[65] Finally, it also reminded the citizens that it is upon them lies the "*duty of realizing true fraternity*."[66]

Right to carry food to multiplexes/cinema halls

In *K.C. Cinema* v. *State of J&K*,[67] a question of constitutional law of general public importance arose for consideration before a two-judge bench of the apex court. It arose in an appeal from the decision of the High Court of Jammu and Kashmir. Originally a public interest litigation was filed in the high court under article 226 of the Constitution seeking direction to owners of multiplexes/cinema halls to allow cinemagoers to carry their own food items and water inside such halls. The high court allowed the petition and issued the necessary direction. It

62 2023 SCC OnLine SC 1386.
63 *Id*., para 1.
64 *Ibid*.
65 *Id*., para 100.
66 *Id*., para 105.
67 (2023) 5 SCC 786.

had also issued a slew of other directions in the matter. The high court reasoned that, *one*, the Jammu and Kashmir Cinemas (Regulation) Rules, 1975 do not authorize the owners to prohibit cinemagoers from carrying their own food and water, *two*, imposition of such prohibitions constrain the cinemagoers to purchase 'junk' food sold at exorbitant rates within the precincts of such halls, and, *three*, such prohibition particularly affects the infants, senior citizens, patients with diabetes etc., In the opinion of the high court such prohibition violates "the right to choice of food, including the right not to eat "junk" food and the right to good health, under Article 21 of the Constitution."[68]

The Supreme Court, on the other hand, took a contrary view. Whereas the high court was of the view that in the absence of specific authorization under the Rules, the cinema halls cannot impose such prohibitions on the moviegoers, the Supreme Court was of the view that in the absence of a specific rule compelling the cinema halls to allow moviegoers to carry their own food and beverages, cinema halls are free to impose such prohibitions. Neither the 1975 Rules nor any other law compels them to do so. In the opinion of the Supreme Court, the absence of such a provision is very significant. It held that the high court was not justified in issuing such a direction, under article 226, in the absence of such a provision. It observed very categorically that:[69]

> The cinema hall is a private property of the owner of the hall. The owner of the hall is entitled to stipulate terms and conditions so long as they are not contrary to public interest, safety and welfare… (s/he) is entitled to determine the business model that is to be followed and to give effect to their own conceptions of the economic viability of a particular business model.

Further, while holding that their freedom to determine the business model is protected under article 19 (1) (g) of the Constitution, the Supreme Court, in particular, observed that "[A] prohibition on carrying food and beverages from outside into the precincts of the movie hall is not contrary to public interest, safety or welfare."[70] Thereby the court seems to have indicated that even by amending the relevant Rules, the state cannot compel the owners of the halls to allow the cinemagoers to carry their own food and water because it may not serve any "public interest". It appears the bench went too far in upholding the rights of the owners of multiplexes/ cinema halls under article 19 (1) (g) of the Constitution, which is not an absolute right. Under article 19 (6), the state is permitted to impose by law reasonable restrictions "in the interest of general public" on the said right. Since the court held that the prohibition imposed is not contrary to public interest, it can possibly be interpreted to mean that the owners cannot be compelled to lift such prohibitions even by law. The court, thus, seems to have preempted the possibility of state's intervention in the matter. It is even more clear from its remarks that "[T]he rule-

68 *Id*., para 5.5.
69 *Id*., para 23.
70 *Ibid*.

making power of the State must be exercised consistent with the fundamental right of the cinema hall owner to carry on a legitimate occupation, trade, or business within the meaning of Article 19(1)(g) of the Constitution."[71] The scope of the right under article 19 (1) (g) has been construed in conformity with the principles of free market capitalism.

The Supreme Court did not appreciate the invocation of article 21 of the Constitution in the matter. In its opinion, in as much as the "moviegoers are not compelled to buy food at the cinema hall"[72] and "they are free to refrain from purchasing them",[73] there is no infringement of article 21 of the Constitution.

It noted with appreciation the submission made on behalf of the cinema halls that as a matter of practice, they are not enforcing the prohibition on carrying food or beverages from outside for infants and babies. The court requested the owners of cinema halls to make similar exceptions for "moviegoers with chronic disease (and/or) …under dietary restrictions due to their medical conditions" on a case-by-case basis. As it is a request, they are not obliged to obey.

Right to health

A public interest litigation filed under article 32 of the Constitution of India in 2013 challenging the practice of carrying out "unnecessary hysterectomies" particularly in the states of Bihar, Chhattisgarh and Rajasthan under certain government health schemes including *Rashtriya Swasthya Bima Yojana* came to be disposed of by a two-judge bench of the Supreme Court in *Narendra Gupta* v. *Union of India*.[74] The petitioner, based on his field study, brought to the notice of the court that:[75]

> [w]omen, who should not have been subjected to hysterectomies and to whom alternative treatment could have been extended, were subjected to hysterectomies, seriously endangering their health in the process. The petitioner also submitted that most women who were subjected to hysterectomies of this kind belonged to the Scheduled Castes, Scheduled Tribes, or Other Backward Communities.

The bench, while holding that "[T]he right to health is an intrinsic element of the right to life under Article 21 of the Constitution. Life, to be enjoyed in all its diverse elements, must be based on robust conditions of health",[76] observed that "[T]here has been a serious violation of the fundamental rights of the women who underwent unnecessary hysterectomies."[77] It issued directions to the union and state governments to ensure that unnecessary hysterectomies are not carried out. The directions included even blacklisting of hospitals, which are carrying out hysterectomies routinely even in cases where it is not necessary.

71 *Id*., para 20.
72 *Id*., para 26.
73 *Ibid*.
74 (2023) 15 SCC 1.
75 *Id*., para 1.

Demonetization and imposition of limits on withdrawal of money

In 2016, the Government of India had demonetized all series of high denomination bank notes of ₹ 500 and Rs. 1000 thus far in circulation in the country. As a result 86.4% of the total currency (by value) in circulation in the country had ceased to be a legal tender. It was undoubtedly a very bold and drastic measure taken purportedly to tackle the problems of black money, counterfeiting, and illegal financing. The process of demonetization was initiated by the Government of India, which subsequently after consulting the Central Board of the Reserve Bank of India (RBI), had issued the final notification dated November 8, 2016 under section 26 (2) of the Reserve Bank of India Act, 1934 (RBI Act, 1934). The said notification, though permitted crediting of demonetized bank notes in the bank accounts and their exchange in the authorized banks, had imposed limits on the total amount that can be exchanged for bank notes having legal tender character. There were also limits imposed on the withdrawal of money from banks and automated teller machines.

