9

CONSTITUTIONAL LAW-I

(FUNDAMENTAL RIGHTS)

*S N Singh**

I INTRODUCTION

BEFORE ANALYZING leading cases relating to fundamental rights reported during 2014, it is necessary to make a few general observations about the judicial trend discernible in recent years. First, no principles have been laid down by the Supreme Court for the constitution of larger benches for hearing the pending cases referred by smaller benches and lay down priorities/dates for hearing and deciding those cases.[1] Second, how much time and resources are wasted in piecemeal decision making is well reflected from two decisions of the Supreme Court. The *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[2] was referred by a full bench (consisting of S.H. Kapadia, CJ and K.S.P. Radhakrishnan and Swatanter Kumar, JJ) to a constitution bench of five judges on September 6, 2010 as it raised "question as to the validity of articles 15(5) and 21-A of the Constitution of India" and, on that basis, *Pramati Educational and Cultural Trust* v. *Union of India*[3] was also sent by a two-judge bench (K.S.P. Radhakrishnan and Dipak Misra, JJ) on March 22, 2013 to a constitution bench. This was done on the assumption

---

* LL.M. (B.H.U.), Ph.D. (Delhi), Advocate. Comments and observations on this survey may be mailed at: s_nsingh@hotmail.com

1 See *infra* notes 15-26.

2 *Society for Unaided Private Schools of Rajasthan* v. *Union of India* (2012) 6 SCC 102.

3 *Pramati Educational & Cultural Trust* v. *Union of India* (2013) 5 SCC 752. The order passed by the division bench read: "Mr Mukul Rohatgi, learned Senior Counsel, referred to the order reported in *Society for Unaided Private Schools of Rajasthan* v. *Union of India* (2012) 6 SCC 102 and submitted that in the light of the order passed by a three-Judge Bench, this matter should have been referred to a larger Bench.

In view of the order passed by this Court, we feel it appropriate that this matter be referred to a larger Bench."

Significantly, *Society for Unaided Private Schools of Rajasthan* v. *Union of India* had already been decided on April 12, 2012 itself about which the counsel were ignorant. In view of this factual position, the reference of *Pramati Educational and Cultural Trust* to a Constitution Bench was inappropriate.

that *Society for Unaided Private Schools of Rajasthan* was still pending on that date. Without placing the *Society for Unaided Private Schools of Rajasthan* case before the constitution bench or re-calling the referral order, it was decided on April 12, 2012 by the same full bench which had referred it to constitution bench,[4] while the second case was decided on May 6, 2014 by a constitution bench after reference.[5] This kind of decision making can never be supported by any yardstick and needs to be avoided. Moreover, even after making reference to a larger bench, it is not known as to how and why a smaller bench decided the case without referring the same to a larger bench. Third, it appears that while making reference to a larger bench, the court is swayed by the arguments of the counsel for the parties and the learned judges do not apply their mind closely. Thus, in *State of Punjab* v. *Rafiq Masih*,[6] a large number of appeals were placed, on reference from a division bench, before a three-judge bench of the apex court "for authoritative pronouncement on the apparent difference of opinion expressed on one hand in *Shyam Babu Verma* v. *Union of India*[7] and *Sahib Ram* v. *State of Haryana*[8] and on the other hand, in *Chandi Prasad Uniyal* v. *State of Uttarakhand*."[9] These cases related to recovery of excess of salary paid to employees by mistake or otherwise but without any fault, negligence or fraud on the part of the employees. While

---

4 *Society for Unaided Private Schools of Rajasthan* v. *Union of India* (2012) 6 SCC 1.

5 *Pramati Educational & Cultural Trust* v. *Union of India*, AIR 2014 SC 2114: (2014) 8 SCC 1 : 2014 (2) SCALE 306. In the first sentence of this decision, A.K. Patnaik J states: "This is a reference made by a three-Judge Bench of this Court by order dated 6-9-2010 in *Society for Unaided Private Schools of Rajasthan* v. *Union of India* (2012) 6 SCC 102 to a Constitution Bench. As per the aforesaid order dated 6-9-2010 [Para 50, p. 542 of *T.M.A. Pai*], we are called upon to decide on the validity of clause (5) of Article 15 of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect from 20-1-2006 and on the validity of Article 21-A of the Constitution inserted by the Constitution (Eighty-sixth Amendment) Act, 2002 with effect from 1-4-2010." The learned judge failed to notice that what he stated as "reference" is not actually the reference order in the present case [the order of reference in the present case was passed on 22.03.2013 which is reported in (2013) 5 SCC 752].

6 (2014) 8 SCC 883. The order of reference made by the court reads as under:

"In view of an apparent difference of views expressed on the one hand in *Shyam Babu Verma* v. *Union of India* (1994) 2 SCC 521 and *Sahib Ram* v. *State of Haryana*, 1995 Supp (1) SCC 18; and on the other hand in *Chandi Prasad Uniyal* v. *State of Uttarakhand* (2012) 8 SCC 417, we are of the view that the remaining special leave petitions should be placed before a Bench of three Judges. The Registry is accordingly directed to place the file of the remaining special leave petitions before the Hon'ble the Chief Justice of India for taking instructions for the constitution of a Bench of three Judges, to adjudicate upon the present controversy", *Rakesh Kumar* v. *State of Haryana* (2014) 8 SCC 892.

7 (1994) 2 SCC 521.

8 1995 Supp (1) SCC 18.

9 (2012) 8 SCC 417.

drawing a distinction between the scope of article 136 and article 142, the court found that the observations made by the court not to recover the excess amount paid to the employees in *Shyam Babu Verma* and *Sahib Ram* cases were in exercise of extraordinary powers under article 142 of the Constitution which confers power on the Supreme Court to pass equitable orders in the ends of justice. On the other hand, in *Shyam Babu Verma* case, while exercising power under article 136, the court had held that "even if by mistake of the employer the amount is paid to the employee and on a later date if the employer after proper determination of the same discovers that the excess payment is made by mistake or negligence, the excess payment so made could be recovered." The law laid down in *Chandi Prasad Uniyal* case did in no way conflict with the observations made in the other two cases. In view of this, the reference was considered unnecessary and the matters were sent back to the division bench without answering the reference. It is difficult to appreciate this kind of decision making process in which huge time and public resources were wasted. Fourth, non-compliance of the directions of the Supreme Court has become a regular feature which is very disturbing.[10] The non-compliance of the court's directions is not only by the state and its instrumentalities but also by the private parties.[11] Moreover, the directions issued even by the apex court carry hardly any meaning when for a decade or so there is no change in the circumstances.[12] The court has realized this fact and in one case it refused to issue

---

10 See, *e.g. Justice Sunanda Bhandari Foundation* v. *Union of India*, 2014 (4) SCALE 533. The non-compliance in this case was of the directions issued in 2006 (7) SCALE 495 in which the court had issued detailed directions regarding the implementation of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995; also see *Bandhua Mukti Morcha* v. *Union of India* (1984) 3 SCC 161 and (1991) 4 SCC 177 (non-enforcement of many labour welfare legislations such as the Bonded Labour System (Abolition) Act, 1976, the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, the Maternity Benefit Act, 1961, the Mines Act, 1952, the Contract Labour (Regulation and Abolition) Act, 1970, the Minimum Wages Act, 1948); *Prakash Singh* v. *Union of India* (2006) 8 SCC 1 and 2011 (13) SCALE 496, 497, 500 (police reforms); *Indian Council for Enviro-Legal Action* v. *Union of India* (1996) 3 SCC 212 and (2011) 8 SCC 161 (preventive and remedial measures for Bichhri village in the State of Rajasthan); *Assn. of Registration Plates* v. *Union of India* (2005) 1 SCC 679 directions issued for implementing the scheme regulating issuance and fixation of high security registration plates (HSRP) were not implemented by the state governments as noticed in *Maninderjit Singh Bitta* v. *Union of India* (2012) 1 SCC 707; *Union of India* v. *Assn. for Democratic Reforms* (2002) 5 SCC 294 (changes in the election law to provide adequate information to the voters about the candidates contesting elections to various bodies were not properly implemented as noticed in *People's Union for Civil Liberties* (*PUCL*) v. *Union of India* (2003) 4 SCC 399.

11 *Ibid.*; also see *Laxmi* v. *Union of India* (2014) 4 SCC 427 in which the Supreme Court issued several directions regarding retail sale of acid which were not being complied as revealed by the order passed on April 22, 2014 when the court directed the Chief Secretaries of several states to ensure that compliance of the order dated December 3, 2013 positively within ten weeks and required them to file affidavit of compliance in the court "on or before 15.7.2014 failing which the Court may have

directions which, it considered, were judicially unmanageable and unenforceable.[13] Fifth, without any justification whatsoever, smaller benches express disagreement with the views expressed in earlier cases decided by coordinate or larger benches.[14] Sixth, despite availability of all kinds of research and internet facilities, cases decided earlier on the issues pending before the court are not being noticed.[15] This results in conflicting decisions adversely affecting not only the parties before the court but it also erodes public confidence in the administration of justice. Seventh, when an issue is pending before a larger bench for decision, smaller benches, even after noticing the pendency of the matter before a larger bench, decide the issue. In *Asis Kumar Samanta* v. *State of West Bengal*,[16] the question whether retrospective promotion or seniority could be granted or not had been referred by a two-judge bench to a larger bench noting that the grant of retrospective promotions and seniority was accepted by the apex court in four decisions while grant of retrospective seniority was held to be *ultra vires* in five decisions. When a similar question came up for consideration before a two-judge bench,[17] the matter was referred to a three-judge bench which decided the matter observing that the pendency of a similar matter before a larger bench did not prevent the Supreme

---

to initiate contempt proceedings against the defaulting States." There is also non-compliance of directions issued in many public interest litigations relating to environmental pollution, particularly those relating to pollution of river Ganga.

12 See *Safai Karanchari Andolan* v. *Union of India*, 2014 (4) SCALE 165, in which the court went on issuing directions for a decade and ultimately disposed of the case when the Parliament enacted the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013.

13 *Pravasi Bhalai Sangathan* v. *Union of India*, AIR 2014 SC 1591.

14 See the observations made by Madan B. Lokur J on behalf of a division bench in *Rajoo @ Ramakant* v. *State of M.P.* (2012) 8 SCC 553 at 556, where the learned judge expressed reservations on certain views expressed in *Khatri II* v. *State of Bihar* (1981) 1 SCC 627 (two-judge bench) and *Suk Das* v. *Union Territory of Arunachal Pradesh* (1986) 2 SCC 401 (three-judge bench).

15 *E.g.* while considering the issue in *Balmer Lawrie & Co. Ltd.* v. *Partha Sarathi Sen Roy* (2013) 8 SCC 345 whether a government company can be considered to be an "authority" for purpose of art. 12 of the Constitution of India, the court did not consider *Som Prakash Rekhi* v. *Union of India* (1981) 1 SCC 449, in which that issue had already been decided. Similarly, the decision of the Constitution Bench *D.S. Nakara* v. *Union of India*, AIR 1983 SC 130 : (1983) 1 SCC 305, on the question of prescribing a cut off date for giving the benefit of liberalised pension was not noticed by a division bench in *Kallakkurichi Taluk Retired Officials Assn.* v. *State of T.N.* (2013) 2 SCC 772. Likewise, on the question of preventive detention, the Constitution Bench decision in *Haradhan Saha* v. *State of West Bengal* (1975) 3 SCC 198 was not noticed in many cases by smaller benches giving conflicting decisions: see, e.g. *Rajesh Gulati* v. *Govt. of NCT of Delhi* (2002) 7 SCC 129; *T.V. Sravanan* v. *State* (2006) 2 SCC 664; *A. Shanthi* v. *Govt. of T.N.* (2006) 9 SCC 711; *Ibrahim Nazeer* v. *State of T.N.* (2006) 6 SCC 603; *A. Geetha* v. *State of T.N.* (2006) 7 SCC 603.

16 (2007) 5 SCC 800.

17 *P. Sudhakar Rao* v. *U. Govinda Rao* (2007) 12 SCC 148.

Court in the past from deciding the issue on merits.[18] This does not seem to be a proper and healthy judicial process.

It may be remembered that six cases were referred to the Chief Justice of India for constitution of larger benches in 2010 which had raised very significant and controversial issues pertaining to various fundamental rights such as reservations, right to education and right to information. The first case was an appeal against the order of Central Information Commission directing Central Public Information Officer, Supreme Court of India to send to the applicant (respondent before the Supreme Court) "complete file(s) (only as available in the Supreme Court) inclusive of copies of complete correspondence exchanged between the constitutional authorities concerned with file noting relating to said appointment of H.L. Dattu J, A.K. Ganguly J and R.M. Lodha J superseding seniority of P. Shah J , A.K. Patnaik J and V.K. Gupta J as allegedly objected to by the Prime Minister's Office (PMO) also".[19] The second case was an appeal against the full bench decision of the High Court of Delhi affirming the decision of the single judge which had upheld the order of the central information

---

18 *P. Sudhakar Rao* v. *U. Govinda Rao* (2013) 8 SCC 693. For this view, the court relied upon an earlier decision in *Pawan Pratap Singh* v. *Reevan Singh* (2011) 3 SCC 267, which was decided by a two-judge bench even though *Asis Kumar Samanta* v. *State of W.B.* (2007) 5 SCC 800 was pending before a larger bench raising the same issue. It may be noted that the pendency of the latter case was not noticed while deciding the former and, therefore, reliance on this decision was not appropriate.

19 *Central Public Information Officer, Supreme Court of India* v. *Subhash Chandra Agrawal* (2011) 1 SCC 496. This appeal has been numbered as Civil Appeal No. 10044/2010 and clubbed with C.A. No. 10045/2010. While passing the order on 26.11.2010 directing the registry to place the matter before the Chief Justice of India for constitution of a bench of appropriate strength, the division bench observed: "Following substantial questions of law as to the interpretation of the Constitution arise for consideration:

1. Whether the concept of independence of the judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the judiciary?
2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?
3. Whether the information sought for is exempt under Section 8(1)*(j)* of the Right to Information Act?

The above questions involve the interpretation of the Constitution and raise great and fundamental issues."

The last order in this case passed on March 24, 2014 by the Supreme Court reads: "What gets revealed from the perusal of the office report is that the original record has been received and statement of case has already been filed by the appellants and the respondents. Viewed in that context, the matter shall be processed for listing before the Hon'ble Court under the rules."

commission directing the office of the Chief Justice of India to disclose the information about the assets of the judges of that court, an information available with him under a declaration.[20] The third case raised the question whether a person holding a scheduled caste/scheduled tribe certificate from state 'A' was entitled to get the benefit of reservation on the basis of that certificate from state 'B' after his migration to state 'B' when that caste/tribe has not been included as a scheduled caste or scheduled tribe in state 'B'. The question referred by a division bench for consideration by a larger bench on October 7, 2010 was with regard to the "extent and nature of interplay and interaction among articles 16(4), 341(1) and 342(1) of the Constitution."[21] The issue in this case related to 100 percent reservation provided for scheduled tribes in the State of Andhra Pradesh for appointment as teachers in scheduled areas. The fourth case, referred by a division bench for consideration by a larger bench, raised the issue of interplay between articles 15, 16, 371D and fifth schedule to the Constitution.[22]

---

20 *Secretary General, Supreme Court of India* v. *Subhash Chandra Agrawal*, 2010 (12) SCALE 496 at 500-501. This Civil Appeal No. 10045/2010 has been clubbed with Civil Appeal No. 10044/2010. The decision of the full bench of the High Court of Delhi is reported as *Secretary General, Supreme Court of India* v. *Subhash Chandra Agrawal*, AIR 2010 Del. 159.

21 *State of Uttaranchal* v. *Sandeep Kumar Singh*, JT 2010 (11) SC 140 : (2010) 12 SCC 794. The final order passed in this case by the Supreme Court on 06.08.2014 disposing of the matter reads: "It is not necessary to answer the reference in the present case in view of the peculiar facts and circumstances, particularly, Office Order dated 3rd July, 2003 and the reasons given by the High Court in paragraph 4 of the impugned order, which reads as under:-s. 4. The impugned order suffers from illegality as the appointing authority of Reason: the petitioner is the University and the University has acted at the dictate of the State Government which has no power to ask for cancellation of an appointment made in accordance with the advertisement. It is adhesion of power by the appointing authority and to act at the dictate of the Government without applying its mind. Such order cannot be sustained in the eyes of law.

3. The impugned order of the High Court does not appear to us to be legally flawed.

4. Civil appeal is dismissed. Question of law is kept open."

22 *Chebrolu Leela Prasad Rao* v. *State of AP*, 2010 (8) SCALE 668. The case relates to certain advertisements issued in 1999 for appointment to non-executive posts in the State of Andhra Pradesh. After hearing, the following substantial questions of law for constitutional interpretation were referred to larger bench for consideration:

"(1) What is the scope of paragraph 5(1), Schedule V to the Constitution of India?

(a) Can the exercise of power conferred therein override fundamental rights guaranteed under Part III?

(b) Does the exercise of such power override any parallel exercise of power by the President under Article 371D?

(c) Does the power extend to subordinate legislation?

(d) Does the provision empower the Governor to make new law?

The fifth case was an appeal from the decision of High Court of Andhra Pradesh which had quashed by a 6:1 majority reservations for socially and educationally backward Muslims through the Andhra Pradesh Reservation in favour of Socially and Educationally Backward Classes of Muslims Act, 2007.[23] Significantly, on appeal before the Supreme Court, a three-judge bench (K.G. Balakrishnan CJI and J.M. Panchal & Dr. B.S. Chauhan JJ), while referring to a Constitution Bench on March 25, 2010 the question of granting reservation to socially and educationally backward classes of Muslims, allowed four per cent reservation, as an *interim* measure till the disposal of the case, to 14 categories of persons covered under the Act excluding creamy layer.[24] The direction was to list the matter in the second week of August, 2010 but the same kept pending even till the end of the year 2014. The sixth case raised the "question as to the validity of Articles 15(5) and 21-A of the Constitution of India" and, therefore, the matter was referred by a full bench on September 6, 2010 to the constitution bench.[25] This case was decided by the same full bench on April 12, 2012,[26] without referring it to the constitution bench as directed by it on September 6, 2010. Significantly, the bench did not decide the issue which it had referred to the constitution bench, i.e. constitutional validity of articles15(5) and 21-A of the Constitution; it merely decided the constitutional validity of the Right of Children to Free and Compulsory Education Act, 2009.

In *State of Karnataka* v. *Associated Management of P & S Schools*,[27] a division bench of the Supreme Court on July 5, 2013 had passed an order that the matter pertaining to medium of instruction in school education be placed before the constitution bench. Not only the constitution bench was constituted, it even decided the case in less than a year on May 6, 2014. Likewise, as stated above, in

---

(2) Whether 100% reservation is permissible under the Constitution?

(3) Whether the notification merely contemplates a classification under Article 16(1) and not reservation under Article 16(4)?

(4) Whether the conditions of eligibility (i.e. origin and cut-off date) to avail the benefit of reservation in the notification are reasonable?

According to Order VII Rule 2 of the Supreme Court Rules, 1966, we deem it appropriate to refer these matters to Hon'ble the Chief Justice of India for constituting a larger Bench for hearing these appeals."

The last order passed in this case shows that the case is still at the stage of impleading the parties and even the pleadings are not complete.

23 *T. Murlidhar Rao* v. *State of AP*, 2010 (2) ALT 357.

24 *State of A.P.* v. *T. Damodar Rao*, 2010 (3) SCALE 344 : (2010) 3 SCC 462. The last order passed on September 19, 2014 by the Supreme Court in this case reads: "List the matter before the Court."

25 *Society for Unaided Private Schools of Rajasthan* v. *Union of India* (2012) 6 SCC 102.

26 *Society for Unaided Private Schools of Rajasthan* v. *Union of India* (2012) 6 SCC 1.

27 AIR 2014 SC 2094 : (2014) 9 SCC 485.

Society for Unaided Private Schools of Rajasthan v. *Union of India*,[28] a three-judge bench on September 6, 2010 referred the matter pertaining to reservation in private unaided educational institutions for decision by a constitution bench since the challenge involved the question as to the validity of articles 15(5) and 21-A of the Constitution of India. The case was never placed before any constitution bench. Based on the above order dated September 6, 2010, however, another case raising the same issue was similarly referred by a two-judge bench to a larger bench.[29] The constitution bench decided the matter on May 6, 2014.[30] On what basis the above two cases were picked up and decided so quickly by the same constitution bench is not known but certainly an anxiety is aroused as to why the issues like reservation for the so-called "socially and educationally backward Muslims" was not considered to be significant enough for early disposal and that too since the decision of the high court quashing the government's action giving reservation to certain categories of Muslims had been stayed by the Supreme Court.[31] Assuming that when the case is decided in future holding the reservation to be constitutionally invalid, what would be the result on the persons who have been reaping benefit under the court's interim order of stay? Likewise, the importance of the question of providing 100% reservation in Andhra Pradesh, which is pending before the Supreme Court since 2002, cannot be considered to be of less significance and urgency. Finally, the issues like information pertaining to appointment of judges of the Supreme Court and disclosure of their assets raised under the Right to Information Act, 2005 were no less important and urgent. Unfortunately, all these cases kept pending till the end of the year 2014. It is would seem quite reasonable

---

28 (2012) 6 SCC 102. After the full bench consisting of S.H. Kapadia, CJ and K.S.P. Radhakrishnan and Swatanter Kumar, JJ passed the order on September 6, 2010 directing that the matter be placed before a Constitution Bench, the matter was listed before the same bench on January 7, 2011 when the bench posted it for hearing on January17, 2011. On January 17, 2011, the full bench consisting of the same three judges, instead of referring the matter to a Constitution Bench, finally decided the writ petitions on April 12, 2012, reported in (2012) 6 SCC 1. Significantly, there is no order withdrawing or modifying the order dated September 6, 2010. The bench decided only the validity of the Right of Children to Free and Compulsory Education Act, 2009 and did not at all consider the constitutional validity of arts. 15(5) and 21-A of the Constitution. In fact, based on the order passed on September 6, 2010 in the above case, another case, namely *Pramati Educational & Cultural Trust* v. *Union of India* (2013) 5 SCC 752, was also referred to a larger bench which was decided on May 6, 2014 [*Pramati Educational and Cultural Trust* v. *Union of India*, AIR 2014 SC 2114 : (2014) 8 SCC 1]. This clearly shows that something had gone wrong in the decision making process by the full bench which went ahead with the case without modifying its order dated September 6, 2010 referring the same to a larger bench. Not only impropriety but even illegality was committed in the entire process. It is not known as to how and why did the bench conveniently ignore its earlier order dated September 6, 2010 and decide the matter hurriedly.

29 *Pramati Educational & Cultural Trust* v. *Union of India* (2013) 5 SCC 752.

30 *Pramati Educational and Cultural Trust* v. *Union of India*, AIR 2014 SC 2114 : (2014) 8 SCC 1.

31 *State of A.P.* v. *T. Damodar Rao*, 2010 (3) SCALE 344 : (2010) 3 SCC 462.

if the larger benches are constituted and referred cases are decided in the order in which references are made by the smaller benches; there can perhaps be no other objective criteria to constitute larger benches and decide these matters expeditiously because if a matter has been referred for consideration of a larger bench, there can be hardly any doubt regarding the importance of the subject matter involved in the case.

In the year 2014, many important cases pertaining to fundamental rights were reported raising completely new and controversial issues as well as regular/ perennial problems relating to human rights such as rights of transgender,[32] rights of gay,[33] reservations in educational institutions and public employment,[34] rights of hawkers,[35] method of allocation of natural resources such as spectrum,[36] problems of acid burn victims,[37] rights of victims of mob violence,[38] hate speech[39] and compulsory registration of FIR in cognizable offences.[40] The most leading case on

---

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

33 *Suresh Kumar Koushal* v. *Naz Foundation*, AIR 2014 SC 563 : (2014) 1 SCC 1.

34 *Pramati Educational and Cultural Trust* v. *Union of India*, AIR 2014 SC 2114; see also interim orders passed in *Sanjeet Shukla* v. *State of Maharashtra*, WP (L) No. 2053/2014, Order dated November 14, 2014 passed by Bombay High Court and *Ram Singh* v. *Union of India*, W.P. (C) No. 274/2014, Order dated April 9, 2014 passed by Supreme Court. The notification no. 63 dated March 4, 2014 including the Jats in the Central List of Other Backward Classes for the States of Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, NCT of Delhi, Bharatpur and Dholpur Districts of Rajasthan, Uttar Pradesh and Uttarakhand was set aside and quashed by a division bench of the Supreme Court on March 17, 2015 : see *Ram Singh* v. *Union of India*, 2015 (3) SCALE 570.

35 *Maharashtra Ekta Hawkers Union* v. *Municipal Corpn., Greater Mumbai* (2014) 1 SCC 490. In this case, the Supreme Court issued detailed guidelines formulated in 2009 on the basis of which it had directed in *Gainda Ram* v. *MCD* (2010) 10 SCC 715, that appropriate government should enact a law on or before June 30, 2011 on the basis of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2012. No law had been enacted till the date of the judgement i.e. 09.09.2013. These guidelines were to remain in forced till the enactment of an appropriate legislation on the subject. The guidelines have no force now in view of the fact that the Parliament has enacted the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 providing for protection of livelihood rights, social security of street vendors and regulation of urban street vending in the country. The Act was brought into force with effect from 1st May, 2014.

36 *Association of United Tele Services Providers* v. *Union of India*, AIR 2014 SC 1984 : (2014) 6 SCC 110.

