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CONSTITUTIONAL LAW – I

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I INTRODUCTION

IT IS often stated that "[T]he Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government."[1] The fundamental rights, reserved by "[W]e the people" under the Constitution, are the effective means of restraining both the legislative and executive branches of the government. The judiciary is the guardian of fundamental rights. The Constitution has invested the Supreme Court and the high courts with enormous powers to prevent infringement of fundamental rights and to remedy their breaches. The Supreme Court is their ultimate protector.

The Supreme Court of India not only has the power but also has the constitutional duty to protect fundamental rights primarily under article 32, which permits approaching the highest court of the land at the very first instance to seek constitutional remedies against violation or threat of violation of any of the fundamental rights. Since the high courts are also endowed with powers to enforce fundamental rights, their decisions often comeup before the Supreme Court in appeals. The Supreme Court, over the years, has contributed immensely to safeguarding and strengthening the fundamental rights by interpreting, expanding and enlivening them. At times, it had also erred in the past. This survey analyses the important decisions rendered by different benches of the Supreme Court on fundamental rights in the year 2024.

II RIGHTS *VIS-À-VIS* POLITICAL PARTIES AND ELECTORAL PROCESSES

In a democracy, the voters should be enabled to make free and informed choices in exercising their franchise. It is very important to preserve the sanctity of the right to vote. The 'voter confidence' in the integrity of the electoral system

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1 It is a statement attributed to Patrick Henry, American politician and was also a well-known anti-federalist. Historians and fact checkers, however, claim that there is no evidence to prove that he ever stated those words anywhere. But, many pointed out that even if the statement is fabricated, it is largely consistent with his political stance. As stated, he was one of the well-known anti-federalists, he had opposed the ratification of the American Constitution mainly because it did not include bill of rights to restrain the new federal government.

and processes is also equally significant. Any measure that adversely affects the right of voters to know and make informed choices or their perception of the fairness of the system and the integrity of the processes should be duly taken note of and closely examined. In 2024, the apex court had the opportunity to examine a couple of such measures on the touchstone of fundamental rights.

Validity of electoral bonds: Balancing fundamental rights

In constitutional adjudications, often the courts had to resolve "the conflict between different constitutional values or different conceptions of the same constitutional value".[2] It is a very delicate task that requires much thought and deep reflection. The conflicts between different fundamental rights, which seek to promote different values, are particularly difficult to resolve. In *Assn. for Democratic Reforms (Electoral Bond Scheme)* v. *Union of India*,[3] the apex court had to resolve one such conflict.

In this case, a five-judge bench was called upon to examine the constitutional validity of the Electoral Bond Scheme, 2018 and section 31 of the Reserve Bank of India Act, 1934, section 29-C of the Representation of the People Act, 1951, section 13-A of the Income Tax Act, 1961, and section 182 of the Companies Act, 2013 as amended respectively by sections 135, 137, 11 and 154 of the Finance Act, 2017 in a batch of writ petitions filed under article 32 of the Constitution of India.

The Electoral Bond Scheme allowed anonymous financial contributions to political parties by any person "who is a citizen of India or incorporated or established in India."In addition to the introduction of the Scheme, the amendments made to the aforementioned provisions permitted unlimited corporate funding to political parties and absolved the political parties from the statutory obligation to disclose the contributions received through electoral bonds and the companies from their statutory obligation to disclose the contributions made in any form.

The Electoral Bond Scheme and the provisions of the Finance Act, 2017, which amended the stated provisions in the aforementioned legislations, were challenged, *inter alia*, on the ground that the "non-disclosure of information about electoral contributions is violative of the right to information of the voter which is traceable to Article 19(1)(a) of the Constitution."[4] On the other hand, the Scheme and the amendments were sought to be defended by the Union of India, *inter alia*, on the ground of informational privacy, which is recognised by the nine-judge bench of the Supreme Court as a fundamental right in *K.S. Puttaswamy*.[5] The argument of the Union of India was that the right to informational privacy includes information about political affiliation, and the financial contribution made by the donor/contributor to a political party is a facet of their political affiliation. The Union of India, thus, shot its gun off the shoulders of donors. It is to protect the right to privacy of the donors that the electoral bond scheme was introduced

2 *Infra* note 3, para 150.

3 (2024) 5 SCC 1.

4 *Id*., para 60.

5 *K.S. Puttaswamy (Privacy-9 J.)* v. *Union of India* (2017) 10 SCC 1.

to allow anonymous financial contributions to political parties.It is interesting to note that the Union of India, which had contested in *K.S. Puttaswamy*the very existence of the right to privacy as a fundamental right under the Constitution,had invoked the very same right to defend anonymous political funding in the instant case.

The five-judge bench had delivered two judgments. The leading judgment was authored by D. Y. Chandrachud, C.J., for himself and on behalf of B.R. Gavai, J.B. Pardiwala, and Manoj Misra, JJ. Sanjiv Khanna J. delivered a separate but concurrent judgment, wherein he agreed with the 'findings and conclusions' recorded in the leading judgment but for reasons that are different on certain aspects.

D. Y. Chandrachud, C.J., in his leading judgment, acknowledged at the outset the existence of both the rights – right to information (invoked by petitioners) and right to informational privacy (invoked by the respondent). He categorically held that the requirement of disclosure of information about the 'candidates', by virtue of the right to information of the voters, extends to 'political parties' as well. Thus, political parties are duty-bound to reveal information on the funding they receive, as it is 'essential' for voters to exercise their choice. Further, relying on *K. S. Puttaswamy*,[6] he also held that "the Constitution guarantees the right to informational privacy of political affiliation."[7] In his opinion, the "[I]nformational privacy to political affiliation is necessary to protect the freedom of political affiliation and exercise of electoral franchise."[8] The right to informational privacy "extends to financial contributions to political parties even if contributions are not traceable to Article 19(1)(a), provided that the information on political contributions indicates the political affiliation of the contributor."[9]

Since, in the instant case, there was an apparent conflict between both these rights, the bench was required to balance them.

It is easier to resolve the conflict between the rights if there is a clear hierarchy between them. Countries with written Constitutions sometimes create such hierarchies. The Indian Constitution does not do so except in the case of "freedom of conscience and right freely to profess, practice and propagate religion" guaranteed under article 25. The said right has been explicitly made subject to other fundamental rights guaranteed in Part III of the Constitution. While noting that, D. Y. Chandrachud, C.J., observed: "[I]f the Constitution does not create a hierarchy between the conflicting rights, the courts must use judicial tools to balance the conflict between the two rights."[10]

D. Y. Chandrachud, C.J., also recounted how the judicial approach to balancing conflicting fundamental rights had evolved over a period of time. In the

6 *Ibid.*

7 *Supra* note 3, para 143.

8 *Ibid*.

9 *Id*., para 146.

10 *Id*., para 150.

initial stage, *i.e.*, before the proportionality standard was employed to test the validity of the state action infringing fundamental rights, the courts were using a collective interest or public interest standard to balance the conflicting rights "by according prominence to one over the other based on public interest."[11] This was done by adopting either of the two modalities - *first*, by circumscribing "one of the fundamental rights in question such that there was no *real* conflict between the rights."[12] While circumscribing, relative constitutional values of the rights were weighed based on public interest, and, s*econd*, by comparing "the values which the rights (and the conceptions of the rights) espouse and gave more weightage to the right which was in furtherance of a higher degree of public or collective interest."[13]

In the second stage, when the courts were gradually shifting from the pre-proportionality stage to proportionality, they applied one of the four prongs of the proportionality standard, *i.e.*, "the least restrictive means prong,"[14] to balance the conflicting rights.

In the third stage, *i.e.,* beginning with *K. S. Puttaswamy*,[15] the structured proportionality standard is being applied to balance the conflicting fundamental rights. In that case, while examining the validity of the Aadhaar Act, 2016, the bench had to resolve the conflict between the right to informational privacy, on the one hand, and the right to food, on the other. All four prongs of the proportionality standard were used for the purpose of resolving that conflict.

In this case, the D. Y. Chandrachud, C.J., departed from that standard. He was of the opinion that the four-pronged 'single proportionality standard' is not sufficient for balancing the two conflicting rights. In his view, "[T]he proportionality standard is an effective standard to test whether the infringement of the fundamental right is justified. It would prove to be ineffective when the State's interest in question is also a reflection of a fundamental right."[16] He hadalso explained the ineffectiveness of the single proportionality standard:[17]

> The proportionality standard is by nature curated to give prominence to the fundamental right and minimise the restriction on it. If this Court were to employ the single proportionality standard to the considerations in this case, at the suitability prong, this Court would determine if non-disclosure is a suitable means for furthering the right to privacy. At the necessity stage, the Court would determine if non-disclosure is the least restrictive means to give effect to the right to privacy. At the balancing stage, the Court would determine

11 *Id*., para 152.
12 *Ibid*.
13 *Id*., para 153.
14 *Id*., para 155.
15 *K.S. Puttaswamy (Aadhaar-5 J.)* v. *Union of India*, (2019) 1 SCC 1.
16 *Supra* note 3, para 158.
17 *Id*., para 159.

> if non-disclosure has a disproportionate effect on the right holder. In this analysis, the necessity and the suitability prongs will inevitably be satisfied because the purpose is substantial: it is a fundamental right. The balancing stage will only account for the disproportionate impact of the measure on the right to information (the right) and not the right to privacy (the purpose) since the Court is required to balance the impact on the right with the fulfilment of the purpose through the selected means. Thus, the Court, while applying the proportionality standard to resolve the conflict between two fundamental rights, preferentially frames the standard to give prominence to the fundamental right which is alleged to be violated by the petitioners (in this case, the right to information).

He thus established, relying on *Campbell,*[18] the 'double proportionality standard' for resolving the conflicts between two fundamental rights. According to him, it is the most suitable standard for balancing the conflicting rights. This standard,too, has four prongs, which are different from the four prongs of the single proportionality standard. The four prongs of the double proportionality standardlaid down by D. Y. Chandrachud, C.J.,are:[19]

(a) Does the Constitution create a hierarchy between the rights in conflict? If yes, then the right that has been granted a higher status will prevail over the other right involved. If not, the following standard must be employed from the perspective of both the rights where rights A and B are in conflict:

(b) Whether the measure is a suitable means for furthering right A and right B;

(c) Whether the measure is the least restrictive and equally effective to realise right A and right B; and

(d) Whether the measure has a disproportionate impact on right A and right B.

As is evident, the first prong of the single proportionality standard, *i.e.*, whether the measure in question serves any 'compelling state interest' or 'legitimate state aim', is missing in the double proportionality standard. This standard applies the remaining three prongs to both the conflicting rights to balance them in cases where the Constitution has not created any hierarchy.

While applying these tests, D. Y. Chandrachud, C.J., found that there is no hierarchy between 'right to information' and 'right to (informational) privacy'. In *K. S. Puttaswamy*,[20] the Supreme Court traced the right to privacy not only to article 21 but to the whole of Part III of the Constitution. It had considered "privacy as an essential component for the effective fulfilment of all the entrenched rights." Relying on the said proposition, he, in the instant case, had acknowledged that "[F]inancial contributions to a political party (as a form of expression of political support and belief) can be traced to the exercise of the freedom of conscience

18 *Campbell* v. *MGN Ltd*., (2004) 2 AC 457.

19 *Supra* note 3, para 163.

20 *Supra* note 5.

under Article 25",[21] which is the only fundamental right that is subject to all other fundamental rights. He, however, refused to hold that the 'right to anonymity of political contribution' is subject to 'right to information' because the former right is traceable, in addition to article 25, to various other freedoms under article 19 (1) as well. He observed:[22]

> [t]he informational privacy of a person's political affiliation is necessary to enjoy the right to political speech under Article 19(1)(a), the right to political protests under Article 19(1)(b), the right to form a political association under Article 19(1)(c), and the right to life and liberty under Article 21.

Since there is no hierarchy created amongst these rights in the Constitution, heproceeded to apply the remaining three prongs of the double proportionality standard to strike a proper balance between the 'right to information' and 'right to (informational) privacy'. On examination, he found that the scheme adopted to ensure anonymity of political contribution satisfies the suitability prong *vis-à-vis* right to informational privacy about political funding, but it fails *vis-à-vis* right to information about political funding. He then applied the necessity prong and held that the measure adopted is not the least restrictive one. He had even indicated an alternative measure, which is the least restrictive and equally effective to protect the informational privacy of the donors, but only so long as it is not outweighed by considerations of disclosure of information about political funding. Having found that the measure adopted is not the least restrictive, hewas of the opinion that there is no necessity of applying the balancing prong (proportionality *stricto sensu*) of the standard to examine the validity of the Scheme and the impugned provisions.

He, accordingly, invalidated the Electoral Bond Scheme, 2018 in *toto* and also declared section 13-A proviso (b) of the Income Tax Act, 1961,section 29-C (1) of the Representation of the People Act, 1951 and Section 182 (3) of the Companies Act, 2013 as amended respectively by sections 11, 137 and 154 of the Finance Act, 2017 as unconstitutional for violating article 19 (1) (a) of the Constitution.

Section 182 (1) of the Companies Act, 2013, as amended by section 154 of the Finance Act, 2017, was considered violative of article 14 for being 'manifestly arbitrary' insofar as it permits all companies, including loss-making companies, to make an unlimited amount of political funding. It was, thus, declared unconstitutional. He, however, did not pronounce on the validity of section 31 of the Reserve Bank of India Act, 1934, as amended by section 135 of the Finance Act, 2017. The reasons for the same are unclear.

Sanjiv Khanna J., in his concurrent judgment, while agreeing with D. Y. Chandrachud, C.J., underscored that the onus is on the state to justify its actions infringing fundamental rights:[23]

21 *Supra* note 3, para 165.

22 *Ibid*.

23 *Id*., para 244.

> [t]hat once the petitioners are able to *prima facie* establish a breach of a fundamental right, then the onus is on the State to show that the right-limiting measure pursues a proper purpose, has a rational nexus with that purpose, the means adopted were necessary for achieving that purpose, and lastly, a proper balance has been incorporated.

The responsibility of the petitioner, according to him, is limited to establishing a *prima facie* case. Thereafter, it is upon the state to justify its action when the same is subjected to thefour-pronged tests of the proportionality standard. This structured analysis, according to him, "places an obligation on the State at a higher level, as it is a polycentric examination, both empirical and normative."[24] In structured proportionality analysis, the courts do not show deference to the state "by acknowledging the legislature's expertise to determine complex factual issues" as this analysis "is not based on a preconceived notion or presumption."[25] According to him, "[E]xamination under the first three stages requires the court to first examine scientific evidence".[26] To enable the court to do so, the state must place the empirical data on record to justify the curtailment of rights. In cases where the data is unavailable or inadequate, the courts must apply "logic and reason". He, thus, made it clear that proper application of structured proportionality analysis leaves no scope for value judgment. The court must arrive at conclusions based on evidence and/or logic and reason.

Further, Sanjiv Khanna J., in his judgment, did not apply the double proportionality standard. He applied the four-pronged single proportionality standard to hold the impugned Scheme and other provisions unconstitutional. He differed from D. Y. Chandrachud, C.J., *inter alia*, with respect to the following aspects:

(i) Unlike D. Y. Chandrachud, C.J., he did not rely on the doctrine of manifest arbitrariness to hold section 182 (1) of the Companies Act, 2013, unconstitutional. He held it unconstitutional by applying the proportionality standard itself, as the said standard, in his opinion, would "subsume the test of manifest arbitrariness"[27] as well.

(ii) Unlike D. Y. Chandrachud, C.J., who did not pronounce on the validity of section 31 of the Reserve Bank of India Act, 1934, as amended by section 135 of the Finance Act, 2017, Sanjiv Khanna, J., declared the provision unconstitutional and struck it down.

Sanjiv Khanna J. was categorical in his opinion that:[28]

24 *Id*., para 245.
25 *Ibid*.
26 *Id*., para 261.
27 *Id*., para 303.
28 *Id*., para 286.

> The voters' right to know and access to information is far too important in a democratic set-up so as to curtail and deny "essential" information on the pretext of privacy and the desire to check the flow of unaccounted-for money to the political parties. While secret ballots are integral to fostering free and fair elections, transparency—not secrecy—in funding of political parties is a prerequisite for free and fair elections. The confidentiality of the voting booth does not extend to the anonymity of contributions to political parties.

The decision rendered in the instant case is undoubtedly going to be regarded as one of the landmarks in the constitutional history of India. Transparency in political funding is a *sine qua non* for the survival of democracy in form and in spirit. The impugned scheme and amendments to statutory provisions, if allowed to remain for long, would have destabilised the democracy.

In the instant case, the Supreme Court, apart from upholding the voters' rights *vis-à-vis* political parties and funding they receive, had also demonstrated its ingenuity in handling intricate questions of constitutional law involving conflict between two fundamental rights. Establishment of the double proportionality standard, which marks the departure from earlier approaches, reduces the scope for subjectivity in handling such intricate questions.

It is also worthwhile to note that in another case, *Karikho Kri* v. *Nuney Tayang*,[29] a two-judge bench of the Supreme Court had broadly dealt with an identical question. It held that voters 'right to know' is not absolute. While rejecting an argument that "a candidate contesting the election must be forthright about all his particulars", it observed:[30]

> [w]e are not inclined to accept the blanket proposition that a candidate is required to lay his life out threadbare for examination by the electorate. His "right to privacy" would still survive as regards matters which are of no concern to the voter or are irrelevant to his candidature for public office.

In its opinion, whether a non-disclosure of a particular movable property would amount to a defect of substantial character has to be decided keeping in view the facts and circumstances of each case. There cannot be any hard-and-fast rule. Though the case involved 'right to know' and 'right to privacy', the bench did not apply any structured standard for adjudication of the case. It gave greater weightage to the fact that the undisclosed movable properties were of lesser value and their disclosure would not have made any significant difference.

