Rights in Review 2016

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CLPR engages in law and policy research and strategic impact litigation to promote the recognition and realization of constitutional values and fundamental rights. Our work aims to empower marginalized groups - especially women and adolescent girls; transgender persons and sexual minorities; people with disabilities and Dalits.

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Introduction

This is the third annual Rights in Review Report released by the Centre for Law and Policy Research, Bangalore. In 2014 and 2015 we published and disseminated rigorous, yet readable, critical assessments of the key decisions of Indian Supreme Court on fundamental rights cases. The acknowledgment and encouragement we have received from judges on the Bench, fellow advocates at the Bar, law students and the public at large convince us that this Report will in the course of time stand out as a veritable record of the Supreme Court's role as a guardian of India's liberal democratic constitution.

This year we will expand the range of cases considered to include both fundamental rights and directive principles cases. Directive principles have re-emerged into our legal and constitutional discourse in new and interesting ways: cow slaughter, uniform civil code and prohibition of alcohol all seek to draw support from Part IV of the constitution.

This book will also be available as a flipbook and as an e-book for enhanced access and distribution.

The Right to Life and Personal Liberty: Article 21

Rights of Undertrials

Re: Inhuman Conditions in 1382 Prisons, (2016) 3 SCC 700

The Article 21 right to life and personal liberty has been progressively extended to prisoners and prison conditions since *Hussainara Khatoon (IV) v Home Secretary, State of Bihar.*[1] In 2016, the Supreme Court revisited the problems of under-trial detention in *Re: Inhuman Conditions in 1382 Prisons.*[2]

In 2013, former Chief Justice R. C. Lahoti wrote a letter to the sitting Chief Justice highlighting problems of overcrowding, unnatural deaths, and inadequate staff in 1382 prisons. He raised four main concerns: overcrowding in prisons, unnatural death of prisoners, shortage of staff, and inadequately trained staff.[3] The letter was registered as a Public Interest Litigation ('PIL') petition in July 2013. The matter is being heard by a bench comprising Justices Madan B. Lokur and Deepak Gupta. Mr. Gaurav Agrawal has been appointed as Amicus Curiae. The Union of India, and all states and union territories are the respondents. The National Human Rights Commission (NHRC) and the National Forum for Prison Reforms are intervenors in the matter.

Affirming precedents which have held that prisoners are also entitled to fundamental rights and deserve to be treated with dignity,[4] in 2016, the court focused on reducing overcrowding in the prisons, primarily through facilitating the early release of

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[1] *Hussainara Khatoon (IV) v Home Secretary, State of Bihar* [(1980) 1 SCC 98]. The Supreme Court has affirmed the right to life and personal dignity of prisoners in *State of Maharashtra v. Prabhakar Pandurang Sangzgiri,* AIR 1966 SC 424; *Charles Sobhraj v. Supdt., Central Jail, Tihar* (1978) 4 SCC 104; *Sunil Batra (II) v. Delhi Administration* (1980) 3 SCC 488; *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608; *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746; *Rama Murthy v. State of Karnataka* (1997) 2 SCC 642; *D.K. Basu v. State of W.B.* (1997) 1 SCC 416; and *T.K. Gopal v. State of Karnataka* (2000) 6 SCC 168.

[2] *Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700

[3] *Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700, 707

[4] *Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700, 705-706. See *Sunil Batra (II) v. Delhi Administration* (1980) 3 SCC 488; *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608; *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746; *Rama Murthy v. State of Karnataka* (1997) 2 SCC 642; *D.K. Basu v. State of W.B.* (1997) 1 SCC 416; and *T.K. Gopal v. State of Karnataka* (2000) 6 SCC 168.

prisoners. The court approached the issue on five fronts: poorly maintained information management systems, ineffective implementation of Sections 436 and 436-A of the Code of Criminal Procedure (Cr. P. C.), incarceration for compoundable offences, efficacious Under Trial Review Committees (UTRCs), and effective legal aid for the poor.

The court directed the Ministry of Home Affairs to ensure that the Management Information System is in place in all the Central, District Jails, and Women jails.[5] Next, it directed the Secretary of the District Legal Services Committee to ensure the release of undertrial prisoners in compoundable offences and explore the possibility of compounding offences rather than carrying out a trial.[6] It instructed the national, state and district legal service authorities to empanel competent lawyers to provide effective legal aid to poor undertrial prisoners and convicts.[7] It mandated quarterly meetings of UTRCs[8] in every district followed up by appropriate steps for early release.[9] The UTRCs were directed to look into effective implementation of Section 436A Cr. P. C .which prescribes the release of undertrial prisoners who have completed more than half of their prescribed punishment. In May 2016, it expanded the mandate of the UTRCs to examine cases where the accused is eligible for bail under Section 167(2)(a)(i)&(ii) of Cr. P. C. (i.e. where investigation is not completed within the stipulated period); those imprisoned for offences which carry a maximum punishment of 2 years; first time male offenders between the ages 19 and 21 who are in custody for offences punishable with less than 7 years of imprisonment and have undergone 1/4th of the maximum sentence; undertrial prisoners who are sick, infirm, or of unsound mind; and prisoners whose trial has not been concluded within sixty days from the date fixed for taking evidence.[10]

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[5] *Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700, 722

[6] *Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700, 722
"Compounding" of an offence is when the complainant agrees to have the charges dropped against the accused. See Section 320 of the Code of Criminal Procedure for the list of offences that can be compounded.

[7] *Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700, 722

[8] In 2015, the Supreme Court had directed that Under Trial Review Committees ('UTRCs') be set up in every prison to review and reduce the incarceration of undertrial prisoners. See *Bhim Singh v. Union of India*, (2015) 13 SCC 603

[9] *Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700, 722

[10] See Order of the Supreme Court in *Re: Inhuman Conditions in 1382 Prisons* dated 6th May 2016.

Additionally, the Court emphasised on the updation of the Model Prison Manual. It mandated the Union government to conduct an annual review of the implementation of the Model Prison Manual 2016.[11] It also directed a similar manual to be prepared for juveniles in Observation Homes or Special Homes under the Juvenile Justice (Care and Protection of Children) Act, 2015.[12]

Despite the court's detailed orders, recent research has suggested spotty implementation on creation of UTRCs and their ability to secure early release of undertrial prisoners.[13]

As the case proceeded, through 2017 the court issued orders to address issues of staff shortage in the prisons[14], appoint a Board of Visitors to visit jails and suggest improvements to the conditions of the prisoners[15], and passed detailed directions on the issue of unnatural deaths in prisons.[16] In subsequent proceedings, the court will examine the Standard Operating Procedure for representation of undertrials framed by the National Legal Services Authority for Under Trial Review Committees.[17]

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[11] *Model Prison Manual 2016*, Ministry of Home Affairs, Government of India, New Delhi (2016)

[12] *Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700, 723

[13] Amnesty International India, Justice Under Trial: A Study of Pre-trial Detention in India, 2017.

[14] See Orders of the Supreme Court in *Re: Inhuman Conditions in 1382 Prisons* dated 17th February 2017 and 2nd May 2017.

[15] See Order of the Supreme Court in *Re: Inhuman Conditions in 1382 Prisons* dated 2nd May 2017.