37 *Laxmi* v. *Union of India* (2014) 4 SCC 427.

38 *Mohd. Haroon v. Union of India*, 2014 (4) SCALE 86 : JT 2014 (4) SC 361 (Muzaffarnagar communal riot of 2013); *Sudesh Dogra* v. *Union of India*, AIR 2014 SC 1940 : (2014) 6 SCC 486 (mob violence and terrorist violence in the State of Jammu and Kashmir).

39 *Pravasi Bhalai Sangathan* v *Union of India*, AIR 2014 SC 1591; *Jafar Imam Naqvi* v. *Election Commission of India*, AIR 2014 SC 2537 : 2014 (7) SCALE 95.

40 *Lalita Kumari* v. *Govt. of U.P.*, AIR 2014 SC 187 : (2014) 2 SCC 1.

the question of allocation/distribution of state largesse was coal blocks allocation which had created a lot of furore at the political level. The full bench of the apex court came very heavily on the issue of allocation of coal blocks by the central government between 1993 to 2011 through screening committee route as well as government dispensation route by holding the allocations to be arbitrary and illegal and later on cancelling 42 coal blocks allocations.[41]

The interim orders passed in three cases during the current year deserve to be noted here. While two orders were passed by High Court of Delhi, the third order was passed High Court of Bombay. Both the orders of High Court of Delhi related to the freedom of press. One of the orders passed by High Court of Delhi related to a suit for permanent injunction and damages filed by a retired judge of the Supreme Court against six defendants for publication of certain news items in which the court granted the relief claimed by the plaintiff.[42] On the other hand, another judge of the same court, distinguishing the above order, refused to pass any stay order in favour of a prominent industrialist against the electronic media.[43] The order passed by High Court of Bombay relates to reservations for Marathas and Muslims in the State of Maharashtra.[44]

Two significant cases reported during the year relating to article 21 deserve special mention here. *Mohd. Arif* v. *Supreme Court of India*,[45] raised two basic issues as to whether hearing of cases, in which death sentence has been awarded, be by a bench of at least three judges of the Supreme Court; and whether hearing of review petitions in death sentence cases be not done by circulation but only be in open court, and accordingly order XL, rule 3 of the Supreme Court Rules, 1966 should be declared to be unconstitutional inasmuch as persons on death row are denied an oral hearing. The majority took the view that "reasonable procedure" under article 21 of the Constitution encompasses oral hearing of review petitions arising out of death penalties. The court did not quash rule 3 because its validity had been upheld in an earlier case by another constitution bench[46] and, therefore, the court observed that its ruling was within the precincts of that judgment. The present decision has the effect of virtually being contrary to what had been held in the earlier case.[47] In any case, in view of the *Mohd. Arif* decision, rule 3, Order

---

41 *Manohar Lal Sharma* v. *The Principal Secretary* (2014) 9 SCC 516 and (2014) 9 SCC 614.

42 *Swatantar Kumar* v. *The Indian Express Ltd*., 207 (2014) DLT 221.

43 *Naveen Jindal* v. *Zee Media Corpn. Ltd*., 209 (2014) DLT 267.

44 *Sanjeet Shukla* v. *State of Maharashtra,* WP (L) No. 2053/2014, Order dated November 14,2014.

45 (2014) 9 SCC 737.

46 In *P.N. Eswara Iyer* v. *Registrar, Supreme Court of India* (1980) 4 SCC 680.

47 In this context, one is reminded of the decision in *Automobile Transport (Rajasthan) Ltd*. v. *State of Rajasthan*, AIR 1962 SC 1406, in which, without overruling *Atiabari Tea Co. Ltd.* v. *State of Assam*, AIR 1961 SC 232: (1961) 1 SCR 809, the Supreme Court held that regulatory measures and compensatory taxes did not violate the freedom of trade, commerce and intercourse throughout the territory of India provided under art. 301 of the Constitution. In the latter case, the Supreme Court had held

XLVII of the Supreme Court Rules, 2013, which is worded in the same language as order XL, rule 3 of the Supreme Court Rules, 1966, requires amendment.

The other case relates to the safai karamcharis for whose welfare the National Commission for Safai Karamcharis under the National Commission for Safai Karamcharis Act, 1993 was established. It may be noted that the Parliament had enacted an Act way back in 1993, called the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 but there was hardly any improvement in the plight of the safai karamcharis. An organisation called Safai Karamchari Andolan along with six other civil society organizations as well as seven individuals belonging to the community of manual scavengers petitioned the Supreme Court in December, 2003 seeking *inter alia* these reliefs: (i) to ensure complete eradication of dry latrines; (ii) to declare continuance of the practice of manual scavenging and the operation of dry latrines violative of articles 14, 17, 21 and 23 of the Constitution and the 1993 Act; (iii) to direct the respondents to adopt and implement the Act and to formulate detailed plans, on time bound basis, for complete eradication of practice of manual scavenging and rehabilitation of persons engaged in such practice; (iv) to direct Union of India and state governments to issue necessary directives to various municipal corporations, municipalities and nagar panchayats (all local bodies) to strictly implement the provisions of the Act and initiate prosecution against the violators; and (v) to file periodical compliance reports pursuant to various directions issued by the Supreme Court. The apex court issued several directions from time to time but nothing substantial came out from these directions. Consequently, in 2012, a contempt petition was filed which was disposed of during the current year. The Parliament also enacted the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 for abolition of the evil of manual scavenging and for the welfare of manual scavengers which came to be enforced with effect from December 6, 2013. This Act in no way dilutes the constitutional mandate of article 17 nor does it condone the inaction on the part of union and state governments under the 1993 Act. This Act, in addition, expressly acknowledges article 17 and article 21 rights of the persons engaged in sewage cleaning and cleaning tanks as well persons cleaning human excreta on railway tracks.[48] In the light of various provisions of the Act and the rules made under it, the full bench disposed of the petition with the direction that all the state governments and the union territories should fully implement the Act and take appropriate action for non-implementation as well as violation of the provisions contained in the 2013 Act. The court felt that no further monitoring was required by it. It was also clarified that in future, persons aggrieved may approach the authorities concerned at the first instance and thereafter the high court having jurisdiction. This case indicates that nothing moves at the

---

that any restriction which directly and immediately hampered trade was violative of the freedom given under art. 301. The former decision virtually overruled the latter but the court did not say so; it rather stated that the former was supplementing the latter.

48 *Safai Karanchari Andolan* v. *Union of India*, 2014 (4) SCALE 165.

executive level and the authorities are not bothered about the directions of the court. The matter kept pending for over a decade before the apex court of the country raising a burning issue pertaining to human rights of the poor, with what results!

Some important issues pertaining to education and educational institutions that have been coming up before the apex court for the last several years relate to reservations, admissions and medium of instructions in the educational institutions. These issues were raised in the context of private aided and unaided minority and non-minority educational institutions. Two cases were decided by the same judge on the same day on behalf of the same Constitution Bench of the Supreme Court. One case related to reservation of seats for the students belonging to scheduled castes (SCs), scheduled tribes (STs) and other backward classes (OBCs) in private unaided educational institutions as provided under clause (5) of article 15 read with article 21-A of the Constitution of India.[49] The other case related to the power of the state to prescribe the medium of instruction, and right of the students to make a choice of the language, for the school education.[50] Another case decided by 2:1 majority during the year was *Christian Medical College* v. *Union of India*,[51] in which the question was whether the national eligibility-cum-entrance test (NEET) conducted by the Medical Council of India and Dental Council of India for admission to medical and dental courses were violative of the fundamental rights guaranteed under articles 19(1)(g), 25, 26 and 30 of the Constitution in so far the minorities and private unaided educational institutions were concerned. This case was decided prior to the decision in *Pramati Educational and Cultural Trust* case, which, as noted above, decided the question of reservations in private unaided educational institutions.

One case reported during 2014 deserves special mention here. This was *Animal Welfare Board of India* v. *A. Nagaraja*,[52] in which the court recognized the rights of animals under the Prevention of Cruelty to Animals Act, 1960 (PCA Act) in the same way as the fundamental rights of the citizens under Part III of the Constitution of India. This case relates to the interplay between the rights of animals under the PCA Act and the fundamental duties of citizens under art. 51-A (g) and (h) towards the animals. Till now, the courts had not been considering the rights of animals as such; the issue was looked at from the point of view of duties of the citizens to protect the animals against pain and suffering and the PCA Act also aimed at the same objective. The issue of animals' right came up before the court in this case on account of certain practices such as *jallikattu* events and bullock cart race held in some of the states using animals for festivals, as a tradition and part of religion or for human pleasure and enjoyment. By a notification dated July

---

49 *Pramati Educational and Cultural Trust* v. *Union of India*, AIR 2014 SC 2114.

50 *State of Karnataka* v. *Associated Management of P & S Schools*, AIR 2014 SC 2094 : (2014) 9 SCC 485.

51 (2014) 2 SCC 305.

52 (2014) 7 SCC 547 : 2014 (6) SCALE 468.

11, 2011 issued under section 22(ii) of the PCA Act, the central government had included "bulls" so as to ban their exhibition or training as performing animals. While taking note of the tremendous pain and suffering of the bulls participating in various events, the Supreme Court upheld the notification issued by the central government and directed that bulls cannot be used as performing animals, either for the *jallikattu* events or bullock cart races in the State of Tamil Nadu, Maharashtra or elsewhere in the country. The court declared that the rights guaranteed to the bulls under sections 3 and 11 of the PCA Act read with article 51-A(g) and (h) of the Constitution could not be taken away or curtailed, except as provided under sections 11(3) and 28 of the PCA Act. The court further declared that the five freedoms of the animals - (i) freedom from hunger, thirst and malnutrition; (ii) freedom from fear and distress; (iii) freedom from physical and thermal discomfort; (iv) freedom from pain, injury and disease; and (v) freedom to express normal patterns of behaviour (called "Brambell's Five Freedoms") - be read into sections 3 and 11 of the PCA Act and be protected and safeguarded by the states, central government, union territories, ministry of environment and forests and animal welfare board of India. The court also held that these five freedoms are considered to be the fundamental principles of animal welfare and they are for animals like the fundamental rights guaranteed to the citizens under Part III of the Constitution of India and the same have to be elevated to the status of fundamental rights so as to secure their honour and dignity. Rights and freedoms guaranteed to the animals under sections 3 and 11 of the PCA Act have to be read along with article 51-A(g) and (h) of the Constitution, which is the magna carta of animal rights, the court held. The court issued detailed directions for the welfare of the animals.

The significant legislations enacted by the Parliament during the year 2014 aimed at protecting the fundamental rights of citizens include the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 and the Whistle Blowers Protection Act, 2011 (Act No.17 of 2014).

II 'STATE' UNDER ARTICLE 12

In *K.K. Saksena* v. *International Commission on Irrigation & Drainage*,[53] a division bench of the apex court held that the respondent registered society International Commission on Irrigation & Drainage (ICID) was not state under article 12 of the Constitution and not answerable to writ jurisdiction of the high court under article 226. In this case, the services of the appellant had been terminated on the ground that the same were not required and he was given three months salary in lieu of notice. The termination was challenged on the ground of arbitrariness and unreasonableness under article 14 as the termination was without holding any inquiry and supplying any reason, particularly because reasons were required to be given for dispensing with inquiry under rule 33(b) of the ICID Employees Conduct Rules, 1967. It was contended that the respondent was 'state' under article 12 of the Constitution. The plea was that ICID was established in

53 2014 (14) SCALE 384.

1950 with a grant given by the central government; there were instances when the government officers had come on deputation under government control and involved in performing public duty; central government has been paying the subscription for administrative and other functions of ICID and, therefore, the financial control rests with the government; the staffing pattern of the ICID was in accord with the government; ICID had monopoly status since it was the only society established by the Government of India to bring together information on irrigation from India and outside; the government provided it irrigation related information generated in the country and uses public cost and also information pulled by it for government irrigation works; and the President or Vice-President in-charge of the central office of the society was a government officer and the officer of the central government was the *ex-officio* secretary general. It was additionally pleaded that in any case writ petition under article 226 of the Constitution was maintainable even if ICID does not qualify to be a 'State' within the purview of article 12 as the term 'other authority' appearing in article 226 was of much wider connotation so as to embrace within it the authorities discharging public functions or public duty of great magnitude which was being done by ICID.

The ICID, on the other hand, contended that it was not state under article 12 and not amenable to writ jurisdiction under article 226 of the Constitution; the management of the society was vested in an international executive council (IEC) consisting of office bearers and one duly appointed representative from each national committee; the office bearers of ICID consisted of president, nine vice-presidents and secretary general and all the office bearers, except the secretary general were elected by majority votes of the members of the council; the representatives of the World Bank, FAO, United National Educational, Scientific and Cultural Organization (UNESCO) and International Irrigation Management Institute had a place in the international executive council of ICID as permanent observers; the representatives of the World Bank, FAO, UNESCO and other related UN agencies participated in the work and various activities of ICID; ICID comprises about 30 staff members working under the general supervision of the council and the president; that Clause 7.3 of the constitution of ICID empowers the secretary general to frame such rules and procedure as he considered necessary for governing the staff and the functioning of the central office in consultation with the staff committee; the following of a staffing pattern by ICID in the line of the central government did not bring the society under the control of the state; ICID was an independently funded organization financed by subscriptions from several countries; and deputation of some officers from the government did not give it the character of a state. It was also contended that the nature of function of ICID did not resemble any public duty which so as to attract the high court's jurisdiction under article 226 as "its objects stimulate and promote the development and the application of the arts, sciences and techniques of engineering, agriculture, economics, ecology and social sciences in managing water and land resources for irrigation, drainage, flood control and river training and for research in a more comprehensive manner adopting upto date techniques and its activities cannot be stated to be intrinsically public in nature or closely related to those performable by the State in its sovereign capacity." The high court, after considering various

provisions of the constitution of ICID and the bye-laws made by ICID and in the light of the principles laid down in various cases by the Supreme Court,[54] dismissed the writ petition under article 226 holding that the respondent was not 'State'. The high court had extensively examined the bye-laws of ICID and held that it was not 'State' under article 12 observing that:[55]

> On a comprehensive survey of the Constitution of ICID and the bye-laws, we do not perceive that there is either any control of the government either financially, functionally or administratively or it is dominated by any action of the government. We do not even remotely see that there is any kind of pervasive control. Some officers may be coming on deputation regard being had to the character of the ICID or there may be initially a grant of Rs.15,000/- in 1950 or some aid at times but that does not clothe it with the character and status of 'other authority' as understood under Article 12 of the Constitution of India. Hence, we conclude and hold that ICID is not an instrumentality of state or other authority under Article 12 of the Constitution of India.

---

54 *Ramana Dayaram Shetty* v. *International Airport Authority of India* (1979) 3 SCC 489. In this case, the court had laid down the following six principles to decide whether an organisation was state under art. 12: "(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government; (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character; (3) It may also be a relevant factor...whether the corporation enjoys monopoly status which is State conferred or State protected; (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality; (5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government; (6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government." These principles were applied in *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology* (2002) 5 SCC 111, in which the court held: "40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi*, be considered to be a State within the meaning of Article 12. The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State." These cases were relied upon in *M/s. Zee Telefilms Ltd.* v. *Union of India* (2005) 4 SCC 649.

55 2014 (14) SCALE 384 at 392.

Before the Supreme Court, the appellant's counsel did not question the above part of the high court's decision. The issue raised on behalf of the appellant before the Supreme Court was that even without being considered 'State' under article 12 of the Constitution, the high court still exercises its jurisdiction under article 226 by looking into the nature of functions of ICID by considering it as "authority" as envisaged under article 226. If ICID was discharging any public duty as an "authority", article 226 could still be invoked as was held in *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani*.[56] The question really was whether there was any difference between the term "other authorities" used under article 12 and the term "authority" used under article 226 of the Constitution?[57] The Supreme Court proceeded on the premise that there was no pervasive governmental control over the functioning of ICID and held that merely because some government officers came on deputation, the same had no consequence. For the purpose of deciding whether the ICID was performing any public function/duty, the court took note of the mission and scope of the activities of ICID.[58]

---

56 (1989) 2 SCC 691.

57 Art. 12 reads: "In this part,… "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." and art. 226(1) reads: "(1) … every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

58 These were: "*Mission*

2.1 The Mission of the International Commission on Irrigation and Drainage is to stimulate and promote the development of the arts, sciences and techniques of engineering, agriculture, economics, ecology and social science in managing water and land resources for irrigation, drainage, flood control and river training applications, including research and development and capacity building, adopting comprehensive approaches and up-to-date techniques for sustainable agriculture in the world.

Scope

2.2 The Commission in achieving its mission may consider the following objectives:

"(a) Planning, financing, socio-economic and environmental aspects of irrigation, drainage, flood control and undertakings for the reclamation and improvement of lands as well as the design, construction and operation of appurtenant engineering works including dams, reservoirs, canals, drains and other related infrastructure for storage, conveyance, distribution, collection and disposal of water.

(b) Planning, financing, socio-economic and environmental aspects of schemes for river training and behaviour, flood control and protection against sea water intrusion of agricultural lands as well as the design, construction and

The mission and scope indicated that ICID was "established as a scientific, technical, professional and voluntary non-governmental international organization dedicated to enhance the worldwide supply of food and fibre for all people by improving water and land management of the productivity of irrigated and drained lands so that the appropriate management of water, environment and the application of irrigation, drainage and flood control techniques." These functions were not "similar to or closely related to those performed by the State in its sovereign capacity", the high court had held. Agreeing with the high court, the apex court held:[59]

> If the authority/body can be treated as a 'State' within the meaning of Article 12 of the Constitution of India, indubitably writ petition under Article 226 would be maintainable against such an authority/ body for enforcement of fundamental and other rights. Article 12 appears in Part III of the Constitution, which pertains to 'Fundamental Rights'. Therefore, the definition contained in Article 12 is for the purpose of application of the provisions contained in Part III. Article 226 of the Constitution, which deals with powers of High Courts to issue certain writs, *inter alia*, stipulates that every High Court has the power to issue directions, orders or writs to any person or authority, including, in appropriate cases, any Government, for the enforcement of any of the rights conferred by Part III and for any other purpose.

---

operation of appurtenant works, except such matters as relate to the design and construction of large dams, navigation works and basic hydrology.

(c) Research and development, training and capacity building in areas related to basic and applied science, technology, management, design, operation and maintenance of irrigation, drainage, flood control, river training improvement and land reclamation.

(d) Facilitation of international inputs required by the developing countries, particularly the low income countries lagging in the development of irrigation and drainage.

(e) Promotion of the development and systematic management of sustained irrigation and drainage systems.

(f) Pooling of international knowledge on the topics related to irrigation, drainage and flood control and making it available worldwide.

(f) Addressing of international problems and challenges posed by irrigation, drainage and flood control works and promoting evolution of suitable remedial measures.

(h) Promoting savings in use of water for agriculture.

(i) Promoting equity including gender equity between users and beneficiaries of irrigation, drainage and flood control systems.

(j) Promotion of preservation and improvement of soil and water quality of irrigated lands."

59 2014 (14) SCALE 384 at 397.

> In this context, when we scan through the provisions of article 12 of the Constitution, as per the definition contained therein, the 'State' includes the Government and Parliament of India and the Government and Legislature of each State as well as "all local or other authorities within the territory of India or under the control of the Government of India". It is in this context the question as to which body would qualify as 'other authority' has come up for consideration before this court ever since, and the test/principles which are to be applied for ascertaining as to whether a particular body can be treated as 'other authority' or not have already been noted above. If such an authority violates the fundamental right or other legal rights of any person or citizen (as the case may be), writ petition can be filed under article 226 of the Constitution invoking the extraordinary jurisdiction of the high court and seeking appropriate direction, order or writ. However, under article 226 of the Constitution, the power of the high court is not limited to the Government or authority which qualifies to be a 'State' under article 12. Power is extended to issue directions, orders or writs "to any person or authority". Again, this power of issuing directions, orders or writs is not limited to enforcement of fundamental rights conferred by part III, but also 'for any other purpose'. Thus, power of the high court takes within its sweep more "authorities" than stipulated in article 12 and the subject matter which can be dealt with under this article is also wider in scope.
>
> In this context, the first question which arises is as to what meaning is to be assigned to the expression 'any person or authority'. By catena of judgments rendered by this court, it now stands well grounded that the term 'authority' used in article 226 has to receive wider meaning than the same very term used in article 12 of the Constitution. This was so held in *Shri Anadi Mukta Sadguru*.[60] In that case, dispute arose between the trust which was managing and running science college and teachers of the said college. It pertained to payment of certain employment related benefits like basic pay *etc*. Matter was referred to the Chancellor of the Gujarat University for his decision. The Chancellor passed an award, which was accepted by the University as well as the State Government and a direction was issued to all affiliated colleges to pay their teachers in terms of the said award. However, the aforesaid trust running the science college did not implement the award. Teachers filed the writ petition seeking *mandamus* and direction to the trust to pay them their dues of salary, allowances, provident fund and gratuity

60 (1989) 2 SCC 691. In this context, the court quoted paras. 14, 16 and 19 of that judgment.

in accordance therewith. It is in this context an issue arose as to whether writ petition under article 226 of the Constitution was maintainable against the said trust which was admittedly not a statutory body or authority under article 12 of the Constitution as it was a private trust running an educational institution. The high court held that the writ petition was maintainable and said view was upheld by this court in the aforesaid judgment.

In paragraph 14, the court spelled out two exceptions to the writ of mandamus, *viz*. (i) if the rights are purely of a private character, no *mandamus* can issue; and (ii) if the management of the college is purely a private body "with no public duty", *mandamus* will not lie. The Court clarified that since the Trust in the said case was an aiding institution, because of this reason, it discharges public function, like Government institution, by way of imparting education to students, more particularly when rules and regulations of the affiliating University are applicable to such an institution, being an aided institution**.** In such a situation, held the Court, the service conditions of academic staff were not purely of a private character as the staff had super-aided protection by University's decision creating a legal right and duty relationship between the staff and the management. Further, the court explained in paragraph 19 that the term 'authority' used in article 226, in the context, would receive a liberal meaning unlike the term in article 12, inasmuch as article 12 was relevant only for the purpose of enforcement of fundamental rights under article 31, whereas article 226 confers power on the high courts to issue writs not only for enforcement of fundamental rights but also non-fundamental rights. What is relevant is the dicta of the Court that the term 'authority' appearing in article 226 of the Constitution would cover any other person or body performing public duty. The guiding factor, therefore, is the nature of duty imposed on such a body, namely, public duty to make it exigible to article 226.

Somewhat more pointed and lucid discussion can be found in the case of *Federal Bank Ltd.* v. *Sagar Thomas*,[61] inasmuch as in that case the court culled out the categories of body/ persons who would be amenable to writ jurisdiction of the high court. This can be found in paragraph 18 of the said judgment, specifying eight categories, as follows:

> 18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the

61 (2003) 10 SCC 733.

> State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.

After analyzing the above cases, the court held:

> What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is a 'State' within the meaning of article 12 of the Constitution, admittedly a writ petition under article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights…. (T)hat is the basic principle of judicial review of an action under the administrative law. Reason is obvious. Private law is that part of a legal system which is a part of Common Law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is 'State' under article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law.
>
> On the other hand, even if a person or authority does not come within the sweep of Article 12 of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, as noted in *Federal Bank Ltd*, such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under liability to discharge any function under any statute, to compel it to perform such a statutory function.

The court held that ICID was neither funded by the government nor discharging any function under any statute. Agreeing with the views of the high court, the apex court held that ICID was not discharging any public duty or positive obligation which was of a public nature. The court observed:[62]

> Though much mileage was sought to be drawn from the function incorporated in the MOA of ICID, namely, to encourage progress in design, construction, maintenance and operation of large and small

62 2014 (14) SCALE 384 at 403.

irrigation works and canals etc. that by itself would not make it a public duty cast on ICID. We cannot lose sight of the fact that ICID is a private body which has no State funding. Further, no liability under any statute is cast upon ICID to discharge the aforesaid function. The high court is right in its observation that even when object of ICID is to promote the development and application of certain aspects, the same are voluntarily undertaken and there is no obligation to discharge certain activities which are statutory or of public character.

There is yet another very significant aspect which needs to be highlighted at this juncture. Even if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review, as already pointed out above. Only those decisions which have public element therein can be judicially reviewed under writ jurisdiction.

Even in *Anadi Mukta Sadguru*, which took a revolutionary turn and departure from the earlier views, this court held that 'any other authority' mentioned in article 226 is not confined to statutory authorities or instrumentalities of the State defined under article 12 of the Constitution, it also emphasized that if the rights are purely of a private character, no *mandamus* could issue.

It is trite that contract of personal service cannot be enforced. There are three exceptions to this rule, namely: (i) when the employee is a public servant working under the Union of India or State; (ii) when such an employee is employed by an authority/ body which is a State within the meaning of article 12 of the Constitution of India; and (ii) when such an employee is 'workmen' within the meaning of section 2(s) of the Industrial Disputes Act, 1947 and raises a dispute regarding his termination by invoking the machinery under the said Act. In the first two cases, the employment ceases to have private law character and 'status' to such an employment is attached. In the third category of cases, it is the Industrial Disputes Act which confers jurisdiction on the labour court/industrial tribunal to grant reinstatement in case termination is found to be illegal.