It may be pertinent to note that the President of India had subsequently promulgated the Specified Bank Notes (Cessation of Liabilities) Ordinance, 2016, which was later replaced by the Specified Bank Notes (Cessation of Liabilities) Act, 2017.

Immediately after the issue of the said notification, several writ petitions were filed before the Supreme Court and various high courts in India challenging the legality and constitutional validity of the same. Various provisions of the RBI Act, 1934, most particularly section 26 (2), and articles 14, 19, 21 and 300-A of the Constitution of India were invoked to assail its validity.

A three-judge bench of the Supreme Court, in *Vivek Narayan Sharma* v. *Union of India*,[78] framed as many as nine questions of law and referred them to a larger bench for consideration and authoritative pronouncement. Three of the nine questions related to violation of fundamental rights *viz.,* (i) whether the impugned notification is *ultra vires* articles 14 and 19? (ii) Whether the limits imposed on withdrawal of funds from the bank account, since not authorized by any law, violates articles 14, 19 and 21? (iii) Whether exclusion of district cooperative banks from accepting deposits and exchanging demonetized bank notes amounts to discrimination?

These were very pertinent questions. The five-judge bench of the Supreme Court, however, did not deem it necessary to answer all the nine questions referred to it. In *Vivek Narayan Sharma (Demonetisation Case-5 J.)* v. *Union of India*,[79] after hearing the submission advanced by the parties, B.R. Gavai, J., who authored the 4:1 majority judgment, reframed the questions for the consideration of bench. He framed only six questions. All the three questions relating to violation of

76 *Id*., para 5.
77 *Ibid*.
78 (2017) 1 SCC 388.
79 (2023) 3 SCC 1.

fundamental rights framed by the three-judge bench were subsumed into one general question i.e., "whether the impugned Notification dated 8-11-2016 is liable to be struck down applying the test of proportionality?"

While examining the question B. R. Gavai, J., employed four-pronged test of proportionality expounded by Aharon Barak,[80] which was also endorsed by a constitutional bench of the Supreme Court in *Modern Dental College and Research Centre*.[81] After a brief examination, B.R. Gavai, J., in his majority judgment, categorically opined that the impugned notification fully satisfies all the four tests. According to him, *one*, the notification was issued for proper purposes, *two*, the measure adopted i.e., demonetization has rational nexus with the stated purposes, *three*, the central government is a best judge on the question of necessity and it is in a better place to choose between the available alternative courses, and the *fourth*, the notification also satisfies the proportionality *strict sensu* test (in other words, balancing test) in as much as it does not take away the right vested in the demonetized bank notes. B. R. Gavai, J., after examining the other questions relating to legality of the notification, upheld its validity.

At the outset, it may be pointed out that the very framing of the question relating to infringement of fundamental and non-fundamental constitutional rights invoked in the instant case in broad and general terms does not seem to be correct. The petitioners have invoked articles 14, 19, 21, and 300-A of the Constitution. It is trite that when several rights are invoked to challenge a state action, "the Court can adopt an integrated proportionality analysis where the limitation on each of the rights is common and affects them in a similar way."[82] But even in such cases, that alone is not sufficient to uphold the validity of such actions. In other words, the state action challenged on the ground of infringement of aforestated provisions of the Constitution cannot be upheld solely on the ground that it satisfies proportionality test. There are additional requirements. For example, first and the foremost, the rights guaranteed under articles 19, 21 and 300-A cannot be taken away or curtailed in any manner or to any extent except under the authority of law duly enacted by a competent legislature. If the imposition of limits on withdrawal of the money deposited in the bank account infringes rights guaranteed under articles 19, 21 and 300-A, it can be justified only when such limits, in the first place, are imposed under the authority of law and not otherwise.

Furthermore, there were many aspects in the impugned notification that were challenged in the instant case. As noted above, apart from the decision to demonetize the specified bank notes, imposition of limits on withdrawals and exclusion of district cooperative banks from accepting or exchanging demonetized bank notes were also challenged. Neither the limits on them are common nor the effects similar. Under the circumstances, validity of each of them should have been examined on the touchstone of relevant fundamental rights. Criteria or tests

80 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge University Press 2012).

81 *Modern Dental College and Research Centre* v. *State of M.P.*, (2016) 7 SCC 353.

82 *Akshay N. Patel* v. *RBI* (2022) 3 SCC 694.

that are applicable vary from provision to provision. Because the question was framed in very broad and general terms, the validity of each of the impugned aspect of the notification was not examined in the majority judgment.

B.V. Nagarathna J., in her dissenting judgment, did not deal with the fundamental rights question as she had taken a clear stand that the impugned notification is not in conformity with section 26 (2) of the RBI Act, 1934. She held that the notification was not issued on the recommendation of the Central Board of the RBI as required under the provision and the said provision does not authorize the central government to demonetize all series of any denomination bank note(s). B.V. Nagarathna J., followed the doctrine of "strict necessity", a well-established doctrine in constitutional jurisprudence that stipulates that the court ought not to examine and pass decision on any question of constitutionality unless it is strictly necessary to decide a case. After holding that the notification was not in conformity with section 26 (2), she rightly abstained from examining the constitutional questions.

IV CRIMINAL LAW AND FUNDAMENTAL RIGHTS

Guilt by association

One of the important questions concerning right to form an association or union arose for consideration in *Arup Bhuyan* v. *State of Assam*.[83] In this case, a three-judge bench of the Supreme Court was called upon to examine the correctness of the law laid down and followed by a two-judge bench, consisting of Markandey Katju and Gyan Sudha Misra, JJ., in three cases decided in 2011 *viz*., *Raneef*,[84] *Arup Bhuyan*,[85] and *Indra Das*.[86]

In the aforementioned cases, the two judge bench, in effect, had rejected the theory of 'guilty by association' embodied in section 3 (5) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and section 10 (a) (i) of the Unlawful Activities (Prevention) Act, 1967. As succinctly captured by M. R. Shah J., in the present case, the view taken by the two judge-bench in those cases was: "mere membership of a banned organisation will not incriminate a person unless he resorts to violence or incites people to violence and does an act intended to create disorder or disturbance of public peace by resort to violence."[87] In effect, the two-judge bench had read down section 3 (5) of TADA and section 10 (10) (a) (i), UAPA.

