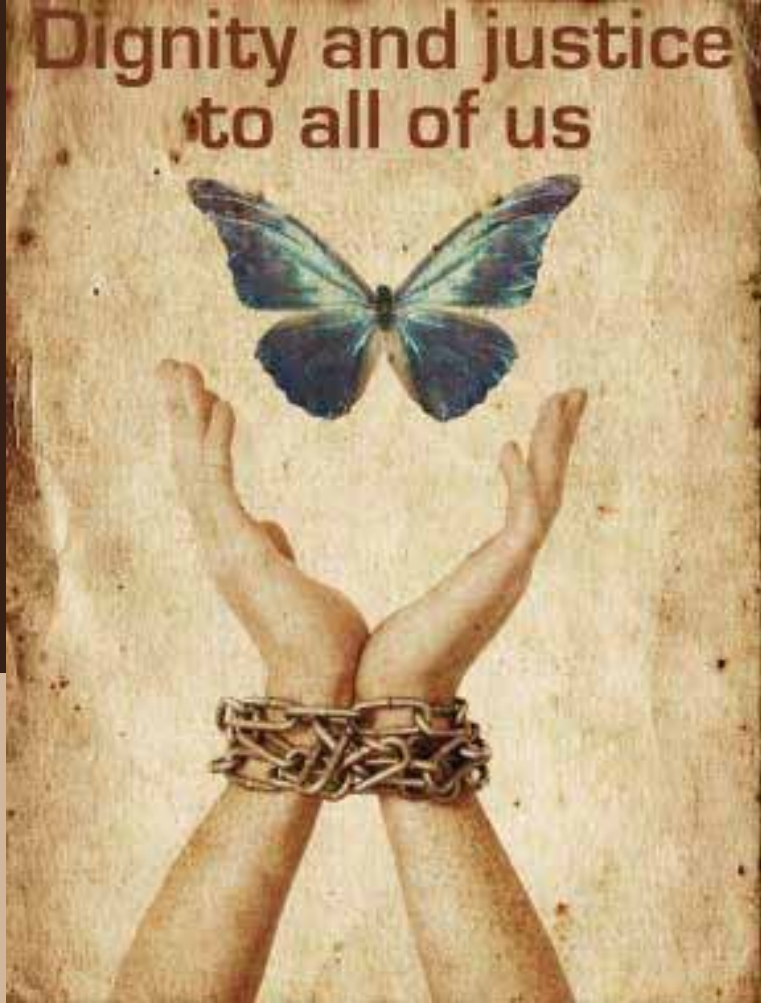
RIGHTS IN REVIEW

The Supreme Court in 2014



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Centre for Law and Policy Research (CLPR) is a non-profit organization based in Bangalore, which works on law and public policy research, impact litigation and legal education.

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Introduction

The Supreme Court of India is the foremost guardian of fundamental rights and the spirit of the Constitution. More careful observers rightly point out that fundamental rights writ jurisdiction however comprises only a minor portion of the Court docket and this has grown smaller in recent decades.[1] While a lot of attention is paid to the pendency of cases and media coverage of high-profile litigation, less attention has been paid to the Supreme Court's protection of fundamental rights. This Rights Review aims to do this with a careful analysis of key Supreme Court cases on fundamental rights. This Review is the first of an annual series to be released each December.

In this Review we cover Supreme Court decisions from January 1 – December 15, 2014 on fundamental rights. We select cases that have developed the law in new directions, confirm an uncertain line of reasoning or apply the law to new factual contexts.[2] Further, we assess whether these decisions advance our constitutional mandate for a robust protection of key civil, political, social and economic rights and highlight the relevance and the impact of these decisions on our collective public life. While we are substantive in our analysis, the discussion avoids unnecessary legal jargon. We aim to communicate the work of the Supreme Court in this vital area of constitutional adjudication to any citizen concerned with public affairs who has little or no legal training. In the absence of other serious annual academic reviews of the Court, this review will engage and inform lawyers, judges, law students and civil society activists as well. The detailed footnotes allow the more informed reader to access and use these case materials more intensively.

Rights in 2014

In 2014 the Supreme Court had a modest year as a rights protection court. In this review we focus on 15 key decisions of the Court on the protection of equality, free speech and expression, life, education and religious rights. We show that in 2014 the Court has expanded the scope and application of equality especially in the context of gender identity and age discrimination. Being an election year, the Court heard several cases involving freedom of speech and expression, though it did not significantly curtail hate speech. The Court has in past years expanded the scope of the right to life under Article 21 to include a range of social and economic rights, such as health, housing and food. However, this year, the Court's noteworthy judgments on the right to life dealt with the most basic interpretation of this right – the deprivation of life by the state. While steering clear of the question of the constitutionality of the death penalty itself, the Court introduced several procedural safeguards regarding commutation of sentences, mercy petitions and death penalty review petitions in Courts. On the other hand, there were no significant judgments involving the protection of social and economic rights, including the right to housing and the right to health, on the

[1] See generally, N. Robinson, "A Quantitative Analysis of the Indian Supreme Court's Workload," *Journal of Empirical Legal Studies*, Vol 10, 2013, p. 570.