In the present case, though we have held that ICID is not discharging any public duty, even otherwise, it is clear that the impugned action does not involve public law element and no 'public law rights' have accrued in favour of the appellant which are infringed. The service conditions of the appellant are not governed in the same manner as was the position in *Anadi Mukta Sadguru.*

III 'LAW' UNDER ARTICLE 13

Under article 13(1) of the Constitution of India, "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void." In *Naz Foundation* v. *Govt. (NCT of Delhi)*,[63] a division bench of the High Court of Delhi had declared section 377, Indian Penal Code, 1860 (IPC), a pre-Constitution provision of law, as unconstitutional by observing as follows:-

> 132. We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the reopening of criminal cases involving Section 377 IPC that have already attained finality."

While hearing appeal against the above decision, G.S. Singhvi, J relied upon *Ram Krishna Dalmia* v. *S.R. Tendolkar*[64] to express the view that there

---

63 (2009) 111 DRJ 1. Section 377, IPC reads thus:

"77. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

64 AIR 1958 SC 538 in which the court had laid down the following principles to decide the constitutional validity of a legislation:-

"11. (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(*c*) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(*d*) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

is always a presumption of constitutional validity of a legislation. The learned judge held:[65]

> A plain reading of these Articles suggests that the High Courts and this Court are empowered to declare as void any pre-constitutional law to the extent of its inconsistency with the Constitution and any law enacted post the enactment of the Constitution to the extent that it takes away or abridges the rights conferred by Part III of the Constitution. In fact a constitutional duty has been cast upon this Court to test the laws of the land on the touchstone of the Constitution and provide appropriate remedy if and when called upon to do so. Seen in this light the power of judicial review over legislations is plenary. However, keeping in mind the importance of separation of powers and out of a sense of deference to the value of democracy that parliamentary Acts embody, self-restraint has been exercised by the judiciary when dealing with challenges to the constitutionality of laws. This form of restraint has manifested itself in the principle of presumption of constitutionality.
>
> Every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution. There is nothing to suggest that this principle would not apply to pre-constitutional laws which have been adopted by Parliament and used with or without amendment. If no amendment is made to a particular law it may represent a decision that the legislature has taken to leave the law as it is and this decision is no different from a decision to amend and change the law or enact a new law. In light of this, both pre- and post-constitutional laws are manifestations of the will of the people of India through Parliament and are presumed to be constitutional.

(*e*) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(*f*) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

65 *Suresh Kumar Koushal* v. *Naz Foundation*, AIR 2014 SC 563 : (2014) 1 SCC 1 at 47.

The above principle applies equally to pre-Constitution laws also as observed in *John Vallamattom* v. *Union of India*:[66]

> *18.* It is neither in doubt nor in dispute that clause (1) of Article 13 of the Constitution of India in no uncertain terms states that all laws in force in the territory of India immediately before the commencement of the Constitution, insofar as they are inconsistent with the provisions of Part III there, shall, to the extent of such inconsistency, be void. Keeping in view the fact that the Act is a pre-Constitution enactment, the question as regards its constitutionality will, therefore, have to be judged as being law in force at the commencement of the Constitution of India.[67] By reason of clause (1) of Article 13 of the Constitution of India, in the event, it be held that the provision is unconstitutional, the same having regard to the prospective nature would be void only with effect from the commencement of the Constitution. Article 372 of the Constitution of India perforce does not make a pre-Constitution statutory provision constitutional. It merely makes a provision for the applicability and enforceability of pre-Constitution laws subject of course to the provisions of the Constitution and until they are altered, repealed or amended by a competent legislature or other competent authorities.
>
> *28.* The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretive changes of the statute effected by passage of time.
>
> *33.* It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26-1-1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation.

---

66 (2003) 6 SCC 611 at 621, 623, 624. Likewise, in *Anuj Garg* v. *Hotel Assn. of India* (2008) 3 SCC 1 at 8, while dealing with the constitutionality of section 30 of the Punjab Excise Act, 1914, it was observed: "7. The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also in international arena, such a law can also be declared invalid."

67 See *Keshavan Madhava Menon* v. *State of Bombay,* AIR 1951 SC 128.

The learned judge further held that article 13 of the Constitution recognizes the principle of severability and also the practice of reading down a statute as both arise out of the principle of presumption of constitutionality of a legislation since a pre-Constitution legislation has been declared void under clause (1) of article 13 only "to the extent" of inconsistency with Part III.[68] The learned judge further held:[69]

> Another significant canon of determination of constitutionality is that the courts would be reluctant to declare a law invalid or ultra vires on account of unconstitutionality. The courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the courts.

---

68 For this view, the court relied upon *R.M.D. Chamarbaugwalla* v. *Union of India*, AIR 1957 SC 628, in which the court laid down the following principles: "(*1*) In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid.

(*2*) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable.

(*3*) Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.

(*4*) Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

(*5*) The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

(*6*) If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation.

(*7*) In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the Preamble to it."

69 *Suresh Kumar Koushal* v. *Naz Foundation*, AIR 2014 SC 563 at 595. For this view the court relied upon *Namit Sharma* v. *Union of India* (2013) 1 SCC 745; *D.S. Nakara* v. *Union of India* (1983) 1 SCC 305; *CST* v. *Radhakrishan* (1979) 2 SCC 249; *Minerva Mills Ltd.* v. *Union of India* (1980) 3 SCC 625 and *DTC* v. *Mazdoor Congress*, AIR 1991 SC 101.

> The courts would preferably put into service the principle of "reading down" or "reading into" the provision to make it effective, workable and ensure the attainment of the object of the Act.

After analyzing a number of cases, Singhvi J, while upholding the provision of section 377, IPC as constitutionally valid under article 13(1), propounded the following principles to judge the validity of a legislation under article 13:[70]

> (i) The High Courts and Supreme Court of India are empowered to declare as void any law, whether enacted prior to the enactment of the Constitution or after. Such power can be exercised to the extent of inconsistency with the Constitution/ contravention of Part III.
>
> (ii) There is a presumption of constitutionality in favour of all laws, including pre-constitutional laws as Parliament, in its capacity as the representative of the People, is deemed to act for the benefit of the People in light of their needs and the constraints of the Constitution.
>
> (iii) The doctrine of severability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the legislature and should be avoided where the two portions are inextricably mixed with one another.
>
> (iv) The court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable.
>
> Applying the aforestated principles to the case in hand, we deem it proper to observe that while the High Court and this Court are empowered to review the constitutionality of Section 377 IPC and strike it down to the extent of its inconsistency with the Constitution, self-restraint must be exercised and the analysis must be guided by the presumption of constitutionality. After the adoption of the Penal Code in 1950 (*sic* 1860), around 30 amendments have been made to the statute, the most recent being in 2013 which specifically deals with sexual offences, a category to which Section 377 IPC belongs. The 172nd Law Commission Report specifically recommended deletion of that section and the issue has repeatedly come up for

---

70 *Suresh Kumar Koushal* v. *Naz Foundation,* AIR 2014 SC 563 at 597.

> debate. However, the legislature has chosen not to amend the law or revisit it. This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision. Such a conclusion is further strengthened by the fact that despite the decision of the Union of India not to challenge in appeal the order of the Delhi High Court, Parliament has not made any amendment in the law. While this does not make the law immune from constitutional challenge, it must nonetheless guide our understanding of its character, scope, ambit and import.

IV RIGHT TO EQUALITY

Discrimination – reasonable classification test

In order to decide whether a classification is valid under article 14 of the Constitution of India, it must fulfil two conditions: (i) it must be founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) the differentia must have a rational nexus to the object sought to be achieved by the Act. In *Subramanian Swamy* v. *CBI*,[71] the constitutional validity if section 6-A(1) of the Delhi Special Police Establishment Act, 1946 (the DSPE Act), inserted *w.e.f.* September12,2003 was challenged on the ground of violation of article 14 of the Constitution as it required obtaining the previous approval of the central government for conduct of any inquiry or investigation for any offence allegedly committed under the Prevention of Corruption Act, 1988 (PC Act) where allegations related to officers of the level of joint secretary and above and some other officers. R.M. Lodha, CJ, while considering the process of classification and what should be regarded as a class for purposes of legislation, observed:[72]

> The Constitution permits the State to determine, by the process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is bound to be some degree of inequality when there is segregation of one class from the other. However, such segregation must be rational and not artificial or evasive. In other words, the classification must not only be based on some qualities or characteristics, which are to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. Differentia which is the basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial.

---

71 AIR 2014 SC 2140 : (2014) 8 SCC 682.

72 *Id.* at 725 & 730 (of SCC).

> Undoubtedly, every differentiation is not a discrimination but at the same time, differentiation must be founded on pertinent and real differences as distinguished from irrelevant and artificial ones. A simple physical grouping which separates one category from the other without any rational basis is not a sound or intelligible differentia. The separation or segregation must have a systematic relation and rational basis and the object of such segregation must not be discriminatory. Every public servant against whom there is reasonable suspicion of commission of crime or there are allegations of an offence under the PC Act, 1988 has to be treated equally and similarly under the law. Any distinction made between them on the basis of their status or position in service for the purposes of inquiry/ investigation is nothing but an artificial one and offends article 14.

In view of the above discussion, the constitution bench of the court held section 6-A(1), which required "approval of the Central Government to conduct any inquiry or investigation into any offence alleged to have been committed under the PC Act, 1988 where such allegation relates to: (a) the employees of the Central Government of the level of Joint Secretary and above, and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Government", to be invalid and violative of article 14 of the Constitution along with the provision of section 26(c) of the Central Vigilance Commission Act, 2003 by which section 6-A(1) had been inserted under the DSPE Act. Contrary to this, in *Manzoor Ali Khan* v. *Union of India*,[73] the apex court held that the requirement of previous sanction for prosecution prescribed under section 19 of the Prevention of Corruption Act, 1988 was not unconstitutional under article 14 of the Constitution but it emphasized that the competent authority must take a decision on the issue expeditiously.

In *P. Ramakrishnan Raju* v. *Union of India*,[74] the question was whether the high court judges appointed from the bar under article 217(2)(b) of the Constitution of India were entitled for an addition of 10 years to their service for the purposes of pension on retirement. The question in fact raised the issue of discrimination *vis-à-vis* judges elevated from state judicial service who get full pension even after working just for 2-3 years as a judge of the high court after adding their entire service which results in the members of the subordinate judiciary getting more pension than judges elevated from the bar. The full bench of the apex court held that there should be no discrimination with regard to fixation of pension of retired high court judges based on the source of their appointment; they must be paid the same pension as they are paid the same salary. "If the service of a judicial officer is counted for fixation of pension, there is no valid reason as to why the experience at Bar cannot be treated as equivalent for the same purpose, the court ruled. P. Sathasivam, CJ further observed:[75]

---

73 AIR 2014 SC 3194.

74 AIR 2014 SC 1619 : 2014 (4) SCALE 329.

75 *Id.* at 1625 (of AIR).

> When persons holding constitutional office retire from service, making a discrimination in the fixation of their pensions depending upon the source from which they were appointed is in breach of Articles 14 and 16(1) of the Constitution. One rank one pension must be the norm in respect of a constitutional office.
>
> When a civil servant retires from service, the family pension is fixed at a higher rate whereas in the case of Judges of the High Court, it is fixed at a lower rate. No discrimination can be made in the matter of payment of family pension. The expenditure for pension to the High Court Judges is charged on the Consolidated Fund of India under Article 112(3)(d)(iii) of the Constitution.
>
> (W)e accept the petitioners' claim and declare that for pensionary benefits, ten years' practice as an advocate be added as a qualifying service for Judges elevated from the Bar. Further, in order to remove arbitrariness in the matter of pension of the Judges of the High Courts elevated from the Bar, the reliefs, as mentioned above are to be reckoned from 1-4-2004, the date on which Section 13-A was inserted by the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Act, 2005. Requisite amendment be carried out in the High Court Judges Rules, 1956 with regard to post-retiral benefits as has been done in relation to the retired Judges of the Supreme Court in terms of amendment carried out by Rule 3-B of the Supreme Court Judges Rules, 1959.

In *Vishal Goyal* v. *State of Karnataka*,[76] the court considered the question of constitutional validity of "institutional preference" in making admissions in postgraduate medical dental courses in government medical and dental colleges as well as against state quota in private medical and dental colleges in the state of Karnataka. The petitioners had been admitted into the MBBS/BDS courses in different government or private medical and dental colleges in the state of Karnataka after being selected through common entrance tests conducted by CBSE or by the authorities of the state government or by the association of private medical and dental colleges in the state of Karnataka and wanted admission into postgraduate medical or dental courses in the year 2014 after completing their MBBS/BDS courses. The national board of examinations had issued two information bulletins for postgraduate entrance test, 2014 (PGET-2014) for admissions to the state quota seats in Karnataka government colleges and institutions and Karnataka government quota seats in private colleges/institutions/deemed universities. Sub-clause (*a*) of clause 2.1 of the information bulletins required that to be eligible to appear for the entrance test, a candidate must be of "Karnataka origin". The explanation under sub-clause (*a*) of clause 2.1 gave the meaning of "A candidate of Karnataka origin".

---

76 (2014) 11 SCC 456.

The petitioners, not of Karnataka origin, were debarred from appearing in the entrance tests for admission to MD/MS/Medical postgraduate diploma courses, 2014 or to MDS/Dental postgraduate diploma courses, 2014 in the state of Karnataka despite their having studied MBBS/BDS in institutions in the state of Karnataka. They challenged sub-clause (a) of cause 2.1 of the two information bulletins, as ultra vires article 14 of the Constitution as interpreted in *Pradeep Jain* v. *Union of India*[77] in which the court had held that excellence could not be "compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and will affect the right to equality of opportunity under Article 14 of the Constitution." Likewise, in *Saurabh Chaudri*,[78] the apex court had also held that decision of the state to give institutional preference can be invalidated by the court if the decision of the state was *ultra vires* the right to equality under article 14 of the Constitution. The court, therefore, held invalid sub-clause (a) of clause 2.1 of the two information bulletins, by virtue of which "A candidate of Karnataka origin" only was eligible to appear for entrance test excluding a candidate who had studied MBBS or BDS in an institution in the state of Karnataka but who did not satisfy the other requirements of sub-clause (*a*) of clause 2.1 of the information bulletin for PGET-2014. Thus, the institutional preference sought to be given by sub-clause (a) of clause 2.1 of the information bulletin for PGET-2014 was clearly contrary to the judgment in *Pradeep Jain* case and, therefore, quashed by the court on the ground of violation of article 14 of the Constitution of India.

In Nirbhaya rape and murder case,[79] one of the accused was below 18 years of age covered under the Juvenile Justice Act, 2000 (JJ Act) by which a separate mechanism was established for juveniles for investigation, trial and punishment. In this case, a young lady was brutally assaulted on December16, 2012 by five persons including one minor and the lady had subsequently succumbed to her injuries. The question in *Subramanian Swamy* v. *Raju*[80] was whether treating all minors at par, irrespective of the nature of crime committed by them, was in consonance with article 14 of the Constitution. The apex court drew a distinction between juvenile justice system and criminal justice system. While the former was aimed at reforming the juvenile, the latter intended to punish the offender; while the former was child friendly, the latter was adversarial.[81] The court found the provision of the JJ Act quite clear leaving no scope for any ambiguity or uncertainty and, therefore, it held that all persons below 18 years of age were put in one category to provide a separate scheme of investigation, trial and punishment

---

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

78 *Saurabh Chaudri* v. *Union of India* (2003) 11 SCC 146.

79 In this case, a young lady was brutally assaulted on 16.12.2012 by five persons including one minor and the lady subsequently succumbed to her injuries.

80 AIR 2014 SC 1649 : (2014) 8 SCC 390.

81 *Id*. at 1666-67 (of AIR).

for all kinds of offences committed by them. All of them formed a class by themselves. The court, repelling the argument of violation of article 14, further held:[82]

> Classification or categorisation need not be the outcome of a mathematical or arithmetical precision in the similarities of the persons included in a class and there may be differences amongst the members included within a particular class. So long as the broad features of the categorisation are identifiable and distinguishable and the categorisation made is reasonably connected with the object targeted, article 14 will not forbid such a course of action. If the inclusion of all under-18 into a class called "juveniles" is understood in the above manner, differences inter se and within the under-18 category may exist. Article 14 will, however, tolerate the said position. Precision and arithmetical accuracy will not exist in any categorisation. But such precision and accuracy is not what article 14 contemplates.
>
> If the provisions of the Act clearly indicate the legislative intent in the light of the country's international commitments and the same is in conformity with the constitutional requirements, it is not necessary for the Court to understand the legislation in any other manner. In fact, if the Act is plainly read and understood, which we must do, the resultant effect thereof is wholly consistent with Article 14. The Act, therefore, need not be read down, as suggested, to save it from the vice of unconstitutionality for such unconstitutionality does not exist.

Many cases were reported during year in which the Supreme Court did not find any discrimination or arbitrariness in legislative provisions or state actions. Thus, in *Suresh Kumar Koushal* v. *Naz Foundation*,[83] the respondent had challenged the constitutional validity of section 377, IPC, which criminalises consensual sexual acts of adults in private under a contract. A division bench of the High Court of Delhi had allowed the writ petition filed by Naz Foundation and declared section 377, IPC unconstitutional.[84] While setting aside the order of the High Court of Delhi and repelling the contention of the respondents regarding discrimination based on sex, G.S. Singhvi J, observed:[85]

> Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category

---

82 *Id.* at 1669.

83 AIR 2014 SC 563.

84 *Naz Foundation* v. *Govt. (NCT of Delhi)* (2009) 111 DRJ 1.

85 AIR 2014 SC 563 at 608-09.

> cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribes punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution.

Likewise, in *S. Seshachalam* v. *Chairman, Bar Council of Tamil Nadu*,[86] the issue was whether proviso to section 16, *explanation* II (5) of the Tamil Nadu Advocates' Welfare Fund Act, 1987 (T.N. Act) denying the payment of two lakh rupees to the kin of advocates receiving pension or gratuity or other terminal benefits was violative of article 14 of the Constitution and whether distinguishing this class of advocates from other law graduates enrolling in the bar straight after their law degree had any rational basis. The challenge to section 1(3) of the Bihar State Advocates' Welfare Fund Act 1983 (Bihar Act) was on similar ground since that provision excluded the persons who have retired from service and are in receipt of retiral benefits from their employers from the purview of the Bihar Act. The high courts of Madras and Patna in both cases had upheld the constitutional validity of the impugned legislations. In both cases, the petitioners were enrolled as advocates after their retirement from the service of the government or other organisations from which they were in receipt of pension or had received other retrial lump sum benefits such as gratuity, *etc*. The appellants contended that the denial of lump sum benefit based by classifying advocates was violative of article 14 of the Constitution as the differentiation between persons who enrolled as advocates after demitting office from the govt. service/organization and who enrolled as advocates and set up practice straight from the law college, was discriminatory as no such distinction had been made while defining the term '*advocate*' under section 2(a) of the T.N. Act. Similar arguments were made regarding Bihar Act also.

R. Banumathi, J, relying on the observations made in *Subramanian Swamy* v. *CBI*,[87] rightly held that the differentia which is the basis of the classification and the object of the Act were two distinct things. What is necessary is that there must be nexus between the basis of classification and the object of the Act. It is only when there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory, the judge held. Relying on the

---

86 2014 (14) SCALE 79; also see *E.S.I.C. Medical Officer's* v. *E.S.I.C.*, AIR 2014 SC 1259, in which the court held that payment of deputation allowance only to those doctors who were taken from other organizations and not to those employed directly was not discriminatory; *ABP Pvt. Ltd*. v. *Union of India*, AIR 2014 SC 1228 – non-inclusion of electronic media under the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 as amended by 1974 amending Act was not discriminatory.

87 (2014) 8 SCC 682.

leading decisions,[88] the judge did not find any infirmity in the impugned judgments and, while dismissing the appeals, observed:[89]

> The profession of law is a noble calling. The legal fraternity toils day and night to be successful in the profession. Although it is true that slowly working one's way up is the norm in any profession, including law, but initially young advocates have to remain in the queue for a prolonged period of time and struggle through greater hardships. Despite being extremely talented, a number of young lawyers hardly get proper opportunity or exposure in their profession. New entrants to the profession in the initial stages of the profession suffer with the meagre stipend which young lawyers may receive during their initial years, coupled with the absence of a legislation concerning this, they struggle to manage their food, lodging, transportation and other needs. Despite their valiant efforts, they are unable to march ahead in their profession. It is only after years of hard work and slogging that some of the fortunate lawyers are able to make a name for themselves and achieve success in the profession. For the majority of the legal fraternity, everyday is a challenge. Despite the difficult times, the lawyer who sets up practice straight after enrolment, struggles to settle down himself in the profession. Some of the lawyers remain struggling throughout their lives yet choose to remain in the profession. It is something like *"riding a bicycle uphill with the wind against one"*.
>
> Contrariwise, the retired employees like the appellants who are law graduates did not withstand the difficult times in the profession. They opted for some other lucrative job during their prime time of their life and lived a secured life. Others found some job and positioned themselves in a comfortable place of employment, chose to join evening college or attended part time classes and obtained law degree and having retired with comfortable retiral benefits, further securing their future, they enrol themselves as an advocate to practice. The retired employees have the substantial retiral benefits, gratuity apart from receiving pension. The availability of lump sum retrial benefits with pension makes a retired employee better placed than their counter part lawyers who struggle through difficult times.
>
> The various welfare fund schemes are in actuality intended for the benefit of those who are in the greatest need of them. The lawyers,

---

88 *In re Special Courts Bill*, 1978 (1979) 1 SCC 380; *National Council for Teacher Education* v. *Shri Shyam Shiksha Prashikshan Sansthan* (2011) 3 SCC 238; *Subramanian Swamy* v. *CBI* (2014) 8 SCC 682.

89 2014 (14) SCALE 79 at 81.

straight after their enrolment, who join the legal profession with high hopes and expectations and dedicate their whole lives to the professions are the real deservers. Lawyers who enrol themselves after their retirement from government services and continue to receive pension and other terminal benefits, who basically join this field in search of greener pastures in the evening of their lives cannot and should not be equated with those who have devoted their whole lives to the profession. For these retired persons, some amount of financial stability is ensured in view of the pension and terminal benefits and making them eligible for lump sum welfare fund under the Act would actually amount to double benefits. Therefore, in our considered view, the classification of lawyers into these two categories is a reasonable classification having a nexus with the object of the Act.

Furthermore, it is also to be noted that in view of their being placed differently than the class of lawyers who chose this profession as the sole means of their livelihood, it can reasonably be discerned that the retired persons form a separate class. As noticed earlier, the *object of the Act is to provide for the constitution of a Welfare Fund for the benefit of advocates on cessation of practice.* As per section 3(2)(d) any grant made by the Government to the welfare fund is one of the source of the Advocates' Welfare Fund. The retired employees are already in receipt of pension from the Government or other employer and to make them get another retiral benefit from the Advocates' Welfare Fund would amount to double benefit and they are rightly excluded from the benefit of the lump sum amount of welfare fund.

Section 28 of the Central legislation - Advocates' Welfare Fund Act 2001 provides that no senior advocate or a person in receipt of pension from the Central Government or State Government shall be entitled to ex-gratia grant under sections 19, 21 and 24 of the said Act. Thus, the Central Act as well as the State Act does make a distinction amongst the advocates on the premise that a group of advocates receive certain financial assistance from the State Government or the Central Government or some other employer in the form of terminal benefits and pension etc. Corresponding Acts of various States namely Kerala Advocates Welfare Fund Act (section 15), Orissa Advocates Welfare Fund Act (section 15) and Rajasthan Advocates Welfare Fund Act (section 16) contain similar provisions making differentiation between advocates who enrolled themselves as advocates after demitting their office and the other class of advocates who enrolled as advocates straight from the law college and set up the practice. We are unable to agree with the learned counsel that the distinction amongst the two class of advocates is unreasonable or irrational.

Recovery of excess salary

The question whether excess amount of salary paid to a government employee can be recovered when there was no fault, negligence, misrepresentation or fraud on the part of the employee had been considered in the past in several cases. While considering appeals in *Shyam Babu Verma* v. *Union of India*[90] and *Sahib Ram* v. *State of Haryana*,[91] the Supreme Court had held that the petitioners were not entitled to the higher pay scales but the excess amount had been paid to them for no fault of theirs and, therefore, the excess amount paid to them shall not be recovered by the employer. This was done by exercising power under article 142 of the Constitution for doing "complete justice" in the cases. But the court did not exercise its power under this provision in *Chandi Prasad Uniyal* v. *State of Uttarakhand*[92] in which it directed recovery of the excess payment of salary. It is worthwhile to mention that in *Syed Abdul Qadir* v. *State of Bihar*,[93] the recovery of excess payment of salary made to the employees due to wrong interpretation of the relevant service rules by the employer was refused by the court even without exercising power under article 142. In *Col. B.J. Akkara* v. *Govt. of India*,[94] the employer was restrained from recovering excess payment:[95]

> (N)ot because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.

---

90 (1994) 2 SCC 521.

91 1995 Supp (1) SCC 18.

92 (2012) 8 SCC 417. The court referred to the above two cases but did not find any exceptional situation as pointed out in *Syed Abdul Qadir* v. *State of Bihar* (2009) 3 SCC 475 and in *Col. B.J. Akkara* v. *Govt. of India* (2006) 11 SCCC 709 and held that the excess payment made due to wrong/irregular pay fixation can always be recovered.

93 (2009) 3 SCC 475.

94 (2006) 11 SCCC 709.

95 *Id.* at 728.