In the present case, the three-judge bench did not agree with the view taken by the two-judge bench in the aforementioned cases. At the outset, it observed:

(i) The two-judge bench ought not to have 'read down' the statutory provisions of TADA/UAPA in those cases: (a) when their constitutional validity was not challenged, and (b) without hearing the Union of India, which was not made a party in any of those cases.

83 (2023) 8 SCC 745.

84 *State of Kerala* v. *Raneef* (2011) 1 SCC 784.

85 *Arup Bhuyan* v. *State of Assam* (2011) 3 SCC 377.

86 *Indra Das* v. *State of Assam* (2011) 3 SCC 380.

(ii) The two-judge bench had erred in plainly importing and applying the American law on the doctrine of 'guilt by association' without duly considering the constitutional provisions in India, more particularly, articles 19(1)(c) and 19 (4) and appreciating the differences in the legal position in the two countries.

Further the law laid down by a two-judge bench that mere membership of an unlawful association is not sufficient to incriminate any person either under section 3 (5) TADA or section 10 (a)(i) UAPA is held to be not a good law. Considering the history of the Constitution (Sixteenth Amendment) Act, 1963 (which enabled the state to impose reasonable restrictions on 'right to freedom of speech and expression' and 'right to form associations and unions' in the interest of 'sovereignty and integrity of India') and the UAPA, 1967, the bench held:[88]

> Section 10(a)(i) which provides that where an association is declared unlawful by a notification issued under Section 3 which has become effective under sub-section (3) of that Section, a person who is and continues to be a member of such association shall be punishable… can be said to be absolutely in consonance with Articles 19(1), (2) and (4) of the Constitution of India and can be said to be in furtherance of the object and purpose for which the UAPA has been enacted.

The bench also declined to read *mens rea* element into the provisions. To hold a person guilty, it is not a pre-requisite to establish that he/she had the 'intent' to accomplish the aims of the organization, which is declared to be unlawful. In other words, the active membership is not the requirement under the law. The bench, however, underscored that under section 10(a)(i) of UAPA, a person is punishable only when he/she "is and *continues* be a member" of an association even after it was declared unlawful by following the due procedure of law. It is not sufficient to just prove that the person was a member on the relevant date. It is important to also prove that he/she continued to be a member even after that date.

This judgment has made it clear that unlike in the United States, in India a law declaring 'guilt by association' is valid. Mere (continued) membership of an unlawful association, even though it is not an active membership and the person concerned does not possess the *mens rea*, is punishable. Such a provision is, indeed, stringent. Though the bench gave detailed reasons to uphold the provision, what is conspicuous by absence in the judgment is the proportionality analysis. Even though the principle of proportionality was invoked in the case, the bench seems to have not found it appropriate to subject the provision(s) in question to the four-pronged test of proportionality, which is increasingly gaining currency in constitutional adjudications in India. It may be plausible to argue that the proportionality analysis could have possibly, if not probably, yielded a different result in the case.

87 *Supra* note 83, para 2.

88 *Id*., para 92.

Article 20: Protection in respect of conviction

Article 20 of the Constitution of India guarantees three protections against conviction in criminal cases *viz*., (i) protection against *ex post facto* laws, (ii) protection against double jeopardy, and (iii) protection against self-incrimination. The protection against *ex post facto* laws enshrined under article 20 (1) prohibits both retrospective criminalization and retrospective enhancement of punishments. By virtue of this provision, no law can criminalize an act or omission of any person retrospectively nor can it enhance the punishment retrospectively for any of the existing offences.

The said provision was invoked in *CBI* v. *R.R. Kishore*[89] to contend that "anything which may relate to or may be a prerequisite for conviction should stand covered by Article 20(1) of the Constitution."[90] Since article 20, as its marginal note says,'provides protection in respect of conviction', protection under clause (1) should be given a wider meaning to include enquiry, investigation and trial procedures which are prerequisite and essential to arrive at a conviction for an offence. In essence, the contention was, by virtue of article 20 (1), even the procedural safeguards cannot be withdrawn retrospectively.

The safeguard in question, in the present case, was the one afforded by section 6-A (1) of the Delhi Special Police Establishment Act, 1946 (DSPEA) to central government officials of certain rank. It mandated that no enquiry or investigation into any offence under the Prevention of Corruption Act, 1988 allegedly committed by the employee of the level of joint secretary and above, either serving the central government or posted in any of the autonomous bodies, can be conducted without the approval of the central government. The said provision was declared unconstitutional for being violative of article 14 of the Constitution by a constitutional bench of the Supreme Court in *Subramanian Swamy.*[91] As a result some of the inquiries/investigations, which were set aside prior to *Subramanian Swamy* by different courts on the ground of non-compliance with the aforesaid section 6-A(1), were sought to be revived by the CBI.

In the above context, the precise question that was raised before the court was whether, in view of article 20 (1), the declaration of the Supreme Court that section 6-A of the DSPEA as unconstitutional can be applied retrospectively?

The five-judge bench of the Supreme Court unanimously answered the question in the affirmative. It said that section 6-A of the DSPEA is only part of the procedure and withdrawal of the safeguard or protection accorded by it does not in any way violate article 20 (1) of the Constitution. It rejected the contention that article 20 (1) should be given a wider meaning to include "anything which may relate to or may be a prerequisite for conviction" as too far-fetched. It said that

89 (2023) 15 SCC 339.

90 *Id*., para 54.

91 *Subramanian Swamy* v. *CBI* (2014) 8 SCC 682.

merely on account of the marginal note, article 20 (1) cannot be given "a very wide and open-ended expanse…stretching it even to procedural aspects."[92]

As regards the question of retrospective applicability of judicial decisions, it categorically reiterated that "once a law is declared to be unconstitutional, being violative of Part III of the Constitution, then it would be held to be void *ab initio*, stillborn, unenforceable and *nonest* in view of Article 13(2) of the Constitution and its interpretation by authoritative pronouncements."[93] It accordingly held that declaration made in *Subramanian Swamy* that section 6-A is unconstitutional "will have retrospective operation….(it) is held to be not in force from the date of its insertion"[94]

In the survey year, even the other two protections against convictions *viz*., protection against double jeopardy and protection against self-incriminations came to be invoked in some cases. In *State of T.N.* v. *Hemendhra Reddy*,[95]it was held that protection against double jeopardy does not prohibit further investigation as it is merely a continuation of the prior investigation. The court added that, in any case, prohibition against prosecution and punishment for the same offence more than once does not extend to investigation. The later cannot be put on par with the former.