[2] The databases used include All India Reporter and Supreme Court Cases, Manupatra, Indiankanoon and the Supreme Court database (judis.nic.in).

Court's docket in 2014.[3] The important judgments on social rights related to the right to education, where the Court revisited and upheld the constitutionality of Articles 21A and 15(5) and the Right of Children to Free and Compulsory Education Act, 2009 ("RTE Act"). Finally, the Court clarified the scope of state regulation of religious and traditional practices and the possibility of a secular fundamental right to adopt. We now turn to these cases in the sections below.

I. EQUALITY AND NON-DISCRIMINATION: Articles 14 to 16

Equality law is among the most well developed areas of rights protection under the Indian Constitution. While Article 14 guarantees equality before the law and equal protection of the law, Articles 15 and 16 expressly prohibit discrimination on various grounds. In 2014 the Court expanded the scope of the grounds of discrimination to new areas, including gender identity and age.

Sex-Discrimination

In ***National Legal Services Authority vs. Union of India and Ors.***,[4] ("*NALSA*") the National Legal Services Authority, a body constituted to provide free legal services to marginalized sections of society, initiated a public interest litigation to remedy the failure of state law and policy to recognize and protect transgendered persons. The Court read the rights to life, equality and free expression together to conclude that the State must legally recognize self-identified gender identities. It construed the right to life under Article 21 to include the rights to dignity, personal autonomy and self-determination that when read together give rise to the conclusion that "the gender to which a person belongs is to be determined by the person concerned".[5] Further, for the first time, the Court held that the anti-discrimination provisions under Articles 14 to 16 included the right not to be discriminated against on the grounds of sexual orientation and gender. In particular the word "sex" in Articles 15 and 16 did not just refer to "man" and "woman", but included other self-identified gender identities.[6] The third limb of the justification for the protection of self-identified gender identities involved the freedom of speech and expression under Article 19(1)(a). The Court held that implicit restrictions, both social and legal, on the transgendered community's choice of self-expression through personal appearance or choice of dressing violated their constitutionally protected fundamental right to free expression. The Court referred extensively to international human rights law on gender identity and sexual orientation in support of these conclusions and issued several directions to the state to grant formal legal status and recognition to the transgender community. The Court held in *NALSA* that the state must in all laws and policies allow

[3] This does not include interim orders in ongoing cases on social rights that are currently pending before the Supreme Court.

[4] *National Legal Services Authority* v. *Union of India and Ors*, (2014) 5 SCC 438. Date decided: April 15, 2014 (Bench: K.S. Radhakrishnan and A.K. Sikri, JJ)

[5] Id., para 74.

[6] The case arose out of NALSA's writ petition on behalf of the transgender community, seeking legal declaration of the gender identity of transgenders and arguing that non-recognition of their gender identity was violative of Articles 14, 19(1)(a) and 21 of the Constitution. Similar writ petitions and interventions were also clubbed along with NALSA's petition.

individuals to decide their own gender and record this as "male", "female" or "third gender".[7]

Prior to this decision, in December 2013, a two judge Bench of the Supreme Court had upheld the constitutional validity of a criminal statute on 'offences against the order of nature' and denied almost identical arguments for the recognition and protection of persons with different sexual orientations in *Suresh Kumar Koushal*.[8] The 2 judge Bench in *NALSA* was careful not to overrule *Koushal* but its recognition of the right to self-identification of gender identity and sexual orientation as constituting "the core of one's sense of being as well as an integral part of a person's identity and … one of the most basic aspects of self-determination, dignity and freedom…" [9] as well as a violation of the rights to equality and free expression casts doubt on the correctness of *Koushal*. Till the Court settles these doubts in the upcoming review of *Koushal* this dissonance in the Court's doctrine may be understood in the following ways: first, to be the result of the procedural and institutional weakness of the Court where co-ordinate benches of 2 judges decide constitutional questions of great importance without reference to a 5 judge Constitutional bench; secondly, to construe *NALSA* to be the general statement of constitutional principle in this field and *Koushal* to be the result of deference to the legislature on the appropriate ways to rectify defects in the criminal law. While *NALSA* is impressive in scope and justification and can potentially reshape wide areas of law and policy including criminal, labour and family law, early assessments suggest that this is yet to happen. Much will depend on how the broad directions issued by the Court will be implemented by government bodies at various levels. In September 2014, the Central Government sought clarifications and modifications of certain points in the Supreme Court's judgment in *NALSA,* which suggests that implementation of the Court's directions by the Central and State governments may still be several months away.[10]

In another judgment that garnered significant media attention, the Court in ***Charu Khurana and Ors v. Union of India and Ors***[11] held that applications from female make-up artists for membership to the Cine Costume Make-up Artists and Hair Dressers

[7] Other directions issued were to take steps to treat transgender community as socially and educationally backward for the purpose of reservation in education and employment; to declare that insistence on sex reassignment surgery as illegal; to operate separate HIV centers for transgenders; to provide separate public toilets and proper measures to provide medical care to transgenders in hospitals; and to take steps for framing social welfare schemes for the betterment of transgenders.