The above decisions clearly show that the court's approach is not consistent on the issue. Unfortunately, the judges have adopted their individualistic approach from which no clear principles are discernible. In this background, once again, the apex was faced with a large number of appeals in *State of Punjab* v. *Rafiq Masih* (*White Washer*).[96] In this case, the respondents were given monetary benefits in excess of their entitlements on account of employers' unintentional mistake in determining the emoluments. The mistakes occurred because of various reasons: the grant of a status to which the concerned employee was not entitled; payment of salary in a higher scale than in consonance of the right of the concerned employee; wrongful fixation of salary of the employee; having been granted allowances for which the concerned employee was not authorized, *etc*. But the employees were not guilty of furnishing any incorrect information, misrepresentation or fraud. After analyzing a large number of cases, Jagdish Singh Khehar J admitted that it was not possible to postulate all situations of hardship for not ordering recovery of excess payments but the learned judge laid down the following situations wherein recoveries by the employers, would be impermissible in law:[97]

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

V STATE LARGESSE

The distribution of state largesse such as contract is subject to the same rigors of article 14 as other state actions. The court, however, in exercise of its power of judicial review considers only the legality of the decision making process

---

96 2014 (14) SCALE 300. These appeals were placed before the division bench as a result of refusal of the three-judge bench to hear a reference from a division bench in *State of Punjab* v. *Rafiq Masih* (2014) 8 SCC 883.

97 *Id*. at 313.

and not the soundness of the decision which is a policy matter.[98] This rule was applied by the Supreme Court in *Manohar Lal Sharma* v. *Principal Secy*.[99] In this case, the controversy related to the legality of allocation of coal blocks between 1993 and 2010 made by the Central Government. The allegations were: non-compliance with mandatory legal procedure under the Mines and Minerals (Development and Regulation) Act, 1957; breach of section 3(3)(a)(iii) of the Coal Mines (Nationalisation) Act, 1973; violation of the principle of trusteeship of natural resources by gifting away precious resources as largesse; arbitrariness, lack of transparency, lack of objectivity and non-application of mind; and allotment was tainted with mala fides and corruption and made in favour of ineligible companies. The petitioners prayed for quashing the entire allocation of coal blocks made to private companies by the Central Government between 1993 and 2010 and a court-monitored investigation by the central bureau of investigation (CBI) and enforcement directorate (ED) or by a special investigation team (SIT) into the entire allocation of coal blocks by the central government in favour of private companies made during the above period. The court, while holding that the entire allocation was illegal, observed:[100]

> (T)he entire allocation of coal block as per recommendations made by the Screening Committee from 14-7-1993 in 36 meetings and the allocation through the Government Dispensation Route suffers from the vice of arbitrariness and legal flaws. The Screening Committee has never been consistent; it has not been transparent; there is no proper application of mind; it has acted on no material in many cases; relevant factors have seldom been its guiding factors; there was no transparency and guidelines have seldom guided it. On many occasions, guidelines have been honoured more in their breach. There was no objective criteria, nay, no criteria for evaluation of comparative merits. The approach had been ad hoc and casual. There was no fair and transparent procedure, all resulting in unfair distribution of the national wealth. Common good and public interest have, thus, suffered heavily. Hence, the allocation of coal blocks based on the recommendations made in all the 36 meetings of the Screening Committee is illegal.
>
> The allocation of coal blocks through Government Dispensation Route, however laudable the object may be, also is illegal since it is

---

98 *M/s. Siemens Aktingeselischaft & S. Ltd*. v. *DMRC Ltd*., AIR 2014 SC 1483; also see *Maa Binda Express Carrier* v. *Northeast Frontier Railway*, AIR 2014 SC 390; *Jai Bhagwan Goel Dal Mill* v. *Delhi State Industrial & Infrastructure Devpt. Corpn.*, AIR 2014 SC 3764; *Gorkha Security Services* v. *Govt. of NCT of Delhi*, AIR 2014 SC 3371 (blacklisting); *M/s. Kulja Industries Ltd*. v. *Chief Gen. Manager*, AIR 2014 SC 9 (blacklisting).

99 (2014) 9 SCC 516.

100 *Id.* at 612.

> impermissible as per the scheme of the CMN Act. No State Government or public sector undertakings of the State Governments are eligible for mining coal for commercial use. Since allocation of coal is permissible only to those categories under Sections 3(3) and (4), the joint venture arrangement with ineligible firms is also impermissible. Equally, there is also no question of any consortium/ leader/association in allocation. Only an undertaking satisfying the eligibility criteria referred to in Section 3(3) of the CMN Act viz. which has a unit engaged in the production of iron and steel and generation of power, washing of coal obtained from mine or production of cement, is entitled to the allocation in addition to the Central Government, a Central Government company or a Central Government corporation.

The court, however, did not decide as to the consequence of illegal allocations. This question was decided in *Manohar Lal Sharma* v. *Principal Secy.*[101] The allocations were held to be illegal and arbitrary; the allottees had not yet entered into any mining lease and commenced production and all allotments were cancelled by the court except the allotment of four coal blocks, *i.e.* Moher and Moher Amroli Extension allocated to Sasan Power Ltd. (UMPP) and Tasra [allotted to Steel Authority of India Ltd. (SAIL), a Central Government public sector undertaking not having any joint venture] and the allocation of Pakri Barwadih coal block [allotted to National Thermal Power Corporation (NTPC), being a central government public sector undertaking not having any joint venture]. The court also held that the allottees of the coal blocks other than those covered by the judgment and the four coal blocks covered by this order must pay an amount of Rs. 295 per metric tonne of coal extracted as an additional levy. This compensatory amount was based on the assessment made by CAG. The compensatory payment on this basis was directed to be made within a period of three months and in any case on or before December 31, 2014. The coal extracted hereafter till March 31, 2015 also attracted the additional levy of Rs. 295 per metric tonne.

Can the state cancel a tender after accepting the bid? This question was raised in *Rishi Kiran Logistics Pvt. Ltd.* v. *Board of Trustees of Kandla Port Trust*,[102] In this case, Kandla Port trust invited tenders to lease out land for erecting liquid storage tanks. The letter of intent was issued to the successful bidders clearly stipulating that formal letter of allotment would be issued after Coastal Regulatory Zone (CRZ) clearance. The CRZ clearance was given after five years but during that period the price of property had jumped manifold. It was decided to cancel the tender process for the purpose of fetching realistic price. The court did not find the cancellation to be arbitrary or unreasonable.

---

101 (2014) 9 SCC 614.

102 AIR 2014 SC 3358 : 2014 (6) SCALE 4.

VI RESERVATIONS IN ADMISSIONS AND APPOINTMENTS

Reservation for Jats

The ghost of reservation continued to haunt during the current year also. As stated in one of the earlier surveys,[103] the issue of reservation has been picked up as hot-cake by all the political parties, particularly on the eve of elections. On the eve of general elections to Lok Sabha in April-May, 2014, the central government extended reservation in educational institutions and jobs to Jats under the other backward classes (OBC) category in nine states despite the fact that the national commission for backward castes had recommended against including Jats in OBC reservation and went by the report of the Indian council for social sciences research that found Jats eligible for OBC reservation. The notification was issued on March 4, 2014, a day before the model code of conduct came into force. The reservation was challenged before the Supreme Court by one Ram Singh and the OBC Reservation Raksha Samiti alleging that the same was aimed at garnering votes in the Lok Sabha elections. A full bench consisting of P. Sathasivam CJ, and Ranjan Gogoi and N.V. Ramana, JJ, without expressing any opinion, rejected the interim prayer for stay while at the same time directed that "any action taken pursuant to the impugned notification will be subject to the outcome of the writ petitions." The court later on quashed the reservations made for Jats.[104]

Reservation for Marathas

The order passed by High Court of Bombay is just to the contrary. In the State of Maharashtra, the elections to the legislative assembly were due in October, 2014 and the then ruling combine INC-NCP took a decision to give reservations to Marathas and Muslims. On 9th July, 2014, the Governor of the state promulgated two Ordinances providing for reservation of seats for admissions in aided and unaided educational institutions in the state and reservation of appointments/posts in public services under the state thus: (i) separate 16% reservation for the educationally and socially backward category (ESBC) in which the Maratha community was included (Maharashtra Ordinance No. XIII of 2014) and (ii) separate 5% reservation for a newly created special backward category – A (SBC – A) consisting of 50 sub-castes amongst Muslim community specified in the schedule to the Ordinance, other than the categories of Muslims to whom reservation had already been given under other categories of backward classes and other backward classes, (Maharashtra Ordinance No. XIV of 2014). The creamy layer was excluded under both the Ordinances. Significantly, 16% and 5% reservation provided under the above two Ordinances were over and above 52% of the existing reservations provided by the Maharashtra State Public Services (Reservation for

---

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

104 *Ram Singh* v. *Union of India*, W.P. (C) No. 274/2014, Order dt. 09.04.2014. It may be pointed out that the final arguments before a division bench were completed on 17.12.2014 and the judgment was delivered on 17.03.2015: 2015 (3) SCALE 570.

Scheduled Castes / Scheduled Tribes / Denotified Tribes (Vimukta Jatis) /Nomadic Tribes / Special Backward Category / Other Backward Classes) Act, 2001. The state government vide resolution dated 15th July, 2014 specified Maratha community as the only community under educationally and socially backward category for 16% reservations under Ordinance No. XIII of 2014.

The constitutional validity of both the Ordinances was challenged in *Sanjeet Shukla* v. *State of Maharashtra*.[105] The main questions raised against the Ordinances were: (1) whether the Ordinances were unconstitutional; (2) whether the total reservation can exceed 50% and if so, under what circumstances; (3) whether any prima facie case had been made out for determination of backwardness of Marathas and whether a prima facie case had been made out for increasing the reservation from the existing 52% to 68% both in educational institutions and public employment as provided under Ordinance No. XIII of 2014; and (4) whether any *prima facie* case had been made out for determination of special backwardness in specified Muslim communities and whether any *prima facie* case had been made out for increase in percentage of reservations in educational institutions from the existing 52% to 57% as provided under Ordinance No. XIV of 2014 in favour of specified communities of Muslims. The division bench issued rule in each petition and passed the following *interim* order:

> (1) *Re: Maharashtra Ordinance XIII of 2014*:
>
> (a) The operation and implementation of the impugned Maharashtra Ordinance XIII of 2014 dated 9 July 2014 and Government Resolution dated 15 July 2014 providing for 16 percent reservations in favour of Marathas is hereby stayed, pending hearing and final disposal of these petitions.
>
> (b) However, in case, any admissions have already been granted in educational institutions till today, based on the above impugned Ordinance XIII of 2014 and the above Government Resolution, the same are not disturbed and those students will be allowed to complete their respective courses.
>
> (2) *RE : MAHARASHTRA ORDINANCE XIV OF 2014* :
>
> (a) There shall be no stay on the implementation +of Maharashtra Ordinance XIV of 2014 dated 9 July 2014 and Government Resolution dated 19 July 2014, in so far as the Ordinance and Resolution provide for 5 per cent separate reservation of seats in State owned or aided educational institutions for the newly created Special Backward Category A comprising 50 subcastes from amongst the Muslim community during the lifetime of the impugned

105 WP (L) No. 2053/2014, Order dt. 14.11.2014.

Ordinance XIV of 2014 dated 9 July 2014, pending the hearing and final disposal of these petitions;

(b) However, in view of the law laid down by Bhandari, J. in the Supreme Court decision in *Ashoka Kumar Thakur's* case,[106] there shall be a stay on implementation of Maharashtra Ordinance XIV of 2014 dated 9 July 2014 and Government Resolution dated 19 July 2014 providing for 5 per cent separate reservation of seats in private unaided educational institutions for the newly created Special Backward Category A comprising 50 subcastes from amongst the Muslim community, pending the hearing and final disposal of these petitions;

(c) In view of the law laid down by two Constitution Benches of the Supreme Court in M. Nagaraj case[107] and Rohtas Bhankhar's case,[108] there shall also be a stay on the implementation of Maharashtra Ordinance XIV of 2014 dated 9 July 2014 and Government Resolution dated 19 July 2014 in so far as they provide for 5% separate reservations for appointments / posts in public services for the Special Backward Category – A comprising 50 sub castes from amongst the Muslim Community, pending the hearing and final disposal of these petitions.

The Supreme Court, on appeal, refused to stay the order of the division bench.[109]

Reservation for transgenders

As if the present reservation system was not enough to create a wide gap between different castes and religions, the Supreme Court came out with yet another category of beneficiaries of reservation, *i.e*. transgender community. In *National Legal Services Authority* v. *Union of India*,[110] the court was concerned with the

---

106 (2008) 6 SCC 1.

107 (2006) 8 SCC 212.

108 2014 (8) SCC 872.

109 In *State of Maharashtra* v. *Sanjeet Shukla*, Special Leave Petition (C) No.34335/ 2014, full bench of the Supreme Court on December 18,2014, while refusing to stay the interim order passed by the High Court of Bombay, passed the following Order:

"What is questioned in these special leave petitions is only an interim order passed by the High Court. Therefore, we decline to entertain these special leave petitions.

The special leave petitions are dismissed accordingly.

However, we request the High Court to dispose of the writ petition before them as expeditiously as possible.

The learned Judges shall not be influenced by any one of the observations made while granting interim order when they pass the final order."

110 AIR 2014 SC 1863 : (2014) 5 SCC 438.

grievances of the members of Transgender Community (TGs) who sought a "legal declaration of their gender identity than the one assigned to them, male or female, at the time of birth" with a prayer that non-recognition of their gender identity violated articles 14 and 21 of the Constitution of India. Hijras/eunuchs, who also fell in that group, claimed legal status as a third gender with all legal and constitutional protection. K.S. Radhakrishnan J noted the plight of TGs in India who were denied even the basic human rights. Pointing out the scope of fundamental rights guaranteed under articles 14, 15 and 16 of the Constitution, the learned judge accepted the rights of TGs to be treated equally and observed:[111]

> Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word "person" and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression "person" and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.
>
> Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed. The Constitution-makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders. Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" under articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression "sex" used in articles 15 and 16 is not just limited to biological sex of male or female, but intended

111 *Id.* at 1890-91 (of AIR).

> to include people who consider themselves to be neither male nor female.
>
> TGs have been systematically denied the rights under article 15(2), that is, not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights under article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services.
>
> Articles 15(2) to (4) and Article 16(4) read with the directive principles of State policy and various international instruments to which India is a party, call for social equality, which TGs could realise, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

Likewise, K.S. Radhakrishnan J also held that TGs were also entitled to the right under article 19(1)(a) of the Constitution. He observed:[112]

> Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from (*sic* on) exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognised and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(*a*) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. The self-identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

---

112 *Id.* at 1891-93.

Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(*a*) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognise those rights.

The recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution.

Article 21, as already indicated, protects one's right of self-determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of "personal autonomy" and "self-determination". Hijras/eunuchs, therefore, have to be considered as Third Gender, over and above binary genders under our Constitution and the laws.

Articles 14, 15, 16, 19 and 21 do not exclude hijras/transgenders from their ambit, but the Indian law on the whole recognise the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett Principle of "biological test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "psychological test" instead of "biological test". Binary notion of gender reflects in the Penal Code, 1860 for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NREGA, 2005, etc. Non-recognition of the identity of hijras/transgenders in the various legislations denies them equal protection of law and they face widespread discrimination.

Article 14 has used the expression "person" and Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression

> "person". All these expressions, which are "gender neutral" evidently refer to human beings. Hence, they take within their sweep hijras/ transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self-identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.
>
> We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.

In a separate judgment, Dr. A.K. Sikri J agreed with the above views and held:[113]

> We are of the firm opinion that by recognising such TGs as third gender, they would be able to enjoy their human rights, to which they are largely deprived of for want of this recognition. As mentioned above, the issue of transgender is not merely a social or medical issue but there is a need to adopt human rights approach towards transgenders which may focus on functioning as an interaction between a person and their environment highlighting the role of society and changing the stigma attached to them. TGs face many disadvantages due to various reasons, particularly for gender abnormality which in certain level leads to physical and mental disability. Up till recently they were subjected to cruelty, pity or charity. Fortunately, there is a paradigm shift in thinking from the aforesaid approach to a rights-based approach. Though, this may be the thinking of human rights activist, the society has not kept pace with this shift. There appears to be limited public knowledge and understanding of same-sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex. As a result of this approach, such persons are socially excluded from the mainstream of the society and they are denied equal access to those fundamental rights and freedoms that the other people enjoy freely.
>
> Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is

---

113 *Id.* at 1902-03.

> only with this recognition that many rights attached to the sexual recognition as "third gender" would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's licence, the right to education, employment, health and so on.

After recognizing various rights of the TGs, the court passed the following order:[114]

(1) Hijras, eunuchs, apart from binary genders, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

(2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

(3) We direct the Centre and the State Governments to take steps to treat them as Socially and Educationally Backward Classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

(4) The Centre and State Governments are directed to operate separate HIV serosurveillance centres since hijras/transgenders face several sexual health issues.

(5) The Centre and State Governments should seriously address the problems being faced by hijras/transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

(6) The Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

(7) The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

(8) The Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

(9) The Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

---

114 *Id.* at 1906.

Compulsory admission of students in primary schools

Two new provisions relating to education were inserted to the Constitution of India by amendments: the Constitution (Eighty-sixth Amendment) Act, 2002, inserted article 21-A while the Constitution (Ninety-third Amendment) Act, 2005, inserted clause (5) to article 15.[115] Article 21-A provides that the "State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine." To implement clause (5) of article 15, the Parliament enacted the Central Educational Institutions (Reservation in Admission) Act, 2006 (Act 5 of 2007) by which seats in central educational institutions (including private aided educational institutions but excluding private unaided educational institutions) were reserved thus: 7.5% for STs 15% for SCs, and 27% for OBCs. In *Ashoka Kumar Thakur* v. *Union of India*,[116] the Supreme Court had held the provisions of clause (5) constitutionally valid with certain riders in so far as the private aided educational institutions were concerned. Four judges of the Constitution Bench did not express any opinion regarding private unaided educational institutions since no such institutions had approached the court:[117] Dalveer Bhandari J, however, pronounced clause (5) of article 15 to be invalid in so far as private unaided educational institutions were concerned on the ground

---

115 Clause (5) of art. 15 provides: "Nothing in this article or in sub-clause (*g*) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30."

116 (2008) 6 SCC 1.

117 *Id.* at 717. The final decision of the court is contained in the following paragraph:

668. The Constitution (Ninety-third Amendment) Act, 2005, is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is not considered and left open to be decided in an appropriate case. Bhandari, J. in his opinion, has, however, considered the issue and has held that the Constitution (Ninety-third Amendment) Act, 2005 is not constitutionally valid so far as private unaided educational institutions are concerned.

669. Act 5 of 2007 is constitutionally valid subject to the definition of "Other Backward Classes" in Section 2(*g*) of Act 5 of 2007 being clarified as follows: If the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the "creamy layer" among such caste.

670. Quantum of reservation of 27% of seats to Other Backward Classes in the educational institutions provided in the Act is not illegal.

671. Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation but majority of the Judges are of the view that the review should be made as to the need for continuance of reservation at the end of 5 years.

that it violated the freedom to carry on any occupation guaranteed under art. 19(1)(g) of the Constitution.

The Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 by virtue of article 21-A requiring all the educational institutions to provide free education to socially and educationally backward classes, scheduled caste and scheduled tribe students to the extent of 25% of the total seats. In *Society for Unaided Private Schools of Rajasthan* v. *Union of India*,[118] S.H. Kapadia, CJ, while upholding the constitutional validity of the above Act, observed on behalf of the majority:

> (W)e hold that the Right of Children to Free and Compulsory Education Act, 2009 is constitutionally valid and shall apply to the following:
>
> (i) a school established, owned or controlled by the appropriate Government or a local authority;
>
> (ii) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;
>
> (iii) a school belonging to specified category; and
>
> (iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.
>
> However, the said 2009 Act, and in particular Sections 12(1)(*c*) and 18(3) infringes the fundamental freedom guaranteed to *unaided minority schools* under Article 30(1) and, consequently, applying the *R.M.D. Chamarbaugwalla* v. *Union of India*[119] principle of severability, the said 2009 Act shall not apply to such schools.

In *Pramati Educational & Cultural Trust* v. *Union of India*,[120] a constitution bench of the apex court was called upon to decide, on a reference, two substantial questions of law: (i) Whether by inserting clause (5) in article 15 of the Constitution by the Constitution (Ninety-third Amendment) Act, 2005, Parliament had altered the basic structure of the Constitution; and (ii) Whether by inserting article 21-A to the Constitution by the Constitution (Eighty-sixth Amendment) Act, 2002, Parliament had altered the basic structure of the Constitution. The object of clause (5) of article 15 is to enable the state to give equal opportunity to socially and educationally backward classes of citizens or to the scheduled castes and the scheduled tribes to study in all educational institutions other than minority

---

118 (2012) 6 SCC 1 at 43.

119 AIR 1957 SC 628.

120 (2014) 8 SCC 1.

educational institutions referred to in clause (1) of article 30 of the Constitution. Patnaik J, pointed out that the aim of clause (1) and (2) of article 15, as originally introduced, was that every citizen irrespective of his religion, race, caste, sex, place of birth or any of them, was given equal treatment by the state but this aim was not achieved and some classes of citizens such as scheduled castes and scheduled tribes remained socially and educationally backward and no access to educational institutions was provided for their advancement. He then pointed out the aim of the clause thus:[121]

> To amplify the provisions of Article 15 of the Constitution as originally adopted and to provide equal opportunity in educational institutions, clause (5) has been inserted in Article 15 by the constitutional amendment made by Parliament by the Ninety-Third Amendment Act, 2005. As the object of clause (5) of Article 15 of the Constitution is to provide equal opportunity to a large number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to study in educational institutions and equality of opportunity is also the object of clauses (1) and (2) of Article 15 of the Constitution, is we cannot hold that clause (5) of Article 15 of the Constitution is an exception or a proviso overriding Article 15 of the Constitution, but an enabling provision to make equality of opportunity promised in the Preamble in the Constitution a reality.

Does clause (5) of article 15 of the Constitution violate article 14 of the Constitution as it excludes from its purview the minority institutions referred to in clause (1) of article 30 of the Constitution and does that clause violate of article 14 as it excludes both unaided and aided minority institutions alike? The court pointed out that the right of aided minority institutions that established the institutions under article 30(1) would not be affected by admission of students belong to non-minority community as held in *T.M.A. Pai Foundation*.[122] Patnaik J held:[123]

> Thus, the law as laid down by this Court is that the minority character of an aided or unaided minority institution cannot be annihilated by admission of students from communities other than the minority community which has established the institution, and whether such admission to any particular percentage of seats will destroy the minority character of the institution or not will depend on a large number of factors including the type of institution.

---

121 (2014) 8 SCC 1 at 251. For this view, the court derived help from *State of Kerala* v. *N.M. Thomas* (1976) 2 SCC 310, *Indira Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 and *Ashoka Kumar Thakur* v. *Union of India* (2008) 6 SCC 1.

122 *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481.

123 (2014) 8 SCC 1 at 259.

> Clause (5) of Article 15 of the Constitution enables the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Such admissions of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes who may belong to communities other than the minority community which has established the institution, may affect the right of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution. In other words, the minority character of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution, whether aided or unaided, may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes and it is for this reason that minority institutions, aided or unaided, are kept outside the enabling power of the State under clause (5) of Article 15 with a view to protect the minority institutions from a law made by the majority. As has been held by the Constitution Bench of this Court in *Ashoka Kumar Thakur* v. *Union of India*, the minority educational institutions, by themselves, are a separate class and their rights are protected under Article 30 of the Constitution, and, therefore, the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution.

Does clause (5) of article 15 violate article 21 right and adversely affect the duty imposed under article 51-A(j) which provides for striving towards excellence in all spheres of individual and collective activity which would not be possible if private educational institutions in which a person studies for the purpose of achieving excellence are made to admit students from amongst backward classes of citizens and from the scheduled castes and the scheduled tribes? Rejecting the contention, the court held:[124]

> Educational institutions in India such as Kendriya Vidyalayas, Indian Institute of Technology, All India Institute of Medical Sciences and Government Medical Colleges admit students in seats reserved for backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes and yet these government institutions have produced excellent students who have grown up to be good administrators, academicians, scientists, engineers, doctors and the like. Moreover, the contention that excellence will be compromised by admission from amongst the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes in private educational institutions is contrary to the Preamble of the Constitution which

---

124 *Ibid.*

> promises to secure to all citizens "fraternity assuring the dignity of the individual and the unity and integrity of the nation". The goals of fraternity, unity and integrity of the nation cannot be achieved unless the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the mainstream of the nation. We, therefore, find no merit in the submission of Mr Nariman that clause (5) of Article 15 of the Constitution violates the right under Article 21 of the Constitution.
>
> We accordingly hold that none of the rights under articles 14, 19(1)(g) and 21 of the Constitution have been abrogated by clause (5) of Article 15 of the Constitution and the view taken by Bhandari, J. in *Ashoka Kumar Thakur* v. *Union of India* that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(g), a basic feature of the Constitution is not correct. Instead, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution is valid.