The right of the voters to verify the recording of their votes

In *Assn. for Democratic Reforms* v. *Election Commission of India*,[31] the Supreme Court had been approached under article 32 of the Constitution seeking

29 (2024) 15 SCC 112.

30 *Id*., para 47.

31 (2025) 2 SCC 732.

enforcement of the voters' right to know whether the vote cast by them is recorded correctly and counted. The challenge was basically to the use of Electronic Voting Machines (EVMs). The main relief sought by the petitioner was a direction to the Election Commission of India to return to the paper ballot system. In the alternative, the direction was sought to provide a printed slip from the Voter Verifiable Paper Audit Trail machine (VVPAT) to the voter to verify and put it in the ballot box and/ or for counting of all the VVPAT slips in addition to electronic counting by the control unit of the EVM.

In support of the relief claimed, it was argued that "the voters' right to know that the vote as cast is duly registered, being a paramount and indelible fundamental right, any administrative reason and ground raised by the ECI… should be rejected."[32]

A two-judge bench of the Supreme Court had outrightly rejected the plea for returning to the paper ballot system as "foolish and unsound."[33] Further, while acknowledging that the voters have a fundamental right to ensure that "their vote is accurately recorded and counted",[34] it was categorical in its view that the said right cannot be equated with "right to physical access to the VVPAT slips"[35] and/ or with the right to seek "100% counting of VVPAT slips".[36] The bench declined to issue any of the directions sought.

After extensively describing (without citing any sources) how the three-unit EVM system[37]functions, the bench concluded that there is no possibility of hacking or tampering with the system to tutor/favour results. According to the bench, the system and the processes followed are foolproof. It observed:[38]

> The EVMs are simple, secure and user-friendly. The voters, candidates and their representatives, and the officials of the ECI are aware of the nitty-gritty of the EVM system. They also check and ensure righteousness and integrity. Moreover, the incorporation of the VVPAT system fortifies the principle of vote verifiability, thereby enhancing the overall accountability of the electoral process.

The bench, however, had issued, even though it had no doubts in the system, two directions "only to further strengthen the integrity of the election process".[39]

Dipankar Dutta J., in his supplementary opinion, while noting the previous rulings of the apex court on the efficacy of EVMs in earlier cases, opined that the issue is definitively concluded now and no such issues should be raised in future "unless substantial evidence is presented against the EVMs".[40]

32 *Id*., para 3.
33 *Id*., para 72.
34 *Id*., para 68.
35 *Ibid*.
36 *Ibid*.
37 EVM system has three units: (i) ballot unit, (ii) control unit, and (iii) VVPAT unit.
38 *Supra* note 31, para 75.
39 *Id*., para 76.
40 *Id*., para 112.

The findings recorded in the judgment largely appear to be *ipse dixit* and are not based on proper evidence, proof or opinion of independent experts. In the instant case, it would have been fruitful to have independent experts who hold alternative views on the tamperability of EVMs appointed as *amici curiae* to assist the court. Addressing their claims and counterclaims, before recording the conclusion, would have been more edifying and persuasive, and that would have also contributed to putting to rest the controversies surrounding EVMs.

III INTERSECTION OF CRIMINAL LAW AND FUNDAMENTAL RIGHTS

It is apodictic that the criminal law manifests the strongest expression of the coercive power of the State.[41]Provisions of criminal law and exercise of coercive power thereunder must always align with fundamental rights and other constitutional principles. The questions regarding their alignment often arise before the Supreme Court. As the ultimate protector of fundamental rights and the upholder of the rule of law, it has the duty to examine such questions and correct the inconsistencies or misalignments, if any.

Rights of arrested persons

The Constitution of India provides certain safeguards against arrests and detentions in certain cases. These safeguards are envisaged under article 22 of the Constitution. The right to be "informed, as soon as may be, of the grounds for such arrest" is one such safeguard guaranteed under clause (1) of article 22 to every arrested person except 'enemy alien' or persons arrested or detained under any preventive detention law. Whereas enemy aliens (not every foreigner) are left in the lurch without any safeguards for reasons that are obvious, the Constitution provides some safeguards to persons detained under preventive detention laws. Clause (5) of article 22 requires that the authority making the detention order "shall, as soon as may be, communicate to such person the grounds on which the order has been made".

It is trite that neither clause (1) nor clause (5) of article 22 explicitly requires that such information or communication, as the case may be, shall be in 'writing'.

In *Pankaj Bansal,*[42] the Supreme Court - while dealing with the requirement of informing the grounds of arrest as mandated under section 19 (1) of the Prevention of Money Laundering Act, 2002 (PMLA), which is no doubt a statutory incorporation of the constitutional safeguards contained under article 22 (1) - had carefully examined the underlying purpose of the provision and categorically stated that the grounds of arrest shall be furnished in writing "as a matter of course and without exception… this would be the advisable course of action to be followed as a matter of principle."[43]

In *Prabir Purkayastha* v. *State (NCT of Delhi)*,[44] the Supreme Court had unequivocally held that the principle laid down in *Pankaj Bansal*[45] shall be followed

41 See *Sukanya Shantha*, *infra* note 153.

42 *Pankaj Bansal* v. *Union of India* (2024) 7 SCC 576.

43 *Id*., para 42.

44 (2024) 8 SCC 254.

45 *Supra* note 42.

in all cases of arrest and detention. In *Prabir Purkayastha*,[46] the Supreme Court was dealing with an arrest made under the Unlawful Activities (Prevention) Act, 1967 (UAPA). The provision dealing withcommunication of grounds of arrest contained in section 43-B(1) of the UAPA is, in all material respects, identical with section 19 (1) of the PMLA. Noting that article 22 (1) of the Constitution is the source of both these provisions, the Supreme Court observed that statutory provisions, which embody a very important constitutional safeguard, "have to be uniformly construed and applied."[47] It made it abundantly clear that identical provisions contained in other statutes shall also be construed to have the same meaning. It observed:[48]

> [t]here is no doubt in the mind of the court that any person arrested for allegation of commission of offences under the provisions of UAPA or for that matter any other offence(s) has a fundamental and a statutory right to be informed about the grounds of arrest in writing and a copy of such written grounds of arrest have to be furnished to the arrested person as a matter of course and without exception at the earliest.

In reaching the said conclusion, the court had placed reliance on earlier cases dealing with the requirement of communication of grounds of preventive detention as mandated under article 22 (5). It noted that the consistent view of the court has been that the communication shall be in writing and it shall be in a language the detainee understands. Noting that the language used in both clauses (1) and (5) of article 22 is identical and neither of them explicitly states that the grounds of arrest or detention, as the case may be, shall be in writing, the court opined that the interpretation given to clause (5) shall *ipso facto* apply to clause (1) as well. Since the requirement of communication of grounds of preventive detention shall be in writing, communication of the grounds of arrest shall also be in writing. Non-compliance with this mandatory requirement would render the arrest and/or detention illegal.

In the instant case, after closely examining the facts and circumstances, the court declared that the arrest was illegal as the remand order was passed without informing in writing the grounds of arrest to the appellant or to his advocate. The court, in no uncertain terms, stated that the failure to inform the grounds of arrest in writing "would vitiate the process of arrest and remand",[49] which cannot be validated by subsequent filing of a charge-sheet.

It must be stated that the rulings in *Pankaj Bansal* and *Prabir Purkayastha* have strengthened the constitutional safeguards against arrests and detentions.

46 *Supra* note 44.
47 *Id*., para 17.
48 *Id*., para 19.
49 *Id*., para 21.

Judicial review of arrests

Another important question as to whether a decision of the competent authority to arrest 'any person' under section 19 of the Prevention of Money Laundering Act, 2002 (PMLA) is subject to judicial review arose for consideration before a two-judge bench of the Supreme Court in *Arvind Kejriwal* v. *Enforcement Directorate*.[50] The appellant, the incumbent Chief Minister of the NCT of Delhi, had challenged the validity of his arrest under the said provision.

Section 19 authorises certain officials of the Enforcement Directorate (ED) to arrest 'any person' without a court warrant and even without registration of a first information report against such person for the predicate offence. It is a very drastic and extraordinary power prone to being abused if unchecked. Therefore, certain preconditions have been laid down in section 19 itself to prevent its pernicious use. As per the provision, no arrest can be made without any rhyme or reason. The provision requires that in order to arrest a person, the authorized official of the ED: (i) must have 'material' in his/her possession, (ii) must have 'reason to believe', based on such material, that the person to be arrested is guilty of an offence punishable under the Act, and (iii) must 'record in writing' such reason to believe. These are, it may be worth stating at the cost of repetition, the pre-conditions to be fulfilled before arresting any person without a court warrant and even without registration of a criminal case against him for the predicate offence.

The Supreme Court held that the preconditions laid down in section 19 are mandatory to be fulfilled before arresting any person. They are, in the opinion of the court, "salutary and serve as a check against the exercise of an otherwise harsh and pernicious power."[51]

The court emphasised that the 'reason to believe' or, in other words, the reason to arrive at the conclusion that the person is guilty of an offence must be based on the 'material' already in possession of the authorised officer, and it shall be recorded in writing. Further, relying on *Gifford*,[52] the court distinguished 'reason to believe' from 'suspicion'. It stated:[53]

> "Suspicion" requires a lower degree of satisfaction, and does not amount to belief. Belief is beyond speculation or doubt, and the threshold of belief "conveys conviction founded on evidence regarding the existence of a fact or doing of an act".

Given that the arrest has drastic consequences and infringes the right to life and personal liberty of a person guaranteed under article 21, the court said, the legislative intent behind laying down such pre-conditions for arrest must be given "meaningful, true and full play." The court had emphatically stated that the 'reason to believe' and the 'material' based on which such reason is recorded "should be

50 (2025) 2 SCC 248.

51 *Id.*, para 20.

52 *Gifford* v. *Kelson* (1943) 51 Man. R 120.

53 *Supra* note 50, para 30.

put to judicial scrutiny and examination… (or else) the restraint prescribed by the legislature would, in fact and in practice, be reduced to a mere formal exercise."[54] According to the court, the opinion of the authorised official that he has 'reason to believe' cannot be conclusive in this regard. This reasoning of the court echoes the view expressed by Atkin, in his famous dissent in *Liversidge* v. *Anderson*,[55] in which case the House of Lords was considering the question as to whether a preventive detention order passed by the Home Secretary is subject to judicial review. The law under which the detention was ordered had authorised the Home Secretary to detain any person 'if he has reasonable cause to believe' that such a person has 'hostile association'. Atkin observed: "… After all this long discussion, the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I have an opinion that they cannot, and the case should be decided accordingly."[56] He had, thus, concluded that the Secretary's view that he had the reasonable cause to believe is open to judicial review. Many years later, this was accepted as the right view even in England, and the majority view was discarded.[57]

Further, in *Arvind Kejriwal*, the court held that since the existence and soundness of the 'reason to believe' is open to judicial scrutiny, such 'reason to believe' recorded in writing "should be furnished to the arrestee to enable him to exercise his right to challenge the validity of arrest."[58] Merely supplying the 'grounds of arrest' does not satisfy the compliance requirement. The reason to believe and the material/document relied upon in forming that reason shall also be supplied. In rare and exceptional cases, where it is not feasible to reveal all the details, ED "may claim redaction and exclusion of specific particulars and details," but its decision to redact or exclude cannot be final. It is also subject to judicial scrutiny.

The court also clarified that the legality of arrest is not rendered immaterial even after the remand order is passed. In cases where an arrest is considered to be illegal for non-compliance with the statutory pre-conditions, a subsequent remand order passed by the court also becomes illegal. In fact, the court/magistrate has a duty to examine whether the conditions laid down under section 19(1) of the PMLA are complied with at the time of arrest. It is only "[U]pon such satisfaction, the Magistrate may consider the request for custodial remand."[59] While emphatically stating that "[T]he exercise of the power to arrest is not exempt from the scrutiny of courts",[60] the court observed:[61]

54 *Id*., para 21.

55 [1942] AC 206.

56 *Ibid*.

57 See *Nakkuda Ali* v. *Jayaratne* [1951] AC 66; Per Lord Reid in *Ridge* v. *Baldwin* [1964] AC 40 at 73; Per Lord Diplock in *I.R.C.* v. *Rossminster Ltd*., [1980] AC 952 at 1011.

58 *Supra* note 50, para 41.

59 *Id*., para 13.

60 *Id*., para 23.

61 *Id*., para 44.

> In fact, not to undertake judicial scrutiny when justified and necessary would be an abdication and failure of constitutional and statutory duty placed on the court to ensure that the fundamental right to life and liberty is not violated.

The legality of the 'reason to believe' has to be determined in the light of what is recorded by the authorised official in writing and all the evidence/material on record, and not just the ones relied upon by him/her. The authorised official, while recording his reason to believe, cannot ignore the material that exonerates the arrestee and selectively pick and choose only the material that implicates him. Ignoring exculpatory material "amounts to legal malice".[62] Thus, the courts must strictly scrutinise all the material. Any undue deference or latitude to ED "will be deleterious to the constitutional values of rule of law and life and liberty of persons."[63] The court was, however, cautious to add that:[64]

Judicial review does not amount to a mini-trial or a merit review. The exercise is confined to ascertain whether the "reasons to believe" are based upon material which "establishes" that the arrestee is guilty of an offence under the PML Act.

According to the court, the judicial review of 'reason to believe' is not a detailed merit review. It should be based on *Wednesbury* principles.[65] No mini-trial can be conducted for the purpose.

The possibility of judicial review is the strongest safeguard against the abuse of the drastic power of arrest without a warrant and without registration of a criminal case. It is very important to safeguard the lives and liberties of individuals against arbitrary arrest and detention. The court was absolutely justified in holding that the decision of the authorised official cannot escape judicial scrutiny. It made it crystal clear that the authorised official of the ED cannot be a sole judge and her/his opinion that s/he 'have reason to believe' is not final. Having thus stated the legal position very clearly, the court seems to have faltered/failed in applying the law to the facts of the case. It is strange that the court did not apply the law, which it had laid down /reiterated, to the facts of the case to conclusively decide the validity of the arrest made. It simply states that "the arrest of Arvind Kejriwal is on several counts, which are independent and separate from each other"[66] and considering all his arguments ", would be equivalent to undertaking a merits review",[67] which is not permissible. What is more strange is that even after stating, more than once, that this appeal is not about the grant or refusal of bail, it is about the validity of the arrest, the court did not adjudicate on the validity of his arrest. It granted him an interim bail.

In the judgment, there are two other important aspects to be noted. First, section 19 of the Act does not specifically require the authorised official to state

62 *Id*., para 62.
63 *Id*., para 61.
64 *Ibid*.
65 *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*(1948) 1 KB 223 (CA).
66 *Id*., para 71.
67 *Id*., para 72.

the "necessity and need to arrest" separately while recording the 'reason to believe.' The court had indicated that it may be required to do so. In reviewing the necessity and need to arrest, the court opined that clauses (a) to (e) of section 41(1)(b)(ii) of the Code of Criminal Procedure may also be relevant to be considered. It, however, framed three questions on the necessity and need to arrest and the parameters to be adopted for its evaluation and referred them to be placed before a larger bench for consideration. Second, the court, taking note of the data on the total number of enforcement case information reports, the number of search warrants issued, the number of searches actually conducted, and, particularly, the number of arrests made, observed:[68]

The data raises a number of questions, including the question of whether DoE has formulated a policy, and when they should arrest a person involved in offences committed under the PML Act.

It urged the ED to "act uniformly, (to be) consistent in (its) conduct, confirming (to the principle of) one rule for all."[69]

As far as the appellant is concerned, he continued to be in prison, even after obtaining the interim bail, on account of the proceedings initiated by the Central Bureau of Investigation (CBI) relating to the same offence. He had again approached the Supreme Court, challenging the validity of his arrest by CBI and, alternatively, seeking release on regular bail. In *Arvind Kejriwal* v. *Central Bureau of Investigation*,[70] another two-judge bench of the Supreme Court granted him regular bail.

Constitutionality and legality of punitive demolitions

In recent days, there has been a new trend, or rather, a state practice of demolishing the properties, either residential or commercial, of persons accused of committing certain crimes, even before carrying out a full-pronged investigation into the alleged crime. This is a newfound way of delivering instant justice by demolishing properties of the accused without investigation, trial and conviction in accordance with due process of law. This is a punishment not even prescribed under any law to be inflicted even on those who are duly found guilty of committing a crime.[71] This practice was questioned in a batch of writ petitions filed under article 32 of the Constitution. In *Directions in the Matter of Demolition of Structures, In re*,[72] a two-judge bench of the Supreme Court considered the question: "whether the properties of the persons, who are accused of committing certain crimes or, for

68 *Id*., para 86.

69 *Id*., para 87.

70 2024 SCC OnLine SC 2550.

71 The Armed Forces (Special Powers) Act, 1958 and the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 are, perhaps the only legislations that explicitly authorize demolition of any 'shelter' or 'structure' based on suspicion without following due process of law (see common section 4 (b) of both the legislations). But under these Acts, destructions/demolitions are not intended to be punishments but they are envisaged as preventive measure to be taken.

72 (2025) 5 SCC 1.

that matter, even convicted for commission of criminal offences, can be demolished without following the due process of law or not?"[73]

In the opinion of the court, "[T]he answer is an emphatic 'No'".[74] It explained that demolishing the properties of the accused persons without following the processes enshrined under law amounts to a violation of the rule of law. An executive declaring the person guilty and proceeding to take punitive action against such a person also breaches the boundaries of the separation of powers. It categorically stated "[T]he executive cannot become a Judge and decide that a person accused is guilty and, therefore, punish him by demolishing his residential/ commercial property/properties. Such an act of the executive would be transgressing its limits."[75]The court also stated that arbitrary demolitions carried out without following due process violate the doctrine of public trust and accountability, various constitutional rights, the right to presumption of innocence and principles of natural justice.