[8] *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

[9] *NALSA*, note 4, para 69.

[10] See *National Legal Services Authority v. Union of India and Ors*, W.P. 400/2012, Application for Clarification/Modification of the Judgment and Order of the Supreme Hon'ble Court dated 15.04.2014, available at http://orinam.net/content/wp-content/uploads/2014/09/NALSA_UOI.pdf In its application, the Government sought additional time beyond the 6 months granted by the Court to implement the Court's directions and also stated that the direction to treat transgenders as socially and educationally backward classes of citizens for purposes of reservation will need to be determined by the National Commission for Backward Classes.

[11] (2014) SCC OnLine SC 900, W.P (C) 78/2013. Date Decided: November 10, 2014 (Bench: Deepak Misra, U.U. Lalit, JJ.)

Association could not be rejected only on grounds that they were women.[12] This opinion is significant in two ways. First, it held discrimination on the grounds of gender to be a clear violation of Article 14 and a denial of "her capacity to earn her livelihood which affects her individual dignity" and thus a violation of Article 21.[13]As the Court has previously struggled to negotiate the nature of employment discrimination on the basis of gender in the airhostess cases,[14] this opinion breaks new ground. Secondly, though the Court did not deal directly with the question of whether the Association is "State" under Article 12, it held that any clause in the bye laws of a trade union which calls itself an Association, cannot violate Articles 14 and 21. This allows for the horizontal application of fundamental rights in ways that were denied by the Court in *Zoroastrian Co-operative Housing Society Ltd*.[15]

Residence

Discrimination in educational institutions based on residence was another theme in Article 14 judgments in 2014. In ***Vishal Goyal and Ors. v. State of Karnataka and Ors,***[16] candidates for admission to post-graduate courses in medical and dental colleges in Karnataka challenged the state government's requirement that only candidates of "Karnataka origin" were eligible to apply for these courses through the state quota.[17] The Supreme Court declared these domiciliary requirements in State Government medical and dental colleges as well as in the state quota in private medical and dental colleges to be *ultra vires* Article 14 of the Constitution. The Court relied heavily on its opinion in *Dr. Pradeep Jain and Ors. v. Union of India*[18] where the Court had held that, when it came to institutions of higher education, considerations other than excellence, such as residential status of the candidate, would violate Article 14 of the Constitution, in addition to compromising on quality and being detrimental to the interests of the nation. In subsequent cases the Court has refined and clarified the permissible scope of domiciliary requirements for State University admissions. However, States have continued to test the boundaries of

[12] Charu Khurana, a Hollywood trained make-up artist and hair stylist, applied for membership of Cine Costume Make-up Artists and Hair Dressers Association in Mumbai. The Association rejected her application on the grounds that (a) women were not eligible for membership as make-up artists and (b) she was not a resident of Mumbai for the past five years.

[13] *Charu Khurana*, note 11, para 45.

[14] *Air India Cabin Crew Association v. Yeshawinee Merchant and Ors. and related petitions*, (2003) (LS) SC 840.

[15] *Zoroastrian Co-operative Housing Society and Anr. v. District Registrar, Co-operative Societies (Urban) and Ors*, (2005) 5 SCC 632. In this case, the Court upheld the right of the society to exclude non-Zoroastrians from membership in the housing society.

[16] Writ Petition (Civil) No. 48/2014. Date Decided: April 24, 2014. (Bench: A.K. Patnaik J.)

[17] A candidate of "Karnataka origin' is one who has completed a minimum of ten academic years and passed the 10th and 12th standard examinations in Karnataka. The petitioners challenged this criterion as being as being violative of Article 14 as it unfairly advantaged people based purely on the factor of residence and also precluded candidates who may have completed their MBBS/BDS in institutions in Karnataka merely because they did not complete their 10th and 12th standards in the state.

[18] (1984) 3 SCC 654. The Court in *Pradeep Jain* held that institutional reservations for MBBS and BDS students shall be made for admission to post graduate courses for those who have completed their degrees in the State.

these limits and instituted more stringent requirements. In *Vishal Goyal* the requirement of completion of 10 academic years in Karnataka was struck down as being contrary to the decision in *Dr. Pradeep Jain* thereby constraining the power of the State to regulate this area. While *Dr. Pradeep Jain* was confined to medical and dental colleges run by the Union or State governments and municipalities, the Court in *Vishal Goyal* confirmed that the same principle applied to the state quotas in private medical and dental colleges as well.