In *Santosh alias Bhure* v. *State (G.N.C.T.) of Delhi*,[96] the court held that compulsorily obtaining specimen signature or handwriting samples would not violate right against self-incrimination. Similarly, in *Mukesh Singh* v. *State (NCT of Delhi)*,[97] it was held that the accused person cannot, by invoking his/her right against self-incrimination, refuse to participate in the test identification parade (TIP). In the opinion of the court, "[T]he accused while subjecting himself to the TIP does not produce any evidence or perform any evidentiary act."[98] Thus, compulsion to participate in the parade does not infringe his/her right against self-incrimination.

Right to default bail

Under section 167(2) of the Code of Criminal Procedure, 1973, an accused person, who is under detention, is entitled to default bail if the investigation is not completed and the charge-sheet/ report is not filed within the stipulated period of sixty or ninety days, as the case may be. It is a settled law that on the expiry of sixty or ninety days, if the charge-sheet/report is not filed within that period, an indefeasible right to default bail accrues to the accused person. The right once accrued cannot be defeated by filing a charge-sheet/report (immediately) after the expiry of the stipulated period. But the legal position was not clear on the question

92 *Supra* note 89, para 55.
93 *Id.*, para 72.
94 *Ibid*.
95 (2023) 16 SCC 779.
96 2023 SCC OnLine SC 538.
97 2023 SCC OnLine SC 1061.
98 *Id.*, para 36.

as to whether, in computing the said period of the sixty or ninety days, the date on which remand order was passed by the Magistrate shall be included or not. On this question, divergent opinions were expressed by different benches of the Supreme Court in the past.[99]

In *Enforcement Directorate* v. *Kapil Wadhawan*,[100] the said question was decided by a three-judge bench of the Supreme Court. In the instant case, the case report came to be filed by the Enforcement Directorate (ED) on the sixty-first day (the date of remand included). Relying on *Rustam*,[101] it was contended on behalf of the ED that the date of remand shall be excluded in computing the said period. In *Rustam*, it may be noted that the court applying section 9 of the General Clauses Act, 1897 (GCA) had excluded the date of remand in computing the period. It was also contended, alternatively, that the sixtieth day was a Sunday and, thus, as per section 10 of GCA, the sixtieth day shall stand extended to the following working day. The three-judge bench, after considering the legislative history and the intent behind section 167(2), categorically rejected both the contentions. According to it, proviso (a) to section 167(2) is a complete code in itself and the provisions of the GCA are inapplicable to interpret it. Since "the question of default bail is inextricably linked to personal liberty and article 21",[102] the said proviso shall be interpreted "based on the pivotal consideration that personal liberty of the individual commands that any lacuna in the specificity of the law has to be so interpreted in the accused's favour."[103] Further, noting that the police is empowered under law to investigate even on the day of remand, it added:[104]

> [i]f the police is empowered to investigate an accused person on the day of the remand order itself, the 60/90 day stipulated period, upon whose expiry, the right of default bail accrues to the accused, should logically be calculated from that day itself. Ignoring the date of remand under Section 167CrPC in the 60/90 day period, would in our opinion, militate against the legislative intent of providing an accused protection from being in prolonged custody, because of slothful investigation.

The three-judge bench, in the instant case, refused to follow the law laid down in *Rustam* (which was also a three-judge bench decision) and declared it *per*

99 In certain cases the court has held that in computing the period of sixty or ninety days, the date on which remand was given must also be included. See, for example, *Chaganti Satyanarayana* v. *State of A.P.* (1986) 3 SCC 141; *CBI* v. *Anupam J. Kulkarni*, (1992) 3 SCC 141; *State* v. *Mohd. Ashraft Bhat*, (1996) 1 SCC 432; *State of Maharashtra* v. *Bharati Chandmal Varma*, (2002) 2 SCC 121. In other cases, the court held that it shall be excluded. See, for example, *State of M.P.* v. *Rustam*, 1995 Supp (3) SCC 221; *Ravi Prakash Singh* v. *State of Bihar* (2015) 8 SCC 340; *M. Ravindran* v. *Revenue Intelligence Directorate* (2021) 2 SCC 485.

100 (2024) 7 SCC 147.

101 *Supra* note 99.

102 *Supra* note 100, para 55.

103 *Id*., para 42.

104 *Id*., para 45.

incuriam as it was decided ignoring *Chaganti Satyanarayana*,[105] which was, in its opinion, a 'binding precedent'.[106] It may, however, be noted that *Chaganti Satyanarayana*, though it was decided prior to *Rustam*, was a two-judge bench decision. Technically, two-judge bench decisions are not binding on three-judge benches. Though, on merits, the law laid down in *Rustam* was incorrect, it was not correct to declare it *per incuriam*. Since it was incorrectly declared *per incuriam*, the law declared by the three-judge bench in the present case, though appears to be correct, is itself vulnerable to be declared *per incuriam* in a future case. Ideally, the matter should have been placed before a five-judge bench for authoritative pronouncement on the question.

Another important question that has direct bearing on right to default bail arose in a writ petition filed under article 32 in *Ritu Chhabaria* v. *Union of India*.[107] The question relates to the practice of filing chargesheet or prosecution complaint in piecemeal, without completing the investigation, before the expiry of sixty days just to scuttle the right of default bail accruing in favour of the accused person under detention. The two-judge bench of the apex court held that the said practice is not in conformity with law. It observed:[108]

> If we were to hold that chargesheets can be filed without completing the investigation, and the same can be used for prolonging remand, it would in effect negate the purpose of introducing section 167(2) of the CrPC and ensure that the fundamental rights guaranteed to accused persons is violated.

Thus, the court ruled that an investigative agency should not file the chargesheet or prosecution complaint without completing the investigation in order just to deprive the right of default bail to the arrested person. Such a chargesheet, if any, filed before completing the investigation, would have the effect of extinguishing the said right. Thus, the remand of the arrested person cannot be continued beyond the stipulated period based on filing of such a piecemeal chargesheet.