[16] *Re: Inhuman Conditions in 1382 Prisons*, (2017) 10 SCC 658

[17] 'Standard Operating Procedure for Representation of Persons in Custody', National Legal Services Authority. Available at <https://nalsa.gov.in/sites/default/files/document/SOP-%20Persons%20in%20Custody.pdf>, Last accessed 19.03.2018

Increased Compensation for Acid Attack Victims

Parivartan Kendra v. Union of India, (2016) 3 SCC 571

Parivartan Kendra, a non-governmental organisation, filed a public interest litigation (PIL) petition under Article 32 seeking compensation for two dalit victims of a brutal acid attack. They alleged that after the attack, the survivors were not given adequate treatment at the hospital due to their caste. Parivartan Kendra asked the court to issue a writ of mandamus to the State of Bihar to provide Rs. 5 Lakhs to the victim for the treatment costs, and at least Rs. 10 lakhs for the pain and suffering endured by the family.[18] It further asked the court to issue a writ of mandamus, asking the government to develop a standard treatment and management guidelines for acid attack victims.[19] Further, it prayed for acid attacks to be included as an offence within the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.[20]

Parivartan Kendra argued that despite the directions of the Supreme Court in *Laxmi v. Union of India*[21], where the Supreme Court had banned over-the-counter sale of acid and directed State governments to provide a minimum of Rs. 3 lakhs compensation under Victim Compensation Schemes, acid is still readily available in India and acid attackers continue to be immune to legal consequences. It pointed out that acid attacks are most prevalent in Bangladesh, Pakistan, Cambodia and India. All countries except India provide effective remedies to the victims. India neither provides adequate compensation to the survivors[22] and nor has any standards for treatment or facilities to treat acid attack victims.[23]

The Supreme Court noted the lack of proper implementation of regulations or control of supply and distribution of acid, it did not issue further guidelines in this regard,

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[18] *Parivartan Kendra v. Union of India,* (2016) 3 SCC 571, 573

[19] *Parivartan Kendra v. Union of India,* (2016) 3 SCC 571, 574

[20] *Parivartan Kendra v. Union of India,* (2016) 3 SCC 571, 574

[21] *Laxmi v. Union of India,* (2014) 4 SCC 427

[22] The compensation amount of "atleast 3 lakhs", to be paid by the State Government as aftercare and rehabilitation costs. See *Laxmi v. Union of India,* (2014) 4 SCC 427, 429-431

[23] *Parivartan Kendra v. Union of India,* (2016) 3 SCC 571, 573-574

and focused on the aspect of compensation. Lastly, the Supreme Court directed the States and Union Territories to take steps to include acid attack victims in the disability list.[24] The court examined the orders passed in *Laxmi v. Union of India*[25], and held that the judgement did not restrict the compensation to 3 lakhs and that the court has the power to grant more compensation. In this case, considering the expenses incurred by the victims' family and taking into account the victims' inability to lead a full life as a result of the acid attack, the court directed the state government to pay a total compensation of 13 lakhs to the victims, and take responsibility for their entire treatment and rehabilitation.

In *Parivartan Kendra v. Union of India*, the Supreme Court did not emphasise much on the aspect of criminal prosecution and prevention of acid attacks. However, it confirmed the orders passed in *Laxmi v. Union of India.*[26] It highlighted the plight of acid attack victims to justify the need for enhanced compensation, taking into account the social stigma they face, the difficulty they have in obtaining employment, and the medical expenses they incur. The enhanced compensation helps the victim secure medical treatment and motivates the State to strictly implement the guidelines so that acid attacks are prevented in the future. More importantly, the Supreme Court directed all States to take steps to include acid attack victims' names in the disability list under the Rights of Persons with Disabilities Act.[27] This recognizes the life-long consequences that acid attack victims face, as was effectively pointed out by the court and will also enable them to rights and entitlements under the law relating to persons with disabilities. The list of physical disabilities in the Act includes 'acid attack victims'.[28]

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[24] *Parivartan Kendra v. Union of India,* (2016) 3 SCC 571, 581

[25] *Laxmi v. Union of India,* (2014) 4 SCC 427

[26] *Laxmi v. Union of India,* (2014) 4 SCC 427

[27] Rights of Persons with Disabilities Act, 2016, Schedule.

[28] Rights of Persons with Disabilities Act, 2016, Schedule, Clause (1)(A)(e).

Right to Live with Dignity

Jeeja Ghosh v. Union of India, (2016) 7 SCC 761

Ms. Jeeja Ghosh, a disability rights activist with cerebral palsy, was forced to deboard her flight for an international conference on disability rights, by SpiceJet. Due to this incident, Ms. Ghosh was unable to attend the Conference and faced severe mental trauma and embarrassment.[29] She approached the Supreme Court under Article 32 seeking legal action and compensation against SpiceJet. The matter was heard by bench comprising Justices A.K. Sikri and R. K. Agrawal.

In her petition, Ms. Ghosh highlighted other instances of disabled persons having faced difficulty and discomfort such as forced de-boarding and signing of indemnity bonds at the hands of non-empathetic airline authorities[30], thus violating their human dignity inherent under Article 21. She argued that SpiceJet violated the 'Civil Aviation Requirements, 2008' with regard to 'Carriage by Air of Persons with Disability and/or Persons with Reduced Mobility'.[31] These prohibit airlines from refusing to carry persons with disability and mandates a training program for their staff every three years. The court stated that the existence of these requirements indicate that the authorities are aware of the problems that persons with disabilities suffer while travelling.[32]

Ms Ghosh pointed out that the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which India ratified in 2007, requires Parties to prohibit all discrimination on the basis of disability, and guarantee equal and effective legal protection to disabled persons.[33] It strives to enable them to live independently, which entails access to transportation systems such as airlines.[34] India has also signed the 'Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for

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[29] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 769
[30] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 772
[31] Issued by the Directorate General of Civil Aviation (DGCA) under Aircraft Rules, 1937. Available at http://dgca.nic.in/misc/draft%20cars/d3m-m1(R1).pdf.
[32] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 770
[33] Article 5, UNCRPD, 2006.
[34] Article 9, UNCRPD, 2006

Persons With Disabilities in Asia and the Pacific' which explicitly requires land, water and air public transport systems to be made accessible and usable as soon as practicable.[35]

SpiceJet Ltd denied any maltreatment towards Ms Ghosh. It alleged that Ms Ghosh had not indicated her disability while booking her tickets. Not knowing of her disability led to confusion and subsequent deboarding of Ms Ghosh, as the crew members felt that she could not have been able to take the five-hour long flight without an escort. Had the airlines been informed of her disability, it would have arranged for an escort. The airlines argued that they act in good faith and in the interest of the safety of all the other passengers.[36]

The Union of India submitted that the Government realised the shortcomings of the 'Civil Aviation Requirements 2008' (CAR 2008) and constituted the 'Asok Kumar Committee'[37] to revise them. The CAR was amended in 2014. Ms Ghosh gave several comments on CAR 2014 in order to improve it. The Union of India said that it had no objection to the court going into the implementation of specific parts of the report.[38]

The court affirmed that '*the rights guaranteed to differently-abled persons under the Persons with Disabilities Act, 1995*[39] *are founded on the principles of human dignity',* which is a facet of the right to life and liberty.[40] The court insisted that '*human dignity is a constitutional value and a constitutional goal*'.[41] Thus, the court held, a violation of the Persons with Disabilities Act violates the Article 21 right to life.[42]

Further, the court held that it is the Government's obligations to ensure that those with disabilities achieve their full potential, free from discrimination and harassment.[43]

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[35] See 'Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons With Disabilities in Asia and the Pacific', UNESCO, 2003, E/ESCAP/APDDP/4/Rev.1, Target 14.

[36] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 789

[37] Asok Kumar Committee to Review Existing CAR on Carriage of Persons with Disability or Reduced Mobility. Report Available at http://civilaviation.gov.in/sites/default/files/moca_003352.pdf.

[38] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 777

[39] Persons with Disabilities (Equal Opportunities,Protection of Rights and Full Participation) Act, 1995

[40] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 791

[41] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 791

[42] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 792

[43] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 794

The obligations to protect constitutional rights as well as those set out in international conventions also extend to private entities.[44] Hence, it held that Ms. Ghosh's ill treatment by SpiceJet on account of her disability violates her fundamental right[45] and directed SpiceJet to pay Ms. Ghosh a compensation of Rs. 10 lakhs for her mental and physical suffering on the ground that the Airlines violated Aircraft Rules, 1937, Civil Aviations Requirements, 2008, and the Persons with Disabilities Act, 1995.[46]

With respect to the CAR 2014, the court had several inputs. The court directed the officers of the Directorate General of Civil Aviation (DGCA) and the Department of Disability Affairs, Ministry of Social Justice and Empowerment to ensure that all airports procure standardised assistive equipment within a suitable time-frame.[47] Next, it asked the committee to reconsider its decision on not allowing persons with disabilities to use their own wheelchair.[48] It further suggested that a separate help desk be set up in airports for persons with disabilities[49] and communications of essential information of the flight be made available in accessible formats.[50] Lastly, the court pointed out that the training and sensitisation of personnel with regard to the needs of passengers with disabilities is of utmost importance and asked the Union of India to draft a suitable training module.[51]

Through this judgement, the court captured the need for affirmative action in disability right. It rightly emphasized that the approach should be from a 'human rights perspective', instead of the traditional approach of sympathy and help based on medical/welfare model. Further, it expanded the field of operation of Articles 21 and 14 to the Persons with Disabilities Act.