Patnaik J, while pointing out that the majority view in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[125] that the Right of Children to Free and Compulsory Education Act, 2009 was applicable to "an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority" was incorrect, observed:[126]

> In our considered opinion, therefore, by the Constitution (Eighty-sixth Amendment) Act, a new power was made available to the State under Article 21-A of the Constitution to make a law determining the manner in which it will provide free and compulsory education to the children of the age of six to fourteen years as this goal contemplated in the directive principles in Article 45 before this constitutional amendment could not be achieved for fifty years. This additional power vested by the Constitution (Eighty-sixth Amendment) Act, 2002 in the State is independent and different from the power of the State under clause (6) of Article 19 of the Constitution and has affected the voluntariness of the right under Article 19(1)(*g*) of the Constitution. By exercising this additional power, the State can by law impose admissions on private unaided schools and so long as the law made by the State in exercise of this power under Article 21-A of the Constitution is for the purpose of providing free and compulsory education to the children of the age

125 (2012) 6 SCC 102.

126 (2014) 8 SCC 1 at 267-270.

> of 6 to 14 years and so long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(*g*) of the Constitution.
>
> When we examine the 2009 Act, we find that under Section 12(1)(*c*) read with Section 2(*n*)(*iv*) of the Act, an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority is required to admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. We further find that under Section 12(2) of the 2009 Act such a school shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed. Thus, ultimately it is the State which is funding the expenses of free and compulsory education of the children belonging to weaker sections and several groups in the neighbourhood, which are admitted to a private unaided school. These provisions of the 2009 Act, in our view, are for the purpose of providing free and compulsory education to children between the age group of 6 to 14 years and are consistent with the right under Article 19(1)(*g*) of the Constitution, as interpreted by this Court in *T.M.A. Pai Foundation* and are meant to achieve the constitutional goals of equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in our society. We, therefore, do not find any merit in the submissions made on behalf of the non-minority private schools that Article 21-A of the Constitution and the 2009 Act violate their right under Article 19(1)(g) of the Constitution.

VII FREEDOM OF SPEECH AND EXPRESSION

Restraining publication of defamatory matter

The Parliament had enacted the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 as amended in 1974 with a view to ameliorate the conditions of journalists and other newspaper employees. The validity of the Act and also the notification issued thereunder by the central government accepting the recommendations of Majithia committee for working journalists and other newspaper employees was challenged on the ground that the same violated the freedoms guaranteed under arts. 14, 19(1)(a) and 19(1)(g) of the Constitution of India.[127] The court pointed out the

127 *ABP Pvt. Ltd*. v. *Union of India* AIR 2014 SC 1228 : 2014 (2) SCALE 85.

validity of the original Act of 1955 had been upheld by a constitution bench in *Express Newspaper (P) Ltd.* v. *Union of India*.[128] In view of that decision, P. Sathasivam CJ, upholding the validity of the impugned legislation, observed:[129]

> (T)he Constitution Bench of this Court in the aforesaid case held that the impugned Act, judged by its provisions, was not such a law but was a beneficent legislation intended to regulate the conditions of service of the working journalists and the consequences that were adverted to in that case could not be the direct and inevitable result of it. It also expressed the view that although there could be no doubt that liberty of the press was an essential part of the freedom of speech and expression guaranteed under Article 19(1)(a) and if the law were to single out the press to lay prohibitive burdens, it would fall outside the protection afforded by Article 19(2), the impugned Act which directly affected the press fall outside the categories of protection mentioned in Article 19(2) had not the effect of taking away or abridging the freedom of speech and expression of the petitioners and did not, therefore, infringe Article 19(1)(a) of the Constitution. Nor could it be held to be violative of Article 19(1)(g) of the Constitution in view of the test of reasonableness laid down by this Court.

During the current year, two decisions raising virtually similar controversy, both providing interim directions, of the high court of Delhi stand in contrast with each other with regard to freedom of speech and expression: *Swatanter Kumar* v. *The Indian Express Ltd*.[130] and *Naveen Jindal* v. *Zee Media Corpn. Ltd*.[131] In *Swatanter Kumar*, a retired judge of the Supreme Court filed a civil suit for permanent injunction from publishing, republishing, carrying out any further reports or articles or any other matter telecasts or repeat telecasts or programs, or debates or any discussion or reporting of any kind, directly or indirectly, pertaining to the purported complaint dated 30th November, 2013 and also a decree for damages of Rs. 5 crores or for any higher amount against six defendants, namely, (i) The Indian Express Ltd. through Editor-in-Chief and Publisher, (ii) Mr. Maneesh Chibber, Reporter, The Indian Express Ltd., (iii) Bennett, Coleman and Company Ltd., The Managing Director & The Editor-in-Chief of 'Times Now' (iv) Global Broadcast News (GBN) through Managing Director, Editor-in-Chief of 'CNN-IBN' and Turner International through Managing Director, (v) Ms. Intern and (vi) Union of India. The suit was filed as a consequence to the breach of his fundamental and personal rights due to the alleged defamatory and malicious acts of the defendants. An intern, defendant no.5, now a lawyer, sent an affidavit dt. 30.11.2013 to the Chief Justice of India making certain allegations against the plaintiff. She claimed to have interned under the plaintiff in the Supreme Court of India, but the

128 AIR 1958 SC 578.

129 AIR 2014 SC 1228 at 1237-38.

130 207 (2014) DLT 221.

131 209 (2014) DLT 267.

plaintiff mentioned that defendant no.5 was neither an intern nominated by the Supreme Court nor by the plaintiff himself. On 10.01.2014, a news item written by defendant no. 2 was published in the defendant no.1 newspaper. The said news item pertained to an alleged complaint made by an individual (defendant no. 5) against a retired judge of the Supreme Court, with the headline "Another intern alleges sexual harassment by another SC Judge". The plaintiff contended that no efforts were made to verify the truth of the allegation. The plaintiff stated that the incidents alleged by the intern did not take place and the alleged complaint was baseless, fraudulent and motivated. The same evening, on the show 'The News Hour', the channel of the defendant no. 3 (Times Now) conducted a debate as to whether the name of the judge with regard to the complaint that had been filed by an intern ought to be disclosed or not. The defendant no. 3 also sought to publicize its programme, by publishing and asking the following questions on its page at www.facebook.com as well as on the channel itself, prior to the telecast to the said show: "If a sitting Supreme Court Judge has sexually harassed his intern, should his name be made public?" "If Justice AK Ganguly's name was made public, should the Judge's name be made public in this case as well?" The plaintiff requested defendant no. 2 to refrain from publishing the allegation as it may have serious consequences. However, defendant nos. 1 & 2 published a news item on 11.01.2014 with the headline: "Justice S Kumar... put his right arm around me, kissed me on my left shoulder... I was shocked". The plaintiff gave further details of the events to contend that grave prejudice and irreparable injury will be caused to him if the defendants were not immediately restrained from defamatory material against the plaintiff and that the balance of convenience was in favour of the plaintiff and against the defendants and the plaintiff had a strong prima facie case and there was every likelihood of the suit being decreed in terms of the prayers made therein.

The plaintiff's counsel relied on *Sahara India Real Estate Corporation Limited* v. *Securities and Exchange Board of India*[132] in which the Supreme Court had laid down principles governing the passing of the prior restraint order against the publication in some exceptional cases. He also relied on *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express*,[133] in which the Supreme Court had laid down the test governing the grant of the prohibitory orders against the publication in the context of interference with the administration of justice.

After noting the high status of the plaintiff, a retired judge of the Supreme Court, Manmohan Singh J observed:[134]

> 32. It is correct that freedom of expression in press and media is the part of Article 19(1) of the Constitution of India where by all the citizens have a right to express their view. However, the said right

---

132 AIR 2012 SC 3829 : (2012) 10 SCC 603. See S N Singh, "Constitutional Law-I (Fundamental Rights)", XLVIII *ASIL* 173 at 192-96 (2012).

133 (1988) 4 SCC 592.

134 207 (2014) DLT 221 at 232.

> of the expression is also not absolute but is subjected to the reasonable restrictions imposed by the Parliament or State in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence. The said position is clear from the plain reading of the Article 19(1) and (2) of the Constitution of India.
>
> 33. The Courts have time and again emphasized that the media and press should not be unnecessarily restricted in their speech as the same may amount to curtailment of expression of the ideas and free discussion in the public on the basis of which the democratic country functions. The Courts should thus refrain from making any prior restraints on the publications in order to curtail such freedom.
>
> (T)he right to press and its freedom to express the ideas in public has always been the integral part of healthy democracy and the prior restraint on the publication was considered to be acceptable under the earlier line of authorities. The Courts have always indicated that the fine balance is required to made so that the said liberty of press should not be uncontrolled or regulated by laws including the laws relating to public order, contempt etc and the same is subject to reasonable restrictions as per the Article 19 (2) of the Constitution of India.

Relying on several decisions of the apex court, Manmohan Singh J held:[135]

> 46. From the mere reading of the excerpts from the judgment of Sahara India, it is can be said that the High Court has ample powers under its inherent powers to restraint the publication in media in the event it arrives at the finding that the said publication may result in interference with the administration of justice or would be against the principle of fair trial or open justice. Although the aforenoted observations seem to suggest that the Court can restrain the publication of the news relating to Court proceedings or postpone the same in order obtain the fair trial. The later part of the judgement in Sahara India suggest that the order of the prior restraint is a preventive order and the said order may proceed to restrain any publication which may cause obstruction of the justice which include intrusion in right to have open justice unbiased by any public opinion expressed in publication. Thus, the interference with the course of justice as a term is not merely confined to the restraint order only on the publications relating to pending Court proceedings. But also, any publication which would give excessive adverse publicity to

---

135 *Id.* at 238-240. .

> the accused or alleged victim which may likely to hamper the fair trial in future is also covered within the ambit and sweep of the enquiry of the Court as to what may constitute the interference with the course of the justice.
>
> 47. Thereafter the Supreme Court in Sahara India further proceeded to lay down that the applicant who seeks the interim injunction or postponement of the publication must discharge the onus as to show that the publication would seriously impair his right to open justice.
>
> 49. Upon fair reading of the aforenoted paragraph of the Sahara India, it is clear that it is the question of degree of prejudice and its nexus with fetching the fair justice or open justice which is a potent factor which is required to be examined and tested by the Courts at the time of passing of the injunction restraining or postponing the publication. The line between fairness and unfairness is sometimes blurred but if the same is likely to prejudice the accused and project him as culprit which may cause irreversible damage to a person, the Court can step in and assume jurisdiction for future prevention of such damage so that the administration of the justice is not impaired.

While applying the above principles to the present case, the learned judge observed:[136]

> 53. In the present case, it is an admitted position that the alleged incident is of May, 2011 and that the complaint was filed before Hon'ble Chief Justice of India in November, 2013. The allegations made in the complaint have neither been examined or tested in any Court of law nor have been proved. No civil or criminal case has been filed by defendant No.5 nor any cogent evidence has been produced along with the complaint.
>
> 54. It is also not clear from the material placed on the record, how the TV channels/media have received the copy of the complaint, name of the plaintiff and his photograph and who has provided all such details. These certainly are serious matters which are required to be inquired at the appropriate time in view of the nature of the present case.
>
> 55. It is also true that the freedom of press cannot be extended beyond reporting of facts. The plaintiff admittedly has an illustrious career spending over 43 years and has earned name in bar and bench and has an impeccable reputation and is well-known for his integrity and high moral values. He has a reputation in India as well as outside India. In his career over 23 years as a Judge, the plaintiff has dealt

136 *Id.* at 241-242.

> with many important cases and has always protected and preserved the interests of justice.
>
> 56. Assuming for the sake of example that a false complaint is filed against the retired judge of high judiciary after his death by raising similar nature of allegations after the retirement of about 10 or 20 years. One would fail to understand that after his death who would protect his interest and defend the case in Court of law when he had in his career given landmark judgments and had a great name and reputation in bar and bench. These questions are to be examined by the Court when the fresh cases are considered.

The learned judge asked a very pertinent question which is relevant in all cases of defamatory statements: If the complaint filed by the defendant No. 5 is found to be false after inquiry, then who would ultimately compensate and return the repute and sufferings of the plaintiff and mental torture caused to him and his family members. He found that the plaintiff was able to make out a strong prima facie case on the basis of the disclosure of the material available on record especially copies of the CDs which clearly showed that "the defendants had published the write ups and telecasted by highlighting the allegations on the front page in order to create sensation amongst public and made it apparent by creating the impression that the plaintiff in all probability is involved in such incident. The balance of the convenience is also in favour of the plaintiff as the degree of the prejudice is far more excessive than that of the defendants. The irreparable loss shall ensue to the plaintiff at this stage and not to the defendants if such publications and telecast of TV news of such nature on similar lines are not postponed." The court, therefore, passed the following order:[137]

> 64. Accordingly, the defendants, their agents, assigns or any of them acting on their behalf and/or any other person, entity, in print or electronic media or internet are:
>
> a) Restrained from further publishing the write ups as mentioned in page Nos.6, 7, 10 of the documents file or publishing any article or write up and telecast which highlights the allegations against the plaintiff in the form of headlines connecting or associating plaintiff with those allegations, particularly, without disclosing in the headlines of article that they are mere allegations against the plaintiff or any other similar nature of articles, write up and telecast.
>
> b) The directions made in para (a) restrains the defendants from publication either in print media or in electronic form or in any manner publishing the said news in televised form. The defendants shall delete the offending content as mentioned in para (a) from

137 *Id*. at 244-45.

> internet or other electronic media and shall take necessary steps within 24 hours from today.
>
> c) The defendants are further restrained from publishing the photographs of the plaintiff either in print media or electronic media or Internet or on TV channels which may suggest connection of the plaintiff with the said allegations made by defendant No.5 and remove his photographs from internet or all other electronic media as well as upload defamatory articles.
>
> 65. The said interim directions as mentioned in paras (a) to (c) of postponement of publications shall remain in force till the next of date of hearing which is a temporary measure as per Sahara India and the same are subject to further monitoring by this Court from time to time.

The court's order passed by another judge of the same court (V.K. Shali J) in *Navin Jindal*[138] stands just in contrast. In this case also, the plaintiff, a prominent politician, had approached the court alongwith his wife for grant of pre-telecasting stay against the defendant in a suit for permanent/mandatory injunction and damages. He is the chairman of M/s. Jindal Steel & Power Limited. It has been stated that plaintiff No.1 is a man of myriad talents having a high sense of patriotism, commitment, responsibility, dedication, honesty, integrity, sincerity and passion in doing all his activities. His grievance was that the plaintiff was having a running feud with defendant No.1, M/s. Zee Media Corporation Ltd. which is engaged in the business of broadcasting news and entertainment and owns several channels including Zee News, Zee Business Channel and Zee News UP which are 24x7 news channels having wide broadcasting and viewership all across India as well as abroad. The defendant No.1 also had websites which disseminates news and views on several issues. Other defendants were related to defendant no. 1 in various capacities. The plaintiff alleged that the defendants had been attempting to blackmail plaintiff no.1 with regard to allotment of coal blocks which were under the scrutiny of the CBI. Defendant no.1 and its officers had allegedly demanded a sum of Rs.100 crores from the plaintiffs in the form of advertisement contracts and aired a false news report on the basis of a forged CAG report because of which the plaintiffs laid a trap against them and subsequent thereto, two FIRs under ss. 384/511/120-B, IPC and also under ss. 466/468/469/471 read with section 120-B, IPC. It has been alleged that because of the registration of FIRs, the defendant no.1 and its office bearers, namely, defendant nos. 2 to 4 were having *mala fidie* intentions and unleashed a campaign of vilification on their news channel by making false, vicious and pernicious allegations with a view to defame the plaintiffs. It was alleged that the allegations aired by the defendants in their news programme between 1.3.2014 to 24.3.2014 were *per se* defamatory and they were

138 209 (2014) DLT 267.

repeated 131 times against the plaintiffs which not only affected the sentiments of a particular community and caste but were also done with a view to damage the prospect of the plaintiff in getting elected to the Parliament in the ensuing parliamentary elections. It was alleged that in these telecasts, false allegations were made against plaintiff no.1 that he was a liar, proved corrupt, tainted, engaged in illegal and unethical trade and business practices and did not deserve to be given ticket by the party on whose ticket he was contesting. It was alleged that on account of this malicious propaganda of the defendants against the plaintiff, it was essentially aimed at influencing and impairing the minds, decision making process of a normal prudent person while casting his or her vote in a manner in which he might deem fit.

It was contended that the entire matter being within the public domain, no pre-publication interim order, in the nature of pre-telecasting order, needs to be issued in favour of the plaintiffs on the ground that the same was within the public domain and that being so, the right to freedom of speech and expression would get violated. V.K. Shali J was of the opinion that in *S. Charanjit Singh*,[139] which was based on the view of the apex court in *Kartar Singh*,[140] was a balanced view on account of the fact that a public person or a person holding a public office should not be so 'thin skinned' or should be rather 'thick skinned' so as to complain about the allegations or the averments or the write ups which are taking place against him in the media or are being telecast unless and until they are grossly defamatory *per se*. The learned judge held that the "publications may be inaccurate, not fully or substantially true or may be distorted or may be offending sensibilities of the person against whom such allegations are made or may be to his annoyance but that is not to be the ground to muzzle them altogether." This was more so when elections are being held and all kinds of allegations are made against the candidates. Shali J further held:[141]

> 21. Coming back to the allegations which have been complained about by the plaintiff in the instant case, I do not *prima facie* find that except that there may be incorrect statements or inaccurate statements which are made by the defendants in its televised reporting or which may be not to the liking of the plaintiff or which may be causing annoyance to him are not *per se* defamatory. The best course is to ignore such inaccurate reporting rather than raise an objection because by the latter course, you are giving it more importance which exactly the opposite party wants.
>
> 22. I have gone through each and every part of the allegations or comments allegedly made by the defendants against the plaintiffs

---

139 *S. Charanjit Singh* v. *Shri Arun Purie*, 1983 (4) DRJ 86 : 1983 RLR 48.

140 *Kartar Singh* v. *The State*, AIR 1956 SC 541.

141 209 (2014) DLT 267 at 279-280. The court noted the order of stay passed in *Swatanter Kumar* v. *The Indian Express Ltd*., 207 (2014) DLT 221.

> but that cannot be said to be *per se* defamatory. To list this, I refer to few allegations. The para which referred to the word 'taint' is actually having reference to Rahul Gandhi and not to plaintiff No.1. Similarly, with regard to non-owning of mines in Bhilwara, sufficient documentary evidence has been placed on record along with news reports which shows his business interest in Bhilwara. Therefore, there cannot be a minute dissection of these comments, allegations and reports at this stage except to take a plain view on reading to see as to whether they are defamatory or not. This view of it being defamatory has already been answered by me in negative.
>
> 24. There is another aspect of the matter or in other words, there is another fundamental rule which has to be observed by the court while granting a stay of this nature. Section 38 of the Specific Relief Act clearly lays down that while granting temporary injunction if there is a method of quantifying damages which a person may suffer because of non-grant of such an injunction then injunction ought not to be granted. In other words, as a matter of rule anything which is complained of which can be measured in terms of money and for which money can be adequate compensation by way of a final relief, can never be injuncted. In the instant case, the plaintiff is complaining that he is being defamed while as the defendants are taking the plea of justification which is a valid defence and a fair comment meaning thereby they stand by the allegations made by them against the plaintiff necessarily meaning that this requires adjudication by the court to arrive at a finding whether the allegations levelled by the defendants against the plaintiff are defamatory or not. If they are held to be not defamatory then the suit is liable to be dismissed if the accusations against the plaintiff are held to be defamatory then he is certainly entitled to damages which he can quantify and show to the court.
>
> 25. Therefore, in such a contingency at this stage to restrain the defendants from pre-telecasting of the programme or the news article or the reporting would not only be a gagging right to freedom of press but also gagging of the public to know about a candidate who is sought to be elected by its electorate.

In view of the above, Shali J held that the plaintiffs were unable to satisfy that they had a *prima facie* good case or that balance of convenience was in their favour or that they would suffer an irreparable loss and, therefore, they were not entitled to any blanket pre-telecast order against the defendants. Shali J, however, safeguarded the interest of the plaintiffs by directing: the defendants to obtain the view of plaintiff nos.1 and 2 in case they intended to televise any programme pertaining to plaintiff no.1 or his companies so that the said interview, comment or his side of the story was simultaneously reflected at the end of the said programme.

Hate speech

The Supreme Court in *Pravasi Bhalai Sangatan* v. *Union of India*,[142] refused to issue directions that were judicially unmanageable and unenforceable. In this case, the petitioner had approached the apex court seeking mandamus prohibiting hate/derogatory speeches made by people representatives/political/religious leaders on religion, caste, region and ethnic lines which violated articles 14, 15, 16, 19 and 21 read with articles 38 and 51-A of the Constitution of India. Likewise, in *Jafar Imam Naqvi* v. *Election Commission of India*,[143] the court refused to pass any order restraining hate speeches during elections holding that hate speech could be a matter of adjudication before the appropriate forum and public interest litigation was not maintainable.

Transgenders' right under article 19(1)(a)

The Supreme Court in *National Legal Services Authority* v. *Union of India*[144] held that transgenders (TGs) had the right under article 19(1)(a) like any other citizen. The court observed:

> Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from (*sic* on) exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognised and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(*a*) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. The self-identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

Disclosure of information by a candidate contesting election

The freedom of speech and expression guaranteed to the citizens under article 19(1)(a) of the Constitution includes right to information. In *Union of India* v. *Association for Democratic Reforms* [145] the Supreme had directed the election commission of India to issue necessary orders under article 324 of the Constitution to call for information on affidavit from each candidate seeking election to the Parliament or a state legislature as a necessary part of his nomination paper furnishing therein information relating to his conviction/acquittal/discharge in any

---

142 AIR 2014 SC 1591.

143 AIR 2014 SC 2537 : 2014 (7) SCALE 95.

144 (2014) 5 SCC 438 at 489.

145 (2002) 5 SCC 294. This decision was followed in *People's Union for Civil Liberties (PUCL)* v. *Union of India* (2003) 4 SCC 399.

criminal offence in the past, any case pending against him of any offence punishable with imprisonment for two or more years, information regarding assets (movable, immovable, bank balance etc.) of the candidate as well as of his/her spouse and that of dependants, liability, if any, and the educational qualification of the candidate. This was done to ensure purity and transparency in the election process. Necessary orders were issued and the candidates were required to furnish the relevant information by way of a duly sworn affidavit. Non-furnishing of the affidavit by any candidate or furnishing of any wrong or incomplete information or suppression of any material information was to result in the rejection of the nomination paper, besides prosecution under the Indian Penal Code, 1860. But only such information was to be considered wrong or incomplete or suppression of material information which was of a substantial character by the returning officer.

In *Resurgence India* v. *Election Commission of India*,[146] a petition was filed praying the apex court to declare a nomination paper invalid if any column in the affidavit was left blank. P. Sathasivam CJ held that the power to reject the nomination paper by the returning officer at the instance of candidate filing the affidavit with particulars left blank can be derived from the reasoning of a full bench in *Shaligram Shrivastava* v. *Naresh Singh Patel*.[147] Relying on this decision, Sathasivam CJ summarized the correct legal position as follows:[148]

> What emerges from the above discussion can be summarized in the form of following directions:
>
> (i) The voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament/Assemblies and such right to get information is universally recognized. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution.
>
> (ii) The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.
>
> (iii) Filing of affidavit with blank particulars will render the affidavit nugatory.
>
> (iv) It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit

146 (2014) 14 SCC 189. This case was followed in *Kisan Shankar Kathore* v. *Arun Dattatray* (2014) 14 SCC 162; also see *C.P. John* v. *Babu M. Palissery* (2014) 10 SCC 547.

147 (2003) 2 SCC 176.

148 (2014) 14 SCC 189 at 203.

with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

(v) We clarify to the extent that Para 73 of People's Union for Civil Liberties case not come in the way of the Returning Officer to reject the nomination paper when affidavit is filed with blank particulars.

(vi) The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank.

(vii) Filing of affidavit with blanks will be directly hit by Section 125A(i) of the RP Act However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalized for the same act by prosecuting him/her.

Medium of instruction in schools

Does a child have a fundamental right to study in school through the medium of his mother tongue? This question was answered in *State of Karnataka* v. *Associated Management of English Medium Primary & Secondary Schools.*[149] The Government of Karnataka issued an order in 1994 regarding the language policy to be followed in primary and high schools with effect from the academic year 1994-1995. The order provided that medium of instruction should be mother tongue or Kannada with effect from the academic year 1994-1995 in all government recognised schools in classes I to IV and the students can be permitted to change over to English or any other language as medium of their choice from class V. The order dated 29-4-1994, however, clarified that permission can be granted to only those students whose mother tongue is English, to study in English medium in classes I to IV in the existing recognised English medium schools.[150] A full bench of the High Court of Karnataka allowed writ petitions which challenged the order

149 (2014) 9 SCC 485 : AIR 2014 SC 2094 : 2014 (7) SCALE 53.

150 The relevant clauses of the order read: "2. The medium of instruction should be mother tongue or Kannada, with effect from the academic year 1994-1995 in all government recognised schools in Classes 1 to 4.

3. The students admitted to 1st standard with effect from the academic year 1994-1995, should be taught in mother tongue or Kannada medium.

4. However, permission can be granted to the schools to continue to teach in the pre-existing medium to the students of Standards 2 to 4 during the academic year 1994-1995.