Age

The Indian Constitution does not expressly prohibit discrimination based on 'age' under Articles 15 and 16. ***Union of India v. Atul Shukla*,** [19] involved an Article 14 challenge to the terms of service for officers in the Indian Air Force. The service terms prescribed different ages of retirement for Air Force officers. The retirement age for ground duty officers was 57 years whereas the returement age prescribed for flying officers was 54 years.[20] The Court held that a classification only on the basis of age resulting from a deliberate and conscious decision to create a younger work force was a violation of Article 14. This judgment is significant as it represents the first time that the Court has recognized age based classifications to be unconstitutional under Article 14. Though the Court did not go so far as to hold age to be a prohibited ground of discrimination under Articles 15 and 16, it is likely that this case will intensify the Court's scrutiny of age related discrimination in other contexts as well.

II. RIGHT TO FREEDOM: Article 19

Every citizen the six fundamental freedoms under Article 19 of the constitution. In ***ABP Pvt. Ltd and Anr v. Union of India and Ors***[21] the Court dealt with the applicability of two of these freedoms to the print media industry: the right to free speech and expression and the right to practice any profession or carry on any occupation, trade or business.[22] The Anand Bazaar Patrika group, which owns several news dailies and news magazines, challenged the regulation of labour in the newspaper industry by the Wage Boards constituted under the Working

[19] 2014 (11) SCALE 370. Date Decided: September 24, 2014. (Bench: T.S. Thakur and C. Nagappan, JJ).

[20] Following the Kargil War, the Ministry of Defence constituted a committee to study ways and means to help ensure a "younger age profile" for the commanding officer in the Indian Armed Forces. The classification at issue in this judgment stemmed from the recommendations of this committee.

[21] (2014) 3 SCC 327. Date Decided: February 7, 2014 (Bench: Ranjan Gogoi and Shiva Kirti Singh, JJ).

[22] Managements of various newspapers approached the Supreme Court, challenging the recommendation of the latest Wage Board that revised wages of working journalists and non-journalists working for newspapers. Further, they also challenged the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955. They argued that Wage Boards constituted under the Act have become obsolete, outdated and an unreasonable restriction on the newspaper industry and its rights under Article 19. Further, regulating the newspaper industry and not the electronic media was argued to be a violation of Article 14.

Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 ("Act") as an unconstitutional restriction on the freedom of the press. An identical challenge was made and rejected more than 50 years ago in *Express Newspapers*[23] where the Court held that the newspaper industry was a class by itself and could be specifically regulated. ABP claimed that such regulation had been abandoned in all other industries and that today the press was singled out through such regulation.[24] However, the Court held that mere passage of time does not indicate that the Act had become obsolete or archaic, and followed precedent to uphold this regulation. While the Supreme Court has consistently held that the freedom of the press does not provide the press with an exemption from the applicability of generally applicable laws, the Court has usually been more sensitive to laws that are selectively applicable to the press.[25] In ABP, the Court adopted a more doctrinaire approach and did held that the recommendations of the Wage Board were reasonable and cannot be held that they were in violation of Article 19 (1) (g).

In 2014 India conducted its 16th general election. Predictably, there was a whole spate of cases that tested the limits of the right to free speech in the context of hate speech. In ***Pravasi Bhalai Sangathan v. Union of India and Ors*,**[26] the Court heard a PIL praying for a series of declarations and directions prohibiting hate speech. The petitioner was an organization working for the welfare of inter-state migrants and sought declarations regarding hate speeches made by representatives of political parties and religious leaders along religious, caste, ethnic and regional lines. The Court developed a robust justification for regulating hate speech and described it as an "effort to marginalize individuals based on their membership in a group" [27] and recognized that such speech lays the groundwork for further discrimination and segregation. However, it reviewed the existing civil and criminal laws under which hate speech was regulated and concluded that it was unnecessary to pass any other directions as such an order or direction might be judicially unmanageable. The only concrete outcome from this survey was a request to the Law Commission to examine whether the Election Commission should be conferred the power to de-recognise a political party for hate speech.[28] The 2014 general election and the various State elections have seen the growth in the scope and intensity of communal hate speech as a campaign device. In the 1990s the Supreme

[23] *Express Newspapers Pvt Ltd. V. Union of India,* (1985) 1 SCC 641.
[24] *ABP Private Limited*, note 21, para 20.
[25] See Bennett Coleman v. Union of India, (1972) 2 SCC 788, where the Court held that singling out the press in a manner that would restrict circulation and impose a prohibitive burden would violate Article 19(1)(a).

[26] AIR 2014 SC 1591. Date Decided: March 12, 2014 (Bench: Dr. B.S. Chauhan, M.Y. Eqbal, A.K. Sikri, JJ)
[27] *Pravasi Bhalai Sangatham*, note 26, para 7.
[28] Two months later, the Court heard another public interest petition on hate speech during elections in *Jafar Imam Naqvi v. Election Commission of India* AIR 2014 SC 2537 where the Court dismissed the petition relying on the decision in *Pravasi Bhalai* and holding that entertaining such prayers in a public interest petition again would be inappropriate and would not be within the constitutional parameters.

Court failed to take a firm approach to curtailing this speech, which in effect legitimized such speech.[29] In 2014, while the Court did not issue any proactive directions to curtail hate speech, its well-grounded articulation of the perils of hate speech in *Pravasi Bhalai Sangathan* will no doubt provide a useful benchmark when the Court considers these issues in the coming years.