The court also opined that such demolitions violate 'right to shelter', which is recognised as a concomitant right of the right to life guaranteed under article 21 of the Constitution. The court very succinctly pointed out and asked:[76]

> It is not only the accused who lives in such property or owns such property. If his spouse, children, or parents live in the same house or co-own the same property, can they be penalised by demolishing the property without them even being involved in any crime, only on the basis of them being related to an alleged accused person?

The court pointed out that such demolitions inflict 'collective punishment', which is impermissible under the law. The court, thus, issued directions/guidelines to be made applicable on a pan-India basis. One can only hope that this would put an end to the unconstitutional and illegal practice of carrying out punitive demolitions.

Right to bail

In *Shoma Kanti Sen* v. *State of Maharashtra*,[77] a two-judge bench of the Supreme Court held that a person accused of offences under the Unlawful Activities (Prevention) Act, 1967, also has a right to be enlarged on bail. Rejecting the argument that there is no fundamental right to bail, it said that such a right can be found in article 21 of the Constitution. Relying on *K. A. Najeeb*,[78] it observed:

> [a] constitutional court is not strictly bound by the prohibitory provisions of the grant of bail in the 1967 Act and can exercise its constitutional jurisdiction to release an accused on bail who has been incarcerated for a long period of time, relying on Article 21 of the Constitution of India.

73 *Id*., para 15.
74 *Id*., para 78.
75 *Id*., para 74.
76 *Id*., para 79.
77 (2024) 6 SCC 591.
78 *Union of India* v. *K.A. Najeeb* (2021) 3 SCC 713.

The bench accordingly directed the release of the accused on bail, subject to such conditions as "the Special court may consider fit." What catches one's attention is that the special court was mandated (not just authorised) to include, *inter alia*, conditions that would allow the investigative agencies to monitor, round the clock, the movements of the accused while on bail. The accused was required to "use only one mobile number", ensure that the "mobile phone remains active and charged round the clock", and to keep "the location status (GPS) of her mobile phone active, twenty-four hours a day". In addition, it was also stated that "her phone shall be paired with that of the investigating officer of NIA to enable him, at any given time, to identify the appellant's exact location."

With the emergence of digital technology, it is far easier to monitor the movements of any person. Generally, round-the-clock monitoring of movements and the location of anyone, including a suspect or an accused on bail, would amount to an invasion of his/her privacy. It is trite that the right to privacy is not an absolute right under the Constitution. It can be curtailed to the extent it is strictly necessary to achieve any of the 'legitimate state aims' or to secure any 'compelling state interest'. Thus, privacy-intrusive bail conditions may be justifiable in exceptional cases. Such conditions should not, however, be used as templates to be included in every order granting bail simply because it is easier to enforce them. It may be advisable to subject such bail conditions, before being imposed, to a four-pronged proportionality analysis to justify their imposition.

It may be very pertinent to note here that a couple of months later, *i.e.,* in July 2024, the Supreme Court, in two other cases, had completely disapproved the practice of imposing extremely privacy-intrusive bail conditions. In *Frank Vitus* v. *Narcotics Control Bureau*,[79]the court held:[80]

> Imposing any bail condition that enables the police/investigating agency to track every movement of the accused released on bail by using any technology or otherwise would undoubtedly violate the right to privacy guaranteed under Article 21.

Further, in *Sk. Javed Iqbal* v. *State of U.P.*,[81] it was held, relying on *Frank Vitus*,[82] that:[83]

> Courts cannot impose freakish conditions while granting bail... While imposing bail conditions, the constitutional rights of an accused who is ordered to be released on bail can be curtailed only to the minimum extent required.

The Supreme Court, in *Girish Gandhi* v. *State of U.P.*,[84] had castigated the practice of imposing very onerous or excessive bail conditions. In this case, the

79 (2024) 8 SCC 415.
80 *Id*., para 16.
81 (2024) 8 SCC 293.
82 *Supr*a note 79.
83 *Supra* note 81, para 37.
84 (2024) 10 SCC 674.

petitioner approached the Supreme Court under Article 32 of the Constitution seeking direction to the effect that the personal bonds and sureties he had executed in connection with one case shall hold good for bail orders he had obtained in connection with other cases registered in other states as well. The court observed:

> From time immemorial, the principle has been that excessive bail is no bail. To grant bail and thereafter to impose excessive and onerous conditions is to take away with the left hand what is given with the right.

It, however, emphasised that what conditions are onerous or excessive will have to be determined keeping in view the facts and circumstances of each case. Accordingly, it held, in the instant case, that requiring a person hailing from Haryana to produce a local surety in Udaipur, Rajasthan, was excessive.

In the survey year, the Supreme Court favoured the granting of bail in a couple of other cases, where there were inordinate delays in concluding the trials. In *Ankur Chaudhary* v. *State of Madhya Pradesh,*[85] while granting bail to the accused being prosecuted for the offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, the court observed:[86]

> [f]ailure to conclude the trial within a reasonable time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India, and as such, conditional liberty overriding the statutory embargo created under Section 37(1)(b) of the NDPS Act may, in such circumstances, be considered.

In *Javed Gulam Nabi Shaikh* v. *State of Maharashtra*,[87] the court granted bail to a person investigated and being prosecuted under the National Investigative Agency Act, 2008, for possessing counterfeit Indian currency. It took into account the fact that the accused was in prison for over four years, and the trial court had yet to frame charges. It opined that "[H]owsoever serious a crime may be, an accused has a right to speedy trial"[88] and also observed:[89]

> If the State or any prosecuting agency, including the court concerned, has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial… then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.

Further, it urged the trial courts and the high courts in the country not to forget the "very well-settled principle of law that bail is not to be withheld as a

85 2024 SCC OnLine SC 2730.

86 *Id.*, para 6.

87 (2024) 9 SCC 813.

88 *Id.*, para 7.

89 *Id.*, para 17. This was quoted with approval by the Supreme Court in *Manish Sisodia* v. *Enforcement Directorate* (2024) 12 SCC 660.

punishment."[90] This was reiterated, and bails have been granted on the ground of possible inordinate delays in completion of trials in *Manish Sisodia* v. *Enforcement Directorate*,[91]*Kalvakuntla Kavitha* v. *Directorate of Enforcement*,[92] and *V. Senthil Balaji* v. *Deputy Director, Directorate of Enforcement*.[93] In all these cases, the accused were detained under PMLA. In *Kalvakuntla Kavitha*, the court, while noting a certain category of accused, including women are entitled to a special treatment in the matter of bail by virtue of the *proviso* to section 45(1) of the PMLA, opined that the benefit of such special treatment cannot be denied by the court without assigning specific reasons in support of such denial. It also clarified that the benefit of special treatment under the proviso is available to all women accused under the PMLA and not confined to 'vulnerable women' only.

In *Prem Prakash* v. *Enforcement Directorate*[94], too, the court granted bail to the appellant under section 45 of the PMLA. It observed:[95]

> All that Section 45 PMLA mentions is that certain conditions are to be satisfied. The principle that "bail is the rule and jail is the exception" is only a paraphrasing of Article 21 of the Constitution of India... Liberty of the individual is always a Rule and deprivation is the exception… Section 45 PMLA, by imposing twin conditions, does not rewrite this principle to mean that deprivation is the norm and liberty is the exception.

In the opinion of the court, "[A]rticle 21 being a higher constitutional right, statutory provisions should align themselves to the said higher constitutional edict."[96] Perhaps it may not be out of place to suggest that even in cases where statutory provisions do not align with the constitutional mandate, courts should correct the misalignments as was done in some of the cases discussed here.

In *Sk. Javed Iqbal* v. *State of U.P.*,[97] the Supreme Court relied, among other cases, on *Javed Gulam Nabi Shaikh*,[98] while granting bail to a person who was in prison for over nine years and was also being prosecuted for possessing counterfeit Indian currency. The court reiterated:[99]

> A constitutional court cannot be restrained from granting bail to an accused on account of restrictive statutory provisions in a penal statute if it finds that the right of the accused, undertrial, under

90 *Id*., para 7.

91 (2024) 12 SCC 660.

92 2024 SCC OnLine SC 2269.

93 2024 SCC OnLine SC 2626.

94 (2024) 9 SCC 787. In *Vijay Nair* v. *Directorate of Enforcement*, [2024 SCC OnLine SC 3597] too the court, relying on *Prem Prakash* and other cases, granted bail to appellant under section 45 PMLA.

95 *Id*., para 12.

96 *Id*., para 15.

97 *Supra* note 81.

98 *Supra* note 87.

99 *Supra* note81, para 42.

> Article 21 of the Constitution of India has been infringed... Even in the case of interpretation of a penal statute, however stringent it may be, a constitutional court has to lean in favour of constitutionalism and the rule of law, of which liberty is an intrinsic part.

In the opinion of the court, though the constitutional court may decline to grant bail in a particular case considering its facts, "it would be very wrong to say that under a particular statute, bail cannot be granted. It would run counter to the very grain of our constitutional jurisprudence."[100]

In *Ajay Ajit Peter Kerkar* v. *Directorate of Enforcement*,[101] the Supreme Court, relying on *Vijay Madanlal Choudhary*,[102] held that the accused persons arrested and detained in connection with the offences under the Prevention of Money Laundering Act, 2002 (PMLA) are also entitled to be considered for bail under section 436A of the Code of Criminal Procedure, 1973 after completing half of the prescribed sentence for the offence charged. In other words, the court's view was that section 436A of the Code applies to PMLA cases as well. Though, unlike default bail contemplated under Section 167 of the Code, section 436A does not provide for an absolute right of bail, the bail under the latter provision shall not ordinarily be denied unless it is shown that the trial was delayed at the instance of the accused person.

The arrest and detention of a person accused of an offence substantially curtails his personal liberty protected under article 21. The bail, when granted, restores his liberty during the pendency of the trial. Thus, when an application for cancellation of bail is filed by the prosecution, the court should not ordinarily grant an interim stay of the order granting bail. In *Parvinder Singh Khurana* v. *Directorate of Enforcement*,[103] the Supreme Court reiterated this position. It was of the view that the interim stay of the order granting bail "amounts to taking away the liberty granted under the order of bail."[104] The court should be very slow in granting such a drastic interim relief during the pendency of the application seeking cancellation of bail. The court even said that "[A]n *exparte* stay of the order granting bail, as a standard rule, should not be granted." It should be granted only in very rare and exceptional cases. It is, however, permissible for the court entertaining an application seeking cancellation of bail to impose additional bail conditions through an interim order if the facts so warrant.

The question whether an accused person, who is already in judicial custody in connection with a different offence, seeks anticipatory bail under Section 438 of the Code of Criminal Procedure arose for consideration in *Dhanraj Aswani* v. *Amar S. Mulchandani*.[105] The court answered the question in the affirmative. It

100 *Ibid*.
101 2024 SCC OnLine SC 4055.
102 *Vijay Madanlal Choudhary* v. *Union of India*, 2022 SCC OnLine SC 929.
103 2024 SCC OnLine SC 1765.
104 *Id*., para 10.
105 (2024) 10 SCC 336.

said "[A]n accused is entitled to seek anticipatory bail in connection with an offence so long as he is not arrested in relation to that offence."[106] The court also observed that:[107]

> [t]he right of an accused to protect his personal liberty within the contours of Article 21 of the Constitution of India with the aid of the provision of anticipatory bail as enshrined under Section 438CrPC cannot be defeated or thwarted without a valid procedure established by law… such procedure should also pass the test of fairness, reasonableness and manifest non-arbitrariness on the anvil of Article 14 of the Constitution of India.

Further, the court, relying on *A. R. Antulay*[108] and *Anwar Ali Sarkar*,[109] underscored the importance of rights arising from procedural law. Their protection is as important as the protection of rights conferred under substantive laws.

Right against self-incrimination

In *Abhishek Banerjee* v. *Enforcement Directorate*,[110] a question whether a person summoned under PMLA can invoke his right against self-incrimination guaranteed under article 20(3) of the Constitution arose for consideration. The Supreme Court answered the question in the negative. It observed:[111]

> The summons can be issued even to witnesses in the inquiry so conducted by the authorised officers. The consequences of Article 20(3) of the Constitution or Section 25 of the Evidence Act may come into play only if the involvement of such a person (noticee) is revealed and his or her statements are recorded after a formal arrest by an ED official.

In *Raghuveer Sharan* v. *District Sahakari Krishi Gramin Vikas Bank*,[112] the court reiterated that the provision contained in the *proviso* to section 132 of the Indian Evidence Act, 1872, is a corollary to the principle enshrined in article 20(3). The *proviso* extends the right against self-incrimination, which is conferred only on an accused person under article 20(3), to witnesses who, in the process of giving evidence in any civil or criminal proceedings, make statements that are self-incriminatory.

Right to 'fair' and/versus 'speedy' trial

The right to fair trial is one of the sacrosanct fundamental rights guaranteed, not explicitly but implicitly, under the Constitution of India. The right to 'speedy trial' is considered to be a facet of the right to 'fair trial.' But it is, however, a fallacy to assume that both these rights always go hand in hand. At times, there may be

106 *Id*., para 65.1.
107 *Id*., para 65.5.
108 *A.R. Antulay* v. *R.S. Nayak* (1988) 2 SCC 602.
109 *State of W.B.* v. *Anwar Ali Sarkar* (1952) 1 SCC 1.
110 (2024) 9 SCC 22.
111 *Id*., para 27.
112 2024 SCC OnLine SC 2489.

conflicts between the two. Overemphasis on speedy trial might defeat the right to a fair trial. A textbook example to illustrate the same is *Sunita Devi* v. *State of Bihar*.[113] In this case, the trial was conducted with an 'utmost haste' as it had commenced and concluded in a single day, and the decision was also rendered with an 'utmost haste'; a twenty-seven-page judgment was delivered within half an hour after the conclusion of proceedings. As noted by the Supreme Court, "[A]t every stage, the accused was denied due opportunity to defend himself… (he) was merely shown the court's proceedings and the writing was on the wall for him."[114] The trial court convicted the accused of offences under the Indian Penal Code, 1860, the Protection of Children from Sexual Offences Act, 2012, and the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. Two days after the conviction, the matter was posted for sentencing. Upon hearing the evidence, the accused was sentenced to death.

The high court, after duly perusing the records of the case, set aside the conviction and the sentence awarded and ordered a *de novo* trial. It had highlighted that in the trial in question, the trial judge had not complied with sections 207, 226, 227 and 230 of the Code of Criminal Procedure, 1973.

The Supreme Court, while declining to interfere with the order of the high court, observed that "a speedy trial, being a facet of fair trial, cannot be permitted to destroy the latter by its recklessness".[115] It stated very succinctly that:[116]

> While a speedy trial is in the best interest of everyone, including society, the pace can only be set through the procedural mechanism, and it cannot be done at the mere dictate of the Court in ignorance of the procedural law.

The court is absolutely right in emphasising procedural compliance. The fairness of a trial depends largely, if not solely, on due compliance with the procedural provisions at every stage of the trial. Failure to comply with procedures infringes the right to a fair trial, which is considered "the heart and soul of criminal jurisprudence".[117] Its denial violates the fundamental rights guaranteed under articles 14 and 21 of the Constitution. As the court rightly stated, a criminal trial that can lead to incarceration in prison or to imposition of the death penalty "should be a real one and…not a mere pretence."[118] Thus, it urged the courts to follow a balanced approach as "the lawyer for the defence cannot fight against the court."[119]

Further, in this case, the court also expressed certain concerns regarding sentencing in criminal cases. It stated that a sentence imposed in a criminal case shall not be a 'mere lottery', nor shall it be an 'outcome of a knee-jerk reaction.' In

113 2024 SCC OnLine SC 984.
114 *Id*., para 55.
115 *Id*., para 12.
116 *Ibid*.
117 *Id*., para 9.
118 *Id*., para 10.
119 *Id*., para 55.

its considered opinion, "[T]he concept of intuitive sentencing is against the rule of law"[120] and "unwarranted disparity (in sentencing) would be against the very concept of fair trial and, therefore, against justice."[121] The court underscored the need to have 'adequate guidelines' to curtail sentencing discretion and to prevent disparities in sentencing. The court, thus, directed the Secretary for the Ministry of Law and Justice to file "an affidavit on the feasibility of introducing a comprehensive sentencing policy… within a period of six months".

Conviction based on illegal 'recoveries'

In *Najmunisha* v. *State of Gujarat Narcotics Control Bureau*,[122] a two-judge bench of the Supreme Court held that the conviction, for an offence under section 29 read with sections 20(b)(ii)(c) and 25 of the Narcotics Drugs and Psychotropic Substances Act, 1985, cannot be premised on the *charas* recovered during the search conducted without complying with the mandatory procedure prescribed under section 41 (2) of the Act. It held that the power of search and seizure conferred under the said provision is not absolute. It is inherently limited by fundamental rights guaranteed under the Constitution as well as statutory provisions. While acquitting the accused, the court reminded both the prosecution and the authorities under the Act to work towards ensuring and upholding the right to a just and fair trial implicit in article 21 of the Constitution.

Protection of liberty obtained illegally

Whether the liberty granted by an illegal order, which was held to be *non est* by a court, be protected was one of the delicate questions considered by the Supreme Court in *Bilkis Yakub Rasool* v. *Union of India*.[123] In this case, the Government of Gujarat had granted remission to certain persons who had been convicted and were serving a sentence of imprisonment for murdering fourteen persons and gang raping women during the Gujarat riots. Since the trial of those cases was transferred earlier and they were held in the State of Maharashtra, it was held by the court that the Government of Gujarat was not the "appropriate Government" for granting remission under the Code of Criminal Procedure, 1973. Thus, the order of remission granted by it was held to be illegal and *non est*. After having quashed the order of remission, the bench was confronted with a question as to whether those who were released from prison by virtue of the said illegal order should be sent back to prison. In other words, should their liberty be taken away because it was granted in violation of the law or should the court, notwithstanding such a violation, weigh in favour of a person's freedom and liberty?