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[44] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 773
[45] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 796
[46] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 796
[47] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 787
[48] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 787
[49] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 787
[50] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 788
[51] *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, 788

Right to Reproductive Health

Devika Biswas v. Union of India, (2016) 10 SCC 726

In January 2012, a mass sterilization camp was conducted in a school in Araria District of Bihar, by a single surgeon in highly unsanitary and unsafe conditions, without pre-operative, post-operative care or counseling.[52] Many such sterilization camps have taken place in other states where none of the procedures laid down by the government were followed.[53] To put an end to the irresponsible and target driven practice of 'sterilization camps' in India, Devika Biswas, an activist, filed a public interest litigation petition before the Supreme Court. The matter was heard by Justices Madan B. Lokur and U. U. Lalit.

Ms Biswas asked the court to pass a series of directions including setting up a committee to investigate the Araria sterilization camp and to initiate proceedings against those involved in these camps. She also asked for additional compensation to be paid to the women affected.[54] She argued that the principal issue was the lack of implementation of the guidelines issued by the Government of India. For instance, the list of empanelled doctors is not readily available, consent forms are not available in the local language, and unrealistic targets for sterilisation are leading to mass force sterilisations of women, especially those who are young or illiterate.[55] Secondly, there is inadequate monitoring of sterilisation camps and facilities. She alleged that the states and the Union are passing the buck, and nobody takes charge of the situation.[56] Third, the Family Planning Indemnity Scheme (FPIS)[57] is not regularly reviewed. The details of utilisation of disbursements in case of death, failure, or complications, and details of death audits are unavailable. Specialists in

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[52] See '*Barrack-room surgery in Bihar's backwaters*', Shoumojit Bannerjee, The Hindu, January 23rd 2012.

[53] Bundi District, Rajasthan (2009-2010); Kerala (2010); Nagpur, Chandrapur and Gadchiroli, Maharashtra (2012); Balaghat District, Madhya Pradesh (2012); Bilaspur, Chattisgarh (2014). *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 735-736

[54] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 735

[55] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 749

[56] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 749

[57] See Family Planning Indemnity Scheme, Family Planning Division, Ministry of Health and Family Welfare, Government of India. Available at http://nhm.gov.in/images/pdf/programmes/family-planing/schemes/FPIS_2nd_Edition_2016.pdf

this scheme are not available at these sterilization camps. Post-op care in the form of counselling, assistance, and follow-up is completely absent. Most importantly, the campaign for sterilisation has effectively become a campaign for *female* sterilisation, with 98.1% of all sterilisation procedures for the year 2014-2015 being carried out on women.

In response, the Union of India first stated that with respect to the incident in Bihar, charge sheets have been filed against the concerned personnel.[58] Next, it said that the Government of India has published several Manuals to guide the State Governments on sterilisation procedures.[59] Primarily, it argued that as public health is a State subject, the Union plays only a 'supportive and facilitative role' in these health welfare schemes.[60] Lastly, it proposed to ensure the phasing out of sterilisation camps across the country over the next three years.

The State of Bihar stated that an FIR has been lodged against the NGO Jai Ambey Welfare Society, which conducted the sterilisation camp in Araria District, and it has been blacklisted. Madhya Pradesh denied coercive sterilisations and said that patients are duly informed before their consent is taken. Rajasthan said that patients are sufficiently instructed and advised before the sterilisation procedure is carried out. With regard to the deaths in Bilaspur District in 2014, Chhattisgarh said that it has taken ameliorative as well as preventive steps in this regard. It has been discovered that the deaths were not a result of the sterilisation, but due to the ingestion of Ciprocin 500 tablet. The state has provided monetary compensation to the families of those who died, taken departmental action against the doctors involved, setup a Judicial Commission of Inquiry, begun criminal proceedings against the manufacturers of Ciprocin 500, and placed greater emphasis on vasectomy to further gender equality.[61]

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[58] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 739
[59] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 739
[60] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 740
[61] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 747-748

Primarily, the court affirmed that the right to life under Article 21 includes the right to health in general[62] and the right to reproductive health in particular.[63] It noted that it is necessary to reconsider the impact such policies '*have on the reproductive freedoms of the most vulnerable groups of society*'.[64] The court rejected the argument of the Union that 'Public Health' comes solely under the purview of the State Governments. The court pointed out that Entry 20A of the Concurrent list pertains to 'Population Control and Family Planning' over which the Union has superior powers of legislation. Population control and family planning is a national campaign and the Union is responsible for its success or failure.[65] It held that schemes announced by the Union and State Governments must respect the fundamental rights of the beneficiaries of the Scheme.[66] Next, the court voiced concern over the lack of a National Health Policy that could address the concerns highlighted.[67] It also asked the Union to address the issue of sterilisation programmes largely focussing on female sterilisation.[68]

The court directed that the Ministry of Health and Family Welfare must display a full list of approved doctors and their particulars.[69] The State Quality Assurance Committees must upload regular biannual and annual reports with details on the number of persons sterilized, the number of deaths or complications from sterilisation, enquiries held and remedial steps taken after such death, and details of claims under the FPIS that have been filed, accepted, pending and rejected.[70] The Union was directed to ensure the

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[62] See *C.E.S.C. Limited and Ors v. Subhash Chandra Bose*, (1992) 1 SCC 441; *Pashcim Banga Khet MAzdoor Samiti v. State of West Bengal*, (1996) 4 SCC 37; *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

[63] See *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1. Also see *A. S. v. Hungary,* (CEDAW/C/36/D/4/2004, UN Communication No. 4/2004, Committee on the Elimination of Discrimination against Women, Thirty-sixth session, 7-25 August 2006)

[64] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 755

[65] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 750

[66] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 751

[67] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 752

[68] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 753

[69] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 757

[70] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 757-758

discontinuation of sterilization camps and simultaneously strengthen the system of Primary Health Care Centres.[71]

Further, the Court directed that the impact and consequences of sterilization must be explained to the patient, who must be given 'sufficient' time ('of one hour or so') to change their mind. The court directed that the quantum of compensation under the FPIS must be increased substantially and the burden must be shared equally by the Union and States.[72]

The Supreme Court disregarded reproductive freedom in *Javed versus State of Haryana*[73], where it upheld the statutory disqualification of candidates from a panchayat election for having more than two children. However, in *Ramakant Rai v. Union of India*[74], it specified quality of care standards and appropriate protocols to be stringently followed to address malpractices in female sterilization, which lacked counseling, informed consent, pre- and post-operative care, and included unhygienic and un-anesthetized operating conditions. The judgement in *Devika Biswas* builds on *Ramakant Rai*, and acknowledges that citizens have reproductive rights under Article 21. However, the statement of the court that '*It is rather unfortunate that the Union of India is now treating the sterilization program as a Public Health issue and making it the concern of the State Government*' raises concerns. Reproductive treatments like sterilization are indeed a public health issue, and the violation of reproductive rights must be treated as an important public health violation.

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[71] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 758

[72] *Devika Biswas v. Union of India*, (2016) 10 SCC 726, 758

[73] AIR 2003 SC 3057 The amendment barred adults with more than two children to from contesting local body elections.

[74] *Ramakant Rai v. Union of India (*2009) 16 SCC 565

Right to life subservient to Article 19 (1) (g)

State of Tamil Nadu v. K Balu, (2017) 2 SCC 281

In the High Courts at Madras and Punjab & Haryana, public interest litigation (PIL) petitions were filed and orders were passed for the removal of retail outlets for liquor on national and state highways. Liquor vendors on national and state highways appealed these decisions in the Supreme Court. The appeal was heard by a bench comprising Chief Justice T. S. Thakur, and Justices D. Y. Chandrachud and L. Nageswara Rao.

The PIL Petitioners presented evidence on road accidents on highways. In its Report on Road Accidents in India for 2015, the Ministry of Road Transport and Highways ("MoRTH") showed that accidents on the national highways resulted in 51,204 deaths, and on state highways resulted in 40,863 deaths. In 2014, the death toll on national highways was 46,110 and 39,352 on state highways. Out of these, there was a high percentage of accidents caused due to drunken driving, and these are often underestimated or underreported in order not to impede the right to receive compensation.[75]

The MoRTH had issued advisories in 2011 and 2013 to all state governments advising them to remove liquor shops situated along national highways and not to issue fresh licenses. It urged that this should be extended to State highways as well. The court enthusiastically enforced Article 21 and accepted the policy of the Union Government as it protects to right to life.