Even in this case, like in *Kapil Wadhwan*, the bench reiterated that the right to default bail is not just a statutory right "but a fundamental right that flows from Article 21 of the Constitution of India."[109] In *V. Senthil Balaji* v. *State*,[110] the court declared the entire section 167, Cr.P.C. "as a limb of Articles 21 and 22(2) of the Constitution of India."[111]

105 *Supra* note 99.
106 *Supra* note 100., para 32.
107 2023 SCC OnLine SC 502.
108 *Id*., para 28.
109 *Id*., para 35.
110 (2024) 3 SCC 51.
111 *Id*., para 53.

Remission and premature release

In *Joseph* v. *State of Kerala*,[112] a convict, who was serving life imprisonment for committing offences under section 302 and 392 of the Indian Penal Code, 1860 had approached the Supreme Court of India under article 32 of the Constitution seeking direction to the state to consider his case for remission and pre-mature release. By then he had served actual imprisonment for over twenty-six years and a total sentence of over thirty-five years (including remission). The reason for non-consideration of his case for remission and pre-mature release was the executive instruction, which was issued after he had completed nearly twenty-five years of imprisonment. The said executive instruction explicitly barred consideration of cases of prisoners involved in the murder of a woman for pre-mature release. The validity of the executive instruction was challenged on the ground that it was not only violative of articles 20 and 21 of the Constitution but it is also inconsistent with the Prison Act and the Rules framed under the said Act.

A two-judge bench upheld the arguments challenging the validity of the executive instructions. It found fault with "*typecasting* convicts" through such inflexible executive instructions "based on their crime committed in the distant past".[113] In its opinion such typecasting and permanent exclusion of certain convicts from the zone of consideration for pre-mature release can "result in the real danger of overlooking the reformative potential of each individual convict."[114] The bench also observed:[115]

> [t]he insistence of guidelines, obdurately, to not look beyond the red lines drawn by it and continue in denial to consider the real impact of prison good behavior, and other relevant factors… results in violation of Article 14 of the Constitution.

The bench, after considering prison records, directed the state to release the petitioner in the interest of justice.

V PREVENTIVE DETENTION

The Constitution of India authorizes both the Parliament and the State Legislatures to enact laws providing for preventive detentions only on specified ground. There are separate legislative entries in the 'union list'[116] and the 'concurrent list'[117] of the seventh schedule of the Constitution, where the grounds are clearly specified. The Constitution also mandates that the laws providing for

112 2023 SCC OnLine SC 1211.

113 *Id*., para 37.

114 *Ibid*.

115 *Ibid*.

116 Under entry 9 of 'union list', the Parliament can enact preventive detention laws "for reasons connected with Defence, Foreign Affairs, or the Security of India".

117 Under entry 3 of the 'concurrent list', both the Parliament and state legislatures can enact preventive detention laws "for reasons connected the security of a State, the maintenance of public order, or the maintenance of essential supplies and services to the community".

preventive detentions must embody certain minimum safeguards envisaged under article 22 (4) to (7). These safeguards, having been incorporated in Part – III, have the status of fundamental rights.

The preventive detention is, no doubt, a British legacy in India. But since the Constitution sanctions it, even now the 'state' resorts to it too often in India. There are many union and state laws providing for preventive detention. In *Pesala Nookaraju* v. *State of A.P.*,[118] a person preventively detained under section 3(2) of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 (A. P. Act, 1986) had approached the Supreme Court, in appeal, challenging his detention.

The ground of his detention was that the detenue was a "habitual offender and committing offences under the Andhra Pradesh Prohibition (amendment) Act, 2020". In reaching the said conclusion, the detaining authority had taken into account the four criminal cases pending against him for "distributing, storing, transporting and selling ID liquor" which, in the opinion of the detaining authority, "causes huge damage to the public health as well as public peace and tranquility." Since the alleged acts come under the category of 'bootlegger' under section 2 (b) of the A. P. Act, 1986, his detention was ordered. Though the initial detention order did not specify the period of detention, the subsequent order passed by the government, after obtaining confirmation from the advisory board, specifically directed that he shall be detained for a period of twelve months.

In the appeal, which was heard by a three-judge bench of the Supreme Court, the appellant had raised two contentions: *First*, the order of detention is violative of the proviso to section 3 (2) of the A.P. Act, 1986, according to which period of detention cannot be extended beyond three months at a time. Though the maximum period of detention specified under the Act is twelve months, detention cannot be ordered for the entire period at once. There has to be periodic assessment every three months, and each time the detention can be extended only for a further period of three months subject to the maximum prescribed under the Act. In support of this argument, the appellant relied upon the two-judge bench decision rendered in *Cherukuri Mani*[119] and article 22(4)(a) of the Constitution. *Second*, the pendency of four FIRs alleging involvement of the accused in bootlegging "is not sufficient to arrive at a subjective satisfaction that the activities of the appellant detenu as a bootlegger is prejudicial to the maintenance of public order."[120]

The three-judge bench, after examining the provision, rightly held that the contention of the appellant that the order of detention is violative of section 3 (2) of the A. P. Act, 1986 is "thoroughly misconceived."[121] The said provision only

118 (2023) 14 SCC 641.

119 *Cherukuri Mani* v. *State of A.P.* (2015) 13 SCC 722.

120 *Supra* note 118, para 49.

121 *Id*., para 40.

deals with delegation of power of preventive detention by the state government to officers of certain rank under certain circumstances and does not deal with the period of detention at all. The bench accordingly overruled *Cherukuri Mani,*[122] where the provision was misinterpreted and misunderstood by the two-judge bench. As regards arguments based on article 22 (4) (a) of the Constitution is concerned, the three-judge bench held that it applies only to the initial period of detention but not to the order passed after confirmation by the advisory board. The subsequent order so passed may extend the period of detention to the maximum prescribed under the law at once.

As regards the second question as to whether there were sufficient grounds for reaching the conclusion that the activities of the detenue are prejudicial to the maintenance of 'public order', which is a constitutionally sanctioned ground for preventive detention, the conclusion of the bench seems to be erroneous. The bench observed:[123]

> Just because four cases have been registered against the appellant detenu under the Prohibition Act, by itself, may not have any bearing on the maintenance of public order. The detenu may be punished for the offences which have been registered against him… but *if the liquor sold by the detenu is dangerous to public health then under the 1986 Act, it becomes an activity prejudicial to the maintenance of public order…*

Since the laboratory report of the liquor seized from the possession of the detenue stated that the "samples were found to be unfit for human consumption and injurious to health",[124] it was held that the detaining authority is justified in reaching the conclusion that the activities of the detenue are prejudicial to maintenance of public order.