5. The students are permitted to change over to English or any other language as medium at their choice, from 5th standard.

and quashed some of the clauses of the order in their application to schools other than schools run or aided by the government but upheld rest of the order.[151]

---

6. Permission can be granted to only students whose mother tongue is English, to study in English medium in Classes 1 to 4 in existing recognised English medium schools.
7. The Government will consider regularisation of the existing unrecognised schools as per policy indicated in Paras 1 to 6 mentioned above. Request of schools who have complied with the provisions of the code of education and present policy of the Government will be considered on the basis of the report of the Zilla Panchayat routed through Commissioner for Public Instructions.
8. It is directed that all unauthorised schools which do not comply with the above conditions, will be closed down."

151 See *Associated Managements of Primary and Secondary Schools in Karnataka* v. *State of Karnataka*, ILR 2008 KAR 2895. The court held: "(*1*) Right to education is a fundamental right being a species of right to life flowing from Article 21 of the Constitution. By virtue of Article 21-A right to free and compulsory primary education is a fundamental right guaranteed to all children of the age of six to fourteen years. The right to choose a medium of instruction is implicit in the right to education. It is a fundamental right of the parent and the child to choose the medium of instruction even in primary schools.

(*2*) Right to freedom of speech and expression includes the right to choose a medium of instruction.

(*3*) Imparting education is an occupation and, therefore, the right to carry on any occupation under Article 19(1)(*g*) includes the right to establish and administer an educational institution of one's choice. 'One's choice' includes the choice of medium of instruction.

(*4*) Under Article 26 of the Constitution of India every religious denomination has a right to establish and maintain an institution for charitable purposes which includes an educational institution. This is a right available to majority and minority religious denominations.

(*5*) Every section of the society which has a distinct language script or culture of its own has the fundamental right to conserve the same. This is a right which is conferred on both majority and minority, under Article 29(1) of the Constitution.

(*6*) All minorities, religious or linguistic, have a right to establish and administer educational institutions of their choice under Article 30(1) of the Constitution.

(*7*) Thus, every citizen, every religious denomination, and every linguistic and religious minority, have a right to establish, administer and maintain an educational institution of his/its choice under Articles 19(1)(*g*), 26 and 30(1) of the Constitution of India, which includes the right to choose the medium of instruction.

(*8*) No citizen shall be denied admission to an educational institution only on the ground of language as stated in Article 29(2) of the Constitution of India.

(*9*) The government policy in introducing Kannada as the first language to the children whose mother tongue is Kannada is valid. The policy that all children, whose mother tongue is not Kannada, the official language of the State, shall study Kannada language as one of the subjects is also valid. The government policy to have mother tongue or regional language as the medium of instruction at the primary level is valid and legal, in the case of schools run or aided by the State.

(*10*) But, the government policy compelling children studying in other government recognised schools to have primary education only in the mother tongue or the regional language is violative of Articles 19(1)(*g*), 26 and 30(1) of the Constitution of India."

On appeal, a division bench of the apex court passed an order referring the following questions for consideration by the Constitution Bench considering the constitutional importance of these questions:[152]

> *1.* What does mother tongue mean? If it referred to as the language in which the child is comfortable with, then who will decide the same?
>
> *2.* Whether a student or a parent or a citizen has a right to choose a medium of instruction at primary stage?
>
> *3.* Does the imposition of mother tongue in any way affect the fundamental rights under Articles 14, 19, 29 and 30 of the Constitution?
>
> *4.* Whether government recognised schools are inclusive of both government aided schools and private and unaided schools?
>
> *5.* Whether the State can by virtue of Article 350-A of the Constitution compel the linguistic minorities to choose their mother tongue only as medium of instruction in primary schools?"

Question (i): "What does mother tongue mean? If it referred to as the language in which the child is comfortable with, then who will decide the same?" was answered by A.K. Patnaik, J on behalf of the constitution bench as follows:[153]

> Mother tongue in the context of the Constitution would, therefore, mean the language of the linguistic minority in a State and it is the parent or the guardian of the child who will decide what the mother tongue of child is. The Constitution nowhere provides that mother tongue is the language which the child is comfortable with, and while this meaning of "mother tongue" may be a possible meaning of the "expression", this is not the meaning of mother tongue in Article 350-A of the Constitution or in any other provision of the Constitution and hence we cannot either expand the power of the State or restrict a fundamental right by saying that mother tongue is the language which the child is comfortable with.

While answering Question (ii): Whether a student or a parent or a citizen has a right to choose a medium of instruction at primary stage?, Patnaik J observed:[154]

> Therefore, once we come to the conclusion that the freedom of speech and expression will include the right of a child to be educated in the medium of instruction of his choice, the only permissible limits

---

152 *State of Karnataka* v. *Associated Managements of English Medium Primary & Secondary Schools* (2013) 11 SCC 72

153 (2014) 9 SCC 485 at 504.

154 *Id.* at 507-508.

> of this right will be those covered under clause (2) of Article 19 of the Constitution and we cannot exclude such right of a child from the right to freedom of speech and expression only for the reason that the State will have no power to impose reasonable restrictions on this right of the child for purposes other than those mentioned in Article 19(2) of the Constitution.
>
> We may now consider whether the view taken by the High Court in the impugned judgment that the right to choose a medium of instruction is implicit in the right to education under Articles 21 and 21-A of the Constitution is correct.
>
> Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. In *Unni Krishnan, J.P.* v. *State of A.P.*,[155] a Constitution Bench of this Court has held that under Article 21 of the Constitution every child/citizen of this country has a right to free education until he completes the age of 14 years. Article 21-A of the Constitution provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. Under Articles 21 and 21-A of the Constitution, therefore, a child has a fundamental right to claim from the State free education up to the age of 14 years. The language of Article 21-A of the Constitution further makes it clear that such free education which a child can claim from the State will be in a manner as the State may, by law, determine. If, therefore, the State determines by law that in schools where free education is provided under Article 21-A of the Constitution, the medium of instruction would be in the mother tongue or in any language, the child cannot claim as of right under Article 21 or Article 21-A of the Constitution that he has a right to choose the medium of instruction in which the education should be imparted to him by the State. The High Court, in our considered opinion, was not right in coming to the conclusion that the right to choose a medium of instruction is implicit in the right to education under Articles 21 and 21-A of the Constitution.
>
> Our answer to Question (*ii*), therefore, is that a child, and on his behalf his parent or guardian, has the right to choose the medium of instruction at the primary school stage under Article 19(1)(*a*) and not under Article 21 or Article 21-A of the Constitution.

With regard to Question (iii): Does the imposition of mother tongue in any way affect the fundamental rights under Articles 14, 19, 29 and 30 of the Constitution?, Patnaik J held:[156]

---

155 (1993) 1 SCC 645.

156 *Supra* note 153 at 508-09, 513.

We will have to decide whether imposition of mother tongue in any way affects the fundamental rights under Articles 19, 29 and 30 of the Constitution. A reading of clause (1) of Article 29 of the Constitution provides that any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same and clause (1) of Article 30 provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

In *D.A.V. College, Bhatinda* v. *State of Punjab*,[157] the Punjabi University in exercise of its power under section 4(2) of the Punjabi University Act (35 of 1961), made Punjabi the sole medium of instruction and examination in all colleges affiliated under Punjabi University. It was contended inter alia before this Court that prescription of such medium of instruction and examination in a language which is not the mother tongue of the minority which has established the educational institution is violative of the rights conferred under clause (1) of article 29 and clause (1) of article 30 of the Constitution and the Constitution Bench of this Court has upheld this contention in the following words:

> "*9*. The right of the minorities to establish and administer educational institutions of their choice would include the right to have a choice of the medium of instruction also which would be the result of reading Article 30(1) with Article 29(1)."

Thus, a Constitution Bench of this Court in *D.A.V. College, Bhatinda* v. *State of Punjab* has already held that minorities have a right to establish and administer educational institutions of "their choice", and therefore they have the choice of medium of instruction in which education will be imparted in the institutions established and administered by them.

The contention of the learned Advocate General, however, is that the aforesaid decision and other decisions of this Court have been rendered in cases where the State imposed a medium of instruction in a language different from the language of the minority community, but if the State prescribes the medium of instruction to be the mother tongue of the child, which is the language of the minority community, there is no violation of the right of these linguistic minority under Article 30(1) of the Constitution. We do not find any merit in this contention because this Court has also held that the "choice" of the minority community under Article 30(1) need not be limited to imparting education in the language of the minority community.

---

157 (1971) 2 SCC 261.

> We accordingly answer Question (*iii*) referred to us and hold that the imposition of mother tongue affects the fundamental rights under Articles 19, 29 and 30 of the Constitution.

Answering Question (iv): Whether government recognised schools are inclusive of both government-aided schools and private and unaided schools?", Patnaik J observed:[158]

> In *Unni Krishnan, J.P.* v. *State of A.P.*,[159] Jeevan Reddy, J. writing the judgment for himself and for Pandian, J. has held in para 204 at p. 753 that the right to establish an educational institution does not carry with it the right to recognition or the right to affiliation and that recognition and affiliation are essential for meaningful exercise of the right to establish and administer educational institutions. In this judgment, the two Judges of this Court have also held that recognition may be granted either by the Government or by any other authority or body empowered to accord recognition and affiliation may be granted by the academic body empowered to grant affiliation. In this judgment, the two Judges of this Court have further held that it is open to a person to establish an educational institution, admit students, impart education, conduct examination and award certificates but the educational institution has no right to insist that the certificates or degrees awarded by such institution should be recognised by the State and therefore the institution has to seek such recognition or affiliation from the appropriate agency.
>
> In the aforesaid *Unni Krishnan, J.P.* v. *State of A.P.* S. Mohan, J. in his concurring judgment has also observed in para 76 at p. 693 that recognition is for the purpose of conforming to the standards laid down by the State and affiliation is with regard to the syllabi and the courses of study and unless and until they are in accordance with the prescription of the affiliating body, certificates cannot be conferred and hence the educational institution is obliged to follow the syllabi and the course of the study. These views expressed by the three Judges in the Constitution Bench judgment of this Court in *Unni Krishnan, J.P.* v. *State of A.P.* have not been departed from in the majority judgment in *T.M.A. Pai Foundation* v. *State of Karnataka*,[160] Kirpal, C.J. writing the judgment in *T.M.A. Pai Foundation* on behalf of the majority Judges has held that the fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation.

---

158 (2014) 9 SCC 485 at 514.

159 (1993) 1 SCC 645.

160 (2002) 8 SCC 481.

> From the aforesaid discussion of the law as developed by this Court, it is clear that all schools, whether they are established by the Government or whether they are aided by the Government or whether they are not aided by the Government, require recognition to be granted in accordance of the provisions of the appropriate Act or government order. Accordingly, government recognised schools will not only include government aided schools but also unaided schools which have been granted recognition.

While answering Question (v): Whether the State can by virtue of Article 350-A of the Constitution compel the linguistic minorities to choose their mother tongue only as medium of instruction in primary schools?, Patnaik J observed:[161]

> We have extracted Article 350-A of the Constitution above and we have noticed that in this article it is provided that it shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups. We have already held that a linguistic minority under Article 30(1) of the Constitution has the right to choose the medium of instruction in which education will be imparted in the primary stages of the school which it has established. Article 350-A, therefore, cannot be interpreted to empower the State to compel a linguistic minority to choose its mother tongue only as a medium of instruction in a primary school established by it in violation of its fundamental right under Article 30(1). We accordingly hold that the State has no power under Article 350-A of the Constitution to compel the linguistic minorities to choose their mother tongue only as a medium of instruction in primary schools.

VIII FREEDOM TO CARRY ON TRADE AND BUSINESS

Blacklisting

The blacklisting of a citizen has serious civil consequences on his fundamental rights under articles 14 and 19(1)(g) of the Constitution of India and, therefore, the power must be exercised fairly and reasonably after complying with the principles of natural justice. While applying this principle, T.S. Thakur J held:[162]

> That apart the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because

---

161 (2014) 9 SCC 485 at 515.

162 *M/s Kulja Industries Limited* v. *Chief Gen. Manager W.T. Proj. BSNL*, AIR 2014 SC 9; also see *Gorkha Security Services* v. *Govt. of NCT of Delhi*, AIR 2014 SC 3371.

> 'blacklisting' simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ Court. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with *Erusian Equipment & Chemicals Ltd.* v. *State of West Bengal*[163] where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the Authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity.

Education as a profession or business

In the past, education had always been considered as a noble profession but with the passage of time it has now become a lucrative business. Now there is mushrooming of private educational institutions like schools, colleges including technical and professional and universities in the private sector not for excellence in education but to run them as business houses. These institutions are now being rated from the point of view of their assets as in case of industrial houses. There is a mad rush to open as many institutions as possible not only within the country but also abroad. During the current year, three leading cases were reported on education raising issue of violation of fundamental rights under articles 14, 15, 19, 29 and 30 of the Constitution of India.[164] The questions pertaining to fundamental right to

---

163 (1975) 1 SCC 70.

164 These cases in chronological order (date of decision) were: *Pramati Educational & Cultural Trust* v. *Union of India* (2014) 8 SCC 1 (validity of clause (5) of Article 15 of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect from 20-1-2006 and on the validity of Article 21-A of the Constitution inserted by the Constitution (Eighty-sixth Amendment) Act, 2002 with effect from 1-4-2010); *State of Karnataka* v. *Associated Management of English Medium Primary & Secondary Schools* (2014) 9 SCC 485 (whether a citizen had the fundamental right to get instructions in schools in his/her mother tongue); *Christian Medical College, Vellore* v. *Union of India* (2014) 2 SCC 305 (involving the issue of power of medical council of India to conduct national eligibility-cum-

education raised in these cases related to compulsory admission of children in schools, medium of instruction in the schools and holding of common admission test to professional courses, etc. The controversy in all cases centered basically around the law laid down in *T.M.A. Pai Foundation* v. *State of Karnataka*[165] as interpreted and applied in two later decisions, *viz. Islamic Academy of Education* v. *State of Karnataka*[166] and *P.A. Inamdar* v. *State of Maharashtra.*[167] The questions raised in all of them were almost similar to those raised and answered in *T.M.A. Pai Foundation*: "(1) Is there a fundamental right to set up educational institutions and, if so, under which provision? (2) Did *Unni Krishnan* case require reconsideration? (3) In case of private institutions (unaided and aided), can there be government regulations and, if so, to what extent? (4) In order to determine the existence of a religious or linguistic minority in relation to Article 30, what is to be the unit, the State or the country as a whole? (5) To what extent can the rights of aided private minority institutions to administer be regulated?"

In *T.M.A. Pai Foundation* v. *State of Karnataka*,[168] an eleven-judge bench of the Supreme Court had unanimously held that all all citizens have a right to establish and administer educational institutions under articles 19(1)(g) and 26, but this right was subject to the provisions of articles 19(6) and 26(a). In *State of Karnataka* v. *Associated Management of English Medium Primary & Secondary Schools*[169] the apex court considered the question whether an unaided non-minority school has a right to choose a medium of instruction under article 19(1)(g) of the Constitution at the primary school stage. A citizen has the right to practise any profession, or to carry on any occupation, trade or business under articles 19(1)(g). In *T.M.A. Pai Foundation*, the majority had interpreted this right to include the right to establish and run educational institutions. Thus, the word "occupation" in article 19(1)(g) included the activity which results in imparting of knowledge to the students even if there was no element of profit generation in such activity. Article 19 guarantees "Right to Freedom" which meant that the right to establish and administer an educational institution will include the right to establish a school for imparting instruction in a medium of his choice. If a citizen establishes a school and intends a particular language as a medium of instruction, he can exercise such right subject to reasonable restrictions under article 19(6) of the Constitution. It

---

entrance test (NEET) for admissions to the MBBS and postgraduate courses in the medical colleges/institutions in the country run by the state governments and by private agencies). While the first two cases were decided unanimously by the same constitution bench on the same date (6.5.2014), the third case was decided by a three-judge bench by a majority of 2:1 on 18.7.2013 which is currently the subject matter of review. Altamas Kabir CJ decided this case on the last day of his retirement.

165 (2002) 8 SCC 481.

166 (2003) 6 SCC 697.

167 (2005) 6 SCC 537.

168 (2002) 8 SCC 481 at 591.

169 (2014) 9 SCC 485; also see *Christian Medical College* v. *Union of India* (2014) 2 SCC 305.

was, therefore, held that a private unaided non-minority school, not enjoying the protection of articles 29(1) and 30(1) of the Constitution can choose a medium of instruction for imparting education to the children in the school. The regulations for maintaining proper academic standards can be made on the freedom provided they are reasonable. But the question is whether power to prescribe regulations for maintaining the standards of education would include the power to prescribe the medium of instruction. On this issue, after referring to *Gujarat University* v. *Krishna Ranganath Mudholkar*,[170] Patnaik J held:[171]

> From the aforesaid quotation, we find that the Constitution Bench has held that under the scheme of distribution of legislative powers between the States and the Union, the power to legislate in respect of primary or secondary education is exclusively vested in the States and has further held that in exercise of this power the State can prescribe the medium of instruction. The Constitution Bench, however, has not held that this power of the State to prescribe the medium of instruction in primary or secondary schools can be exercised in contravention of the rights guaranteed under Articles 19(1)(*a*) and 19(1)(*g*) of the Constitution. The Constitution Bench has only held that if the medium of instruction has a direct bearing or impact on the determination of standards in institutions of higher education, the legislative power can be exercised by the Union to prescribe a medium of instruction. For example, prescribing English as a medium of instruction in subjects of higher education for which only English books are available and which can only be properly taught in English may have a direct bearing and impact on the determination of standards of education. Prescribing the medium of instruction in schools to be mother tongue in the primary school stage in Classes I to IV has, however, no direct bearing and impact on the determination of standards of education, and will affect the fundamental rights under Articles 19(1)(a) and 19(1)(g) of the Constitution.

One of the questions considered by the court in *Pramati Educational & Cultural Trust* v. *Union of India*[172] was whether clause (5) of article 15 of the Constitution destroyed the right to establish and administer private educational institutions guaranteed under article 19(1)(g) of the Constitution. For the first time, the Supreme Court in *T.M.A. Pai Foundation*[173] had held that the establishment and running of an educational institution was "occupation" article 19(1)(g) of the Constitution. Patnaik J further held:[174]

---

170 AIR 1963 SC 703.

171 (2014) 9 SCC 485 at 512-13.

172 (2014) 8 SCC 1.

173 (2002) 8 SCC 481.

174 (2014) 8 SCC 1 at 253-54, 256.

Thus, the content of the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions, as per the judgment of this Court in *T.M.A. Pai Foundation*, includes the right to admit students of their choice and autonomy of administration, but this Court has made it clear in *T.M.A. Pai Foundation* that this right and autonomy will not be affected if a small percentage of students belonging to weaker and backward sections of the society were granted freeships or scholarships, if not granted by the Government. This was the charitable element of the right to establish and administer private educational institutions under Article 19(1)(*g*) of the Constitution. Hence, the identity of the right of private educational institutions under Article 19(1)(*g*) of the Constitution as interpreted by this Court, was not to be destroyed by admissions from amongst educationally and socially backward classes of citizens as well as the Scheduled Castes and the Scheduled Tribes.

In *P.A. Inamdar*,[175] this Court speaking through Lahoti, C.J., was, however, of the view that the judgment in *T.M.A. Pai Foundation* held that there was no power vested on the State under clause (6) of Article 19 to regulate or control admissions in the unaided educational institutions so as to compel them to give up a share of the available seats to the State or to enforce reservation policy of the State on available seats in unaided professional institutions.

The reasoning adopted by this Court in *P.A. Inamdar*, therefore, is that the appropriation of seats by the State for enforcing a reservation policy was not a regulatory measure and not reasonable restriction within the meaning of clause (6) of Article 19 of the Constitution. As there was no provision other than clause (6) of Article 19 of the Constitution under which the State could in any way restrict the fundamental right under Article 19(1)(*g*) of the Constitution, Parliament made the Constitution (Ninety-third Amendment) Act, 2005 to insert clause (5) in Article 15 of the Constitution to provide that nothing in Article 19(1)(*g*) of the Constitution shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) in Article 15 of the Constitution, thus, vests a power on the State, independent of and different from the regulatory power under clause (6) of Article 19, and we have to examine whether this new power vested in the State which enables the State to force

175 *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537.

> the charitable element on a private educational institution destroys the right under Article 19(1)(*g*) of the Constitution.
>
> We, therefore, do not find any merit in the submission of the learned counsel for the petitioners that the identity of the right of unaided private educational institutions under Article 19(1)(*g*) of the Constitution has been destroyed by clause (5) of Article 15 of the Constitution.

Patnaik J also repelled the contention that the width of power given to the state under clause (5) of art. 15 destroyed the right under art. 19(1)(g). Treating at par both aided and unaided private educational institutions also did not violate the right under art. 19(1)(g). He observed:[176]

> In our view, therefore, a law made under clause (5) of Article 15 of the Constitution by the State on the ground that it treats private aided educational institutions and private unaided educational institutions alike is not immune from a challenge under Article 14 of the Constitution. Clause (5) of Article 15 of the Constitution only states that nothing in Article 15 or Article 19(1)(*g*) will prevent the State to make a special provision, by law, for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) of Article 15 of the Constitution does not say that such a law will not comply with the other requirements of equality as provided in Article 14 of the Constitution. Hence, we do not find any merit in the submission of Mr Nariman that clause (5) of Article 15 of the Constitution that insofar as it treats unaided private educational institutions and aided private educational institutions alike it is violative of Article 14 of the Constitution.

It may be noted here that in *Ashwini Thanappan* v. *Director of Education*,[177] a two-judge bench of the apex court after noting that the issue involved in that case related to the interpretation of article 27 of the Constitution and the counsel had pointed out that the judgment in *Pramati Educational & Cultural Trust* v. *Union of India*[178] was inconsistent with the judgment of the constitution bench in *P.A. Inamdar* v. *State of Maharashtra*,[179] and the matter required further consideration, directed the matter to be placed before the chief justice for appropriate directions for constituting a Bench of appropriate strength. It is indeed strange that the court did not notice that both these cases (dealing with arts. 14, 15, 19, 21-A, 29 and 30) had nothing to do with article 27 of the Constitution (which provides for freedom as to payment of taxes for promotion of any particular religion), where was then the necessity of making a reference to the chief justice?

---

176 (2014) 8 SCC 1 at 256.

177 (2014) 8 SCC 272.

178 (2014) 8 SCC 1.

179 (2005) 6 SCC 537.

In *Christian Medical College, Vellore* v. *Union of India*,[180] four notifications were published by the Medical Council of India (MCI) and the Dental Council of India (DCI). Two notifications issued by MCI described as "Regulations on Graduate Medical Education (Amendment) 2010, (Part II)" amended the Regulations on Graduate Medical Education, 1997 and the "Postgraduate Medical Education (Amendment) Regulations, 2010 (Part II)" amended the Postgraduate Medical Education Regulations, 2000. Two notifications issued by DCI related to admission in the BDS and MDS courses which were similar to the notifications published by MCI. The major controversy was with regard to the MCI's power to regulate, by introducing National Eligibility-cum-Entrance Test (NEET), admissions to the MBBS and postgraduate courses in the medical colleges/ institutions in the country run by the state governments and by private agencies which have the fundamental right under article 19(1)(g) and some which have also the right under article 30 of the Constitution of India. The issue also related to the interplay of article 29(2) and article 30(1) and article 30(2) of the Constitution.[181]

---

180 (2014) 2 SCC 305. This case was decided by 2 : 1 majority on 18.07.2013 before the constitution bench decision in *Pramati Educational and Cultural Trust* v. *Union of India*, AIR 2014 SC 2114. An application for oral hearing of the review petition against this decision was allowed on 23.10.2013 (after the retirement of Altmas Kabir CJ who had constituted the majority) by a full bench consisting of H.L. Dattu, Anil R. Dave and Vikramajit Sen, JJ and the review petition was pending till the end of 2014 : (2014) 2 SCC 392.

181 (2014) 2 SCC 305 at 328. The issues raised in the case, as formulated by the majority, were: (*i*) The powers of the Medical Council of India and the Dental Council of India to regulate the process of admissions into medical colleges and institutions run by the State Governments, private individuals (aided and unaided), educational institutions run by religious and linguistic minorities, in the guise of laying down minimum standards of medical education, as provided for in Section 19-A of the Indian Medical Council Act, 1956, and under Schedule VII List I Entry 66 to the Constitution.

(*ii*) Whether the introduction of one National Eligibility-cum-Entrance Test (NEET) offends the fundamental right guaranteed to any citizen under Article 19(1)(*g*) of the Constitution to practise any profession or to carry on any occupation, trade or business?

(*iii*) Whether NEET violates the rights of religious and linguistic minorities to establish and administer educational institutions of their choice, as guaranteed under Article 30 of the Constitution?

(*iv*) Whether subordinate legislation, such as the right to frame regulations, flowing from a power given under a statute, can have an overriding effect over the fundamental rights guaranteed under Articles 25, 26, 29(1) and 30 of the Constitution?

(*v*) Whether the exclusion of Entry 11 from the State List and the introduction of Entry 25 in the Concurrent List by the Constitution Forty-second (Amendment) Act, 1976, makes any difference as far as the Regulations framed by the Medical Council of India under Section 33 of the 1956 Act and those framed by the Dental Council of India under Section 20 of the Dentists Act, 1948, are concerned, and whether such Regulations would have primacy over State legislation on the same subject?