The court then examined the question of banning the sale of liquor on national and state highways from the perspective of Article 19 (1) (g). It held that there is no fundamental right under Article 19(1)(g) to trade in liquor, and liquor has been regarded as *res extra commercium*.[76] The doctrine of *res extra commercium* applies to things which

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[75] Road Accidents in India - 2015, Transport Research Wing, Ministry of Road Transport and Highways, Government of India. Available at http://pibphoto.nic.in/documents/rlink/2016/jun/p20166905.pdf.

[76] See *State of Bihar v. Nirmal Kumar Gupta*, (2013) 2 SCC 565; *Amar Chandra Chakraborty, Appellant v. Collector of Excise, Govt of Tripura, Agartala*, (1972) 2 SCC 442; *Nashirwar v. State of Madhya Pradesh,* (1975) 1 SCC 29; *Har Shankar v. Deputy Excise and Taxation Commissioner*, (1975) 1 SCC 737; *Secretary to Government, Tamil Nadu v. K. Vinayagamurthy*, (2002) 7 SCC 104; *State of Punjab v. Devans Modern Breweries*

cannot be traded between individuals. This doctrine has been used by courts to identify activities which harm the public and therefore is not a protected fundamental right.[77]

Thirdly, the court emphasised on the Directive Principle in Article 47, which mandates that the State must endeavour to prohibit the consumption of intoxicating drinks and drugs which are injurious to health, for the improvement of public health. While excise duty may be an important source of revenue to the States, a prohibition on the grant of liquor licenses to liquor shops on the national and state highways would ensure that the consumption of alcoholic liquor does not pose dangers to the lives and safety of the users of highways.[78]

The court rejected the line of argument adopted by the State of Tamil Nadu which suggested that the ban be limited to national highways. There can be no valid distinction between a national highway and State highway insofar as the location of liquor shops abutting the highway is concerned. Accidents take place both on National and State highways and easy availability of liquor poses a grave danger to both in equal measure. The court also rejected the argument of MoRTH to exclude stretches of national and state highways which fall within the limits of a municipal or local authority (with a population exceeding 20,000). It held that such exclusions defeat the policy, since the presence of liquor shops along such stretches would '*allow drivers to replenish their stock of alcohol*'. Further, carving out an exception would be wholly arbitrary and violate Article 14.[79] The court '*tailored*' the orders of the Punjab and Haryana High Court and ordered that the liquor shops must not be visible and directly accessible from a national or state highway, and must not be situated within a distance of 500m of the outer edge of the national or state highway or a service lane along the highway.[80]

Ltd. (2004) 11 SCC 26; *State of Kerala v. Kandath Distilleries,* (2013) 6 SCC 573; *M/S. Khoday Distilleries Ltd. Etc v. State Of Karnataka & Ors* (1996 AIR 911)

[77] *State of Bihar v. Nirmal Kumar Gupta*, (2013) 2 SCC 565; *Amar Chandra Chakraborty v. Collector of Excise*, (1972) 2 SCC 442; *Nashirwar v. State of M.P.*, (1975) 1 SCC 29; *Har Shankar v. Excise and Taxation Commr.*, (1975) 1 SCC 737; *State of T.N. v. K. Vinayagamurthy,* (2002) 7 SCC 104; *State of Punjab v. Devans Modern Breweries Ltd.,* (2004) 11 SCC 26; *State of Kerala v. Kandath Distilleries*, (2013) 6 SCC 573

[78] *State of T. N. v. K. Balu*, (2017) 2 SCC 281, 289

[79] *State of T.N. v. K. Balu,* (2017) 2 SCC 281, 289

[80] *State of T.N. v. K. Balu*, (2017) 2 SCC 281, 195

This order created panic in the states, who then rushed to denotify several state highways.[81] The court modified its order in 2017 reducing the distance to 220 metres instead of 500 metres of national and state highways in towns with a population less than 20,000,[82] which dilutes its effect.

The pronouncement has been criticised as 'judicial overreach'. It is argued that directive principles of state policy are 'policy issues' which should be left to the government. The court 'forcing' the government to implement them goes against the spirit of 'separation of powers'.[83]

[81] Government officials rush to denotify highways running through cities, Economic Times, 4th April 2017

[82] *State of T.N. v. K. Balu*, (2017) 6 SCC 715

[83] 'The Supreme Court liquor ban may be a case of judicial overreach', Faizan Mustafa, Hindustan Times, 5th April 2017.

Right to Property: Article 300-A

Sayyed Ratanbhai v. Shirdi Nagar Panchayat, (2016) 4 SCC 631

In 1974, the State Government acquired the land around the Shirdi Shrine that was previously leased out to shopkeepers by the Shirdi Gram Panchayat. The shopkeepers allege that the Government officials and Shri Sai Baba Sansthan, Shirdi together tried to evict them for the construction of a new building. Thus, the shopkeepers filed a suit to prevent their eviction and protect their livelihood. In 1979, there was compromise between the three entities (the State Government and the Sansthan on one side and the shopkeepers on the other) which promised that 45 shops will be accommodated in a shopping complex that would be constructed by the Sansthan, and the remaining shops will be gradually provided alternate accommodation.

While no action was taken on the compromise, the Town Planning Authority drafted a new Development Plan to widen of the road, which included the area where the shops were present. In view of the fact that the development plan was essential in public interest, the compromise was held non-executable by the Execution Court. Further, The Nagar Panchayat issued a public notice on 11th April 2011 stating that the appellants had illegally constructed shed on these plots for their business.

Aggrieved by these events, the shopkeepers approached the High Court, which upheld the finding of the Execution Court but directed the shopkeepers to be paid compensation, as they were not illegal occupants of the land. The shopkeepers, with Mr Sayyed Ratanbhai at the forefront, appealed to the Supreme Court by filing a Special Leave Petition under Article 136. A bench comprising Justices V. Gopala Gowda and Amitava Roy decided the case.

Mr Ratanbhai and the other shopkeepers argued that the compromise decree was final and binding on the parties. As on the date of the decree, the development plan did not exist, and cannot be retrospectively invoked. Thus, they have a right over the sites and cannot be evicted. Mr Siddharth Luthra argued on behalf of the shopkeepers that evicting

them in the garb of the development plan violates their fundamental rights under Articles 14, 19, and 21. Secondly, he argued that the Nagar Panchayat is incompetent to issue the notice of 11th April 2011 under the Bombay Highways Act, 1955, and Section 56 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1966, as it is not the owner of the land involved.

The Shirdi Nagar Panchayat, represented by Mr Shekhar Naphade, argued that the Nagar Panchayat is not bound by the compromise decree, as it is not party to it. Secondly, in the absence of any evidence to show that the tenancy of the shopkeepers was with the permission of the State Government or Municipal Council, they do not have a right to retain the possession. At best, they can be seen as licensees without any vested rights. Third, as there is no irreparable loss to the shopkeepers here, the court may not need to exercise its jurisdiction under Article 136. Lastly, the alleged right to occupy the land must make way for the overwhelming public interest which necessitates the implementation of the Development Plan.[84]

Justice Amitava Roy, who authored the judgement, held that the compromise is non-executable, as the demand of public interest takes precedence. He elaborated that public interest amounts to the collective welfare of the people and public institutions. It is generally informed with the dictates of the public trust doctrine. Quoting the latin maxim '*Salus Populi Est Suprema Lex*'[85], he held that health, safety and welfare of the public is supreme in law, and in such matters, private rights have to take a back seat.[86]

However, Justice Roy held that shopkeepers do have a right to compensation. In a welfare state, the state must not only provide adequate compensation, but also rehabilitate the displaced. Uprooting the shopkeepers would '*spell an overall dislocation*', especially to the goodwill and reputation they had built over the past 45 years.[87] The court affirmed the decision in *K. T. Plantation*[88], that the State has to justify the grounds for depriving a person

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[84] *Sayyed Ratanbhai v. Shirdi Nagar Panchayat* (2016) 4 SCC 631, 647
[85] 'Let the welfare of the people be the supreme law.'
[86] *Sayyed Ratanbhai v. Shirdi Nagar Panchayat* (2016) 4 SCC 631, 658
[87] *Sayyed Ratanbhai v. Shirdi Nagar Panchayat* (2016) 4 SCC 631, 661
[88] *K. T. Plantation v. State of Karnataka* (2011) 9 SCC 1

of his property and compensate for the loss, or provide strong justification for refusing compensation. It also affirmed the principle in *Olga Tellis*[89] that the right to livelihood is an integral part of the Article 21 right to life.[90] The court indicated that it would like the State to provide alternative sites of land to the shopkeepers. In the event that alternative sites are not feasible, a lump-sum compensation of Rs. 20 lakhs each for big (16' x 11') shops, and Rs. 15 lakhs each for the small (7' x 11') shops was to be provided by the state.[91]

The 44th Amendment to the Constitution removed the right to acquire, hold and dispose of property as a fundamental right and inserted Article 300A which prohibited the deprivation of property without the authority of law.[92] The court in this case elaborated that the right to property under Article 300-A is not just a constitutional right but also a 'human right'.[93] It clarified what constitutes 'public interest' that may necessitate property acquisition by the State, and ordered increased compensation in lieu of such acquisition.