The bench, even though it acknowledged that "the most important constitutional value is personal liberty",[124] refused to protect the liberty granted

120*Id*., para 35.
121*Id*., para 33.
122 2024 SCC OnLine SC 520.
123 (2024) 5 SCC 481.
124*Id*., para 228.

to the convicts through an illegal remission order. It observed: "Article 21 of the Constitution states that no person shall be deprived of his liberty except in accordance with law. Conversely, we think that a person is entitled to the protection of his liberty only in accordance with the law. "[125]Further, the court raised a series of intriguing rhetorical questions that contain their own answers:[126]

> When a person's liberty cannot be violated in breach of a law, can a person's liberty be protected even in the face of a breach or violation of the law? In other words, should the rule of law prevail over the personal liberty of a person or vice versa? Further, should this Court weigh in favour of a person's freedom and liberty even when it has been established that the same was granted in violation of law? Should the scales of justice tilt against the rule of law? In upholding the rule of law, are we depriving Respondents… their right to freedom and liberty? We wish to make it clear that only when the rule of law prevails will liberty and all other fundamental rights prevail under our Constitution, including the right to equality and equal protection of law as enshrined in Article 14 thereof. In other words, whether liberty of a person would have any meaning at all under our Constitution in the absence of the rule of law or the same being ignored or turned a blind eye? Can the rule of law surrender to liberty earned as a consequence of its breach? Can a breach of the rule of law be ignored in order to protect a person's liberty that he is not entitled to?

The bench, thus, underscored the paramountcy of the rule of law under the Indian constitutional scheme. Its breach cannot be countenanced even to protect the personal liberties, which are otherwise considered to be very sacrosanct.

State responsibility *vis-à-vis* victims of child sexual abuse

The Supreme Court, in *Right to Privacy of Adolescents, In re*,[127] had underscored the responsibility of the state, both under the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) and the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), towards the victims of child sexual abuse. The court held "[T]he minor child, who is the victim of the offences under the POCSO Act, is also deprived of the fundamental right to live a dignified and healthy life."[128] It commanded the police to strictly comply with the requirement under section 19 (6) of the POCSO Act and the concerned agencies and instrumentalities of the state to "step in and render all possible aid to the victim children, which will enable them to lead a dignified life."[129] It opined that the provisions of the JJ Act, which impose obligations on the state to take care of such

125 *Id*., para 231.
126 *Ibid*.
127 (2024) 15 SCC 788.
128 *Id*., para 53.
129 *Ibid*.

children and rehabilitate them, are consistent with article 21 of the Constitution. It declared in categorical terms that non-compliance with section 19 (6) of the POCSO Act and failure to fulfil the obligations under the JJ Act would amount to a violation of article 21.

Guidelines for the prevention of child marriages

The Society for Enlightenment and Voluntary Action, a non-governmental organisation, had approached the Supreme Court by invoking its writ jurisdiction under article 32 of the Constitution for the issuance of effective guidelines to combat the problem of child marriages in India. Their main argument was that despite the enactment of the Prohibition of Child Marriage Act, 2006, the problem still persists, and it is alarming. A three-judge bench of the Supreme Court, in *Society for Enlightenment and Voluntary Action* v. *Union of India*,[130] had issued extensive guidelines for effectively combating the problem. In its opinion, child marriage deprives children of their right to health, education, employment and life opportunities. It is, thus, "an affront to cherished constitutional principles of equality, liberty and free expression."[131] Child marriages violate article 21 of the Constitution, in particular, by denying children the right to choice and autonomy, the right to sexuality and the right to development. It specifically took note of the vulnerabilities experienced by children belonging to marginalised communities. It, thus, underscored the importance of adopting an intersectional approach in addressing the problem of child marriages.

IV PREVENTIVE DETENTION

The power to order preventive detention of a person is an extraordinary power, which must be exercised sparingly and with great care, caution and restraint. Sometimes the detaining authorities exercise such power either capriciously or very routinely. In the past, both recent and distant, the Supreme Court had often alerted the authorities about the dangers of resorting to preventive detentions in a routine manner without due diligence and application of mind. In *Nenavath Bujji* v. *State of Telangana*,[132] a three-judge bench of the Supreme Court had dealt with one such case of preventive detention ordered under the statute, which perhaps has the longest 'short title', *viz*., the Telangana prevention of dangerous activities of bootleggers, dacoits, drug-offenders, goondas, immoral traffic offenders, land-grabbers, spurious seed offenders, insecticide offenders, fertilizer offenders, food adulteration offenders, fake document offenders, scheduled commodities offenders, forest offenders, gaming offenders, sexual offenders, explosive substances offenders, arms offenders, cybercrime offenders and white collar or financial offenders Act, 1986. One can reasonably infer from the shorttitle itself that the ambit of the law is very wide and it has the potential to be abused.

The detainee, in the present case, had been detained based on four FIRs registered for chain snatching, theft or robbery, etc. (of which two were registered

130 2024 SCC OnLine SC 2922.
131 *Id*., para 170.
132 2024 SCC OnLine SC 367.

outside the territorial jurisdiction of the detaining authority). Though in none of those FIRs, the detenue had been named as one of the accused persons, the detaining authority relied upon his confessional statement to the police. Though this gave rise to a substantial question of law as to whether a confessional statement made to police can be relied upon for placing a person under preventive detention under any law, the court did not deal with it for the reason that it had not "put the counsel appearing for the parties to notice on this issue." It had left the said question open to be decided in future in an appropriate case.

Though ordinarily the courts in exercise of power of judicial review do not go into the merits of the case to enquire into the sufficiency of material on record based on which preventive detention is ordered, the Supreme Court did so in the instant case, having regard to its facts and circumstances. On examination, the court was of the opinion that mere registration of two FIRs[133] could not have been made the basis to place the person under preventive detention. In the opinion of the court, what has been alleged in those FIRs raised the problem relating to 'law and order' and not 'public order'. After discussing the distinction between 'law and order' and 'public order ' extensively, the court reiterated that:[134]

> [t]he true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its reach upon society… The act by itself, therefore, is not determinant of its own gravity. In its quality, it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different.

Accordingly, it said that every case of disorder or disturbance to law and order cannot be construed as a threat to public order, which is the minimum threshold for ordering preventive detention of a person under the aforementioned statute. The court was also categorical in its view that "[I]nability on the part of the state's police machinery to tackle the law and order situation should not be an excuse to invoke the jurisdiction of preventive detention."[135] The court, thus, set aside the impugned detention order. While doing so, the court had recalled that earlier in *Mallada K. Sri Ram*[136] and *Ameena Begum,*[137] it had called out the "callous exercise of the exceptional power of preventive detention" by the authorities in the State of Telangana and cautioned them not to invoke such power at the drop of a hat. In the instant case, it again urged the State to take serious note of earlier warnings and to ensure that "the preventive detention orders are not passed in a routine manner without any application of mind."[138]

133 In the detention order, the authority claimed to have placed reliance only upon two FIRs registered within his territorial jurisdiction even though he had made references to other two FIRs as well to ascertain the criminal antecedents of the detenue.

134 *Supra* note 132, para 32.

135 *Ibid*.

136 *Mallada K. Sri Ram* v. *State of Telangana* (2023) 13 SCC 537.

137 *Ameena Begum* v. *State of Telangana* (2023) 9 SCC 587.

138 *Supra* note 132, para 47.

The court also highlighted the crucial role the 'Advisory Boards' are required to play while scrutinising the preventive detention orders. The scrutiny or review by the Advisory Board is an important constitutional safeguard available to detainees. The Board is not a mere rubber-stamping authority. The Board is expected to subject the detention orders to robust scrutiny. It is required to:

> (i) consider the material placed before it; (ii) to call for further information, if deemed necessary; (iii) to hear the detenu, if he desires to be heard, and (iv) to submit a report in writing as to whether there is sufficient cause for "such detention" or whether the detention is justified.

The detentions can continue beyond the period of three months, except in cases exempted, only if the advisory board, after scrutiny, opines that there was "sufficient cause" to order such detention. The court, thus, urged the Advisory Boards to keep in mind the mandate contained in Article 22 (4) of the Constitution.

Under the Constitution, persons detained under any of the preventive detention laws are also entitled to certain other safeguards as well. These safeguards include the right to be informed of the grounds of detention and the right to make a representation against the detention order. Both these rights are guaranteed under clause (5) of article 22. In *Sarfaraz Alam* v. *Union of India*,[139] the apex court explained the relationship between these two rights:[140]

> While the aforesaid two rights and duties form two separate parts of Article 22(5) of the Constitution of India, they do overlap despite being mutually reinforcing. Though they travel on different channels, their waters merge at the destination.

The first right requires the authorities to duly serve to the detainee the grounds of detention that "weighed in the mind of the detaining authority in passing the detention order." It is only thereafter that the detainee would be in a position to exercise his second right, i.e., the right to make a representation. Unless the detainee has adequate knowledge of the grounds of detention, he could not be in a position even to decide whether he should challenge the detention order or not. Thus, informing the detainee of the grounds of detention is of utmost importance.

In this case, the court also emphasised that the authorities, at the time of serving the grounds of detention, also have a cardinal duty to inform the detainee, either in writing or orally, of his fundamental right to make a representation. These are two different rights, even though they are interrelated. Authorities must comply with both.

In *Shabna Abdulla* v. *Union of India*,[141] the court held that the non-supply of documents relied upon by the detaining authority, in this case, WhatsApp chats, vitiates the detention order. It was accordingly set aside. Similarly, in *Jaseela*

139 (2024) 3 SCC 347.

140 *Id*., para 12.

141 2024 SCC OnLine SC 2057.

Shaji v. *Union of India*,[142] a three-judge bench of the Supreme Court held that non-supply of statements of a person, which were relied upon by the detaining authority, to the detenue had affected his right to make an effective representation guaranteed under article 22(5). The court emphasised that it is obligatory for the detaining authority to furnish every document relied upon in arriving at a subjective satisfaction. In this case, the court also held that non-receipt of the representation submitted by the detainee and delay in considering it had also violated his right under article 22(5).

V RIGHT TO FORMAL AND SUBSTANTIVE EQUALITY

Sub-classification of SCs and STs

The sub-classification of scheduled castes (and also scheduled tribes) for the purpose of equitable distribution of benefits of affirmative action policies of the state, most particularly reservations in education and employment, has been one of the long-standing demands in the country. The arguments of the proponents of sub-classification were that the benefits of affirmative action policies have not been percolating equitably to all the castes included in the schedule. On account of*inter se* inequalities among those castes, the benefits of such policies have largely been cornered by members of certain dominant scheduled castes and others are not benefited from such policies, and they remain marginalised. It is their view that sub-classification is necessary to address the *inter se* inequalities among various scheduled castes.

In view of such demands, some of the States in India took measures for sub-classification of scheduled castes in their respective states. They provided for either a 'preferential model' or 'exclusive model' of reservation for the sub-classified castes. The State of Andhra Pradesh was one of them. It adopted an exclusive model of reservation according to which all the castes in the schedule have been classified into four sub-groups with a separate quota for each of them. In case of non-availability of candidates, vacancies were to be carried forward. However, that sub-classification came to be invalidated by the Supreme Court as early as 2004 in *E. V. Chinnaiah*.[143] The five-judge bench had unanimously held that sub-classification of scheduled castes is violative of both articles 341 and 14 of the Constitution of India because: *one*, it amounts to tinkering with the Presidential List prepared under article 341, *two*, scheduled castes as a whole constitute a homogenous 'class' and there cannot be further sub-division among them, and *three*, the states do not have legislative competence to make sub-classification. Since the sub-classification itself was struck down, the validity of the 'exclusive model'adopted by them was not considered in the said case. Subsequent to the decision in *E.V. Chinnaiah*, sub-classifications made in other states like Tamil Nadu, Punjab and Haryana have also been challenged.

It may be pertinent to note that the State of Tamil Nadu had adopted a different kind of 'exclusive model'. It reserved sixteen per cent of the scheduled

142 (2024) 9 SCC 53.

143 *E.V. Chinnaiah* v. *State of Andra Pradesh* (2005) 1 SCC 394.

castes quota exclusively for sub-classified castes, *i.e., Arunthathiyar*. In case of non-availability of candidates, vacancies are to be carried forward.States of Punjab and Haryana followedthe 'preference model'. In Punjab, sub-classified castes have been given preference over fifty per cent of the entire scheduled caste quota. In case of non-availability of candidates from sub-classified castes, other scheduled castes are entitled to be considered for those seats/posts as well. In Haryana, all the castes in the scheduled have been classified into two groups; each group has a preference of over fifty per cent of the scheduled castes quota. In case of non-availability of candidates from the respective group, others are entitled to be considered.

Both Punjab and Haryana reservations were struck down by the Punjab and Haryana High Court in two different cases on the basis of rulings in *E.V. Chinnaiah*. Special leave petitions were filed before the Supreme Court challenging them. The Tamil Nadu Reservation policy was challenged directly before the Supreme Court under article 32. In these cases, questions were also raised on the correctness of the decision rendered in *E.V. Chinnaiah* as well. Thus, in *State of Punjab* v. *Davinder Singh*,[144] a seven-judge bench of the Supreme Court has been constituted to reconsider the correctness of the said decision and authoritatively decide the matter. The case appeared somewhat one-sided from the beginning, as, before the Supreme Court, neither the Union Government nor any of the state governments opposed sub-classification of Scheduled Castes or Scheduled Tribes. Only some of the private parties opposed the matter. The Union government did not even contest the legislative competence of the State Legislatures to enact laws for sub-classification.

On August 1, 2024, the seven-judge bench passed a polyvocal verdict (4 separate judgments and two written notes of endorsements) overruling by a 6:1 majority (Bela M. Trivedi J., dissenting) the decision rendered in *E.V. Chinnaiah*.In addition, in *Davinder Singh*, the following propositions have also been laid down by the majority:

(i) Scheduled castes and scheduled tribes are not homogeneous communities. D. Y. Chandrachud, C.J., (who wrote for himself and on behalf of Manoj Misra, J.) observed that there is enough historical and empirical evidence to indicate *inter se* inequalities among them. He, in particular, pointed out that inter-caste marriages are not common among members of different scheduled castes.

(ii) Since they are not homogeneous and not similarly situated, it is constitutionally permissible to classify them. There is nothing in the Constitution to prevent their sub-classification.

(iii) Thesub-classification, if made, must be reasonable. It cannot be random or arbitrary. It must be backed by empirical evidence. The validity of sub-classification can be subjected to scrutiny on the following yardsticks:

144 (2025) 1 SCC 1.

(a) Inadequacy of representation of specific castes in the services, which needs to be proved with quantifiable and demonstrable data, and

(b) Inter-se social backwardness among them.

To justify the sub-classification, it should also be established that the latter, *i.e.,* (b), is the reason for the former, i.e., (a).

(iv) The sub-classification is open to judicial review on the aforementioned yardsticks.

(v) Though it is open for the State to adopt either a 'preferential model' or 'exclusive model' of reservation for the sub-classified castes, it is not permissible to exclude any caste included in the Presidential list. All the castes in the schedule should continue to be eligible to receive the benefits of affirmative action policies. In other words, no community included in the presidential list can be excluded altogether from receiving the benefits of affirmative action policies.

D. Y. Chandrachud, C.J., in his judgment, had further elaborated it. He specified what is permissible and impermissible in both these models. According to him, in the preference model, providing preference to sub-classified caste(s) over all the seats earmarked for the whole of scheduled castes would be unconstitutional, whereas providing preference to sub-classified caste(s) over a certain percentage of the seats earmarked for the whole of scheduled castes would be constitutionally valid. Similarly, in the exclusive model, exclusive reservation of the entire scheduled caste quota in favour of the sub-classified caste(s) would be unconstitutional, whereas exclusive reservation of a certain percentage of the scheduled caste quota to the sub-classified castes would be constitutionally valid.

(vi) Article 341 does not deal with reservations. States have the power to classify the scheduled castes while granting reservations. Such classification for the purpose of reservation does not amount to tinkering with the Presidential List prepared under article 341.

These propositions, deciphered largely from the judgment authored by D. Y. Chandrachud, C.J., have been fully endorsed by six out of the seven judges on the bench. Bela M. Trivedi J. disagreed with the majority. According to her, the five-judge bench in *E.V. Chinnaiah* had laid down the correct proposition of law, and there is no reason to revisit it.

It is important to note that the majority did not state that the sub-classification is necessary, and the states must carry it out in order to address the problem of *inter se* inequalities among scheduled castes and tribes. The opinion of the majority was that the *states have the competence to sub-classify scheduled castes and tribes, and they can be sub-classified since they are not homogeneous*. There is no *mandamus* or direction issued to the states to undertake the sub-classification exercise. So, in essence, the states are not obliged to, but they have the competence to sub-classify them. The sub-classification, however, cannot be done randomly or in an arbitrary manner. According to the majority, the sub-classification, if made,

must be reasonable. It must be backed by empirical evidence, and it is also subject to judicial review.