III. LIFE: Article 21

Article 21 is often understood as the normative foundation from which many new unenumerated rights may be derived and developed. However, this year the most important cases on the right to life were about the conditions under which the State may deprive any person of their life: the death penalty and encounter killings.

The decisions of the Court in *Jagmohan*[30] and *Bachan Singh* [31] have appeared to foreclose the Constitutional challenge to the death penalty itself as a violation of Article 21. Ever since, the Court's attention has focused on the application of the rarest of the rare cases sentencing standard and the procedural administration of death row and mercy petitions. In ***Shatrughan Chauhan & Anr. vs. Union of India and Ors***[32] the Court considered the commutation of death sentences of 15 convicts whose mercy petitions had been rejected by the President.[33] The Court spelt out its analysis for commutation of death sentences to life imprisonment and evaluated various supervening circumstances: prolonged delay in execution of a death sentence and insanity, mental illness/schizophrenia of the convict are valid criteria. This judgement is therefore also a recognition of the rights of persons with mental disability being on death row. However, the award of sentence based on *per incuriam* judgments does not entitle a convict to commutation. The Court stressed that no exhaustive guidelines or outer time limits could be prescribed for disposing mercy petitions and the analysis must proceed on an individualized case-by-case basis. The Court held that when the delays in disposing mercy petitions were seen to be "unreasonable, unexplained and exorbitant,"[34] it was the duty of the Court to step in. In applying these standards to the individual petitioners, the Court found that 'all' the fifteen convicts were entitled to a commutation of their sentences. Further, the Court also laid down certain conditions in the treatment of convicts.[35]

The new law in *Shatrugan Chauhan* led to immediate relief to the 15 petitioners and can potentially lead to a review of the 22 mercy petitions that were recently rejected

[29] *Manohar Joshi vs Nitin Bhaurao Patil & Anr.,* 1996 SCC (1) 169

[30] *Jagmohan Singh v. The State of U.P.*, (1973) 1 SCC 20.

[31] *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24.

[32] (2014) 3 SCC 1. Date Decided: January 21, 2014 (Bench: P. Sathasivam, CJI, Ranjan Gogoi, Shiva Kirti Singh, JJ)

[33] The argument was that a number of supervening circumstances had occurred that resulted in their death sentences violating their right to life under Article 21 of the Indian Constitution.

[34] *Shatrugan Chauhan,* note 31, para 263.

[35] These included conditions that the convict should not be placed in solitary confinement; be provided with free legal aid; receive speedy disposal of mercy petitions; receive communication of rejection of mercy petition in writing; receive a minimum fourteen day notice before execution; be subject to a mental health evaluation of prisoner prior to execution.

by the President.[36] For this reason alone this judgment must be seen as the most impactful judgment of the year.

The Court followed up its decision on the commutation process in *Shatrugan Chauhan* with more procedural protection through the judicial review process of commutation decisions in ***Mohd. Arif and Ors. v. The Registrar, Supreme Court of India and Ors.***[37] A Constitution Bench, by a 4:1 decision, held that judicial review of death penalty cases must mandatorily be heard in open court by a bench of at least three judges.[38] In doing so, the Court held that the Supreme Court Rules [39] that allowed applications for review to be disposed of by circulation without any oral arguments was unconstitutional in so far as review petitions for death penalty cases were concerned.[40] It justified these special requirements on the basis that the right to life could be deprived only upon following a procedure that was 'just', 'fair' and 'reasonable'.[41]

Another context in which the Court considered the deprivation of the right to life was encounter deaths. In ***PUCL v. State of Maharashtra***[42], the petitioners demanded that the Court issue directions for the investigation of deaths in police encounters.[43] The Court laid down detailed procedures to be followed in investigating deaths arising from police encounters, which served to concretise and clarify the procedure through which the right to life may be deprived.[44] Over the years the Court has considered several encounter cases, including *Chaitanya Kalbagh*[45] and *Prakash Kadam*[46], where it issued case specific directions. In *PUCL*, the Court consolidated the procedural safeguards implicit in these earlier judgments and also articulated the procedures for investigation and maintaining records in greater detail.

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[36] President's Secretariat, "Statement of Mercy Petition Cases" as on 03.11.2014, available at rashtrapatisachivalaya.gov.in/pdfs/mercy.pdf

[37] (2014) 9 SCC 737, Date Decided: September 2, 2014. (Bench: R.M. Lodha, CJI, J.S. Khehar, J. Chelameswar, A.K. Sikri, R.F. Nariman, JJ)

[38] This case arose from a group of petitions which contended that review petitions involving review of death sentences should be heard by a bench of at least three or preferably five Supreme Court justices and should be heard in open Court rather than by "circulation".