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[89] *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545

[90] *Sayyed Ratanbhai v. Shirdi Nagar Panchayat* (2016) 4 SCC 631, 658-659

[91] *Sayyed Ratanbhai v. Shirdi Nagar Panchayat* (2016) 4 SCC 631, 662

[92] The Constitution (Forty-fourth Amendment) Act, 1978

[93] *Tukaram Kana Joshi and Ors. v. Maharashtra Industrial Development Corporation and Ors.* (2013) 1 SCC 353

Fundamental Freedoms

Right to Freedom of Speech: Article 19(1)(a)

Subramanian Swamy v UOI, (2016) 7 SCC 221

In 2014, Dr. Subramanian Swamy made corruption allegations against Ms. Jayalathitha. In response, Tamil Nadu State Government filed defamation cases against Dr. Swamy. Thereafter, Dr. Swamy and other prominent politicians challenged the constitutionality of the criminal defamation law in India, i.e., Sections 499 and 500 of the Indian Penal Code (IPC) in *Subramanian Swamy v UOI,* before a two judge bench of the Supreme Court comprising Justices Dipak Misra and P. C. Pant.

Section 499[94] defines defamation and Section 500[95] prescribes the punishment. Defamation is defined as spoken or written words or visible representations, concerning any person intended to harm his/her reputation. Exceptions to this include an 'imputation of truth' required for 'public good', or the conduct of any person touching any public question, or expressing opinions on a public performance.

The challenge before the court was twofold – first, whether criminalising defamation is an excessive restriction on freedom of speech, and second, whether the criminal defamation law under Sections 499 and 500 is vaguely phrased and hence arbitrary.

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[94] Sec 499, IPC**,** Defamation.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person. Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives. Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation. Explanation 4.—No imputation is said to harm a person's reputa-tion, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgrace-ful.

[95] Sec 500, IPC, Punishment for defamation.—Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Dr. Swamy argued that criminal defamation is an excessive restriction on the freedom of speech, since a civil law remedy is already in existence. Defamation is a dispute between private individuals, and should not be treated as a crime as it does not subserve any public interest.[96]

Mr PP Rao and Ms Mahalakshmi Pavani argued that the Article 19(2) restriction on the freedom of speech intends to safeguard the interests of the State and the general public, and not of any individual. It cannot be the justification for the existence of Section 499.[97] Further, the right to reputation as a facet of the Article 21 right to life is vis-a-vis the state. Article 19(2) cannot be invoked to serve the private interest of the individual.

Mr Datar argued that freedom of thought and speech includes the right to dissent and controlling free speech by the majority is not acceptable. Sections 499 and 500 are unconstitutional as they enable the majority to arrest and cripple freedom of thought and expression.[98] Reputation is a facet of Article 21 of the Constitution but the protection of reputation under Article 21 must be distinguished from enabling a private complainant to approach a criminal court for his sense of self-worth.[99]

The Union of India argued that, first, freedom of speech is a robust right but not isolated and unrestricted. Secondly, it is for the legislature to determine the restrictions to be imposed on such right. Moreover, the Constituent Assembly Debates clarify the stand of the framers of the Constitution that the word 'defamation' in Article 19(2) includes criminal defamation.[100] Third, Article 19(2) represents varied social community interests and the principle objective is to "preserve reputation as a shared value of the collective". The criminalisation of defamation is meant to subserve basic harmony in polity.[101] On the other hand, the freedom of speech is guaranteed in order to advance public debate and discourse,

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96 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 248-252
97 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 252
98 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 256
99 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 256
100 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 261
101 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 259

and not to protect speech with harmful intent and no social value.[102] Fourth, the right to reputation is a part of the article 21 right to life and cannot be tarnished in the name of freedom of speech. Sixth, injury to reputation cannot be monetarily compensated, as dignity cannot be weighed in monetary terms. The State has an obligation to protect the dignity of its people. Hence, when the the right to freedom of expression is weighed against the right to reputation, the latter must be protected.[103] Additionally, Sections 499 and 500 promote the values of 'fraternity' assured in the Preamble.[104]

The court held that Section 499 is not an excessive restriction under Article 19(2). The society is a collection of individuals, and what affects individuals also affects the society as a whole. Hence, it is valid to treat defamation as a public wrong. The court accepted the analogy that Fundamental Rights under Articles 17, 23 and 24 are enforceable against individuals.[105] Further, criminal defamation is not a disproportionate restriction on free speech, because the protection of reputation is a fundamental right as well as a human right.[106] The court relied on judgements of other countries and reaffirmed the right to reputation as a part of the Article 21 right to life. Using the principle of 'balancing of fundamental rights', the court held that the right to freedom and speech and expression cannot be "*allowed so much room that even reputation of an individual which is a constituent of Article 21 would have no entry into that area"*.[107] Criminal defamation laws safeguard the constitutional values of human dignity flowing from the Preamble[108] and the Fundamental Duties.[109]

The second argument was that the explanations and exceptions under Section 499 are vaguely worded. Dr Swamy argued that under the first exception, the accused has to prove that the statements made are not only true, but also for 'public good'. This goes beyond the limits of reasonableness under Article 19(2). Dr Rajeev Dhawan argued that the

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[102] *Subramanian Swamy v UOI* (2016) 7 SCC 221, 262
[103] *Subramanian Swamy v UOI* (2016) 7 SCC 221, 259
[104] *Subramanian Swamy v UOI* (2016) 7 SCC 221, 262
[105] *Subramanian Swamy v UOI* (2016) 7 SCC 221, 300-301
[106] *Subramanian Swamy v UOI* (2016) 7 SCC 221, 344
[107] *Subramanian Swamy v UOI* (2016) 7 SCC 221, 316-318
[108] Through the term "fraternity". See *Subramanian Swamy v UOI* (2016) 7 SCC 221, 328-332
[109] *Subramanian Swamy v UOI* (2016) 7 SCC 221, 344

Constitution envisages reasonable restrictions, and any restriction that invades and infringes the fundamental rights in an excessive manner cannot pass the test of reasonableness. Due to the language of Section 499 and 500 IPC, the provisions cannot be held to be reasonable restrictions.[110]

The Union of India argued that the provisions are not vaguely worded, and the exceptions laid down clarify the contours of the provision.[111] They must be strictly interpreted by the courts. It is the duty of the courts to ensure that the complainant is the one who is aggrieved by the alleged defamation.[112] Further, the possibility of misuse of a provision is not enough to declare the Sections as unconstitutional.[113]

The court rejected the argument that the sections are vaguely worded and ambiguous. Using the Constituent Assembly Debates to understand what the framers of the Constitution meant by the word "defamation" in Article 19(2), the court held that the word as its own independent identity.[114] It stands alone and defamation laws have to be understood as they were when the Constitution came into force.[115]

This judgement undid the trend of decriminalizing defamation, which was seen as a logical consequence of *Shreya Singhal v Union of India*[116]. *Shreya Singhal* struck down Section 66A of the Information Technology Act which criminalised 'offensive' comments made on social media. The effect of Sections 499 and 500 of the IPC and Section 66A of the IT Act are comparable, as Section 66A was often used to stifle criticism on social media against prominent (and usually political) figures. This judgement could have drawn inspiration from *Shreya Singhal* and contributed to stronger protections of free speech, instead of maintaining status quo.