As the hurdle for sub-classification by the states is cleared, the ball is now in their courts. It is up to the states to carry out sub-classification and adopt either the 'exclusive model' or the 'preference model.' Whether it will solve the issue of *inter se* inequalities among the scheduled castes/tribes and the consequential denial of benefits of affirmative action policies is a question on which one can only speculate at this stage. Because of the large number of castes/tribes included in the schedules in many states, irrespective of the model adopted, it is not possible to allocate a separate quota for each caste/tribe. Their grouping becomes inevitable and, as per the decision of the Supreme Court, such grouping should be based on *intelligible differentia* established through empirical evidence. Otherwise, such groupings are unlikely to stand the judicial scrutiny. They may be struck down on the ground of either 'under classification' or 'over classification'. Sub-classification is, thus, an arduous task to be undertaken by the States. They need to have foolproof empirical evidence to justify it before a court of law. It may be pertinent to refer to one of the observations made by S. B. Sinha J., in *E. V. Chinnaiah* itself, as it is suggestive of the level of judicial scrutiny the sub-classifications may be subjected to by the courts:[145]

The population of "Relli" which is the most backward category consists of 1.67% only and although hardly any person of that community had been getting the benefits of education, they are placed in Category A wherefor the benefits of reservation being 1%; whereas those belonging to Adi-Andhra having 8.96% of population and where the students belonging to that community have been taking admissions in all disciplines had been placed in Category D had also been provided reservation to the extent of 1%. We do not know on what basis both categories have been put in the same class.

Furthermore, in the long run, it may be possible that one or two castes/tribes within each group may emerge as the biggest beneficiaries of the affirmative action policies to the disadvantage of other castes/tribes in the same group. Those other castes/tribes may feel excluded again. How can their concerns be addressed in such an eventuality? Further fragmentation of the reservation quota not only undermines the broader objective of reservation policy but may also render the very policy unworkable in many agencies or instrumentalities of the States, where cadre strengths are small. Thus, the states shall adopt a cautious approach.

In *Davinder Singh,* some judges went beyond the brief and expressed their opinions on issues that did not directly arise for consideration before the bench. Pankaj Mithal J. was of the opinion that the benefit of reservation shall be extended only for one generation. In his view, "if any generation in the family has taken advantage of the reservation and has achieved a higher status, the benefit of the reservation would not be logically available to the second generation".[146] B. R. Gavai J. has forcefully advocated for the application of creamy layer criteria to

145 *Supra* note 143, para 97.

146 *Supra* note 144, para 607.3.

scheduled castes/tribes as well. In his opinion, creamy layers among the scheduled castes/tribes should be excluded from availing the benefits of the affirmative action policies of the state. According to him, non-exclusion of the creamy layer among the scheduled castes/tribes would defeat the constitutional mandate. His view was explicitly endorsed by three other judges on the bench, *viz*., Vikram Nath, Sathish Chandra Sharma, and Pankaj Mithal JJ.

As far as these observations are concerned, first and foremost, they were unwarranted. Such questions did not arise for adjudication in the case at all. In constitutional adjudications, the judges must follow the doctrine of "strict necessity" and address only such questions that are strictly necessary to decide a case. In *V.K. Majotra*,[147] the apex court has very succinctly stated this point:[148]

> The writ courts would be well advised to decide the petitions on the points raised in the petition, and if, in a rare case, keeping in view the facts and circumstances of the case, any additional points are to be raised, then the concerned and affected parties should be put to notice on the additional points to satisfy the principles of natural justice. Parties cannot be taken by surprise…

It was reiterated in other cases, including, recently, in *P. Radhakrishnan* v. *Cochin Dewaswom Board*,[149] a decision rendered by a two-judge bench of the Supreme Court in 2025. In this case, the bench clearly pointed out that:[150]

> If, without putting parties on notice (even in the rare and exceptional case where facts warrant), the court travels beyond the scope of the petition, takes parties by surprise and makes any strong observations and directions, it will create a chilling effect on other prospective litigants too.

It is, thus, very important for a bench or judges thereof to abstain from expressing their views on questions that do not arise for consideration. Furthermore, in *Davinder Singh,* the aforementioned observationshave been made by the judges somewhat intuitively without adequate evidence-based reasoning in support. Though similar observations have been made in some of the earlier cases by judges, in none of them did they provide evidence-based reasoning.

The reservation in public employment in India is not aimed at poverty alleviation or economic empowerment of the beneficiaries. It is a democratic principle aimed at providing representation to certain socially backward classes or communities (not any particular individuals or families), who are underrepresented in the services under the state. It cannot be used as a tool for economic emancipation of one family after another,so that if any member of any family receives the benefit in one generation, in the second generation, the other members of that family shall be denied the benefits of reservation. Further, there is no empirical evidence to

147 *V. K. Majotra* v. *Union of India* (2003) 8 SCC 40.
148 *Id*.
149 Civil Appeal No. 11902 of 2025, decided on October 6, 2025.
150 *Id*., para 28.

even suggest, let alone convincingly establish, that the consequences of generations of discrimination and exploitation can be wiped out if one member of a family receives the benefit of reservation and gets the so-called coveted government job. Such beneficiaries cannot create assets that can provide intergenerational financial stability for the entire family. Many first-generation government employees, including those who secure higher positions, find it harder to provide decent education to their children and acquire a decent dwelling house, even though they may be considered as a creamy layer because of the low-income criteria that may be prescribed. What is even more important to note is that there is no empirical evidence to suggest that economic progress can completely offset the disadvantages of 'social backwardness', which is the basis of reservations policies for scheduled castes/tribes and even for other backward classes.

In matters concerning reservations, the apex court generally insists on evidence-basedpolicy-making. Even in the instant case, it was said that the sub-classification of scheduled castes/tribes should be backed by empirical evidence lest it be struck down. Perhaps, in constitutional litigations in India, the reservation is the only area in which the apex court insists on empirical evidence to validate the state law or policy. In this scenario, it is quite strange that the judges advocate a policy of exclusion of second-generation family members and creamy layers from availing the benefit of reservation without placing reliance on any empirical evidence to justify the same.

If such a question directly arises in a future case, it shall be dealt with more holistically rather than intuitively.

Facially-neutral discrimination

In *Gaurav Kumar* v. *Union of India*,[151] the apex court highlighted how certain facially neutral provisions/measures might have a disproportionate impact on marginalised and economically weaker sections of society. In a writ petition filed under article 32, the Supreme Court was considering the validity of enrollment fees charged by the State Bar Councils in excess of the fee prescribed under section 24(1)(f) of the Advocates Act, 1961. The court, while holding that charging of excess fees violates both articles 14 and article 19(1)(g) of the Constitution, observed:[152]

> The burden of payment of enrolment fees and other miscellaneous fees imposed by SBCs falls equally on all persons seeking enrolment. While the burden is facially neutral, it perpetuates structural discrimination against persons from marginalised and economically weaker sections of society.

Caste based discrimination in prisons

In *Sukanya Shantha* v. *Union of India*,[153] a public interest litigation filed under article 32 of the Constitution, a three-judge bench of the Supreme Court

151 (2025) 1 SCC 641

152 *Id*., para 92.

153 (2024) 15 SCC 535.

dealt with an issue of caste-based institutionalised discrimination of prisoners in Indian prisons. The petitioner, a journalist by profession, had challenged the constitutional validity of certain provisions in Prison Manuals and Rules of several states that allowed, authorised or, in some cases, mandated, either directly or indirectly, segregation of prisoners and/or assignment of work to the prisoners on the basis of their castes. The impugned Prison Manuals and Rules explicitly envisaged assigning menial jobs like sweeping and cleaning to prisoners belonging to lower castes, while allowing prisoners belonging to high castes, euphemistically referred to as "suitable castes" in some of the Prison Manuals, to do cooking and such other clean jobs.

The Supreme Court, after carefully examining such provisions in the light of the broader constitutional framework and values, declared them to be violative of not only Articles 14, 15 and 17 but also articles 21 and 23 of the Constitution of India. The court observed "[W]hile caste-based classifications are permissible under certain constitutional provisions, they are strictly regulated to ensure they serve the purpose of promoting equality and social justice." The Constitution does not permit caste-based classifications to "discriminate against the members of the marginalised castes."[154] The court was categorical that the caste-based classification of prisoners has no rational nexus with either of the two objectives of classification of prisoners in prisons, *viz*., (i) maintenance of security and discipline, and (ii) possibility of reform and rehabilitation.

The court noticed that some of the provisions in the impugned Prison Manuals and Rules though do not directly permit caste-based classifications do so indirectly by permitting classifications of prisoners on the basis of their 'habits', 'customs', 'superior mode of living', and 'natural tendency to escape', *etc*., They permit assignment of 'menial' jobs to prisoners belonging to castes 'accustomed to perform such duties.' These are discriminatory even though some of them appear to be facially neutral. The court held that:[155]

> [r]ules that discriminate among individual prisoners on the basis of their caste, specifically or indirectly by referring to proxies of caste identity, are violative of Article 14 on account of invalid classification and subversion of substantive equality.

The court also held that reference to 'scavenger class' and the notion of considering certain occupations as 'degrading or menial' are aspects of the caste system and untouchability. In the opinion of the court, provisions that allow prisoners belonging to high castes to refuse the food prepared by the lower castes amount to according "legal sanction by the State authorities to untouchability and the caste system."[156]

The court was of the view that assigning menial work to lower caste prisoners violates their fundamental right under Article 21 of the Constitution,

154 *Id*., para 184.
155 *Id*., para 189.
156 *Id*., para 201.

which includes "right to overcome caste barriers" and "freedom to break free from these traditional social restrictions". The right guaranteed under article 21 extends beyond mere survival. It "envisages the growth of individual personality". Subjecting individuals to caste-based discrimination stifles their personal growth and, thus, violates article 21.[157] The Constitution does not permit curtailment of rights guaranteed under article 21 "except through a law which is substantively and procedurally fair, just and reasonable".[158]

Further, it was held that forcing prisoners belonging to lower castes "to selectively perform menial jobs amounts to forced labour" and, thus, violates the right against exploitation guaranteed under article 23 of the Constitution.[159]

The court directed all the states and union territories to revise their Prison Manuals and Rules in line with the judgment within a period of three months. They were also asked to delete the 'caste' column and any reference to castes in prisoners' registers. The court also scrutinised the Model Prison Manual 2016 and the Model Prisons and Correctional Services Act, 2023 and found several lacunas and gaps in them in addressing the problem of caste-based segregation and assignment of work in prisons. It accordingly directed the Government of India to make necessary changes to them. Further, while discussing reference to 'habitual offenders' in various Prison Manuals, including the Model Prison Manual, the court even incidentally observed that classification of habitual offenders under various habitual offender laws enacted by the states is constitutionally suspect, and the vague and broad language used in such legislation permits targeting of members of denotified tribes. Since they were not under challenge, the court did not examine that legislation in detail.

In India, the caste system is deeply entrenched, and discriminations based on caste manifest in a variety of ways in almost every walk of life. It is an evil that could have been eradicated long ago if there had been a firm resolve and commitment. What astonishes one is that even though the framers had unequivocally resolved to abolish 'untouchability' and forbade its practice in 'any' form, its institutionalised practice continued for such a long time with legal sanction accorded by the state. The court seems to be absolutely right in acknowledging that "[T]he fight against caste-based discrimination is not a battle that can be won overnight; it requires sustained effort, dedication, and the willingness to confront and challenge societal norms that perpetuate inequality."[160] As noted by the court in this judgment itself, "the 'bounds of caste are made of steel' — 'Sometimes invisible but almost always inextricable'. But not so strong that they cannot be broken with the power of the Constitution."[161] It only requires the right people – meaning people steadfastly committed to uphold constitutional ideals and values – in the right places.

157 *Id*., para 209.
158 *Id*., para 8.
159 *Id*., para 216.
160 *Id*., para 30.
161 *Id*., para 252.

Rights of persons with disability

In *Om Rathod* v. *Director General of Health Services*,[162] the appellant, a person with disability, had approached the Supreme Court challenging the decision of a medical board that declared him ineligible to pursue a medical or dental course because of his disability. The high court had dismissed his initial writ petition. A three-judge bench of the Supreme Court, while allowing his appeal, held that the principle of reasonable accommodation is not just a statutory right emanating from the Rights of Persons with Disabilities Act, 2016, but it is also rooted in fundamental rights guaranteed under Part III of the Constitution. Reasonable accommodation is "a gateway right for persons with disabilities to enjoy all the other rights enshrined in the Constitution and the law… (it is also) a facet of substantive equality and its failure constitutes discrimination."[163] In addition, it also added that "[T]he inclusion of persons with disability in the medical profession would enhance the quality of healthcare and meet the preambular virtue of fraternity and the guarantees in Articles 21, 19, 14 and 15 of the Constitution".[164]

In *Rajive Raturi* v. *Union of India*,[165] the court reiterated the position. In this case, a three-judge bench was dealing with a writ petition filed under article 32, "seeking directions to ensure meaningful access to public spaces for persons with disabilities". The court opined that the right to accessibility is foundational, and it falls well within the framework of fundamental rights. It stated that "[A]rticle 14 upholds equal access to spaces, services, and information; Article 19 guarantees the freedom to move and express oneself; and Article 21 ensures the right to live with dignity."[166] The right to accessibility enables persons with disability to enjoy other fundamental rights as well.

Equal right to seek maintenance under secular law

In *Mohd. Abdul Samad* v. *State of Telangana*,[167] the Supreme Court had considered a question as to whether a divorced Muslim woman can claim maintenance under section 125 of the Code of Criminal Procedure, 1973, even after the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The two-judge bench answered the question in the affirmative. B.V. Nagarathna, J., in her supplementary judgment, opined that the non-obstante clause in section 3 of the 1986 Act cannot be read to restrict or diminish the right to maintenance under section 125 of the Code, which is available to a divorced Muslim Woman as well. Such a reading would be regressive and contrary to articles 14, 15(1) and (3), and article 39(e) of the Constitution. In applying section 125 of the Code, no discrimination shall be made on the ground of religion, race, caste, sex, place of birth or any of them as mandated under article 15(1).

162 2024 SCC OnLine SC 3130.
163 *Id*., para 29.
164 *Id*., para 60.
165 (2024) 16 SCC 654.
166 *Id*., para 27.
167 (2025) 2 SCC 49.

Equal right to a healthy/pollution-free environment

It has been time and again stated by the Supreme Court that the right to live in a pollution-free environment is a concomitant part of the right to life guaranteed under article 21.[168] In *Container Corpn.of India Ltd.* v. *Ajay Khera*,[169] a two-judge bench of the Supreme Court added that such a fundamental right is equally available to all and not confined to the people living in any particular region or territory. In this case, the bench was considering, *inter alia*, the validity of one of the suggestions made by the National Green Tribunal (NGT) to restrict the entry of diesel vehicles into Inland Container Depots (ICDs) in Delhi and divert them to ICDs outside Delhi NCR in order to control the pollution in the region. The bench castigated the NGT for making such a suggestion. It observed:[170]

> Such an observation by NGT is in complete ignorance of the fact that citizens living in other parts of the country, other than Delhi NCR, also have a fundamental right to a pollution-free environment as guaranteed by Article 21 of the Constitution of India. Such a fundamental right is equally enforceable by all and is not confined to the people of Delhi NCR. NGT, while protecting/safeguarding the above fundamental right of the people of Delhi NCR, cannot allow infringement of the same fundamental right of the citizens living outside Delhi NCR. The observation of NGT is totally unjustified and unwarranted.

In *M.K. Ranjitsinh* v. *Union of India*,[171] a three-judge bench of the Supreme Court went a step ahead and recognised that the people in India have "a right against the adverse effects of climate change."[172] In this case, the Supreme Court was dealing with a writ petition filed under article 32 seeking intervention of the court for the protection of the Great Indian Bustard and the Lesser Florican, which are on the verge of extinction. Though the court was of the opinion that the right against the adverse consequences of climate change and the right to clean environment are "two sides of the same coin", it said: "[A]s the havoc caused by climate change increases year by year, it becomes necessary to articulate this (i.e., the right against the adverse effects of climate change) as a distinct right." It identified both articles 14 and 21 as important sources of these rights.

It may be noted that it is for the first time that the Supreme Court has invoked article 14 as one of the important sources of these rights. Article 14 contains the general principle of equality. It guarantees 'equality before law' and 'equal protection of laws' to every person. The reason for the invocation of article 14 was the acknowledgement of the fact that the effects of climate change and environmental

168 For another reiteration, see*M.C. Mehta* v. *Union of India*, 2024 SCC OnLine SC 3366.
169 (2024) 3 SCC 216.
170 *Id*., para 25.
171 2024 SCC OnLine SC 570.
172 *Id*., para 24.

degradation are not uniform on the rich and the poor. The poorer communities suffer more than the rich, and that would undoubtedly impact the right to equality.[173]

Further, the court observed that while giving effect to the right to be free from the adverse consequences of climate change, there is a need to keep in mind the other rights of affected communities, like the right against displacement and allied rights. It emphasised the need to adopt a holistic approach, keeping in view all aspects. It also reminded the state of the international obligations it had undertaken to address the problems of climate change. As regards the specific issue raised in the case, i.e., protection of the Great Indian Bustard and the Lesser Florican, the court appointed an expert committee to study and suggest suitable measures to be taken.

Right to seek regularisation in public employment.

Regularisation and permanent absorption into the posts to which employees were initially appointed by the state on a temporary basis have always been one of the contentious issues in India. Even the Supreme Court had expressed conflicting views in different cases. Thus, in *Umadevi (3)*,[174] a five-judge bench had been constituted to authoritatively lay down the law. The bench unanimously and categorically held that temporary, *ad hoc*, or casual employees do not have any fundamental right to seek regularisation or absorption into permanent posts. The bench also held that it is not proper for the constitutional courts "to direct absorption in permanent employment of those who have been engaged without following a due process of selection envisaged by the constitutional scheme."[175] The bench, however, did not foreclose the possibility of regularisation and absorption into permanent posts of any employees appointed temporarily or on an *ad hoc* basis. It made an exception for those employees whose initial appointments were made "after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed". It thus made a distinction between *irregular* and *illegal* appointments. In its view, whereas the former can be regularised, the latter cannot be.