The medical council of India (MCI) is essentially a recommendatory body established under the Medical Council Act, 1956 with these objects: "(*a*) to give representation to licentiate members of the medical profession, a large number of whom are still practising in the country; (*b*) to provide for the registration of the names of citizens of India who have obtained foreign medical qualifications which are not at present recognised under the existing Act; (*c*) to provide for the temporary recognition of medical qualifications granted by medical institutions in countries outside India with which no scheme of reciprocity exists in cases where the medical practitioners concerned are attached for the time being to any medical institution in India for the purpose of teaching or research or for any charitable object; (*d*) to provide for the formation of a Committee of Postgraduate Medical Education for the purpose of assisting the Medical Council of India to prescribe standards of postgraduate medical education for the guidance of universities and to advise universities in the matter of securing uniform standards for postgraduate medical education throughout India; and (*e*) to provide for the maintenance of an all-India register by the Medical Council of India, which will contain the names of all the medical practitioners possessing recognised medical qualifications."

The majority, speaking through Altamas Kabir CJ, held that MCI Act, 1956 Act and the MCI Regulations did not vest any authority in the MCI "to either conduct examinations or to direct that all admissions into different medical colleges and institutions in India would have to be on the basis of one common national eligibility-cum-entrance test, thereby effectively taking away the right of the different medical colleges and institutions, including those run by religious and linguistic minorities, to make admissions on the basis of their own rules and procedures." Altamas Kabir CJ held the amended regulations and notifications issued under them for regulating admissions to all MBBS, BDS and postgraduate courses *ultra vires* the Constitution observing thus:[182]

> (W)e have no hesitation in holding that the Regulations on Graduate Medical Education (Amendment), 2010 (Part II) and the Postgraduate Medical Education (Amendment) Regulation, 2010 (Part II), whereby the Medical Council of India introduced the single National Eligibility-cum-Entrance Test and the corresponding amendments in the Dentists Act, 1948, are ultra vires the provisions of Articles 19(1)(*g*), 25, 26(*a*), 29(1) and 30(1) of the Constitution,

---

(*vi*) Whether the aforesaid questions have been adequately answered in *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481 and in the subsequent decisions in *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697, *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537 and *Indian Medical Assn.* v. *Union of India* (2011) 7 SCC 179 and

(*vii*) Whether the views expressed by the Constitution Bench comprised of five Judges in *Preeti Srivastava* v. *State of M.P.* (1999) 7 SCC 120, have any impact on the issues raised in this batch of matters?

182 (2014) 2 SCC 305 at 383.

> since they have the effect of denuding the States, State-run universities and all medical colleges and institutions, including those enjoying the protection of the above provisions, from admitting students to their MBBS, BDS and postgraduate courses, according to their own procedures, beliefs and dispensations, which has been found by this Court in *T.M.A. Pai Foundation* case, to be an integral facet of the right to administer. In our view, the role attributed to and the powers conferred on MCI and DCI under the provisions of the Indian Medical Council Act, 1956, and the Dentists Act, 1948, do not contemplate anything different and are restricted to laying down standards which are uniformly applicable to all medical colleges and institutions in India to ensure the excellence of medical education in India. The role assigned to MCI under Sections 10-A and 19-A(1) of the 1956 Act vindicates such a conclusion.
>
> As an offshoot of the above, we also have no hesitation in holding that the Medical Council of India is not empowered under the 1956 Act to actually conduct NEET.

In his dissenting opinion, Anil R. Dave J upheld the constitutional validity of the amended regulations as well as the notifications observing that MCI had the power to conduct the NEET for making admissions to the MBBS and postgraduate courses in the medical colleges/institutions in the country run by the state governments and by private agencies and the introduction of NEET did not violate fundamental rights of the petitioners guaranteed under the provisions of articles 19(1)(g), 25, 26, 29(1) and 30 of the Constitution of India. Dave J held:[183]

> (I)n my opinion, it cannot be said that introduction of NEET would either violate any of the fundamental or legal rights of the petitioners or even adversely affect the medical profession. In my opinion, introduction of NEET would ensure more transparency and less hardship to the students eager to join the medical profession. Let us see the consequence, if the apex bodies of medical profession are not permitted to conduct NEET. A student, who is good at studies and is keen to join the medical profession, will have to visit several different States to appear at different examinations held by different medical colleges or institutes so as to ensure that he gets admission somewhere. If he appears only in one examination conducted by a particular university in a particular State and if he fails there, he would not stand a chance to get medical education at any other place. NEET will facilitate all students desirous of joining the medical profession because the students will have to appear only at one examination and on the basis of the result of NEET, if he is found suitable, he would be in a position to get admission somewhere in

183 *Id.* at 391.

> the country and he can have the medical education if he is inclined to go to a different place. Incidentally, I may state here that learned Senior Counsel Mr Gupta had informed the Court that some medical colleges, who are more in a profiteering business rather than in the noble work of imparting medical education, take huge amounts by way of donation or capitation fees and give admission to undeserving or weak students under one pretext or the other. He had also given an instance to support the serious allegation made by him on the subject. If only one examination in the country of the said examination, in my opinion, unscrupulous and money-minded businessmen operating in the field of education would be constrained to stop their corrupt practices and it would help a lot, not only the deserving students but also the nation in bringing down the level of corruption.
>
> For the aforestated reasons, I am of the view that the petitioners are not entitled to any of the reliefs prayed for in the petitions. The impugned notifications are not only legal in the eye of the law but are also a boon to the students aspiring to join medical profession.

As pointed out earlier in this survey, the review petition against the decision is pending before the Supreme Court and oral hearing has been allowed for the review petition. Certainly, the hurried manner in which the judgment was delivered by the learned chief justice on the last day of his office does create a doubt whether the courts should render justice in this manner. The majority view does not satisfy the test of 'justice' and deserves to be reviewed at the earliest to restore the power of MCI to conduct admission test at the national level for the benefit of lakhs of aspirants to professional medical courses. This will also facilitate the conduct of such tests in other branches of learning such as law, engineering, *etc*.

IX RIGHT TO LIFE AND PERSONAL LIBERTY

During the current, the Supreme Court re-affirmed its commitment to recognize the rights of transgenders (TGs),[184] victims of rape,[185] acid attack[186] and riots/terrorist attacks.[187] In these cases, the court not only awarded compensation to the victims but also considered the scheme of their rehabilitation. During the year, the cases under art. 21 raised issues relating to workers right,[188] right to live

---

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

185 *In re India Woman Says Gang-raped on Orders of Village Court*, AIR 2014 SC 2816 : (2014) 4 SCCC 786.

186 *Laxmi* v. *Union of India* (2014) 4 SCC 427.

187 *Sudesh Dogra* v. *Union of India*, AIR 2014 SC 1940 : (2014) 6 SCC 486.

188 *Occupational Health and Safety Assn.* v. *Union of India*, AIR 2014 SC 1469.

peacefully,[189] right to reputation,[190] police atrocities,[191] protection of physically challenged persons[192] protection of women from harassment at workplace[193] and euthanasia,[194] but the court refused to accept that article 21 confers right to adopt and to be adopted.[195] One case even dealt with the question of rights of animals.[196]

Registration of FIR before conducting investigation

A constitution bench of the Supreme Court held the registration of first information report (FIR) before conducting investigation did not violate the right under article 21 of the Constitution. In *Lalita Kumari* v. *State of U.P.*,[197] the court had directed that in case of cognizable offences, FIR should be registered immediately on receipt of a complaint without investigation. Sathasivam CJ observed:[198]

> Therefore, conducting an investigation into an offence after registration of FIR under Section 154 of the Code is the "procedure established by law" and, thus, is in conformity with Article 21 of the Constitution. Accordingly, the right of the accused under Article 21 of the Constitution is protected if the FIR is registered first and then the investigation is conducted in accordance with the provisions of law.

Right of gay

In *Suresh Kumar Koushal* v. *Naz Foundation*,[199] one of the issues related to violation of article 21 of the Constitution which guarantees right to life and personal liberty. In this case, the constitutional validity of section 377, IPC (which criminalises consensual sexual acts of adults in private) was challenged on the ground of violation of fundamental rights guaranteed under articles 13, 14, 15, 19 and 21 of the Constitution. While dealing with article 21, G.S. Singhvi J held:[200]

---

189 *Deepika* v. *State of U.P.*, AIR 2014 All 1.

190 *Umesh Kumar* v. *State of A.P.*, AIR 2014 SC 1066.

191 *Beenu Rawat* v. Union of India, AIR 2014 SC 538 but see *contra* AIR 2013 SC 818.

192 *Justice Sunanda Bhandari Foundation* v. *Union of India*, 2014 (4) SCALE 533 raised the issue of non-implementation of directions passed in 2006 (7) SCALE 495.

193 *Additional District and Sessions Judge 'X'* v. *Registrar General, High Court of Madhya Pradesh*, 2014 (14) SCALE 238 : AIR 2015 SC 645.

194 *Common Cause (A Regd. Society)* v. Union of India, 2014 (3) SCALE 1.

195 *Shabnam Hashmi* v. *Union of India*, AIR 2014 SC 1281.

196 *Animal Welfare Board of India* v. *A. Nagaraja* (2014) 7 SCC 547 : 2014 (6) SCALE 468.

197 AIR 2014 SC 187 : (2014) 2 SCC 1.

198 *Id.* at 218 (of AIR).

199 AIR 2014 SC 563 : (2014) 1 SCC 1.

200 *Id.* at 610-11 (of AIR).

> The requirement of substantive due process has been read into the Indian Constitution through a combined reading of Articles 14, 21 and 19 and it has been held as a test which is required to be satisfied while judging the constitutionality of a provision which purports to restrict or limit the right to life and liberty, including the rights to privacy, dignity and autonomy, as envisaged under Article 21. In order to fulfil this test, the law must not only be competently legislated but it must also be just, fair and reasonable. Arising from this are the notions of legitimate State interest and the principle of proportionality.
>
> The right to privacy has been guaranteed by Article 12 of the Universal Declaration of Human Rights (1948), Article 17 of the International Covenant on Civil and Political Rights and the European Convention on Human Rights. It has been read into Article 21 through an expansive reading of the right to life and liberty.

Singhvi J took note of the grievances of the respondents about their harassment by police when he suggested:[201]

> Respondent 1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section. It might be a relevant factor for the legislature to consider while judging the desirability of amending Section 377 IPC.

Rights of transgenders (TGs)

In *National Legal Services Authority* v. *Union of India*,[202] the fundamental rights of transgenders (TGs) was recognized by the Supreme Court for the first time not only under articles 14-16 and 19 but also under article 21 of the Constitution of India. K.S. Radhakrishnan J held:[203]

> Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution.

---

201 *Id.* at 614.

202 AIR 2014 SC 1863 : (2014) 5 SCC 438.

203 Id. at 1893-1894 (of AIR).

(P)ersonal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

Article 21… protects one's right of self-determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of "personal autonomy" and "self-determination". Hijras/ eunuchs, therefore, have to be considered as Third Gender, over and above binary genders under our Constitution and the laws.

Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude hijras/transgenders from their ambit, but the Indian law on the whole recognise the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett Principle of "biological test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "psychological test" instead of "biological test". Binary notion of gender reflects in the Penal Code, 1860 for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NREGA, 2005, etc. Non-recognition of the identity of hijras/transgenders in the various legislations denies them equal protection of law and they face widespread discrimination.

Article 14 has used the expression "person" and Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human beings. Hence, they take within their sweep hijras/ transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self-identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to

> give various directions to safeguard the constitutional rights of the members of the TG community.

Agreeing with Radhakrishnan J, Dr. A.K. Sikri J. held that a person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well and a right to be identified and categorized as "third gender". He pointed out the advantages of this recognition thus:[204]

> We are of the firm opinion that by recognising such TGs as third gender, they would be able to enjoy their human rights, to which they are largely deprived of for want of this recognition.
>
> Some of the common and reported problem that transgenders most commonly suffer are: harassment by the police in public places, harassment at home, police entrapment, rape, discriminations, abuse in public places, et al. The other major problems that the transgender people face in their daily life are discrimination, lack of educational facilities, lack of medical facilities, homelessness, unemployment, depression, hormone pill abuse, tobacco and alcohol abuse, and problems related to marriage and adoption. In spite of the adoption of the Universal Declaration of Human Rights (UDHR) in the year 1948, the inherent dignity, equality, respect and rights of all human beings throughout the world, the transgenders are denied basic human rights. This denial is premised on a prevalent juridical assumption that the law should target discrimination based on sex (i.e. whether a person is anatomically male or female), rather than gender (i.e. whether a person has qualities that society consider masculine or feminine (arguing that by defining sex in biological terms, the law has failed to distinguish sex from gender, and sexual differentiation from sex discrimination). Transgender people are generally excluded from the society and people think transgenderism as a medical disease. Much like the disability, which in earlier times was considered as an illness but later on looked upon as a rights-based approach. The question whether transgenderism is a disease is hotly debated in both the transgender and medical-psychiatric communities. But a prevalent view regarding this is that transgenderism is not a disease at all, but a benign normal variant of the human experience akin to left-handedness.
>
> Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual

---

204 *Id.* at 1902-03.

> recognition as "third gender" would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's licence, the right to education, employment, health and so on.
>
> Further, there seems to be no reason why a transgender must be denied of basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination. The Constitution has fulfilled its duty of providing rights to transgenders. Now it is time for us to recognise this and to extend and interpret the Constitution in such a manner to ensure a dignified life for transgender people. All this can be achieved if the beginning is made with the recognition of TG as third gender.

Hearing of appeals and review petitions in death penalty cases

The Supreme Court Rules, 1966, Order XL, rule 3, provided that, "Unless otherwise ordered by the Court] an application for review shall be disposed of by circulation without any oral arguments …." This provision was upheld by a constitution bench in *P.N. Eswara Iyer* v. *Registrar, Supreme Court of India*.[205] The questions raised in *Mohd. Arif* v. *Supreme Court of India*[206] were: (1) whether the hearing of cases in which death sentence has been awarded should be by a bench of at least three if not five Supreme Court judges and (2) the hearing of review petitions in death sentence cases should not be by circulation but should only be in open court, and accordingly Order XL, Rule 3, of the Supreme Court Rules, 1966 should be declared to be unconstitutional inasmuch as persons on death row are denied an oral hearing. Rohinton Fali Nariman, J., for the majority, held that "in review petitions arising out of those cases where the death penalty is awarded, it would be necessary to accord oral hearing in the open Court." The learned judge found ample observations in *P.N. Eswara Iyer* judgment justifying oral hearing in death sentence cases. Rohinton J observed:[207]

> (D)eath sentence cases are a distinct category of cases altogether. Quite apart from Article 134 of the Constitution granting an automatic right of appeal to the Supreme Court in all death sentence cases, and apart from death sentence being granted only in the rarest of rare cases, two factors have impressed us. The first is the irreversibility of a death penalty. And the second is the fact that different judicially trained minds can arrive at conclusions which, on the same facts, can be diametrically opposed to each other.

---

205 (1980) 4 SCC 680.

206 (2014) 9 SCC 737.

207 *Id.* at 737.

> Adverting first to the second factor mentioned above, it is well known that the basic principle behind returning the verdict of death sentence is that it has to be awarded in the rarest of rare cases. There may be aggravating as well as mitigating circumstances which are to be examined by the Court. At the same time, it is not possible to lay down the principles to determine as to which case would fall in the category of rarest of rare cases, justifying the death sentence. It is not even easy to mention precisely the parameters or aggravating/ mitigating circumstances which should be kept in mind while arriving at such a question. Though attempts are made by Judges in various cases to state such circumstances, they remain illustrative only.…
>
> Experience based on judicial decisions touching upon this aspect amply demonstrate such a divergent approach being taken. Though, it is not necessary to dwell upon this aspect elaborately, at the same time, it needs to be emphasised that when on the same set of facts, one judicial mind can come to the conclusion that the circumstances do not warrant the death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, we feel that when a convict who has suffered the sentence of death and files a review petition, the necessity of oral hearing in such a review petition becomes an integral part of "reasonable procedure".
>
> We are of the opinion that "reasonable procedure" would encompass oral hearing of review petitions arising out of death penalties. The statement of Justice Holmes, that the life of law is not logic; it is experience, aptly applies here.
>
> The first factor mentioned above, in support of our conclusion, is more fundamental than the second one. Death penalty is irreversible in nature. Once a death sentence is executed, that results in taking away the life of the convict. If it is found thereafter that such a sentence was not warranted, that would be of no use as the life of that person cannot be brought back. This being so, we feel that if the fundamental right to life is involved, any procedure to be just, fair and reasonable should take into account the two factors mentioned above. That being so, we feel that a limited oral hearing even at the review stage is mandated by Art. 21 in all death sentence cases.

The learned judge further observed:[208]

> The validity of no oral hearing rule in review petitions, generally, has been upheld in *P.N. Eswara Iyer* which is a binding precedent. Review

208 *Ibid.*

petitions arising out of death sentence cases is carved out as a separate category as oral hearing in such review petitions is found to be mandated by Article 21. We are of the opinion that the importance of oral hearing which is recognised by the Constitution Bench in *P.N. Eswara Iyer* itself, would apply in such cases. We are conscious of the fact that while awarding a death sentence, in most of the cases, this Court would generally be affirming the decision on this aspect already arrived at by two Courts below namely the trial court as well as the High Court. After such an affirmation, the scope of review of such a judgment may be very narrow. At the same time, when it is a question of life and death of a person, even a remote chance of deviating from such a decision while exercising the review jurisdiction, would justify oral hearing in a review petition.

> We feel that this oral hearing, in death sentence cases, becomes too precious to be parted with….
>
> No doubt, the Court thereafter reminded us that the time has come for proper evaluation of oral argument at the review stage. However, when it comes to death penalty cases, we feel that the power of the spoken word has to be given yet another opportunity even if the ultimate success rate is minimal.

Allowing oral hearing in death sentence cases, the learned judge observed:[209]

> Henceforth, in all cases in which death sentence has been awarded by the High Court in appeals pending before the Supreme Court, only a bench of three Hon'ble Judges will hear the same. This is for the reason that at least three judicially trained minds need to apply their minds at the final stage of the journey of a convict on death row, given the vagaries of the sentencing procedure outlined above. At present, we are not persuaded to have a minimum of 5 learned Judges hear all death sentence cases. Further, we agree with the submission of Shri Luthra that a review is ordinarily to be heard only by the same bench which originally heard the criminal appeal. This is obviously for the reason that in order that a review succeeds, errors apparent on the record have to be found. It is axiomatic that the same learned Judges alleged to have committed the error be called upon now to rectify such error.…
>
> We are of the view that the justice of the situation in this class of cases demands a limited oral hearing for the reasons given above.
>
> We make it clear that the law laid down in this judgment, viz., the right of a limited oral hearing in review petitions where death

209 *Ibid.*

> sentence is given, shall be applicable only in pending review petitions and such petitions filed in future. It will also apply where a review petition is already dismissed but the death sentence is not executed so far. In such cases, the petitioners can apply for the reopening of their review petition within one month from the date of this judgment. However, in those cases where even a curative petition is dismissed, it would not be proper to reopen such matters.

Commutation of death sentence for delay in execution/consideration of mercy petition

Can a convict awarded death penalty for the commission of an offence claim commutation of his sentence on any ground was the question decided by a full bench of the Supreme Court in *Shatrughan Chauhan* v. *Union of India*.[210] In this case, the court considered a number of writ petitions in which the convicts had been awarded death sentence and their mercy petitions were rejected by the President of India/Governor of a state under article 72/161 of the Constitution of India. The convicts on death row or some one else on their behalf had approached the apex court under article 32 of the Constitution of India for commutation of their death sentences on several supervening circumstances like delay in consideration of the mercy petitions, insanity, solitary confinement, judgments declared *per incuriam* and procedural lapses. P. Sathasivam CJ, accepting the argument that if there was undue delay in deciding the mercy petition, the sentence deserves to be commuted, observed:[211]

> In view of the above, we hold that undue long delay in execution of sentence of death will entitle the condemned prisoner to approach this Court under Article 32. However, this Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after the sentence was finally confirmed by the judicial process. This Court cannot reopen the conclusion already reached but may consider the question of inordinate delay to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life.
>
> Keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonising delay caused to the convict only on the basis of the gravity of the crime.

---

210 (2014) 3 SCC 1. This decision was relied upon in *V. Sriharan* v. *Union of India*, AIR 2014 SC 1368 : (2014) 4 SCC 242; also see *Union of India* v. *Shatrughan Chauhan*, 2014 (3) SCALE 551;

211 (2014) 3 SCC 1 at 38-41.

> It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously. Though no time-limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage viz. calling for the records, orders and documents filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities.
>
> Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/ consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself. To this extent, the jurisprudence has developed in the light of the mandate given in our Constitution as well as various Universal Declarations and directions issued by the United Nations.
>
> The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. In this line, although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is inexcusable. Since it is well established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence of death has a dehumanising effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence.
>
> We sincerely hope and believe that the mercy petitions under Articles 72/161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. Although, no time frame can be set for the President for disposal of the mercy petition but we can certainly request the Ministry concerned to follow its own rules rigorously which can reduce, to a large extent, the delay caused.

The learned judge noted the existing criteria for deciding mercy petitions under articles 72/161 of the Constitution formulated by the government: Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification); cases in which the appellate court expressed doubt as to the reliability of evidence but has nevertheless decided on

conviction; cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified; where the high court on appeal reversed acquittal or on an appeal enhanced the sentence: is there any difference of opinion in the bench of the high court judges necessitating reference to a larger bench; consideration of evidence in fixation of responsibility in gang murder case; and long delays in investigation and trial, etc. Sathasivam CJ suggested that one more criterion – delay in execution – be added to the above criteria. Moreover, article 21 "being paramount principle on which rights of the convict are based, this must be considered along with the rights of the victims or the deceased's family as also societal consideration since these elements form part of the sentencing process as well. It is the stand of the respondents that the commutation of sentence of death based on delay alone will be against the victim's interest." While considering fresh petition under article 32, the court has no power to re-open the case on merits but "undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of article 21 and thereby entails as the ground for commutation of sentence. However, the nature of delay i.e. whether it is undue or unreasonable must be appreciated based on the facts of individual cases and no exhaustive guidelines can be framed in this regard.", the learned judge held. He also held that there was difference between a convict sentenced to death under TADA or IPC and, therefore, the *ratio* to the contrary laid down in *Devender Pal Singh Bhullar*[212] were held to be *per incuriam.*

With regard to the ground of insanity/mental illness/schizophrenia, Sathasivam CJ held that after it was established that the death convict was insane as duly certified by the competent doctor, article 21 protects him and such person cannot be executed without further clarification from the competent authority about his mental problems. He also emphasized that when the matter is placed before the President, it is incumbent on the part of the home ministry to place all the materials such as judgment of the trial court, high court and the final court *viz.* Supreme Court as well as any other relevant material connected with the conviction at once and not call for the documents in piecemeal. The petitioners in the present case had alleged that this was not done in their cases.

The court considered the cases of all the convicts to find out delay and procedural lapses. P. Sathasivam CJ found disparities in implementing the existing law to ensure a just, fair and reasonable procedure to protect the rights of the convicts who enjoyed their fundamental right under article 21 till the last breath of their life and, therefore, he issued detailed guidelines regarding solitary confinement, procedure to be followed in placing mercy petitions before the President, communication of rejection of mercy petition by the Governor/President, supply of copy of rejection of mercy petition, minimum 14 days' notice for execution which allows the prisoner to prepare himself mentally for execution, to make his peace with God, prepare his will and settle other earthly affairs and allow the prisoner to have a last and final meeting with his family members and allow the prisoners' family members to make arrangements to travel to the prison

212 *Devender Pal Singh Bhullar* v. *State (NCT of Delhi)* (2013) 6 SCC 195.

which may be located at a distant place and meet the prisoner for the last time, communication to family members, mental health evaluation, physical and mental health reports, furnishing documents to the convict, final meeting between prisoner and his family and post-mortem reports after execution.

P. Sathasivam CJ ultimately commuted the death sentence of all convicts who had approached the court to life imprisonment on various grounds such as unexplained delay in deciding mercy petitions, insanity and procedural lapses.

X CULTURAL AND EDUCATIONAL RIGHTS OF MINORITIES

The scope of cultural and educational rights of minorities and their right to establish and administer educational institutions has always been a matter of controversy and despite authoritative pronouncement of an eleven-judge bench,[213] the controversy remains alive. Three leading cases involving various issues touching the rights of minorities were reported during the current year. In *Christian Medical College* v. *Union of India*,[214] the controversy related to the regulations made by medical council of India and dental council of India prescribing national eligibility-cum-entrance test (NEET) for making admissions to the MBBS/BDS and postgraduate courses in the medical colleges/institutions in the country run by the state governments and by private agencies. A full bench of the apex court, speaking for the majority through Altamas Kabir CJI, quashed the regulations made by MCI and DCI on the ground that they had no power to regulate admissions in respect of minority institutions enjoying protection of art. 30 of the Constitution. The learned judge observed:[215]

> What can ultimately be culled out from the various observations made in the decisions on this issue, commencing from *Kerala Education Bill* case[216] to recent times, is that admissions to educational institutions have been held to be part and parcel of the right of an educational institution to administer and the same cannot be regulated, except for the purpose of laying down standards for maintaining the excellence of education being provided in such institutions. In the case of aided institutions, it has been held that the State and other authorities may direct a certain percentage of students to be admitted other than by the method adopted by the institution. However, in cases of unaided institutions, the position is that except for laying down standards for maintaining the excellence of education, the right to admit students into the different courses

---

213 *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481.

214 (2014) 2 SCC 305. This was his last judgment of his judicial career. A review petition against this judgment has been admitted for oral hearing by a full bench of the court.

215 *Id.* at 380.