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110 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 254
111 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 263
112 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 260-261
113 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 266
114 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 293
115 *Subramanian Swamy v UOI* (2016) 7 SCC 221, 289
116 *Shreya Singhal v Union of India* (2015)5 SCC 1

The ‘right to reputation’ read into the right to life takes restricting speech beyond Article 19(2) to an undefined broad territory of the right to life, making freedom of speech contingent on judicial mercy. This trend of locating restrictions to speech outside of Article 19(2) sets a dangerous precedent for free speech in India.

Right to Freedom of Occupation: Article 19(1)(g)

South Central Railways v. S.C.R. Caterers, (2016) 3 SCC 582

Under the Railways Catering Policy of 2010, several catering contractors were granted a 3 year licence. In April 2013 a bidding process was announced by the South Central Railways inviting participation from catering service providers, to enter into a contract with the South Central Railways management, at the end of this three year period. This threatened the renewal of the licenses of the existing caterers. The Welfare Association petitioned before the High Court, contending that they were entitled to renewal and that this benefit could be granted to only those who had been issued licenses under the Catering Policy of 2010. The High Court[117] decided in favour of renewal of the licenses of the catering units of the Welfare Association.

The South Central Railways appealed to the Supreme Court which examined the constitutionality of the bid notice and the matter was heard by two judge bench of V.Gopala Gowda and Amitava Roy.

The Welfare Association argued that the 2010 Policy stipulated the renewal of licenses of existing vendors after 3 years if it found that the vendors have carried out their job in a satisfactory manner. The Association further argued that renewal of licenses must be read into the contracts of existing licensees. They contended that the social objectives of running the Railways by Central Government must necessarily include the protection of right to livelihood of caterers, apart from protection of Article 19(1)(g) right[118].

The South Central Railways argued that the selection of vendors was necessary to achieve the *greater good of the passengers* – high quality at the cheapest price. They contended that the respondents, caterers have no vested right to get their licenses renewed at the cost of stifling competition[119]. They drew the court's attention to Para 3.3.1 of Catering Policy, 2010, which stipulated that "..*IRCTC will not renew any contract required to be handed over*

[117] S.C.R. Caterers, Dry Fruits, Fruit Juice Stalls Welfare Assn. v South Central Railways, 2013 SCC OnLine AP 168

[118]. South Central Railways v S.C.R. Caterers, (2016) 3 SCC 582, 592

[119] South Central Railways v S.C.R. Caterers, (2016) 3 SCC 582, 591

to Zonal Railways on expiry of the contract.[120]" As the licenses granted by the IRCTC in 2010 had now expired, South Central Railway Zone was entitled to call for fresh bids. They argued that the policy restricting the right of renewal can be challenged only on limited ground of being arbitrary or glaring error but no such grounds of challenge exist in this case.[121]

The court accepted the arguments of the SCR Welfare Association and directed the SCR to renew these licenses. Three strand of arguments - 1)Livlhoood 2) equality 3) DPSP

The court noted Justice Krishna Iyer's views in *LIC v. D.J. Bahadur*[122] that forgetting that social justice values of the Constitution impact the interpretation of Indian laws will weaken the vital flame of the Democratic, Socialist Republic of India. As a 'counter-majoritarian institution', the court took on the role of furthering the objectives enshrined in Article 38. The court understood its role as a counter-majoritarian institution to mean that it should the DPSP under Article 38. As per Article 38 of the Directive Principles of State Policy, the state must strive to promote social, economic and political welfare and eliminate inequalities amongst individuals as well as groups and the non-renewal of licenses would render them unemployed.

Relying on *R.D. Shetty v. International Airport Authority,*[123] which had held that the state cannot arbitrarily discriminate between similarly situated persons, the court found that the renewal of licenses as envisaged in the 2010 Policy must be applied to all the businesses, big and small, irrespective of when such licenses were granted by the Indian Railways. The court observed that the policy of non-renewal of licenses stems from the government's need to earn from business units. Forcing small units to participate in a public competition, at par with big units, was unfair, unreasonable and arbitrary.

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[120] Para 3.3.1, Catering Policy 2010 read - "All existing major and minor catering units will be awarded and managed by the Zonal Railways, except Food Plaza, Food Courts, Fast Food Units. All such contracts presently being managed by IRCTC, on expiry of the contract period, will be awarded by the Zonal Railways. IRCTC will not renew any contract required to be handed over to Zonal Railways on expiry of the contract."

[121] South Central Railways v S.C.R. Caterers, (2016) 3 SCC 582, 591

[122] 1980 AIR 2181

[123] 1979 AIR 1628

Relying on *Olga Tellis v. Bombay Municipal Corporation,*[124] the court stated that the right to livelihood is a part of the right to life, and affirmed that the denial of licenses under the guise of policy amounts to deprivation of their right to freedom of occupation guaranteed under Article 19(1)(g) as well as the right to livelihood. The court weighed in the livelihood concerns of the caterers by reading Article 19(1)(g) right and directing renewal of their catering licenses.

[124] 1986 AIR 180

Reasonableness, Non-arbitrariness, Equality and Non-Discrimination: Article 14

Principles of Natural Justice

Alagaapuram R. Mohanraj. v. Tamil Nadu Legislative Assembly, (2016) 6 SCC 82

In February 2015, several members of the Tamil Nadu Legislative Assembly allegedly resorted to unruly conduct while the session was in progress. Consequently, the Speaker passed an order suspending nineteen Members of the Legislative Assembly (MLAs) of the Desiya Murpokku Dravida Kazhagam (DMDK) Party for the rest of the Session, for breaching the privilege conferred by the House. The Privileges Committee, which oversees the privileges of the members and examines breach of those privileges, looked into the suspension and recommended that six of the nineteen members, including Mr Alagaapuram R. Mohanraj, be suspended from the Assembly. Consequently, they were suspended for the remainder of the session and for 10 days of the next Session. They were also denied their salary and other incidental benefits during their suspension.

Mr. Alagaapuram and five of his suspended colleagues filed a writ petition before the Supreme Court against this action. This case was heard by Justices J. Chelameswar and A.M. Sapre.

The MLAs contended that their suspension and denial of salaries violated their fundamental right to speech [Articles 19(1)(a)], freedom of trade and occupation [19(1)(g)], and right to life [Article 21]. They also argued that denial of access to the evidence that was relied on for the suspension violated the principle of natural justice under Article 14. The MLAs argued that suspension lead to preventing them from participating in the proceedings which is violation of freedom of speech under Article

19(1)(a).[125]. On Article 19(1)(g), the MLAs contended that their suspension lead to violation of their fundamental right to carry on an occupation and the term "occupation" has to be given the widest amplitude to include the office of a Member of Legislative Assembly. Further, the MLAs argued that deprivation of salaries and allowances due to suspension violated their Right to Life under Art21. [3 sentences]

The court differentiated Article 19(1)(a) from the freedom of speech provided to legislators under Articles 105 and 194 of the Constitution. Articles 105 and 194 provide powers, privileges and immunities to members of the Parliament and Legislative Assemblies respectively. The court held that the freedom of speech is not absolute, and curtailment of speech due to suspension from the legislature falls within reasonable restriction. The privilege of speech under Article 194 is subject to 'other provisions of the Constitution and the rules and standing orders regulating the procedure of the legislative bodies.' Thus, the protection of speech under Articles 194 and 19(1)(a) would not apply on members after the cessation of membership or suspension by law[126]. The court held that the right to freedom of speech of the MLAs was not violated in this case.

Relying on *Sodan Singh vs. New Delhi Municipal Committee*[127], and *T.M.A Pai Foundation vs. State of Karnataka*[128], on point of violation of freedom of occupation, the court held that only those activities fall under 'occupation' which generate economic benefits. Moreover,as the Supreme Court has held in *Rajbala v State of Haryana*[129] contesting elections in India is not a fundamental right, so consequently the right to participate in proceedings of the legislative bodies cannot be a fundamental right falling under Article 19(1)(g). Thus, it was held that a MLA cannot be seen as holding office for purpose of carrying out occupation or livelihood and hence, Article 19(1)(g) is not violated in this instance[130].