It is difficult to countenance the reasoning that what affects 'public health' affects 'public order'. It seems to be far-fetched. The bench reached this conclusion after referring to several cases either defining or distinguishing 'public order' from 'law and order'. In the process, it wrongly cited *Romesh Thappar*[125] as a case dealing with preventive detention. It was stated that "Romesh Thappar….was detained under the Madras Maintenance of Public Order Act, 1949. The detention order was challenged directly in this Court by filing a writ petition under Article 32 of the Constitution."[126] What was challenged in the said writ petition was the order of the Government of Madras issued under Madras Maintenance of Public Order Act, 1949 imposing ban upon the entry and circulation of *Cross Roads* – a journal edited, printed and published by Romesh Thappar in Bombay. Romesh Thappar was not detained under the said Act or under any other law by the

122 *Supra* note 119.

123 *Id*., para 68. Emphasis supplied.

124 *Id*., para 55.

125 *Romesh Thappar* v. *State of Madras*, 1950 SCC 436.

126 *Supra* note 118, para 57.

Government of Madras. It is, however, correct that in *Romesh Thappar*, the six-judge bench of the Supreme Court attempted to define/elucidate 'public order'. It said that it is an expression of wider connotation and 'public safety' falls within the wider concept of 'public order'. But, neither *Romesh Thappar* nor any other case referred to by the bench in the present judgment clearly supports the view that what affects 'public health' affects 'public order'. The only support for such a conclusion can be drawn from the explanation to clause (a) of section 2 of the A.P. Act, 1986 which provides that "…grave or widespread danger to life or public health" shall be deemed to affect public order.

It may also be pertinent to note that in none of the other cases dealing with preventive detention of bootleggers cited in the present judgment, mere involvement in bootlegging was considered sufficient to order their preventive detention. They were placed under preventive detention because, in addition to bootlegging, detenues were also involved in other violent acts.

What is, however, important to be examined is a question as to whether the constitutionally sanctified expressions like 'public order' can be statutorily defined very widely to enlarge the power of preventive detention. It is axiomatic to state that if the wider meaning is assigned to 'public order', that would proportionately reduce the scope of several fundamental rights. Thus, the decision rendered by the three-judge bench in the present case needs to be reconsidered at the earliest.

In the survey year, in *Ameena Begum* v. *State of Telangana*,[127]another (two-judge) bench of the Supreme Court dealt with a similar case of preventive detention under the identical legislation in force in the State of Telangana. In this case, the impugned detention order stated that the detenu was "*habitually committing the offences including outraging the modesty of women, cheating, extortion, obstructing the public servants from discharging their legitimate duties, robbery and criminal intimidation along with his associates in an organised manner…"*[128] The grounds cited for detention in this case, *prima facie*, appears to be far more serious than the grounds cited for detention in *Pesala Nookaraju*. Even then the outcome of the case was different. Whereas in *Pesala Nookaraju*, the three-judge bench upheld the preventive detention, the two-judge bench, in this case, set aside the order of preventive detention.

The two-judge bench, after extensively analyzing the case law on judicial reviewability of preventive detentions, has very succinctly stated the questions a constitutional court needs to examine while testing the legality of preventive detention orders.[129] The bench carefully scrutinized the compliance with those requirements while passing the detention order in question. In the present case, it set aside the said order observing:[130]

127 (2023) 9 SCC 587.
128 *Id*., para 3.
129 *Id*., paras 28.1 to 28.10.
130 *Id*., para 47.

> On an overall consideration of the circumstances, it does appear to us that the existing legal framework for maintaining law and order is sufficient to address like offences under consideration, which the Commissioner anticipates could be repeated by the detenu if not detained. We are also constrained to observe that preventive detention laws—an exceptional measure reserved for tackling emergent situations—ought not to have been invoked in this case as a tool for enforcement of "law and order". This, for the reason that, the Commissioner despite being aware of the earlier judgment and order of the High Court… passed the detention order ostensibly to maintain "public order" without once more appreciating the difference between maintenance of "law and order" and maintenance of "public order". The order of detention is, thus, indefensible.

The bench also cautioned the State of Telangana that "the drastic provisions of the Act are not to be invoked at the drop of a hat."[131]

VI RIGHT TO RELIGION AND CONSTITUTIONAL MORALITY

In *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra*,[132] the correctness of the view taken by a Constitution Bench of the Supreme Court in 1962 in *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*,[133] came up for consideration before the five-judge bench. In *Sardar Syedna*, the constitutional validity of the Bombay Prevention of Excommunication Act, 1949 was challenged on the ground that it violates fundamental right to religion guaranteed under articles 25 and 26 of the Constitution. The Act declared excommunication of a member of any community illegal notwithstanding anything to the contrary contained in any law, custom or usage. The Constitution Bench, by majority, held that the practice of excommunication amongst *Dawoodi Bohras* is an integral part of the management of the community. Since the Act bars excommunication, *inter alia*, on religious grounds as well, it interferes with the right of the community "to manage its own affairs in matters of religion", which is guaranteed under article 26 (b) of the Constitution and accordingly declared it as unconstitutional.

In the present petition filed under article 32 in 1986, a writ of mandamus was sought to be issued to the state government directing it "to give effect to the provisions of the Excommunication Act after reconsidering (sic) the decision of this court in *Sardar Syedna*."[134] In the meantime, it is apt to note, the impugned Bombay Excommunication Act, 1949 was repealed by section 20 (c) of the Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016. Notwithstanding the same, the five-judge bench proceeded to consider the petition on the ground that the larger question of

131 *Id*., para 48.
132 (2023) 4 SCC 541.
133 AIR 1962 SC 853.
134 *Supra* note 132, para 4.

constitutional validity of the practice of excommunication prevalent among many communities, not only *Dawoodi Bohras*, survives to be examined.

As regards the substantial issue involved in the case, the bench noted that in *Sardar Syedna*, the aspect that the right guaranteed under article 26 (b) is subject to 'morality' was not duly considered. Further, acknowledging that "[A]s far as the concept of morality… is concerned, much water has flown after the decision in *Sardar Syedna*",[135] the bench opined that the pertinent question to be considered in the present case is "whether the exclusionary practice which prevails in the *Dawoodi Bohra* community of excommunicating its members will stand the test of constitutional morality?"