216 *Kerala Education Bill, 1957, In re*, AIR 1958 SC 956 : 1959 SCR 995.

> could not be interfered with. In the case of aided minority institutions, it has been held that the authority giving aid has the right to insist upon the admission of a certain percentage of students not belonging to the minority community, so as to maintain the balance of Article 19(2) and Article 30(1) of the Constitution. Even with regard to unaided minority institutions, the view is that while the majority of students to be admitted should be from the minority community concerned, a certain percentage of students from other communities should also be admitted to maintain the secular character of education in the country in what has been described as a "sprinkling effect".

In his dissenting opinion, Anil R. Dave J held that MCI and DCI were entitled to regulate the admission procedure by virtue of the provisions of the Medical Council of India Act, 1956 and the Dentists Act, 1948, which enable them to regulate and supervise the overall professional standards. The introduction of common entrance test for admissions to medical courses would improve the standards of education and instil confidence in the students. The learned judge pointed out that similar question had been raised with regard to admission to veterinary course through a common test and the court had upheld the power of the Veterinary Council of India in *Veterinary Council of India* v. *Indian Council of Agricultural Research*.[217] Dave J held:[218]

> So far as the rights guaranteed to the petitioners under the provisions of Articles 25, 26, 29 and 30 are concerned, in my opinion, none of the rights guaranteed under the aforestated articles would be violated by permitting NEET. It is always open to the petitioners to select a student subject to his being qualified by passing the examination conducted by the highest professional body. This is to assure that the students who are to undergo the professional training are suitable for the same. The Regulations relating to admission of the students i.e. admitting eligible, deserving and bright students would ultimately bring reputation to the educational institutes. I fail to understand as to why the petitioners are keen to admit undeserving or ineligible students when eligible and suitable students are available. I am sure that even a scrupulous religious person or an educational institution would not like to have physicians or dentists passing through its institution to be substandard so as to bring down the reputation of the profession or the college in which such a substandard professional was educated. Minorities—be it religious or linguistic—can impart training to a student who is found worthy to be given education in the field of medicine or dentistry by the professional apex body. In my opinion, the Regulations and NEET would not curtail or

---

217 (2000) 1 SCC 750.

218 (2014) 2 SCC 305 at 390-92.

adversely affect any of the rights of such minorities as apprehended by the petitioners. On the contrary, standard quality of input would reasonably assure them of sterling quality of the final output of the physicians or dentists, who pass out through their educational institutions.

An apprehension was voiced by some of the counsel appearing for the petitioners that autonomy of the petitioner institutions would be lost if NEET is permitted. I fail to understand as to how autonomy of the said institutions would be adversely affected because of NEET. The government authorities or the professional bodies named hereinabove would not be creating any hindrance in the administrative affairs of the institutions. Implementation of NEET would only give better students to such institutions and from and among such highly qualified and suitable students, the minority institutions will have a right to select the students of their choice. At this stage, the institutions would be in a position to use their discretion in the matter of selection of students. It would be open to them to give weightage to the religion, caste, etc. of the student. The institutions would get rid of the work of conducting their separate examinations and that would be a great relief to them. Except some institutions having some oblique motive behind selecting students who could not prove their mettle at the common examination, all educational institutes should feel happy to get a suitable and eligible lot of students, without making any effort for selecting them.

For the reasons recorded hereinabove, in my opinion, it cannot be said that introduction of NEET would either violate any of the fundamental or legal rights of the petitioners or even adversely affect the medical profession. In my opinion, introduction of NEET would ensure more transparency and less hardship to the students eager to join the medical profession. Let us see the consequence, if the apex bodies of medical profession are not permitted to conduct NEET. A student, who is good at studies and is keen to join the medical profession, will have to visit several different States to appear at different examinations held by different medical colleges or institutes so as to ensure that he gets admission somewhere. If he appears only in one examination conducted by a particular university in a particular State and if he fails there, he would not stand a chance to get medical education at any other place. NEET will facilitate all students desirous of joining the medical profession because the students will have to appear only at one examination and on the basis of the result of NEET, if he is found suitable, he would be in a position to get admission somewhere in the country and he can have the medical education if he is inclined to go to a different place. Incidentally, I may state here that learned Senior Counsel Mr Gupta had informed the Court that some medical colleges, who are more

> in a profiteering business rather than in the noble work of imparting medical education, take huge amounts by way of donation or capitation fees and give admission to undeserving or weak students under one pretext or the other. He had also given an instance to support the serious allegation made by him on the subject. If only one examination in the country is conducted and admissions are given on the basis of the result of the said examination, in my opinion, unscrupulous and money-minded businessmen operating in the field of education would be constrained to stop their corrupt practices and it would help a lot, not only the deserving students but also the nation in bringing down the level of corruption.

In another case,[219] the question was whether a student had a fundamental right to get instruction in his/her mother tongue during school. In other words, the question was whether the state can prescribe the medium of instruction for all schools including those run by minorities? A.K. Patnaik J held:[220]

> We are of the considered opinion that though the experts may be uniform in their opinion that children studying in Classes I to IV in the primary school can learn better if they are taught in their mother tongue, the State cannot stipulate as a condition for recognition that the medium of instruction for children studying in Classes I to IV in minority schools protected under Articles 29(1) and 30(1) of the Constitution and in private unaided schools enjoying the right to carry on any occupation under Article 19(1)(*g*) of the Constitution would be the mother tongue of the children as such stipulation (*sic* would violate the aforesaid fundamental rights).
>
> We accordingly … hold that the imposition of mother tongue affects the fundamental rights under Articles 19, 29 and 30 of the Constitution.

In *Pramati Educational & Cultural Trust* v. *Union of India*,[221] challenge was to the validity of clause (5) of art. 15 of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect from 20-1-2006 and on the validity of art. 21-A of the Constitution inserted by the Constitution (Eighty-sixth Amendment) Act, 2002 with effect from 1-4-2010. A.K. Patnaik J for the constitution bench held that exclusion of all minority educational institutions, whether aided or unaided, by clause (5) of art. 15 did not violate art. 14 of the Constitution; the minority institutions, by themselves, were a separate class and their rights were protected under art. 30 of the Constitution. Patnaik J held:[222]

---

219 *State of Karnataka* v. *Associated Management of English Medium Primary & Secondary Schools* (2014) 9 SCC 485.

220 *Id.* at 514.

221 (2014) 8 SCC 1

222 *Id.* at 259.

> Clause (5) of Article 15 of the Constitution enables the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Such admissions of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes who may belong to communities other than the minority community which has established the institution, may affect the right of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution. In other words, the minority character of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution, whether aided or unaided, may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes and it is for this reason that minority institutions, aided or unaided, are kept outside the enabling power of the State under clause (5) of Article 15 with a view to protect the minority institutions from a law made by the majority.

Patnaik J, while declaring that the Right of Children to Free and Compulsory Education Act, 2009 insofar it applied to minority educational institutions protected under art. 30 of the Constitution were ultra vires, observed:[223]

> When we look at the 2009 Act, we find that Section 12(1)(b) read with Section 2(*n*)(*ii*) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(*c*) read with Section 2(*n)(iv*), an unaided school has to admit into twenty-five per cent of the strength of Class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character

---

223 *Id.* at 270.

> of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[224] insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.
>
> In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-sixth Amendment) Act, 2002 inserting Article 21-A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra vires Article 19(1)(*g*) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution.

XI AWARD OF COMPENSATION

As stated in the survey of previous years, the question of awarding compensation for the violation of fundamental rights of citizens has been dealt with by the apex on a case to case basis and no discernible principles emerge from them. One may take the case of victims of rape. In fact, in one case,[225] the court refused to undertake the issue relating to framing of uniform social security schemes by the states to victims of rape.

Victims of gang rape

In *Satya Pal Anand* v. *State of M.P.*,[226] two school-going girls belonging to poor families were gang-raped by 16 persons and paid interim compensation of Rs. two lakh each. The state government had also undertaken before the high court that it would take care of the victims in future also. The court considered the compensation as too low and grossly inadequate while at the same time realized that the traumatic stress which a gang-rape victim undergoes every moment of her life cannot be compensated by any amount. It pointed out that no amount of money can restore the dignity and confidence of a rape victim but certain measures like adequate compensation, insurance and social security schemes may help in rehabilitating the rape victim to some extent. Keeping in view all the factors, the court directed the state of Madhya Pradesh to make payment of Rs 8 lakhs more to each of the two victims within one month. The court took strong exception to the

---

224 (2012) 6 SCC 1.

225 *Satya Pal Anand* v. *State of M.P.* (2014) 4 SCC 800.

226 *Ibid.*

disclosure of identity of the victims by the affidavit of the state which is an offence under section 228-A, IPC.

The above case was relied upon in *re India Woman Says Gang-raped on Orders of Village Court*,[227] where the Supreme Court had taken *suo motu* cognizance of a case on the basis of a news item published in the *Business and Financial News* dated January 23, 2014 relating to the gang-rape of a 20-year-old woman of Subalpur Village, PS Labpur, District Birbhum, the State of West Bengal on the intervening night of January 20,2014/ January 21,2014 on the orders of community panchayat as punishment for having relationship with a man from a different community. The court *inter alia* considered the question of compensation to the victim of rape. The court realized that no compensation can be adequate or can give any respite to the rape victim but as the state had failed in protecting such serious violation of a victim's fundamental right, relying on earlier decisions,[228] directed the state of West Bengal to make payment of Rs 5 lakh as compensation, in addition to the already sanctioned amount of Rs 50,000, within one month. Besides, the court directed that compensation and other benefits be given directly to the victim as she was major. The court further clarified that according to section 357-B, the compensation payable by the state government under section 357-A shall be in addition to the payment of fine to the victim under section 326-A or section 376-D, IPC. The court also emphasized the need for the state machinery to work in harmony with each other to safeguard the rights of women. Likewise, the court reminded that all hospitals, public or private, whether run by the central government, the state government, local bodies or any other person, were statutorily obligated under section 357-C to provide first aid or medical treatment, free of cost, to the victims of any offence covered under sections 326-A, 376, 376-A, 376-B, 376-C, 376-D or section 376-E, IPC.

It is indeed difficult to reconcile both the above cases with regard to quantum of compensation. In one case, the court directed payment of Rs. ten lakh while in the other case it awarded just Rs. five lakh.

Victims of acid attack

The increasing incidents of acid attack drew the attention of the apex court in *Laxmi* v. *Union of India*,[229] in which following directions were issued by it to regulate the sale of acid with a view to avoid acid attacks and to compensate and rehabilitate the victims of acid attack:

> The Centre and States/Union Territories shall work towards making the offences under the Poisons Act, 1919 cognizable and non-bailable.

---

227 AIR 2014 SC 2816 : (2014) 4 SCC 786.

228 *Bodhisattwa Gautam* v. *Subhra Chakraborty* (1996) 1 SCC 490; *P. Rathinam* v. *State of Gujarat*, 1994 SCC (Cri) 1163; *Railway Board* v. *Chandrima Das* (2000) 2 SCC 465.

229 (2014) 4 SCC 427 at 429-30.

In the States/Union Territories, where rules to regulate sale of acid and other corrosive substances are not operational, until such rules are framed and made operational, the Chief Secretaries of the States concerned/Administrators of the Union Territories shall ensure the compliance with the following directions with immediate effect:

1. Over the counter, sale of acid is completely prohibited unless the seller maintains a log/register recording the sale of acid which will contain the details of the person(s) to whom acid(s) is/are sold and the quantity sold. The log/register shall contain the address of the person to whom it is sold.

2. All sellers shall sell acid only after the buyer has shown:

   (a) a photo ID issued by the Government which also has the address of the person;

   (b) specifies the reason/purpose for procuring acid.

3. All stocks of acid must be declared by the seller with the Sub-Divisional Magistrate (SDM) concerned within 15 days.

4. No acid shall be sold to any person who is below 18 years of age.

5. In case of undeclared stock of acid, it will be open to the SDM concerned to confiscate the stock and suitably impose a fine on such seller up to Rs 50,000.

6. The SDM concerned may impose fine up to Rs 50,000 on any person who commits breach of any of the above directions.

Educational institutions, research laboratories, hospitals, government departments and the departments of public sector undertakings, who are required to keep and store acid, shall follow the following guidelines:

1. A register of usage of acid shall be maintained and the same shall be filed with the SDM concerned.

2. A person shall be made accountable for possession and safe keeping of acid in their premises.

3. The acid shall be stored under the supervision of this person and there shall be compulsory checking of the students/ personnel leaving the laboratories/place of storage where acid is used.

The SDM concerned shall be vested with the responsibility of taking appropriate action for the breach/default/violation of the above directions.

> We … direct that the acid attack victims shall be paid compensation of at least Rs 3 lakhs by the State Government/Union Territory concerned as the aftercare and rehabilitation cost. Of this amount, a sum of Rs 1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance with the above direction.
>
> The Chief Secretaries of the States and the Administrators of the Union Territories shall take necessary steps in getting this order translated into vernacular and publicise the same appropriately for the information of public at large.

Compensation to riot victims

In *Sudesh Dogra* v. *Union of India*,[230] the petitioner had alleged the persistent failure of state government to prevent incidents of crime and terrorist acts leading to death and injuries to persons on a large scale. The court noted that as per the order of the state government issued in 1990, persons other than the government employees who had lost their lives in militant activities or acts of violence were to be paid *ex gratia* of Rs 1 lakh and same was admittedly being paid. With regard to the state of Chhattisgarh, while seven petitioners had received a total sum of Rs 2,52,000, other three petitioners were paid a sum of Rs 2,00,000 each inclusive of Rs 1 lakh paid by the government of Jammu and Kashmir. The additional amount paid by the state of Chhattisgarh was by way of *ex gratia* relief. The court pointed out that *ex gratia* was an act of *gratis* and had no connection with the liability of the state in law. It held that the very nature of the relief and its dispensation by the state could not be governed by directions in the nature of mandamus unless there was an apparent discrimination in the manner of grant of such relief. The petitioners did not allege that they had been discriminated. No particulars were furnished to the court with regard to the incident of Udhampur Nagar for claiming additional compensation to the victims to enable the court to comprehend under what circumstances such compensation was ordered to be paid to the victims involved in the said case. Moreover, the incident had occurred nearly a decade earlier and, therefore, the court refused to issue directions for additional compensation.

In ill-famous Muzaffarnagar violence case,[231] it was alleged that riots had erupted in and around district Muzaffarnagar, U.P. as a result of communal tension prevailing in the city, which wrecked lives of a large number of people who fled from their homes out of anxiety and fear after a mahapanchayat was organized by

---

230 AIR 2014 SC 1940 : (2014) 6 SCC 486.

231 *Mohd. Haroon* v. *Union of India*, 2014 (4) SCALE 86 : JT 2014 (4) SC 361.

the Jat community at Nagla Mandaur, 20 kms away from Muzaffarnagar city on September 7, 2013. Over 1.5 lakh persons from Uttar Pradesh, Haryana and Delhi participated to oppose the incident which had occurred on August 27, 2013 in Kawal village under Jansath Tehsil of Muzaffarnagar because of which violence broke out between two communities and three youths were killed from both sides in the wake of a trivial incident which had occurred earlier and the whole incident was given a communal colour to incite passion. Many allegations were made by the petitioners: Since August 27, 2013, more than 200 Muslims had been brutally killed and around 500 were missing in the spurt of the incident in 50 villages of the Jat community dominated areas where the Muslim community was in minority; in the remote villages, more than 40,000 persons had migrated under threat and forcibly asked to move out of the village otherwise they would be killed; many thousand persons including infants, children, women and elderly were without food and shelter in various villages and no facilities were being made available by the administration; huge illegal and unauthorized arms and ammunitions had been recovered in and around Muzaffarnagar; the displaced persons of all communities were compelled to live in shelter camps where adequate arrangements were becoming the problem of survival. Several writ petitions under article 32 of the Constitution were filed by individuals/Supreme Court Bar Association/NGOs seeking an inclusive protection for each victim whose fundamental rights had been infringed in the said riot by praying for numerous rehabilitative, protective and preventive measures to be adhered to by both the state and the central government. The relief claimed was to ensure proper and adequate rehabilitation of the victims whose houses had been burnt, properties got damaged and to provide immediate temporary shelters/transit camps, food and clothing; and to direct *ex-gratia* relief of Rs. 25,00,000/- each to the kin of the deceased and Rs. 5,00,000/- each to the injured from the Prime Minister's relief fund as well as from the corpus of the state of Uttar Pradesh and to direct the state government to take stern action against the persons responsible for rape and other heinous offences and also to provide rehabilitation to the victims.

A full bench of the apex court, speaking through P. Sathasivam CJI, took strong note of the incident which violated fundamental rights of the victims on a large scale and passed comprehensive directions *inter alia* for payment of compensation and rehabilitation. The court realized that no compensation could be adequate for the victims of rape but since the state had failed in protecting serious violation of fundamental rights, it was duty bound to provide compensation to help the victims' rehabilitation. The humiliation or the reputation snuffed out could not be recompensed but the monetary compensation will at least provide some solace. Under section 357A, IPC, onus is put on the district legal service authority or state legal service authority to determine the quantum of compensation in each case for the victims of crime in coordination with the central government. The court pointed out that no rigid formula could be evolved for providing a uniform amount; it should vary in the facts and circumstances of each case. Keeping in view the facts and circumstances of the present cases, the court directed the state government to make payment of Rs. 5 lakh, in addition to various other benefits, within 4 weeks to the victims. As provided under section 357B,

compensation payable by the state government under section 357A was to be in addition to the payment of fine to the victim under section 326A or section 376D, IPC. Likewise, the victims of rape were directed to be paid compensation of Rs. 5 lakhs each, in addition to various other benefits, by the state government within a period of 4 weeks. The state was also directed to provide other financial assistance as well as any other scheme applicable to them for their betterment and to continue their normal avocation. The parents of children who had died in the violence and in the camps due to cold weather conditions were also directed to paid similar compensation as that to others. The court directed the state to identify the left out injured persons (simple/grievous), next kin of the deceased who died in the communal violence and settle the compensation agreed to before the court (Rs. 10,00,000 + Rs. 3,00,000 + Rs. 2,00,000 = Total Rs. 15,00,000). Direction were also issued to settle pending compensation claims for damages caused to movable/ immovable properties of the persons concerned due to the violence.

Compensation to a victim of electrocution

In *Raman* v. *Uttar Haryana Bijli Vitran Nigam Ltd*.,[232] the appellant, a four year old boy was electrocuted on November 3, 2011 by coming in direct contact with the naked electric wire lying open on the roof of his house. The boy was immediately taken for first aid to a nearby R.M. Anand Hospital in Panipat, Haryana from where he was referred to Post-Graduate Institute of Medical Sciences, Rohtak. The final treatment was given at Safdarjang Hospital, New Delhi, where the doctors were left with no other option but to carry out triple amputation by removing both his arms upto arm pit and left leg up to knee as the grievous injuries suffered were not curable. On February 8, 2012, the disability certificate was issued to the appellant certifying to be 100% permanent disability. Prior to this tragic incident, on August 16, 2011 the appellant's father along with other neighbours had allegedly approached the SDO, Chhajpur, Panipat i.e. respondent No. 3 through a representation, to remove the iron angle from the vicinity of the residential area, as it endangers the life of around 40 to 60 families which is densely populated. But no action was taken by him. After noticing the 100% permanent disability suffered by the appellant in the electrocution accident on account of which he lost all the amenities and became a deadwood throughout his life and keeping in view the law laid down in numerous cases by the apex court on the subject, the court directed payment of compensation of Rs. 60 lakh to the appellant.

XII CONCLUSION

The trend of cases pertaining to fundamental rights analyzed in this survey establish that the Supreme Court traversed new areas to safeguard the fundamental rights of not only human beings but also that of the animals.[233] The plight of

---

232 2014 (14) SCALE 354.

233 *Animal Welfare Board of India* v. *A. Nagaraja* (2014) 7 SCC 547 : 2014 (6) SCALE 468.

transgenders (TGs)[234] was highlighted by the court which had never been done in the past. Recognizing them as third gender and providing them benefits of reservation and other scheme is likely to improve their social and economic conditions; instead of indulging only in begging, TGs may join the main stream in the society. Yet another area of concern before the court was the plight of victims of acid attack.[235] Only time will tell about the impact of various directions passed by the court to protect and rehabilitate the victims of such attack which have seen increasing trend in recent years.

The decision regarding gay persons[236] with reference to section 377, IPC had been the subject of serious controversy but in the context of present day social and moral values prevailing in this country, the decision cannot be faulted. In any case, the court has left to the legislature to consider whether section 377, IPC should be repealed or modified.

The decision of the Supreme Court in *Mohd. Arif* v. *Supreme Court of India*[237] laying down that (1) the hearing of cases in which death sentence has been awarded should be by a Bench of at least three Supreme Court judges and (2) the hearing of review petitions in death sentence cases should not be by circulation but should only be in open court is significant. But rule 3, Order XLVII of the Supreme Court Rules, 2013, which is worded in the same language as order XL, rule 3 of the Supreme Court Rules, 1966, requires amendment in the light of this decision.

The contour of article 21 was further expanded in *Shatrughan Chauhan* v. *Union of India*,[238] in which the question was whether article 21 of the Constitution was violated by executing death sentence awarded to a convict notwithstanding the existence of supervening circumstances such as unexplained delay in considering mercy petition under articles 72/161 of the Constitution of India, or in executing the death sentence or there were serious procedural lapses, insanity of the convict or the decision of the apex court confirming death sentence was based on a judgment which was *per incurium*. This is a leading case with regard to procedure to be followed in considering mercy petitions under articles 72/161 of the Constitution of India.

It is beyond thinking as to why the controversy relating to educational matters, particularly reservations in admissions and appointments in unaided and minority educational institutions, compulsion to make admissions, method of making admissions particularly in professional courses and the degree of state regulation/ control to ensure standard of education never dies down. With the passage of time, the controversy keeps alive and, in fact, remains fresh as if there have been no authoritative judicial pronouncements till now despite a eleven bench judgment

---

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

235 *Laxmi* v. *Union of India* (2014) 4 SCC 427.

236 *Suresh Kumar Koushal* v. *Naz Foundation*, AIR 2014 SC 563 : (2014) 1 SCC 1.

237 (2014) 9 SCC 737.

238 (2014) 3 SCC 1.

in *T.M.A. Pai Foundation*.[239] It appears that the cases are being decided on the basis of preconceived notions of the judges coming from different communities; they are not getting out of their background.[240] The question as to what is meant by "standard" which an educational institution has to maintain and whether prescribing a common admission test was a necessary step in this direction has yet to be authoritatively decided.

The decisions of the Supreme Court do not provide any uniform guidelines regarding payment of compensation to the victims of rape and heinous crimes, atrocities committed by terrorists, mob violence, *etc*.[241] In fact, the court specially refused to consider laying down any guidelines for social security measures in one of the cases involving gang rape victim holding that some other petition was pending before the apex court.[242] How long the court would continue to pass orders/ directions on a case to case basis and avoid formulating broad guidelines on the issue remains to be seen. The court must ensure at least some minimum amount of compensation for the victims.

As in the past, various issues pertaining to education, minorities and reservation have been cropping up time and again before the courts but the parties never seem to be satisfied with judicial verdicts. In the current year, issues of admission, common admission test, reservations for Jats and Marathas were dealt with by the court besides many controversies relating to violence, rape and acid attack. The courts also considered some cases filed by retired judges of the high court and Supreme Court and they remained successful in getting stay order[243] and pensionery benefits.[244]

The observations made by Madan B. Lokur J in one case that, "It is high time that those of us who are Judges of this Court and decision makers also become policy makers"[245] depicts the agony and helplessness of a judge of the apex court

---

239 (2002) 8 SCC 481.

240 See particularly *Christian Medical College, Vellore* v. *Union of India* (2014) 2 SCC 305. Two other cases decided during the year were: *Pramati Educational & Cultural Trust* v. *Union of India* (2014) 8 SCC and *State of Karnataka* v. *Associated Management of English Medium Primary & Secondary Schools* (2014) 9 SCC 485.

241 In this connection, one can see the judicial apathy from the judgment of R.V. Raveendran J in *State of Rajasthan* v. *Sanyam Lodha* (2011) 13 SCC 262 : 2011 (9) SCALE 379, in which the learned judge had refused to intervene even though in that case out 392 victims of rape in the state of Rajasthan between January, 2004 and August, 2005, 377 girls were not paid any compensation by the state from chief minister's relief fund while paying Rs. 5 lakh to one, Rs. 3.95 lakh to another and between Rs. 10,000 to Rs. 50,000 to 13 girls. See S N Singh, "Constitutional Law – I (Fundamental Rights), XLVII *ASIL*171 at 219 (2011).

242 *Satya Pal Anand* v. *State of M.P*. (2014) 4 SCC 800.

243 *Swatanter Kumar* v. *The Indian Express Ltd*., 207 (2014) DLT 221.

244 *P. Ramakrishnan Raju* v. *Union of India*,AIR 2014 SC 1619 : 2014 (4) SCALE 329.

245 *Bhola Ram* v. *State of Punjab*, AIR 2014 SC 241 at 246.

when needless delay is caused in disposing of cases expeditiously. In fact, in this case, leave to appeal was granted by the Supreme Court after four years of filing the special appeal petition and the case was finally decided five years thereafter. There appears some mistake of the Supreme Court registry in listing the matter. Action should have been taken against the guilty after inquiry and guidelines at the administrative level need to be issued to avoid recurrence of such incidents in future.