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[125] *Alagaapuram R. Mohanraj v Tamil Nadu Legislative Assembly*, (2016) 6 SCC 82, 92
[126] *Alagaapuram R. Mohanraj v Tamil Nadu Legislative Assembly*, (2016) 6 SCC 82, 95
[127] *Sodan Singh vs. New Delhi Municipal Committee*, (1989) 4 SCC 105
[128] *T.M.A Pai Foundation vs. State of Karnataka*, (2002) 8 SCC 481
[129] *Rajbala v State of Haryana*, (2016) 2 SCC445
[130] *Agaapuram R. Mohanraj v Tamil Nadu Legislative Assembly*, (2016) 6 SCC 82, 99

On the issue of violation of the right to life due to loss of salaries and benefits, the court cited *Raja Ram Pal v Hon'ble Speaker, Lok Sabha*[131] to clarify that salary and other benefits of legislative members are purely incidental to the membership and are not an independent and indefensible constitutional right. Therefore, deprivation of such benefits does not amount to fundamental right violation under Article 21.[132]

Despite the court's denial of the petitioner's substantive claims, the court accepted the procedural argument that principles of natural justice under Article 14 were violated.

Lastly, the court went into the contention of violation of principles of natural justice under Article 14. The proceedings of the Privileges Committee had substantially relied on a video recording and singled out the six MLAs. However, this video was not shown to them. Relying on *Jagjit Singh vs. State of Haryana*[133], the court held that violation of principles of natural justice is one of the limited grounds on which judicial review could be undertaken against the internal proceedings of the legislative bodies. The court was of the view that the principles of natural justice require the MLAs to be granted an opportunity to see the video recording in order to produce a suitable defence. As this was denied, the court set aside the order of the Committee, restoring the salary and other benefits incidental to the membership of the assembly[134].

With sustained and diverse cultures of protest in legislative assemblies of States in India, the power of the House to discipline and regulate its members has become critical to a democratic legislative culture. This has strengthened the hands of the speaker in. However these authorities must follow due process.

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131 *Raja Ram Pal v Hon'ble Speaker, Lok Sabha*, (2007) 3 SCC 184,p.287, para 155

132 *Alagaapuram R. Mohanraj v Tamil Nadu Legislative Assembly*, (2016) 6 SCC 82, 100

133 *Jagjit Singh vs. State of Haryana*, (2006)11 SCC 1

134 *Alagaapuram R. Mohanraj v Tamil Nadu Legislative Assembly*, (2016) 6 SCC 82, 104

Non Arbitrariness

Cellular Operators Association of India v. TRAI, (2016) 7 SCC 703

The Telecom Regulatory Authority of India (TRAI) enacted the Telecom Consumers Protection (Ninth Amendment) Regulations, 2015[135] which required telecom service providers to compensate their consumers for the inconvenience caused due to call drops. A mandatory penalty of 1 Rupee was imposed for each call drop, up to the limit of three call drops per day per customer, on the service providers.

In 2016, the Cellular operators challenged the 2015 TRAI Regulations before the Delhi High Court.[136] The Delhi High Court upheld the validity of the 2015 TRAI Regulation. The Cellular Operators Association of India, a body of unified telecom service providers and telecom operators, appealed at the Supreme Court against the Delhi High Court judgement. The matter was before the bench comprising Justices Kurian Joseph and Rohinton Nariman.

The Cellular Operators argued that the TRAI Regulation, a subordinate legislation was ultra vires for being "manifestly arbitrary" and "unreasonable restriction" under Articles 14 and 19(1)(g) respectively. The Cellular Operators argued that the regulation was manifestly arbitrary as the Regulation went against the TRAI Act by empowering the authority to levy a penalty without establishment of fault, thus introducing a strict no-fault penal liability on the Service provider. Secondly, the regulation contradicted its own TRAI paper[137] where it said that an average of 36.9% call drops happen owing to the fault of the consumer. [138]As the regulation is manifestly arbitrary and thus unreasonable, so it also falls outside of Article 19(6) which lays down permissible restrictions on freedom of trade and occupation.

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[135]2015 TRAI Regulation, (https://www.trai.gov.in/sites/default/files/Ninth_Amendment_16_oct_2015.pdf)(last accessed on (12/04/2018)

[136] *Cellular Operators Association of India v TRAI,* 2016 SCC OnLine Del 1388

[137] Consultation Paper on Compensation to the Consumers in the Event of Dropped Calls, Consultation Paper No. 4/2015, Telecom Regulatory Authority of India, Published on 4th September 2015. Available at http://www.trai.gov.in/sites/default/files/Final_CP_on_Call_Drop_Issue.pdf

[138]*Cellular Operators Association of India v. TRAI,* (2016) 7 SCC 703, 739

TRAI responded that the Regulation was framed keeping the "small man" in mind, which constitute 96% of consumers and was aimed at providing some "solace" to these persons for dropped calls.[139] TRAI argued that technically speaking, it was possible to pinpoint when call drops are due to the fault of the service providers.[140] TRAI conceded that 36.9% call drops occured due to customer's fault and asked the court to read down the regulation, so that service providers are made to pay for their faults, which would come to 63% of what is charged.[141] Referring to *Delhi Science Forum v UOI*[142], it was also contended that the Regulations did not violate Article 19(1)(g) because they were made in public interest, which is a restriction as per Article 19(6)[143].

The court held that the impugned regulations notified by TRAI violated Articles 14 and 19(1)(g).. Relying on *Khoday Distilleries Ltd. v. State of Karnataka*[144], the court noted that Article 14 has been interpreted as a guarantee against arbitrary executive action. This test would have to be assessed in terms of manifest arbitrariness, when considering a challenge to subordinate legislation.

The court then discussed the applicability of 'reasonable restrictions' on the cellular operators rights to carry on business under Article 19(1)(g). The court did not accept 'public interest' as reason enough to impose such restrictions. The test of 'public interest' as a standard has to be satisfied in addition to the test of 'reasonable restrictions' for legislation to be held valid under Article 19(6).The court accepted that while the TRAI regulation may have been for public good, the regulation should also pass an independent test of not being manifestly arbitrary or unreasonable[145]. Thus, any impugned law which is manifestly arbitrary would automatically be unreasonable restriction under Article 19(6).

On the question of 'manifest arbitrariness' and 'unreasonable restriction' of the Regulations, the court relied on the technical paper issued by TRAI a few days after the

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[139] *Cellular Operators Association of India v. TRAI,* (2016) 7 SCC 703, 726
[140] *Cellular Operators Association of India v. TRAI,* (2016) 7 SCC 703, 727
[141] *Cellular Operators Association of India v. TRAI,* (2016) 7 SCC 703, 727
[142] *Delhi Science Forum v UOI*, (1996) 2 SCC 405
[143] *Cellular Operators Association of India v. TRAI,* (2016) 7 SCC 703, 739
[144] *Khoday Distilleries Ltd. V. State of Karnataka*, (1996) 10 SCC 304
[145] *Cellular Operators Association of India v. TRAI,* (2016) 7 SCC 703, 739

regulations.[146] The court found that the authorities overlooked their own paper which stated that 36.9% of the call drops take place because of the consumers, and held that the contract between the service providers and consumers has been amended to the former's disadvantage by levying penalty for call drops despite there being no fault traceable to the service provider. The court thus held the Regulations as unconstitutional for violating Article 14 and Article 19(1)(g).

The court refused to read down the regulation to only apply when it was the fault of the service provider. Relying on precedents[147], it reiterated that the doctrine of reading down would not apply when language in definite and unambiguous i.e. service provider to credit one rupee for every single call drop in its network.

This case clarified the grounds on which a subordinate legislation can be struck down. By firmly rooting the unconstitutionality of TRAI Regulations under Article 14 and Article 19(1)(g), the court avoided the criticism of interfering in the policy prerogatives of the Government.

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[146] Consultation Paper on Compensation to the Consumers in the Event of Dropped Calls, Consultation Paper No. 4/2015, Telecom Regulatory Authority of India, Published on 4th September 2015. Available at http://www.trai.gov.in/sites/default/files/Final_CP_on_Call_Drop_Issue.pdf

[147] *Hindu Women's Rights to Property Act, 1937, In re*, (1941) SCC OnLine FC 3; *Owners of SS Kalibia v Wilson*, (1910) 11 CLR 689 (Aust)

Voluntary Health Association v. State of Punjab, (2016) 10 SCC 265

In *Voluntary Health Association vs. State of Punjab*, the Supreme Court heard two writ petitions that highlighted the growing rate of female foeticide and the resultant imbalance in the sex ratio due to ineffective implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT).