The bench categorically observed that the practice of excommunication violates several rights of the person subjected to it and in some cases "it will result in his civil death." Thus, in its opinion, it is plausible to argue that "the concept of constitutional morality which overrides the freedom conferred by clause (b) of Article 26, will not permit the civil rights of excommunicated persons which originate from the dignity and liberty of human beings to be taken away." Further the right under article 26 (b) needs to be balanced with other fundamental rights, in particular right to life and personal liberty, guaranteed under the Constitution, which was not done in *Sardar Syedna*. Hence the bench unequivocally held that the decision rendered in *Sardar Syedna* needs reconsideration. Since a bench of nine-judges, in Sabarimala temple entry case,[136] is already considering, *inter alia*, the questions relating to both balancing the right under article 26 with other fundamental rights and also the scope and extent of the word 'morality' in articles 25 and 26 of the Constitution, the bench ordered that this writ petition should also be tagged with and heard by the nine-judge bench.

VII RIGHTS FOR NON-HUMAN SENTIENT BEINGS

Do fundamental rights guaranteed in Part – III of the Constitution of India, particularly rights enshrined under articles 14 and 21, are available to non-human or sentient animals was an interesting question that arose before a five-judge bench of the Supreme Court in *Animal Welfare Board of India* v. *Union of India*.[137] In this case, amendment Acts of three states *viz*., Tamil Nadu, Maharashtra and Karnataka amending the Prevention of Cruelty to Animals Act, 1960 to permit bovine sports viz., '*Jallikattu*' (Tamil Nadu) and 'Bullock Card Race' (Karnataka and Maharashtra) were challenged in a writ petition filed under article 32 of the Constitution.

In the case, the petitioners, who were challenging the state amendment Acts, advanced an interesting argument:[138]

135 *Id.*, note 30.

136 *KantaruRajeevaru (Right to Religion, In re-9 J.)* v. *Indian Young Lawyers Assn.* (2020) 3 SCC 52.

137 (2023) 9 SCC 322.

138 *Id*., para 18.

> [t]he expression "person" as used in Article 21 of the Constitution of India includes sentient animals and their liberty is sought to be curtailed by legitimising the aforesaid bovine sports and the instrument of such legitimisation being the three Amendment Acts is unreasonable and arbitrary, thereby not meeting the standard of Article 14 of the Constitution of India.

They also argued that these sports are not part of the 'cultural heritage of the state' in order to counter the claim of one of the respondent states i.e., Tamil Nadu, which contended that the *Jallikattu* is part of their cultural heritage to claim protection under article 29 of the Constitution.

As far the question of conferring fundamental rights on animals, the bench noted at the outset that there is no precedent to rely on. Even the division bench in *A. Nagaraja*,[139] which outlawed the aforestated bovine sports, did not hold in clear terms that animals are entitled to fundamental rights. In the absence of a law or a precedent, the five-judge bench observed:[140]

> The only tool available for testing this proposition is interpreting the three Amendment Acts on the anvil of reasonableness in Article 14 of the Constitution of India. While the protection under Article 21 has been conferred on person as opposed to a citizen, which is the case in Article 19 of the Constitution, we do not think it will be prudent for us to venture into a judicial adventurism to bring bulls within the said protected mechanism. We have our doubt as to whether detaining a stray bull from the street against its wish could give rise to the constitutional writ of *habeas corpus* or not. In the judgment of *A. Nagaraja*, the question of elevation of the statutory rights of animals to the realm of fundamental rights has been left at the advisory level or has been framed as a judicial suggestion. We do not want to venture beyond that and leave this exercise to be considered by the appropriate legislative body. We do not think Article 14 of the Constitution can also be invoked by any animal as a person. While we can test the provisions of an animal welfare legislation, that would be at the instance of a human being or a juridical person who may espouse the cause of animal welfare.

It is made categorically clear that the sentient non-human animals are not entitled to claim fundamental rights guaranteed for persons/citizens under the Indian Constitution. Human beings or juristic entities formed by them who espouse the cause of animal welfare, however, have the *locus* to challenge laws and state actions adversely affecting animals on the ground of arbitrariness or unreasonableness or on any other ground.

In the present case, the bench did not countenance the argument of arbitrariness/unreasonableness. It observed "no irrational classification as regards

139 *Animal Welfare Board of India* v. *A. Nagaraja* (2014) 7 SCC 547.
140 *Supra* note 137, para 29.

these bull sports has been made by the legislature so as to attract the mischief which Article 14 of the Constitution of India seeks to prevent."[141]

Further, on the question whether *Jallikattu* is an integral part of the Tamil culture, the bench chose to defer with the view taken by the legislature. The reason for its deference is that such question cannot be answered without undertaking "religious, cultural and social analysis in great detail",[142] which the judiciary cannot undertake, particularly, in exercise of writ jurisdiction.

In the course of analysis, the five-judge bench made a very striking observation: "As we proceed on the basis that the Constitution does not recognise any fundamental right for animals, we shall have to test the legality of the three statutes against the provisions of the 1960 Act along with the *constitutional provisions of Articles 48, 51-A (g) and (h)*."[143] It is pertinent to note that the bench also recorded its findings that the amendment Acts in question are not relatable to article 48 and are not contrary to provisions contained in articles 51-A (g) and (h).

Article 48 of the Constitution contains one of the directive principles of state policy and articles 51-A (g) and (h) contain fundamental duties. The million dollar question is whether a law can be examined on the touchstone of directive principles of state policy and/or fundamental duties and declared unconstitutional if they are found to be not in conformity with them. If the answer to the question is in the affirmative, it would open floodgate of litigations challenging state actions.

VIII SPECIOUS WRIT PETITIONS

In *Ashwini Kumar Upadhyay* v. *Union of India*,[144] section 33 (7) of the Representation of the People Act, 1951 was challenged in a writ petition filed under article 32 of the Constitution. The said provision allows a candidate to contest elections from two constituencies. The Petitioner had also sought direction to the Government of India and the Election Commission to take appropriate steps to ensure that no person contests election for the "same office" from more than one constituency and also to discourage independent members from contesting elections.