[39] Amendment Order XL to Rule 3 of the Supreme Court Rules, 1966

[40] The Constitutionality of Rule 3 of the Supreme Court Rules, 1966 had previously been considered and upheld by the Court in *P.N. Eswara Iyer and Ors. v. Registrar, Supreme Court of India* (1980) 4 SCC 680. The Court was careful to state that its decision in *Mohd Arif* was not contrary to the Constitutional Bench's decision in *P.N. Eswara Iyer*, but instead carved out a niche for review petitions that involved commutation of death penalties.

[41] *Mohd Arif*, note 36, para 40.

[42] 2014 (11) SCALE 119. Date Decided: September 23, 2014 (Bench: R.M. Lodha, CJI, R.F. Nariman, J.)

[43] This case was an appeal from a judgment of the Bombay High Court where PUCL had sought directions from the Court regarding nearly 99 police encounters that had occurred in Mumbai between 1995 and 1997 and resulted in the deaths of 135 persons.

[44] These included requirements to record any receipt of intelligence or a tip-off in writing and to file an FIR without delay if an encounter death occurred following a tip-off or receipt of intelligence. The Court also held that investigations of encounter deaths had to be conducted by the CID or an independent police team andprovided detailed procedures on the facts to be recorded and the rights of the victim's family to compensation/complaint.

[45] *Chaitanya Kalbagh and Ors. v. State of U.P. and Ors.*, (1989) 2 SCC 314.

[46] *Prakash Kadam and Ors. v. Ramprasad Viswanath Gupta and Anr.,* (2011) 6 SCC 189.

Over the last three decades, the Court has been less able and willing to protect life and liberty against the State vigorously. There is hardly any instance where the Court has struck down an internal security law or procedure as unconstitutional. In 2014, the Court has made significant progress in institutionalizing procedural constraints on the death penalty and encounter killings. This may well be the first sign of a stronger constitutional protection of the core life and liberty rights against State intrusion.

IV. RIGHT TO EDUCATION: Article 21A

The Right of Children to Free and Compulsory Education Act, 2009 ("RTE Act") legally guarantees the fundamental right of children to education under Article 21A and imposes duties on schools to provide education that complies with basic norms and standards. Section 12(1)(c) of the RTE Act mandates that unaided private schools must admit 25% of their student strength in Class I with children from weaker and disadvantaged sections of society. Section 18 made it mandatory for all schools to secure a certificate of recognition and Section 21 provides for the establishment of a School Management Committee in every school. In 2012, in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr*.[47], a 3 judge bench considered the challenge by several private aided, unaided, minority and non-minority schools to the constitutional validity of the RTE Act. While unaided non-minority schools claimed that the Act, especially Section 12(1)(c), violated their freedom to carry out a business under Article 19(1)(g), aided and unaided minority schools argued that the Act infringed on their special constitutional rights as minority institutions under Article 29 and 30 of the Constitution. The Supreme Court upheld the constitutional validity of the RTE Act, but held that the Act, especially Section 12 did not apply to unaided minority schools as it infringed on their rights under Article 29 and 30 of the Constitution.

A year later, in ***Pramati Educational and Cultural Trust***, [48] several unaided non-minority schools approached a Constitution Bench of the Supreme Court challenging not only the RTE Act, but also Articles 21A and 15(5). The main ground for challenge was that Articles 15(5) and 21A and the RTE Act infringed on the principle of equality which is a basic feature of the Constitution. Therefore they claimed that the RTE Act destroyed the basic structure of the Constitution.

Article 15(5) was introduced into the Constitution through The Constitution (Ninety-Third Amendment) Act, 2005 to enable the state to require private non-minority educational institutions to admit students from socially and economically backward classes. The 5 judge bench upheld the constitutional validity of Article 15(5) on the following grounds: first, as the object of Article 15(5) was to provide equal

[47] (2012) 6 SCC 102.

[48] *Pramati Educational & Cultural Trust & Ors v. Union of India & Ors,* (2014) 8 SCC 1. Date Decided: May 6, 2014 (Bench: R.M. Lodha, CJI, A. K. Patnaik, Sudhansu Jyoti Mukhopadhaya, Dipak Misra, Fakkir Mohamed Ibrahim Kalifulla, JJ.)

opportunities to students the admission of a small percentage of students from weaker and disadvantaged sections of the society would not erode the right to do business under Article 19(1)(g). Secondly, the Article 15(5) distinction between minority and non-minority schools did not damage the equality principle as the Constitution already recognized minority schools as a separate class.

The primary challenge to Article 21A was that in so far as it imposed obligations on non-state actors it damaged their fundamental rights to do business. While the Court agreed with the petitioners that the primary obligation under Article 21A is on the 'State' it may, by law, determine the 'manner' in which this may be done. Imposing obligations on private schools does not violate their rights to do business under Article 19(1)(g) so long as these obligations were modest and could be justified on a harmonious construction of Articles 21A and 19(1)(g).