In *Vinod Kumar* v. *Union of India*,[176] a two-judge bench of the Supreme Court noted the aforesaid distinction made in *Umadevi (3)* while dealing with an appeal filed by employees, whose claim for regularisation and absorption was turned down by the Central Administrative Tribunal and the High Court of Judicature at Allahabad, relying on *Umadevi (3)* itself. In this case, the due procedure was followed while making initial appointments, though on a temporary basis. They were continued in service for more than twenty-five years. The bench, after considering the specific circumstances under which they were employed and

173 On this aspect, also see *State of Telangana* v. *Mohd. Abdul Qasim* [(2024) 6 SCC 461], in which a two-judge bench of the Supreme Court, while emphasizing on the importance of forest conservation, opined that the depletion of forests affects the vulnerable communities the most and violates their right to equality under art. 14.

174 *State of Karnataka* v. *Umadevi* (3), (2006) 4 SCC 1.

175 *Id*., para 12.

176 (2024) 9 SCC 327

continued in service, allowed their appeal and set aside the judgment of the high court. It observed:[177]

> This Court believes that the essence of employment and the rights thereof cannot be merely determined by the initial terms of appointment when the actual course of employment has evolved significantly over time. The continuous service of the appellants in the capacities of regular employees, performing duties indistinguishable from those in permanent posts, and their selection through a process that mirrors that of regular recruitment, constitute a substantive departure from the temporary and scheme-specific nature of their initial engagement. Moreover, the appellants' promotion process was conducted and overseen by a Departmental Promotional Committee and their sustained service for more than 25 years without any indication of the temporary nature of their roles being reaffirmed or the duration of such temporary engagement being specified, merits a reconsideration of their employment status.

The bench, accordingly, directed the respondent to regularise their services. In another case, *i.e.*, *Ernakulam Regional Cooperative Milk Producers Union Ltd.* v. *Nithu*,[178] another two-judge bench of the Supreme Court had, however, refused to entertain the claims of the employees for regularisation on the ground that their initial appointments were illegal.

Judicial review in contractual matters

Ordinarily, a party to a contract cannot invoke writ jurisdiction of the high court seeking enforcement of rights that stem from the contract merely because the other party to a contract is the state or its instrumentality. It does not, however, mean that the writ jurisdiction cannot be invoked at all in contractual matters. Where the state acts in an arbitrary, unfair or unreasonable manner, the writ of habeas corpus can be invoked. It is a settled law that the Constitution limits the authority of the state and its instrumentalities. By virtue of article 14, the state is required not to act in an arbitrary, unfair or unreasonable manner. While reiterating the same, in *Subodh Kumar Singh Rathour* v. *Kolkata Metropolitan Development Authority*,[179] the three-judge bench of the Supreme Court stated that the demarcation between a 'private law element' and 'public law element' is crucial in dealing with contractual disputes. If it involves any public law element, then the invocation of writ jurisdiction is justifiable. It observed:[180]

> Judicial review is permissible to prevent arbitrariness of public authorities and to ensure that they do not exceed or abuse their powers in contractual transactions, and requires overseeing the administrative power of public authorities to award or cancel contracts or any of their stipulations.

177 *Id*., para 5.
178 2024 SCC OnLine SC 650.
179 (2024) 15 SCC 461.
180 *Id*., para 60.

The court had, however, acknowledged the difficulties in determining whether the action is arbitrary or not. It stated that "arbitrariness is more easily visualised than precisely stated or defined."[181] Whether the impugned action of the state is arbitrary or not has to be determined in the light of the facts and circumstances of each case. The obvious test to be applied is "whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness."[182] It had particularly pointed out that "[E]very State action must be informed by reason, and it follows that an act uninformed by reason is arbitrary." Most importantly, it was held that in ascertaining whether the impugned action is arbitrary or not, the courts in exercise of their power of judicial review can examine the records of any internal deliberations or file notings. It observed:[183]

> [o]nce a decision has been officially made through proper means and channel, any internal deliberations or file notings that formed a part of that decision-making process can certainly be looked into by the Court for the purposes of judicial review in order to satisfy itself of the impeccability of the said decision… and (to ascertain) whether it conforms to the principles enshrined in Article 14 of the Constitution.

In the instant case, the court, after examining the records/file notings leading to the cancellation of the tender, declared it illegal. It emphatically said: "The litigation at hand is nothing but a classic textbook case of an arbitrary exercise of powers".[184]

Right to property

In some of the cases decided during the year, the Supreme Court dealt with the right to property and payment of compensation for acquisition. *Dharnidhar Mishra* v. *State of Bihar*,[185] it was held that even though the right to property ceased to be a fundamental right, by virtue of article 300-A, "[T]he State cannot dispossess a citizen of his property except in accordance with the procedure established by law. The obligation to pay compensation, though not expressly included in Article 300-A, can be inferred in that Article."[186] In *Union of India* v. *Dr Asket Singh*,[187] the requirement of making payment of compensation within a reasonable time from the date of vesting of the property must be read into the Requisitioning and Acquisition of Immovable Property Act, 1952. Unreasonable delay in payment of compensation violates article 14, which prohibits arbitrariness. In *Dinesh* v. *State of Madhya Pradesh*,[188] the court opined that the enquiry

181 *Id*., para 67.
182 *Ibid*.
183 *Id*., para 87 and 89.
184 *Id*., para 132.
185 (2024) 10 SCC 605.
186 *Id*., para 16.
187 2024 SCC OnLine SC 925.
188 2024 SCC OnLine SC 937.

contemplated under section 15 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, is analogous to the enquiry contemplated under section 5-A of the Land Acquisition Act, 1894. As such, it is not just a statutory enquiry; it has the "flavour of fundamental right" guaranteed under article 14.

VI THE VALIDITY OF SECTION 6-A, CITIZENSHIP ACT, 1955

Section 6-A was inserted into the Citizenship Act, 1955, in 1985 by the Citizenship (Amendment) Act, 1985, for giving effect to certain provisions of the 'Assam Accord'.[189] Section 6-A contains special provisions for conferment of citizenship on Indian origin immigrants from Bangladesh covered by the Assam Accord. The provision had divided them into two categories for conferring citizenship: (i) It conferred deemed citizenship on all immigrants who entered Assam prior to January 1, 1966, and (ii) It allowed immigrants who entered Assam between January 1, 1966 and March 25, 1971, to register themselves with the registering authority. The second category of persons would be deemed to be citizens only after the expiry of ten years. The persons who had entered Assam on or after March 25, 1971, are not entitled to any special treatment. If their entry is illegal, they are liable for deportation after following due process.[190]

The said provision was challenged on numerous grounds, including on the ground of violation of Articles 14, 21 and 29 of the Constitution, before the Supreme Court.The validity of the provision was examined by a five-judge bench in *Citizenship Act, 1955, Section 6-A, In re.*[191] For assailing the provision, the petitioners had advanced very ingenious arguments. Their arguments based on fundamental rights were as follows:

(i) The impugned provision treats equals unequally as it applies only to the State of Assam, even though the problem of illegal immigration from East Pakistan (i.e., Bangladesh) is prevalent in other states like West Bengal.

(ii) The cut-off dates in the provision have no rationale, and they have been set arbitrarily. The phrase "ordinarily resident in Assam" contained in the provision is vague.

(iii) Massive influx of immigrants is causing demographic change, as a result, their right to conserve Assamese culture and shape their cultural identity, protected under article 29(1) of the Constitution, is violated.

189 'Assam Accord' is the Memorandum of Settlement signed between the representatives of Union Government and the leaders of All Assam Students Union (AASU) and All Assam Gana Sangram Parishad (ASGSP) in the presence of then Prime Minister Rajiv Gandhi. This was entered into to settle the issues of foreigners (Bangladeshi immigrants) in Assam.

190 It may be noted that in *Mohd. Rahim Ali* v. *State of Assam* [(2024) 15 SCC 152] keeping in view the fundamental rights guaranteed under articles 14 and 21 of the Constitution, which are available to every person and not only to citizens, the Supreme Court held that a person cannot be declared a foreigner, under the Foreigners Act, 1946, without complying with the principles of natural justice.

191 (2024) 16 SCC 105.

(iv) The impugned provision also violates article 21 as the influx of immigrants "affects the way of life of original inhabitants",[192] "burdens the country's natural resources, particularly impacting the citizens residing in a State and hindering sustainable development, along with depriving the Assamese community from enjoying the full spectrum of socio-economic rights."[193] The provision also contravenes the 'public trust doctrine' by permitting the immigrants to utilise natural resources.

The five-judge bench delivered three judgments. The majority judgment was authored by Surya Kant J. (for himself and on behalf of M.M. Sundresh and Manoj Misra, JJ). D.Y. Chandrachud C.J. wrote a separate judgment concurring with the majority. J. B. Pardiwala J. wrote a partly concurring and partly dissenting judgment.

The majority squarely rejected the contentions of the petitioners and upheld the constitutional validity of section 6-A of the Citizenship Act, 1955. It opined that it is permissible under the Constitution to classify states on the basis of their unique historical circumstances and, thus, the selective application of the provision to the State of Assam alone is justified in view of its unique historical situation leading to the signing of the Assam Accord. Further, after considering the legislative history of the provision, the court rejected the argument that cut-off dates prescribed under the provision are arbitrary. It found that there were reasons behind each of the cut-off dates. It also said that the phrase "ordinarily resident in Assam" used in the provision is not vague.

The majority did not accept the contention of the petitioners that demographic change taking place on account of the massive influx of immigrants violates their right under Article 29(1) of the Constitution. It was observed:[194]

> Accepting the petitioners' assertion that a mere change in demographics is sufficiently actionable evidence of erosion of rights under Article 29(1) would have far-reaching consequences… it would undermine the idea of fraternity envisaged by our Constitutional drafters, and bring to life their fears by threatening the cohesion of our diverse nation. It would open the floodgates for similar challenges by residents of other States who might seek to undermine Article 19(1)(e) rights and inter-State migration under the guise of protecting their indigenous culture under Article 29(1). The Constitution of India, and indeed this Court as well, does not envision India as a Union of endogamous-homogeneous territories. The cascading ramifications of accepting the petitioners' stand on federalism and national harmony would be significant, deleterious and not improbable.

192 *Id*., para 315.
193 *Id*., para 312.
194 *Id*., para 307.

Additionally, the court also stated that the petitioners have failed "to show either an actionable impact on Assamese culture, or trace the cause of it to Section 6-A." Even the invocation of article 21 and the public trust doctrine did not find favour with the court.

D.Y. Chandrachud C.J. agreed with the majority that the impugned section 6-A does not violate any of the constitutional provisions. J. B. Pardiwala J. applied the principle of 'temporal unreasonableness' and declared the provision invalid with prospective effect. In his opinion, the classification made under the impugned provision is no longer reasonable, and it has no rational nexus with the objective, which was the speedy and effective identification of foreigners entered into the State of Assam. D.Y. Chandrachud C.J. disagreed with J. B. Pardiwala J. He was of the view that the principle of temporal unreasonableness cannot be applied to the provision because the classification made in the provision is still relevant and has a nexus with its objective. According to him, "[T]he process of detection and conferring citizenship in Assam is a long-drawn-out process spanning many decades. To strike it down due to lapse of time is to ignore the context and object of the provision."[195]

VII RIGHT TO LIFE AND FUNDAMENTAL FREEDOMS

Right to freedom of speech

These days, responses to social media posts are often written by the police in the form of a first information report (FIR), which sets the criminal justice process in motion. There are many reported cases in the recent past, where registrations of FIRs were not warranted. But the influential busybodies had caused their registration.In *Javed Ahmad Hajam* v. *State of Maharashtra*,[196] an FIR was filed against the appellant for the offence punishable under section 153-A of the Indian Penal Code, 1860 for posting on his WhatsApp status the following messages: (i) "August 5 — Black Day Jammu & Kashmir", (ii) "14th August — Happy Independence Day Pakistan", and (iii)"Article 370 was abrogated, we are not happy." These messages were posted on different days in August 2022.

Section 153-A penalises "promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. and doing acts prejudicial to the maintenance of harmony". The appellant had filed a writ petition before the high court for quashing the FIR for the said offence. The high court, though of the opinion that the Independence Day message to Pakistan does not fall within the purview of section 153-A, had refused to quash the FIR on the ground that the other two messages, however, constitute an offence punishable under the said section. It was against this decision that the appellant approached the Supreme Court.

The Supreme Court set aside the impugned judgment of the high court and quashed the FIR. Relying on *Manzar Sayeed Khan*,[197] *Bhagwati Charan Shukla*,[198]

195 *Id*., para 525.

196 (2024) 4 SCC 156.

197 *Manzar Sayeed Khan* v. *State of Maharashtra* (2007) 5 SCC 1.

198 *Bhagwati Charan Shukla* v. *Provincial Govt*., AIR 1947 Nag 1.

and *Patricia Mukhim*,[199] it held that the messages in question do not attract the offence punishable under section 153-A. Specifically noting the words used by the appellant in his WhatsApp status, the court opined that:[200]

> On a plain reading, the appellant intended to criticise the action of the abrogation of Article 370 of the Constitution of India. He has expressed unhappiness over the said act of abrogation. The aforesaid words do not refer to any religion, race, place of birth, residence, language, caste or community. It is a simple protest by the appellant against the decision to abrogate Article 370 of the Constitution of India and the further steps taken based on that decision.

The court clearly stated that by virtue of the freedom of speech and expression guaranteed in the Constitution, "every citizen has the right to offer criticism of the action of abrogation of Article 370 or, for that matter, every decision of the State. He has the right to say he is unhappy with any decision of the State."[201] It even cautioned that "[I]f every criticism or protest of the actions of the State is to be held as an offence under Section 153-A, democracy, which is an essential feature of the Constitution of India, will not survive."[202]

It was reiterated by the court that the right to dissent and protest peacefully is an integral part of the right to freedom of speech and expression guaranteed under article 19(1)(a). It even said that the right to dissent must also be "treated as a part of the right to lead a dignified and meaningful life guaranteed by Article 21."[203] At the same time, it did not fail to underscore that "the protest or dissent must be within the four corners of the modes permissible in a democratic set up."[204]

Further, the court also observed that "[E]very citizen has the right to extend good wishes to the citizens of other countries on their respective Independence Days."[205] No motives can be attributed to the person for extending such good wishes, "only because he belongs to a particular religion."[206]

Finally, the court also urged every individual to "respect the right of others to dissent"[207] and emphasised the need to enlighten, educate and sensitise the police machinery "about the democratic values enshrined in our Constitution."[208]

In the same spirit of upholding free speech, a three judge bench of the Supreme Court in *Editors Guild of India* v. *Union of India*, [209] stayed the notification

199 *Patricia Mukhim* v. *State of Meghalaya* (2021) 15 SCC 35.
200 *Supra* note 196, para 11.
201 *Ibid*.
202 *Id*., para 13.
203 *Id*., para 14.
204 *Ibid*.
205 *Id*., para 16.
206 *Ibid*.
207 *Ibid*.
208 *Id*., para 17.
209 2024 SCC OnLine SC 1537.

dated March 20, 2024 issued by the union government under rule 3(1)(b)(v) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2022 till the constitutional validity of the said rule is finally determined by the High Court of Judicature at Bombay, where a batch of writ petitions were filed challenging its validity.

The said rule authorizes the central government to establish a 'fact check unit' and requires the intermediaries to "make reasonable efforts" to ensure that their users do not "host, display, upload, modify, publish, transmit, store, update or share any information", identified as fake or false or misleading by such unit "in respect of any business of the Central Government."

The Supreme Court was approached at the juncture where two judges of the high court had rendered a split verdict and, as a result, the matter was referred to a third judge. The Supreme Court, while considering the matter, observed that "the challenges to the validity of Rule 3(1)(b)(v) involve serious constitutional questions"[210] and it "implicates core values impinging on the freedom of speech".[211] In view of that, the court opined, the impugned notification "would need to be stayed" till the question of validity is finally settled by the high court.

In *Bloomberg Television Production Services India (P) Ltd.* v. *Zee Entertainment Enterprises Ltd.*,[212] the apex court set aside an *ex parte ad interim* order, passed by the trial court and upheld by the high court, directing the appellants to take down an article published on their online media platform within a week. The Supreme Court said that without satisfaction of the threefold test,*viz*., (i) a *prima facie* case, (ii) a balance of convenience, and (iii) irreparable loss or harm, no court should pass an interim order. The courts should also take into account the severe ramifications of such orders on the right to freedom of speech of the author and the rights of the public to know. While pointing out the errors committed by the trial judge and the single judge of the high court while passing/ upholding the *ex parte ad interim* order in the instant case(which was a defamation suit), the Supreme Court urged the courts to be cognizant of the rising number of "SLAPP suits" in various jurisdictions in the world. Citing Donson F.J.L.,[213] the court explained:[214]

> The term "SLAPP" stands for "Strategic Litigation against Public Participation" and is an umbrella term used to refer to litigation predominantly initiated by entities that wield immense economic power against members of the media or civil society, to prevent the public from knowing about or participating in important affairs in the public interest.

210 *Id*., para 24.

211 *Id*., para 23.

212 (2025) 1 SCC 741.

213 Donson, F.J.L., *Legal Intimidation: A SLAPP in the Face of Democracy* (London, New York : Free Association Books, 2000).

214 *Supra* note 212, para 9.

The SLAPP suits are a serious threat to democracy. They have been on the rise in India in recent days. The FIR filed in *Javed Ahmad Hajam*, discussed above, is also an example of SLAPP. It is really noteworthy that the Supreme Court has taken note of this phenomenon. It has rightly urged the courts to keep in mind "the potential of using prolonged litigation to prevent free speech and public participation".[215]

In *Nipun Malhotra* v. *Sony Pictures Films India Private Limited*,[216] the Supreme Court was confronted with a serious dilemma. In this case, the appellant had first approached the Delhi High Court questioning the stereotypical portrayal of persons with disabilities in the trailer of a movie, *Aankh Micholi,* produced by the respondents. The contention was that the exercise of freedom of speech and expression by the makers of the movie contravened the rights of persons with disability under articles 14, 15 and 21. Apart from seeking directions to the Sony Pictures to issue a public apology and to pay punitive damages, the petitioner/ appellant had also sought directions for the inclusion of an expert on disability in the Central Board of Film Certification and the advisory panel constituted under the Cinematograph Act, 1952.