A three judge bench of the Supreme Court in an earlier order dated December 11, 2017 had outrightly rejected, without assigning any reason, the prayer seeking direction to discourage independent members from contesting elections.[145]

When the matter was taken up to consider the remaining two prayers, article 19 of the Constitution was invoked in support of the prayers of the petitioners. Reliance was also placed on an earlier statement of the Chief Election Commissioner (CEC) and the 255th Report of the Law Commission of India. Both urging/

141 *Id*., para 36.

142 *Id*., para 45.2.

143 *Id*., para 42 (emphasis supplied).

144 (2023) 5 SCC 668.

145 *Ashwini Kumar Upadhyay* v. *Union of India*, 2017 SCC OnLine 2158.

recommending amendment of the said section 33 (7). It was also pointed out that if a candidate contesting in two constituencies succeeds in both, that would necessitate by-elections, which would be a drain on the public exchequer.

The court was not convinced by any of these arguments. Firstly, the argument based on article 19 was too far-fetched that it was not even reconsidered by the bench. In its opinion, none of other grounds can lead to invalidation of a statutory provision. While dismissing the writ petition, the bench clearly opined that permitting or not permitting a candidate to contest from more than one constituency in any election is a matter of legislative policy and "Parliament is legitimately entitled to make legislative choices and enact or amend legislation."[146] It is the prerogative of the Parliament to convert any recommendation of the Law Commission or Election Commission into a mandate of law. No direction can be issued to the Parliament to do the same. The bench was also categorical in its assertion that in the absence of violation of any fundamental right, the court cannot strike down the impugned provision as unconstitutional.

In the survey year, another writ petition filed under article 32 by the same petitioner purportedly in public interest came to be disposed of by the apex court in *Ashwini Kumar Upadhyay* v. *Union of India*.[147] The petition had raised as many as seven questions for the consideration of the court. The bench summed-up his case in brief as follows:[148]

> The country is celebrating the 75th Anniversary of Independence but there are many ancient, historical, cultural, religious places in the name of "brutal foreign invaders", their servants and family members. He has given various examples. He invokes the right to dignity as flowing from Article 21 of the Constitution of India. He further submits that there is his fundamental right to culture which is protected in Articles 19 and 29. Again, he refers to Article 25 as the source of his right to religion and in regard to his fundamental right to know, he leans on Article 19(1)(a). He also has brought up the concept of "sovereignty" being compromised by the continuous use of the names of the "brutal invaders."

The petitioner sought three directions: (i) to home ministry to establish 'Renaming Commission' to find the original names of ancient and historical places of religious and cultural significance, (ii) to Archaeological Survey of India 'to research and publish the initial names' of such places, and (iii) to the centre and the state governments to update their websites and records to mention the original names of all such places.

The court dismissed the writ petition stating that "the reliefs… sought… should not be granted by this Court acting as the guardian of fundamental rights of all… and bearing in mind the values which a Court must keep uppermost in its

146 *Supra* note 144., para 12.
147 (2023) 8 SCC 402.
148 *Id*., para 3.

mind".[149] It also observed that "[T]he history of any nation cannot haunt the future generations of a nation to the point that succeeding generations become prisoners of the past."[150]

IX CONCLUSION

Many constitutional questions requiring interpretation and exposition of law relating to fundamental rights arose before the Supreme Court in 2023. Some of the important questions were adjudicated by seven different constitutional benches consisting of five-judges. In four of them, polyvocal judgments were rendered by the benches and in the remaining three univocal judgments were delivered. As regards polyvocal judgments rendered in four cases, except in *Anoop Baranwal*,[151] in all three other cases *viz*., *Kaushal Kishore*,[152]*Supriyo*,[153] and *Vivek Narayan Sharma*,[154] all the judges did not concur on all aspects. There were dissents and discordant notes. Notable dissenting judgments were delivered by B. V. Nagarathna, J., both in *Vivek Narayan Sharma* as well as in *Kaushal Kishore*. In *Supriyo*, the five-judge bench had delivered four judgments. But notwithstanding such polyvocality, exposition of binding legal propositions on each of the contested issues are clearly discernable. Views expressed by D. Y. Chandrachud, C.J., and Sanjay Kishan Kaul, J., in their partly dissenting judgments in *Supriyo*, present futuristic vision of how law should evolve in the times to come to secure equal rights and recognition to sexual minorities in India in all walks of life.

In six out of seven cases decided by five-judge benches, all the questions involved were authoritatively answered either unanimously or by majority. The only exception is *Central Board of Dawoodi Bohra Community*,[155] in which the five-judge bench referred the writ petition originally instituted in 1986 to be clubbed with the review petitions filed in the Sabarimala temple entry case to be jointly heard by a nine-judge bench.

In the survey year, many other noteworthy judgments were delivered by either three-judge or two-judge benches. One of the noticeable aspects is the increasing use of the four-pronged 'proportionality standard' in constitutional adjudications in India not only to examine the validity of limitations on substantive rights but also on procedural rights. The Supreme Court, in *Madhyamam Broadcasting Ltd*.,[156] clearly set the precedent for its use even in cases, where procedural rights are involved. The only conspicuous exception is *Arup Bhuyan*,

149 *Id*., para 13.
150 *Id*., para 12.
151 *Supra* note 8.
152 *Supra* note 33.
153 *Supra* note 51.
154 *Supra* note 79.
155 *Supra* note 132.
156 *Supra* note 18.

in which the three-judge bench did not apply proportionality standard to test the validity of provisions, which embody the principle of 'guilt by association.'

Further, in *Kapil Wadhwan*,[157] though the three-judge bench has rightly interpreted section 167 (2) of the Cr.PC. in the light of article 21 of the Constitution, it erred in declaring another three-judge bench decision rendered in *Rustam*[158] as *per incurium*. In view of the disagreement with the earlier interpretation, the matter should have been referred to a larger bench for authoritative pronouncement. The decision rendered in *Pesala Nookaraju*[159] is more concerning. It upheld the preventive detention of a person, who was allegedly involved in bootlegging on the ground that his activities are endangering public health and, thus, they are prejudicial to the maintenance of public order. The court expansively interpretated 'public order' to include activities dangerous to 'public health'. It is important to note that 'public order' is not only one of the constitutionally sanctioned grounds for preventive detention, it is a ground on which many of the fundamental rights can be restricted in India. The expansive interpretation of the expression 'public order' will have implications on all those rights. Thus, it needs to be reconsidered.

157 *Supra* note 100.
158 *Supra* note 99.
159 *Supra* note 118.