The second challenge to Article 21A was that its application to minority schools violated Articles 29 and 30. While the Court 'harmoniously' balanced Articles 21A and 19(1)(g), it surprisingly created an exception to the scope of Article 21A to exempt all minority schools (whether aided or unaided). The Court went further than its judgment in *Society* to exempt all minority schools from Article 21A as it was concerned 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 of the school." [49] However, this concern about admissions of non-minority students does not justify the exemption of minority schools from all regulation under Article 21A and the RTE Act.

State regulation of the medium of instruction in schools has remained a primary focus of regulation for some State governments. These regulations have been challenged by private schools and parents who argue that they should decide the medium of instruction for their students and children respectively. In ***State of Karnataka & Anr v. Associated Management of (Government Recognised – Unaided – English Medium) Primary & Secondary Schools & Ors.***[50] ("*Medium of Instruction case*")the Court held that the right to freedom of speech and expression under Article 19(1)(a) included the right of a child to be educated in the medium of instruction of her choice (or on her behalf, her parent's or guardian's choice). Consequently, the State could not restrict this right because it is of the opinion that a certain language is more beneficial for the child.[51] However, the Court did not

[49] *Pramati Educational & Cultural Trust,* note 47, para 33.

[50] (2014) 9 SCC 485. Date Decided: May 6, 2014 (Bench: R.M. Lodha CJI, A. K. Patnaik, Sudhansu Jyoti Mukhopadhaya, Dipak Misra, Fakkir Mohamed Ibrahim Kalifulla, JJ.)

[51] In 1994, the Government of Karnataka issued an order that the medium of instruction in all Government recognized schools in classes I to IV must be in the mother tongue or in Kannada and that students may change over to English or any other language as a medium of their choice only from class V. The Associated Management of Primary and Secondary Schools in Karnataka challenged this Order, contendeding that the right to choose the medium of instruction in classes I to IV of a school was a Fundamental Right of the child under Art.19(1)(a) and 21A and the school under Articles 19(1)(g), 26, 29 and 30(1) of the Constitution. The Karnataka High Court quashed the order in so far as it was

carefully reconcile the power of the State to regulate education under Article 21A and the right of the child to choose under Article 19(1)(a). Further, medium of instruction regulations were held to violate the right of unaided schools to do business under Article 19 and minority schools protection under Articles 29(1) and 30.

In the absence of any other significant Supreme Court cases on social and economic rights this year, *Pramati* and *Medium of Instruction case,* offer us the only window into the Court's understanding of the scope and application of such rights. Two facets of the *Pramati* decision deserve emphasis: the implicit horizontal application of the right to education to private schools opens the possibility of the horizontal application of other social and economic rights that can lead to more equitable and sustainable social change. Secondly, the exemption granted to minority schools has created a surge of schools seeking minority status. In litigation before various High Courts [52] and now before the Supreme Court,[53] the scope and extent of the minority exception has become the most intensely litigated aspect of the right to education. The Court's judgment in the *Medium of Instruction case* too is likely to give rise to further litigation as some State governments seek to overcome this decision through new regulations in the area of medium of instruction.

V. RELIGION: Articles 26 to 30

The Constitution protects the religious and cultural rights of several groups. In 2014 the Court decided important cases on the right to adopt, the right to continue with traditional practices and customs, and the extent to which the state may regulate religious institutions. We review these cases in turn.

The parent's right to adopt a child is regulated by statutory and customary personal law in India. *Laxmikant Pandey v. Union of India*[54] instituted new judicially crafted regulations for inter-country and intra-country adoption processes. In ***Shabnam Hashmi v. Union of India and Others***,[55] a public interest petitioner prayed for the recognition of the fundamental right of parents to adopt a child irrespective of religion, caste and creed under Article 21 of the Constitution. The Court recognized the enabling provisions of the Juvenile Justice Act, 2000 and the normative force of Article 44 which commends the pursuit of a uniform civil code. However, the Court did not go so far as to recognize a fundamental right to adopt as it chose to wait for the "dissipation of conflicting thought processes in this sphere of practices and belief prevailing in the country." [56] In the meantime, the Court clarified that personal

applicable to unaided primary and secondary schools and the State of Karnataka subsequently appealed this decision to the Supreme Court.

[52] See for example, *Azim Premji Foundation v. State of Karnataka and Ors.*, W.P. 42994/2014, (High Court of Karnataka) and *Ashith Karthik Rao and Ors. v. State of Karnataka and Ors.*, W.P. 29061/2014, decided on 04.09.2014 (High Court of Karnataka).

[53] See for example, *National Coalition for Education v. Union of India and Ors.,* W.P. 267/2014 (Supreme Court); *Vibgyor School, N S Palya and Ors. v. State of Karnataka and Ors.*, Civil Appeal 10292/2014 (Supreme Court).

[54] (1984) 2 SCC 244.

[55] *Shabnam Hashmi v. Union of India and Others,* (2014) 4 SCC 1. Date Decided: February 19, 2014 (Bench: P. Sathasivam, CJI, Ranjan Gogoi, Shiva Kirti Singh, JJ)

[56] Id , para 16.

law, beliefs and faith cannot constrain the operation of secular enabling law in these fields. To that extent the judgment advances a secular option to members of any religious faith who choose to adopt a child.