The respondents claimed that the overall message of the movie was about the resilience of persons with disability. The said claim was not contested by the petitioner/appellant before the high court. Acknowledging the same, the high court had declined to issue the directions sought.

The Supreme Court, though it agreed with the final decision of the high court, did not seem to be fully convinced by the approach adopted by it in disposing of the writ petition. Since the case involved a conflict between two fundamental rights, *i.e.*, freedom of speech and expression of the filmmakers, on the one hand, and the rights of persons with disabilities, on the other, it was of the opinion that the high court could have adopted one of the two alternative methods in disposing of the case:

(i) It could have opined that there was no necessity to balance these rights because rights in question of persons with disability,*viz*., right to dignity, equality and non-discrimination, "do not include the right to curb the filmmakers' right to exhibit a film duly certified for such exhibition."[217] Or

(ii) It could have applied either the single or the double proportionality standard to balance between the conflicting rights.[218]

The Supreme Court, however, was clearly of the view that "the creative freedom of the filmmaker cannot include the freedom to lampoon, stereotype,

215 *Ibid*.

216 2024 SCC OnLine SC 1639.

217 *Id*., para 68.

218 The suggestion made by the Supreme Court that the high court could have applied the 'single proportionality standard' is somewhat intriguing given that in an earlier case discussed above, D. Y. Chandrachud, C.J., (who wrote the judgment in the instant case) had doubted its efficacy in matters involving conflict of rights.

misrepresent or disparage those already marginalised."[219] The question of whether the creative freedom had been exercised in such a manner needs to be determined, keeping in view the overall message of the film. It is evident from the following observations:[220]

> If the overall message of the work infringes the rights of persons with disabilities, it is not protected speech, obviating the need for any balancing. However, in appropriate cases, if a stereotypical/ disparaging portrayal is justified by the overall message of the film, the filmmaker's right to retain such a portrayal will have to be balanced against the fundamental and statutory rights of those portrayed.

Like the high court, even the Supreme Court had duly emphasised the overall message of the film. It seemed to have agreed with Jeremy Waldron, who had disagreed with Ronald Dworkin and John Stuart Mill on the question of hate speech. Their essential arguments have been briefly articulated in the judgment.[221]

The court had also highlighted the need to distinguish between '*disabling humour*' and '*disability humour*'. It said, while the latter 'challenges conventional wisdom' and 'attempts to better understand and explain disability', the former 'denigrates' disability.[222]

It laid down a broad framework, consistent with the Constitution and the Rights of Persons with Disabilities Act, 2016, for guiding the portrayal of persons with disability in visual media.

Restrictions on the right to profession: Chartered accountants

The Constitution of India guarantees the right to practice any profession under article 19(1)(g), which is subject to reasonable restrictions that can be imposed under article 19(6). In *Shaji Poulose* v. *ICAI*,[223] article 19(1)(g) and article 14 of the Constitution were invoked to challenge the constitutional validity of clause 6.0 of chapter VI of the guidelines issued by the Institute of Chartered Accountants of India (ICAI). Clause 6 provided for the imposition of a mandatory ceiling limit on the number of tax audits that can be undertaken by a chartered accountant in a financial year under section 44-AB of the Income Tax Act, 1961. The guidelines also stipulated that violation of the ceiling limit amounts to professional misconduct and would render the violator liable to disciplinary proceedings.

The constitutional validity of the said clause has been in contestation for quite some time before different high courts, and they have expressed divergent opinions. In the present case, the Supreme Court, while disposing of the writ petition filed under article 32 along with several transferred cases, had upheld the

219 *Supra* note 216, para 70.
220 *Ibid*.
221 See *Id*., paras 26 and 27.
222 See *Id*., para 66.
223 (2025) 2 SCC 304.

constitutional validity of the said clause on the ground that the imposition of ceiling limit is a reasonable restriction that would serve the public interest, which is manifested, in the present case, "as a benefit to the public exchequer in terms of appropriate quality of tax audit reports".[224]

Article 19(6) of the Constitution permits imposition of reasonable restrictions on freedom of profession, *inter alia*, "in the interests of the general public". The Supreme Court very succinctly elucidated how a balance needs to be maintained between individual rights and liberties, on the one hand, and the public interest on the other:[225]

> Our Constitution, by establishing a welfare State, emphasises a fine balance between the public interest of the community and the liberties of the individual. Indeed, this is not to say that individual rights and liberties are not a matter of vital public interest, but any policy or law may not be struck down at the instance of an individual alone. In other words, there is a basic unity between fundamental rights and the public interest. The public interest inherent in the said individual's exercise of a fundamental right under Part III would need to be delicately balanced with the imminent constitutional imperative of the "ordered progress of society towards a welfare State".

Right to food

The right to food is not explicitly guaranteed as a fundamental right in the Constitution. But the Supreme Court in a number of cases held it to be a concomitant of the right to life, which has been interpreted to mean the right to live with human dignity. There is, however, an explicit provision in the directive principle of state policy, which requires the state to regard 'raising the level of nutrition' as one of its primary duties.[226]In *Anun Dhawan* v. *Union of India*,[227] some social activists had approached the Supreme Court under article 32 seeking various directions to states and union territories requiring them, *inter alia*, to frame a scheme "to implement the concept of Community Kitchens to combat hunger, malnutrition and starvation and the deaths resulting thereof."[228] One of their pleas is that in India, "the Centre and States have the constitutional duty to ensure basic sustainability of human life."

The Supreme Court, after considering the overall scheme of the National Food Security Act, 2013, which had adopted the 'right-based approach' and the 'life cycle approach' to provide food and nutrition security and various other schemes and programmes of the state and central government, had declined to issue a direction to implement the concept of community kitchens. It did not even go into the question of whether the concept of community kitchen is a better

224 *Id*., para 133.3.
225 *Id*., para 133.2.
226 Art. 47.
227 (2024) 12 SCC 299.
228 *Id*., para 1.

alternative in comparison to the existing schemes and programmes to ensure food security, or not. According to the court, it is a policy matter, and it is, thus, open to the states and union territories to decide. The courts have limited jurisdiction to interfere with policy choices. It dismissed the petition while reiterating that "[T]he courts do not and cannot examine the correctness, suitability or appropriateness of a policy, nor are the courts advisors to the executive on the matters of policy which the executive is entitled to formulate."

Right to access quality and safe products

In the *Indian Medical Association*. v. *Union of India*,[229] the Supreme Court held that the right to health, derived from article 21 of the Constitution, "encompasses the right of a consumer to be made aware of the quality of products being offered for sale by manufacturers, service providers, advertisers and advertising agencies." India does not have effective laws to deal with misleading advertisements. The Guidelines for Prevention of Misleading Advertisements and Endorsements of Misleading Advertisements, 2022, lack a robust enforcement mechanism to ensure compliance with obligations cast on advertisers. Noting this lacuna, the bench issued a slew of directions for its effective implementation and stated that those directions shall be treated as law declared by the Supreme Court under article 141 of the Constitution.

Right to abortion

In *A (Mother of X)* v. *State of Maharashtra*,[230] the apex court once again reiterated that the opinion of a pregnant person shall be given primacy in the matter of abortion. Relying on *X* v. *State (NCT of Delhi)*,[231] it said that the "decision to terminate pregnancy is deeply personal for any person."[232] Every pregnant person has a right to abortion, which is a concomitant right of dignity and autonomy protected under article 21 and, hence, their consent in terminating pregnancy is paramount. Even in cases of divergence in the opinions expressed by a pregnant person, who is a minor or mentally ill, and her guardian, her opinion should be given due weight in arriving at a just conclusion. The right to reproductive autonomy, being a fundamental right, shall not be compromised "for reasons other than to protect the physical and mental health of the pregnant person."[233] The bench urged the medical board constituted under the Medical Termination of Pregnancy Act, 1971, to reflect on the effect of pregnancy on the physical and mental health of the pregnant person while forming its opinion.

VIII RELIGION AND EDUCATION

Imparting religious instructions in state-funded educational institutions

Article 28 (1) of the Constitution prohibits educational institutions, which are maintained wholly out of state funds, from imparting 'religious instructions'.

229 (2024) 8 SCC 46
230 (2024) 6 SCC 327.
231 (2023) 9 SCC 433.
232 *Id*., para 21.
233 *Ibid*.

In *Anjum Kadari* v. *Union of India*,[234] a three-judge bench of the Supreme Court, while staying the impugned decision of the high court, which had declared the Uttar Pradesh Board of Madarsa Education Act, 2004 as unconstitutional, quoted with approval the interpretation of the phrase 'religious instructions' by D. M. Dharmadhikari, J., in his concurrent judgment in *Aruna Roy*:[235]

> The expression "religious instruction" used in Article 28(1) has a restricted meaning. It conveys that teaching of customs, ways of worship, practices or rituals cannot be allowed in educational institutions wholly maintained out of State funds. But Article 28(1) cannot be read as prohibiting the *study of different religions* existing in India and outside India... Any interpretation of Article 28(1), which negates the fundamental right of a child or a person to get education of different religions of the country and outside the country and of his own religion, would be destructive of his fundamental right of receiving information, deriving knowledge and conducting his life on the basis of a philosophy of his liking.

The decision of the high court was finally set aside in *Anjum Kadari* v. *Union of India*.[236] After a detailed analysis of the provisions, the bench upheld the constitutional validity of the impugned Act except for the provisions that seek to regulate higher-education degrees. They are found to be in conflict with the provisions of the University Grants Commission Act, 1956 and, thus, invalidated.

One of the noteworthy aspects in the judgment is that the bench reiterated that the constitutional validity of ordinary statutes cannot be tested on the touchstone of the basic structure doctrine. It observed:[237]

> The reason is that concepts such as democracy, federalism, and secularism are undefined concepts. Allowing courts to strike down legislation for violation of such concepts will introduce an element of uncertainty in our constitutional adjudication.

In the opinion of the court, even though, in cases involving a challenge to the validity of a statute, the basic structure doctrine can be technically invoked, the statute can be invalidated only if the infringement of an express provision of the Constitution is established. Hence, the court observed, "in a challenge to the validity of a statute for violation of the principle of secularism, it must be shown that the statute violates provisions of the Constitution pertaining to secularism." It also opined that "[S]ecularismis one of the facets of the right to equality"[238] enshrined in article articles 14, 15 and 16 of the Constitution. Secularism also has other facets. They are contained in articles 25 to 30 of the Constitution. Unless the impugned Act is proved to be violative of any of these provisions, it cannot be

234 2024 SCC OnLine SC 4018.
235 *Aruna Roy* v. *Union of India* (2002) 7 SCC 368, para 81.
236 (2025) 5 SCC 53.
237 *Id*., para 56.
238 *Id*., para 4o.

declared as unconstitutional for being inconsistent with the undefined concept of secularism.

It is true that the term 'secular' or 'secularism' is not defined in the Constitution, but so are other grand expressions used in the Preamble,*viz*., sovereign, socialist, democratic and republican.Can these terms be considered vague in the context of the Indian Constitution? These terms were not used as mere platitudes in the preamble. They have definitive meanings that can be deciphered from the relevant operative provisions of the Constitution. Is the court justified in treating 'secularism' as a vague concept after having identified its different facets relying on articles 14-16 and articles 25-30 of the Constitution? In 2024 itself, another two-judge bench of the Supreme Court, in *Dr Balram Singh* v. *Union of India*,[239]had opined that even though the term 'secular' was not included in the original Preamble as its meaning was considered to be imprecise in 1949, "[O]ver time, India has developed its own interpretation of secularism".[240] The bench relied upon the very same provisions to articulate its meaning.

Further, the more or less consistent stance of the court that the basic structure doctrine can be used as a touchstone to examine only the constitutional amendments and not ordinary legislation may permit the state to accomplish in exercise of its ordinary legislative power (or executive power) what it cannot accomplish in exercise of its constituent power. This aspect needs closer and detailed examination.

Indicia for the determination of a 'minority educational institution'

Clause (1) Article 30 of the Constitution of India confers on all religious and linguistic minorities "the right to establish and administer educational institutions of their choice." This provision has, as enunciated by D.Y. Chandrachud, C.J.,[241] twin purposes: (i) non-discrimination purpose i.e., to ensure that minorities based on language or religion are not discriminated against in the matter of establishment and administration of educational institutions, and (ii) the conferment of 'special right' on them to protect their autonomy and limit the state regulation or interference in the administration of such institutions.

D.Y. Chandrachud, C.J., stated these twin purposes in his majority judgment delivered in *Aligarh Muslim University* v. *Naresh Agarwal*.[242] In this case, a seven-judge bench of the Supreme Court was called upon to lay down the criteria to determine whether an educational institution is a "minority educational institution"

239 2024 SCC OnLine SC 3433. In this case, the two-judge bench of the Supreme Court dismissed a writ petition challenging the insertion of the words 'secular' and 'socialist' into the preamble of the Constitution by the Constitution (Forty-second Amendment) Act, 1976. The court also delineated on the meaning of the word 'socialist' in the context of Indian Constitution. For the comments on the same, see P. Puneeth, "The constitutional conception of socialism: A vision beyond welfare State", *The Leaflet*, January 22, 2025. *Available at*: https://theleaflet.in/equality/the-constitutional-conception-of-socialism-a-vision-beyond-welfare-state.

240 *Id.*, para 3.

241 *Aligarh Muslim University* v. *Naresh Agarwal* (2025) 6 SCC 1 (para 68).

242 *Ibid*.

for the purpose of article 30(1) of the Constitution. The question was referred to a seven-judge bench by a three-judge bench,[243] when it realised, while hearing an appeal against the decision of a division bench of the Allahabad High Court,[244] that the high court had relied on the decision in *Azeez Basha*,[245] the correctness of which was doubted in *Anjuman-e-Rahmaniya*,[246] and referred to a larger bench for reconsideration. As the reference is still pending, the three-judge bench was of the view that the matter before it cannot be adjudicated unless the decision in *Azeez Basha* is reconsidered.[247] In *Azeez Basha*, a five-judge bench of the Supreme Court, while holding that the words 'establish' and 'administer' in article 30(1) shall be read conjunctively, had declared that the Aligarh Muslim University established under the Aligarh Muslim University Act, 1920, is not a minority educational institution. In its opinion, an institution cannot be designated as a minority educational institution if it derives its character through a statute.

The seven-judge bench, in the instant case, answered the reference that had been pending since 1981. D.Y. Chandrachud, C.J., authored the majority judgment for himself and on behalf of Sanjiv Khanna, J.B. Pardiwala, and Manoj Misra, JJ. The remaining three judges, *viz.*, Surya Kant, Dipankar Dutta, and Satish Chandra Sharma, JJ., delivered three separate, partly dissenting judgments.

D.Y. Chandrachud, C.J., explicitly overruled the view taken in *Azeez Basha* that "an educational institution is not established by a minority if it derives its legal character through a statute."[248] In his opinion, that cannot be a sole basis to deny minority status to an educational institution. Taking into account the fact that an institution, which was originally setup as Muhammadan Anglo-Oriental College, was later converted into Aligarh Muslim University through a statute, he observed:[249]

> The incorporation of the university would not ipso facto lead to the surrender of the minority character of the institution. The circumstances surrounding the conversion of a teaching college to a teaching university must be viewed to identify if the minority character of the institution was surrendered upon the conversion. The Court may, on a holistic reading of the statutory provisions relating to the administrative set-up of the educational institution, deduce whether the minority character or the purpose of establishment was relinquished upon incorporation.

243 *Aligarh Muslim University* v. *Naresh Agarwal* (2020) 13 SCC 737.

244 *Aligarh Muslim University* v. *Malay Shukla* 2006 SCC OnLine All 2207.

245 *S. Azeez Basha* v. *Union of India*, 1967 SCC OnLine SC 321.

246 *Anjuman-e-Rahmaniya* v. *District Inspector of Schools*, WPs (C) Nos. 54-57 of 1981, order dated 26-11-1981 (SC).

247 It may be noted that in *T.M.A. Pai Foundation* v. *State of Karnataka*, [(2002) 8 SCC 481], the eleven-judge bench formulated a question that is identical with the reference made in *Anjuman-e-Rahmaniya*, the bench did not answer it.

248 *Supra* note 241, para 166.

249 *Id*., para 165.6.

He succinctly laid down the factors to be considered to determine whether an educational institution was, in fact, 'established' by a minority. The enquiry must relate back to the date of establishment of the institution. Thus, "the court must consider the genesis of the educational institution"[250] and focus on three factors, *viz*., ideation (conception of the idea), purpose and implementation of the idea.[251]

Another important aspect to be noted is that D.Y. Chandrachud, C.J., in his judgment, clearly accepted that "the rights to establish and administer must be read conjunctively and not disjunctively."[252] He, however, raised a very pertinent question: "[w]hether the conjunctive reading of the words… would also mean that for an educational institution to be a minority institution, it should have been both established and administered by a minority."[253]The question does not seem to have been answered very decisively in the judgment. On the one hand, he observed:[254]

> To determine whether an educational institution is a minority educational institution, a formalistic test, such as whether it was established by a person or group belonging to a religious or linguistic minority, is not sufficient. The tests adopted must elucidate the purpose and intent of establishing an educational institution for the minority. Both the establishment and the administration by the minority must be fulfilled cumulatively for that.