Article 26 grants every religious denomination and any part of such denomination the right to manage its own religious affairs subject to regulations on the grounds of public order, morality and health. In ***Animal Welfare Board vs. A. Nagaraja & Ors*****,**[57] the constitutional validity of the Prevention of Cruelty to Animals Act, 1960 [58] (the "PCA Act") to regulate or prohibit a custom of bullock cart racing was challenged as a violation of Article 26. Moreover, the Tamil Nadu Regulation of Jallikattu Act, 2009 did not prohibit this traditional practice. *Animal Welfare Board* does not directly discuss religious rights under Articles 25-30 and the Court in effect denies that the practice is one that is protected by Article 26. Instead, the Court emphasized the "the welfare and the well-being of the animals" and found that the animals were clearly subjected to mental and physical abuse during and in preparation for these races.[59] Reading the PCA Act with the fundamental duties under Articles 51(g) and (h) to have compassion for living creatures and develop humanism, the Court held that bulls could not be used as performing animals in these traditional races. Further, the Court held that the Tamil Nadu statute was repugnant to the provisions of the PCA Act and thus void under Article 254(1) of the Constitution. The willingness of the Court to narrowly construe the scope of Article 26 either to recognizable religious denominations or to identifiable religious activities will subject a wider range of traditional and customary practices to critical scrutiny for fundamental rights violations and legislative reform.

Other issues that the Court dealt with in relation to religious rights included the extent to which the state can regulate the administration of religious institutions. In ***Dr. Subramanian Swamy v. State of Tamil Nadu and Ors.,***[60] the Court held that any officer appointed by the Government to administer the temple could be appointed only temporarily in case of mismanagement of the temple and not on a permanent basis as this would violate the rights of the Dikshitar denomination under Article 26 of the Constitution. [61]

[57] *Animal Welfare Board v. A Nagaraja and Ors,* (2014) 7 SCC 547 Date Decided: May 7, 2014 (Bench: K.S. Radhakrishnan, Pinaki Chandra Ghose, JJ.)

[58] While some parties challenged Government Notifications prohibiting the race, others intervened to protect the Notification and uphold the prohibition. The organizers of the events claimed that the race was a custom of more than 300 years and was closely associated with village life in South India.

[59] *Animal Welfare Board,* note 56, para 73.

[60] (2014) 5 SCC 75. Date Decided: January 6, 2014 (Bench: Dr. B.S. Chauhan, S.A. Bobde, JJ.)

[61] A community called "Podhu Dikshitars" administered the Sabhanayar Temple in Chidambaram, Tamil Nadu. The Commissioner of Religious Endowments appointed an Executive Officer under the Act and passed an Order defining his powers and duties. The Trust Board of the temple challenged the Order before the Madras High Court in a Writ Petition. The Petition and the subsequent appeal before the Division Bench of the High Court were dismissed. During these proceedings, the High Court allowed Subramanium Swamy to be impleaded as a party. He appealed to the

The renewed focus on religious conversions and the uniform civil code in the last few months is likely to give rise to new litigation that will test the boundaries of religious and cultural freedom in India. In 2015 the Court's resolve to protect the secular character of the Constitution will possibly be severely tested.

Conclusion

This review confirms that fundamental rights protection is not the primary function of the Supreme Court of India either in terms of the size of the docket or the scope and nature of the cases before the Court. While the Supreme Court does not choose its own cases and merely responds to the cases brought before it by petitioners, we must appreciate that the Court can significantly shape its jurisdiction through procedural and substantive measures that facilitate and encourage rights protection litigation. This Review shows that the rights protection role of the Supreme Court and its willingness to grant substantive protection, especially in socio-economic rights is diminishing. What is really needed is a detailed and critical analysis of the role of the Court in protection of fundamental rights. One of the motivations for this review is to bring to public attention to the capacity and willingness of the Court to discharge this constitutional mandate conferred on it.

In conclusion it can be said that in 2014 the three most important cases were *Shatrugan Chauhan* (on the death penalty), *Pramati* (on right to education) and *NALSA* (on sex discrimination). In both *Shatrugan Chauhan* and *Pramati*, the Court chose to protect these rights in a manner that will give rise to significant litigation. In *Shatrugan Chauhan* the Court directed a case-by-case review and this will mean that the Supreme Court must dedicate significant resources to ensure that convicts on death row receive prompt decisions on review. In *Pramati* the Court exempted minority institutions substantially from Article 21A and the RTE Act which has led to repeat litigation on the identification of minorities and the scope of their exemption from the right to education obligations. It was in *NALSA* that the Court adopted a sharper principled approach to rights adjudication to guide legislative and executive authorities as well as private actors through a broad holding that can be the basis for radical social change. The promise of the elaborate protection of fundamental rights in the Indian Constitution requires a Court that readily embraces the substantive role that it does in *NALSA*.

Supreme Court against the judgment and order of the High Court.

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