He also opined that "[A]rticle 30(1) cannot extend to a situation where the minority community which establishes an educational institution has no intention to administer it."[255] On the other hand, he said that the administrative structure of the educational institutions is not an indicator to determine whether an institution was established by a minority. Elucidating further, he observed:[256]

> [i] It is not necessary to prove that administration vests with the minority to prove that it is a minority educational institution because the very purpose of Article 30(1) is to grant special rights on administration as a *consequence* of establishment. To do otherwise would amount to converting the consequence into a precondition.

After the above observation, he has stated: "The test to be adopted by the Court is whether the administrative set-up of the educational institution affirms the minority character of the institution."[257] As regards the educational institutions established before the commencement of the Constitution, he opined:[258]

250 *Id*., para 140.
251 *Id*., paras 140 to 142 and 165.7.1.
252 *Id*., para 70.
253 *Id*., para 71.
254 *Id*., para 75.
255 *Ibid*.
256 *Id*., para 143.
257 *Id*., para 144.
258 *Id*., para 145. Emphasis supplied.

> The test of administration should be evaluated in praesenti, that is, on the date of the commencement of the Constitution. An institution to be a minority institution must satisfy the criteria of being *"administered" as a minority institution* on the date of commencement of the Constitution, and being a minority institution on the date of formation.

He also added that even though the institution was originally established by the minority for the benefit of the community, the court "must assess the impact of any subsequent events that altered the character of the institution before the commencement of the Constitution."[259] Further, while once again underscoring that the "statutory incorporation of the institution does not ipso facto amount to a surrender of the minority character of the institution",[260] D.Y. Chandrachud, C.J., stated that the question "whether the regulatory measures wrest the administrative control from the founders of the institution" is a question of fact. It should be answered on the facts of each case after "a comprehensive analysis of the administrative framework, which includes a host of factors such as the representation of the interests of the community in the administrative set-up."[261]

On a plain reading of the judgment, it is not clear whether D.Y. Chandrachud, C.J., was making any distinction between "administered *by* the minority" and "administered *as* a minority institution".[262] In the final conclusion, he has, however, indicated that the statutory provisions relating to the administrative set-up need to be holistically read to determine the minority character of the institution. His answer seems to be that how and by whom an institution is administered are relevant factors.[263]

He left the question of whether Aligarh Muslim University is a "minority educational institution" to be determined by a regular bench, taking into consideration the criteria and factors laid down in his judgment. He had, however, reiterated that even the institutions and universities established before the commencement of the Constitution are also entitled to the right guaranteed under article 30(1) if they satisfy the criteria laid down. The onus to satisfy the criteria "is on the claimants."[264]

Suraya Kant, J., was, however, categorical that for claiming any benefit under article 30 of the Constitution, the institution must satisfy atwo-pronged/conjunctive test that "it was established by a minority community and has been/is being administered by such a community."[265] Indicia suggested by him for the determination of the character of the institution are different from what D.Y. Chandrachud, C.J., had suggested. Both he and Satish Chandra Sharma, J., lay

259 *Ibid*.

260 *Ibid*.

261 *Ibid*.

262 See *Id*., para 438 (Per Dipankar Dutta J.).

263 It may be noted that SCC 'headnotes' are not accurate on this aspect.

264 *Supra* note 241, para 147.

265 *Id*., para 380.9.

equal stress on both 'establishment' and 'administration'. Dipankar Dutta, J., agrees with them. All three judges also agreed that in determining whether the institution was established by the minority, the courts should not only look at the genesis of the institution. According to them, the establishment of an institution "is not an event frozen at a single point". All subsequent developments should also be taken into consideration.

Lastly, though all other judges have left the question whether Aligarh Muslim University is a minority institution or not for the purpose of article 30 of the Constitution to be determined by a regular bench, Dipankar Dutta, J., answered it in the negative. He had clearly stated in his conclusion that "AMU was neither established by any religious community, nor is it administered by a religious community which is regarded as a minority community; hence, AMU does not qualify as a minority institution."[266]

IX ARTICLE 31-C: SAFE HARBOR TO CERTAIN LAWS

Article 31-C was inserted by the Constitution (Twenty-fifth Amendment) Act, 1971, with a view to providing a safe harbour to the laws enacted for giving effect to the directive principles contained in articles 39(b) and (c) of the Constitution. In the first part, the provision protected such laws from judicial scrutiny and possible invalidation on the ground that they violate articles 14, 19 or 31 of the Constitution. In the second part, it protected the judicial scrutiny of any "law containing a declaration that it is for giving effect to such policy… (even) on the ground that it does not give effect to such policy."

In the landmark case of *Kesavananda Bharati* v. *State of Kerala*,[267] the first part of the provision was declared to be valid by a 7:6 majority, whereas the second part was declared invalid and struck down for being violative of the basic structure of the Constitution by another 7:6 majority consisting of different judges. H.R. Khanna J. was the only judge who was part of both these combinations of majorities.

Subsequently, the first part of the provision was amended by section 4 of the Constitution (Forty-second Amendment) Act, 1976, for extending protection to all laws enacted for giving effect to "all or any of the principles laid down in Part IV". Section 4 was struck down by the Supreme Court in *Minerva Mills* v. *Union of India*.[268] The consequence of striking down the said section 4 was the subject matter for adjudication before a nine-judge bench of the Supreme Court in *Property Owners Association* v. *State of Maharashtra*.[269] In this case, the bench considered two substantial questions of law involving constitutional interpretation:

(i) Whether the unamended provision of the first part of article 31-C (as upheld in *Kesavananda Bharati*) was revived as a result of striking down the amendment in *Minerva Mills*?

266 *Id*., para 540.
267 (1973) 4 SCC 225.
268 (1980) 3 SCC 625.
269 2024 SCC OnLine SC 3122.

(ii) Whether the privately owned resources fall within the meaning of "material resources of the community" under article 39(b) of the Constitution.

The bench delivered three judgments. The majority judgment was authored by D.Y. Chandrachud, C.J., (for himself and on behalf of Hrishikesh Roy, J.B. Pardiwala, Manoj Misra, Rajesh Bindal, Satish Chandra Sharma, Augustine George Masih, JJ). Both B.V. Nagarathna and Sudhanshu Dhulia, JJ., authored separate judgments. They partly concurred and partly disagreed with the majority.

The first question was answered unanimously by the bench. It had categorically held that the unamended article 31-C was revived as a consequence ofthe invalidation of Section 4 of the Forty-second Amendment Act. It rejected the argument of the appellant that "the decision in *Minerva Mills* only renders the amended text of Article 31-C unenforceable and cannot repeal the Forty-Second Amendment in totality or reinstate the unamended Article 31-C."[270]

As regards the second question, even though there was a broad consensus among all the judges that the phrase "material resources of the community" in article 39(b) includes privately owned resources, there were disagreements with regard to the question as to what privately owned resources fall within the meaning of the phrase. According to D.Y. Chandrachud, C.J., even though the phrase includes the privately owned resources, all privately owned resources do not fall within the ambit of the provision. He insisted that the determination of what resources fall within the ambit of the provision shall be context-specific. He indicated that factors "such as the nature of the resource and its characteristics; the impact of the resource on the well-being of the community; the scarcity of the resource; and the consequences of such a resource being concentrated in the hands of private players"[271] may be taken into consideration in determining whether a particular privately owned resource falls within the ambit of the provision or not. He outrightly rejected the 'expansive view' – every resource owned by any individual falls within the ambit of the provision – adopted by Krishna Iyer J., in his minority opinion in *Ranganatha Reddy*,[272] which was relied upon by the Supreme Court in *Sanjeev Coke*.[273] He even said that in *Sanjeev Coke*, the bench erred in relying on the minority opinion of Krishna Iyer J., in *Ranganatha Reddy,* as the majority in the said case had expressly distanced itself from the observations made by him.

B.V. Nagarathna J., on the other hand, opined that both clause (b) and clause (c) of article 39 complement and supplement each other; thus, the former clause should be construed in the light of the provision contained in the latter clause. Also, articles 37 and 38 shall always be borne in mind while examining the validity of any state action aimed at furthering any of the directive principles. The phrase "material resources", so construed, includes every privately owned resource except

270 *Id*., para 46(ii).

271 *Id*., para 229.

272 *State of Karnataka* v. *Ranganatha Reddy* (1977) 4 SCC 471.

273 *Sanjeev Coke Manufacturing Co.* v. *Bharat Coking Coal* (1983) 1 SCC 147.

the personal belongings such as apparel, personal jewellery and other household articles. Sudhanshu Dhulia, J., also took a similar stance. According to him, the phrase should be given an expansive meaning. Both opined that the court, in *Sanjeev Coke*, did not commit any error in following the minority view of Krishna Iyer J.

By virtue of the majority view in this case, the position now is that the question whether any privately owned resource can be regarded as a "material resource of the community" has to be determined keeping in view the context and by applying the factors delineated by D.Y. Chandrachud, C.J. Further, as he indicated, the factors mentioned by him are only illustrative. The courts in future, while determining such questions, may take into account other factors as well. Since this process leaves scope for subjectivity, the variations in outcomes cannot be overruled.

X ARTICLE 32 AND ALTERNATIVE REMEDY

One of the unique features of the Indian Constitution is the recognition of the right to enforce fundamental rights in and of itself as a fundamental right under article 32 of the Constitution. B. R. Ambedkar described it as "the very soul of the Constitution and the very heart of it." In his opinion, without this provision, the whole Constitution would be a nullity. The uniqueness of the provision lies in the fact that it allows the citizens and others to approach the highest court of the land at the very first instance as a matter of right to seek appropriate remedies against violation or threat of violation of other fundamental rights. Though high courts in India are endowed with equal powers to remedy breach of fundamental rights, under the constitutional scheme, the option lies with the individual concerned to approach either the Supreme Court or the jurisdictional high court under article 226 for appropriate remedies. It is not a precondition to exhaust the alternative remedy available under article 226 to move the Supreme Court under article 32 for the enforcement of other fundamental rights. Even then, the maintainability of writ petitions filed under article 32 is often questioned on the ground of the availability of alternative remedies and the Supreme Court also at times allows such pleas. However, there is no clarity on when the non-exhaustion of an alternative remedy does or does not constitute a bar for the invocation of article 32. The approach of the Supreme Court has been pretty random.

In *Bilkis Yakub Rasool* v. *Union of India*,[274] several writ petitions and public interest litigations were filed under article 32 of the Constitution, challenging the grant of remission or premature release of prisoners convicted for the murder of fourteen people and gang rape of several women during the Gujarat riots. The petitioners invoked the right to life and liberty guaranteed under article 21 and the right to equality and equal protection of laws guaranteed under article 14 of the Constitution to challenge the remission orders. The maintainability of writ petitions was questioned by the respondents, *inter alia*, on the ground of the availability of alternative remedies. Considering the specific facts and circumstances of the

274 (2024) 5 SCC 481.

case, the two-judge bench of the Supreme Court rejected the plea regarding the maintainability of the petition filed by Bilkis Yakub Rasool, one of the victims of gang rape and whose family members were also murdered by the convicts in front of her own eyes. The bench held that "[B]earing in mind the expanded notion of access to justice which also includes speedy remedy, we think that the petition filed by the petitioner… cannot be dismissed on the ground of availability of an alternative remedy under Article 226 of the Constitution."[275] It was also of the view that since the competence of the State of Gujarat to grant remission was also questioned by the Petitioner, the Gujarat High Court could not have dealt with the said question. Thus, the petition filed under article 32 was held to be maintainable. The bench, however, did not decide the question regarding the maintainability of the public interest litigations filed by others challenging the validity of the grant of remission. Since the petition filed by one of the victims was held to be maintainable, consideration of the said petition on its merit was held to suffice in the instant case. The question as to whether an order of remission granted by the state can be questioned in a public interest litigation filed by public-spirited individuals (who were not victims) was kept open to be considered in an appropriate case in future.

The bench, while upholding the maintainability of the writ petition filed by a victim, also made a general observation on the scope of writ jurisdiction of the Supreme Court under article 32 of the Constitution. It opined that the writ jurisdiction can be invoked "to enforce the goals enshrined in the Preamble to the Constitution, which speak of justice, liberty, equality and fraternity."[276] The bench, however, did not elaborate on this proposition. It has the effect of significantly widening the scope of writ jurisdiction. One of the concerns to be noted is that this proposition may be relied upon in future by enterprising litigants to approach the Supreme Court even in matters that concern the enforcement of fundamental rights.

XI CONCLUSION

In 2024, larger benches consisting of five judges (in two cases), seven judges (in two cases) and nine judges (in one case) heard and decided certain substantial questions of law directly involving fundamental rights. In all these cases, the benches delivered polyvocal judgments. D. Y. Chandrachud, C.J., and Manoj Misra, J., were part of all these benches. D. Y. Chandrachud, C.J., had authored either a majority or a leading (non-majority) or a separate concurrent judgment in each of these cases. Manoj Misra, J., did not author a separate judgment in any of these cases. In the *Association of Democratic Reforms*,[277] though the five-judge bench delivered two judgments, the Electoral Bond Scheme and certain provisions of the Finance Act, 2017, were declared unconstitutional unanimously. D. Y. Chandrachud, C.J., who authored the majority judgment, laid down the 'double proportionality standard' to balance the conflict between two fundamental rights, *viz*., 'right to information' and 'right to informational privacy'. He clearly opined that a 'single

275 *Id*., para 72.
276 *Ibid*.
277 *Supra* note 3.

proportionality standard' is not sufficient for balancing the two conflicting rights. However, in *Nipun Malhotra*,[278] he had indicated that even a 'single proportionality standard' can also be applied for balancing the conflicting rights. This inconsistency may require clarification in a future case.

In *Citizenship Act, 1955, Section 6-A, In re.*,[279] the five-judge bench delivered three judgments and upheld the constitutional validity of section 6-A of the Citizenship Act, 1955 by a 4:1 majority. J.B. Pardiwala J., who authored a separate and partly dissenting judgment, declared the said provision invalid with prospective effect by applying the principle of 'temporal unreasonableness', which is not very frequently invoked or applied in constitutional adjudications in India. However, its application in the instant case, as pointed out by D. Y. Chandrachud, C.J., in his separate concurrent judgment, does not appear to be correct.

In *Davinder Singh*,[280] the seven-judge bench had reconsidered the correctness of the decision rendered in *E.V. Chinnaiah*.[281] The bench delivered four separate judgments and two written notes of endorsement. There was no single majority judgment. The bench, however, overruled *E.V. Chinnaiah* by a 6:1 majority and held that sub-classification of Scheduled Castes and Scheduled Tribes is permissible, and states have legislative competence to sub-classify them. Bela M. Trivedi, J., wrote a dissenting judgment and held that *E.V. Chinnaiah* had laid down the correct law and there is no need for its reconsideration. It must be noted that the majority only held that the sub-classification is permissible. It did not direct the states to carry out sub-classifications. It rather insisted that sub-classifications, if made, must be reasonable and based on empirical data. Their reasonableness is subject to judicial review. It is a clear indication for the states not to resort to sub-classifications without undertaking proper studies to justify the same.

In *Aligarh Muslim University*,[282] the seven-judge bench finally answered the reference made to a larger bench way back in 1981. The bench delivered four separate judgments. D. Y. Chandrachud, C.J., authored the majority judgment, and the other three judges authored separate, partly dissenting judgments. One major difference between the majority and the minority judgments is that the majority had partly overruled *Azeez Basha*[283] explicitly, whereas the minority did not do so. As regards the indicia for the determination of minority educational institutions, the differences between them appear to be only with respect to certain specifics and the emphasis they lay on different aspects.

In the *Property Owners Association*,[284] the nine-judge bench had considered two important questions having far-reaching consequences. The bench delivered

278 *Supra* note 216.
279 *Supra* note 191.
280 *Supra* note 144.
281 *Supra* note 143.
282 *Supra* note 241.
283 *Supra* note 245.
284 *Supra* note 269.

three separate judgments. The majority judgment was authored by D. Y. Chandrachud, C.J. Two separate judgments were authored by B.V. Nagarathna and Sudhanshu Dhulia, JJ. They partly concurred and partly disagreed with the majority. The bench unanimously held that the first part of article 31-C, in the form in which it was upheld in *Kesavananda Bharati*, was revived as a result ofthe invalidation of Section 4 of the Forty-Second Amendment Act. Both the majority and the minority also broadly agreed that 'privately owned resources' fall within the ambit of the phrase 'material resources of the community' in article 39 (b). Disagreements between them were only with regard to what privately owned resources fall within the ambit of article 39(b). The majority did not favour the 'expansive view', whereas the minority did so.

In addition to the larger bench decisions, in the survey year, many other cases involving fundamental rights were decided by either a three-judge or two-judge bench. Significant among them include – decision to uphold the paramountcy of rule of law by refusing to protect the liberties secured in violation of it; Relying on article 21 to grant bails notwithstanding statutory embargoes under UAPA, NDPS, PMLA by interpreting them in a manner that aligns with the constitutional mandate; explicit acknowledgement of growing number of "SLAPP suits" and asking the courts to be cognizant of such suits; clarification that the courts can scrutinize 'internal deliberations' or 'file notings' of the executive to determine whether the action in question is arbitrary or not; issuance of guidelines to prevent illegal demolition of properties belonging to the accused persons; directions to the state to end institutionalized caste-based discriminations in prisons, *etc.*,

The court's suggestion for framing a comprehensive sentencing policy to curtail sentencing discretion to prevent disparities in sentencing and the reference to a larger bench raises the question as to whether the authorities under Section 19 of the PMLA, while recording 'reason to believe', are required to state that "necessity and need to arrest" are also equally noteworthy. Framing of comprehensive sentencing policy and the requirement of stating "necessity and need to arrest", if the larger bench answers the question in the affirmative, would go a long way in reducing arbitrariness in exercising discretionary powers in those areas.

On the whole, based on the reported judgments discussed in this survey, the Supreme Court can certainly be credited for upholding fundamental rights and significantly strengthening and reinforcing them in the survey year.