It was argued that pre-natal diagnostic Centres enabling sex determination were facilitating female foeticide. Female foeticide violates the right to equality and that of life and liberty of female children. In September, Dr. Sabu Mathew George, an impleader, argued that that the appropriate authorities are not following the mandate of Rule 18A of the Rules. Mr. Colin Gonsalves, representing the petitioner, had submitted information on 'District-wise Sex Ratio at Birth of Odisha State' between 2010 and 2014, pointing out that pointed out that there were many districts where the sex ratio had fallen below 900. In particular, the sex ratio had gone down to 705 and 794 in 2014 in two districts - Kendrapara and Ganjam.[148]

A bench comprising Justices Dipak Misra and Shiva Kirti Singh heard the case. Elucidating upon the object behind the enactment of the Act, they called for effective implementation of the PCPNDT. They affirmed the directions issued in *Center for Enquiry into Health and Allied Themes (CEHAT) & Ors. vs. Union of India & Ors.(I)*[149], *Center for Enquiry into Health and Allied Themes (CEHAT) & Ors. vs. Union of India & Ors.(II)*[150], and *Voluntary Health Association vs. State of Punjab (I)*[151]. Further, the court directed that all States must maintain a centralized database of the number of boys and girls being born; birth information for each District, Municipality, Corporation or Gram Panchayat must be displayed on the website; all statutory authorities envisaged under the Act must be constituted; complaints under the Act must be fast tracked in courts; judges must be periodically imparted training to develop the requisite sensitivity; awareness campaigns

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[148] *Voluntary Health Association v. State of Punjab*, (2016) 10 SCC 265, 288

[149] *Center for Enquiry into Health and Allied Themes (CEHAT) & Ors. vs. Union of India & Ors.(I)*, (2001) 5 SCC 577

[150] *Center for Enquiry into Health and Allied Themes (CEHAT) & Ors. vs. Union of India & Ors.(II)*, (2003) 8 SCC 398

[151] *Voluntary Health Association vs. State of Punjab (I)*, (2013) 4 SCC 1

must be undertaken using Legal Aid authorities and para-legal volunteers; states must wide publicise the issue; States and Union Territories must implement the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) (Six Months Training) Rules, 2014, since training is imperative for realising the purpose of this Act; and States must have incentive schemes for the girl child in place.

Commenting on the nature of the constitutional rights that have been conferred upon individuals, the court observed that fundamental rights, particularly the rights of a woman or a female child, are natural and universal and are available to an individual by virtue of birth and are not conferred upon them by anyone. They grant the female child a constitutional identity which cannot be mortgaged in favour of any social norm.

On the one hand, judicial observations like these resonate with gender equality and constitutional morality, on the other, the court fails to effectively address the question of the potential misuse of the PCPNDT Act, which created a barrier to proper healthcare and reproductive autonomy of women in certain cases. Further, it has made space for harassment of medical professionals. This reflects a paradoxical approach to women's rights. While recognizing the constitutional equality between men and women as a natural right, the court has not make any concrete observations on the provisions of the PCPNDT Act being misused to instigate terror in the minds of medical professionals and in effect leading to denial of proper treatment and medical help even where there is possibility of loss of the woman's life owing to complications arising from a pregnancy.

State Of Punjab & Anr. vs. Brijeshwar Singh Chahal, (2016) 6 SCC 1

In this case, the procedure adopted by State governments of Punjab and Haryana in the appointment of law officers was challenged as being arbitrary and in violation of Article 14 on account of lack of a fixed criterion for making appointments. The appointment procedure was challenged on account of the absence of any realistic assessment of requirements, and any fair, objective and transparent method to guide such appointments.

A Bench comprising of Chief Justice T.S. Thakur and Justice Kurian Joseph directed the States of Punjab and Haryana to frame a specific procedure and criterion that would inform the appointment of law officers to the courts in these states. The court held that such an unregulated system could result in 'erosion of the Rule of law, public faith in the fairness of the system and injury to public interest and administration of justice.'

The court referred to the Report of the CAG on Social, General and Economic sectors (non PSUs) for 2011-2012 for Haryana which indicated the lack of any correlation as to the quantity of appointments and the workload in various courts. As a result, a large number of appointees in Haryana had no work to do. This pattern was also seen in Punjab, which had a large number of unnecessary appointments. It was noted that there was no procedure in place to overlook appointments made in these states, and officers were conventionally appointed on a contractual basis in consultation with the Advocate General, on the basis of 'discrete enquiries' and 'good behavior'.

The court stressed that appointments should be regulated by a policy or statute. It relied upon the case of *Srilekha Vidyarthi v. State of U. P*.[152] to emphasize that the appointment of Government Counsels is not merely a professional engagement but also has a public element especially since the remuneration of these counsels is drawn out of the public exchequer. Reiterating that all public bodies are custodians of public interest and the duty to act fairly is a facet of the 'rule of law', the court emphasized the need for public prosecutors to act in favour of the administration of justice and curb increased litigation against the State. Government law officials, it was recorded, constitute the largest litigant

[152] *Srilekha Vidyarthi v. State of U. P.*, 1993 AH LJ 4 (SC)

group in the country and the assistance received by the court from the Bar is a strong factor in maintaining the quality of the judgement.

The court referred to the 197th Report of the Law Commission and stated that the appointments must be made in consultation with the Sessions Judge and High Court. The constitution of a committee for the purpose of making and regulating appointments was recommended. The Committee was directed to frame norms that would determine the selection process to ensure that there is fairness in the procedure.

This case has emphasised that officials in-charge of governing the affairs of public bodies serve as custodians of public and thus, must be appointed on the basis of a fair, transparent and objective procedure. **Did they strike down the appointment?**

Hiral Harsora v Kusum Harsora, (2016) 10 SCC 165

In 2007, Ms. Kusum Harsora and her mother Ms. Pushpa Harsora filed a complaint under the Protection of Women from Domestic Violence Act, 2005 (PWDVA) against Ms. Kusum's brother Mr. Pradeep, his wife Ms. Hiral and his two sisters alleging that they committed various acts of violence. Hiral and the Pradeep's sisters approached the Metropolitan Magistrate to discharge the three female respondents stating that a complaint under Section 2(q)[153] of the PWDVA can only be made against an adult male. The Metropolitan Magistrate passed an order in 2012 refusing to discharge the female respondents. In 2012, Hiral filed a writ petition at the Bombay High Court, which discharged them. In 2013, Kusum and Pushpa filed a writ petition in the Bombay High Court, challenging the constitutionality of Section 2(q). The Bombay High Court read down section 2(q) of the PWDVA to hold that the provisions must be read as a part of the scheme of the Act. It held that a complaint against women would be maintainable under the PWDVA, if they are co-respondents with the male. However, the court emphasized that a complaint under the Act would not be maintainable against women respondents exclusively or in cases where there no male accused.[154]

Hiral appealed to the Supreme Court against this judgement of the Bombay High Court. The matter was decided by a bench comprising Justices Kurian Joseph and Rohinton Nariman. Justice Rohinton Nariman authored the judgement.

Hiral argued that a plain reading of the term 'respondent' as defined in Section 2(q) can only mean an adult male. Secondly, the PWDVA is a penal statute which should be construed strictly, if an ambiguity arises. There is no ambiguity here. Hence, the provision should not be diluted. Thirdly, the change suggested by the Bombay High Court can only be carried out by the legislature, not a court.[155]

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[153] Section 2(q) , "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

[154] *Kusum Narottam Harsora v Union of India*, 2014 SCC OnLine Bom 1624.

[155] *Hiral Harsora v Kusum Harsora*, (2016) 10 SCC 165, 177

Kusum Harsora contended that rather than reading down Section 2(q) of PWDVA like the Bombay High Court did, the provision could be struck down for violating equality under Article 14. In its current form, it discriminates between 'male' and 'female' respondents. The classification is not based on an intelligible differentia, and has no rational nexus with the object sought by the PWDVA. Second, the PWDVA is a social legislation and not penal. It aims to protect women from domestic violence of all kinds. Thus, the court must adopt an interpretation that furthers such a purpose. Thirdly, the interpretation that includes males and females in the definition of respondents is in tune with other statutory laws such as the Hindu Succession Act 1956.[156]

The court held that the classification of 'adult male person' subverts the doctrine of equality under Article 14, by '*restricting the reach of a social beneficial statute meant to protect women against domestic violence*'.[157] The court held that the "*microscopic difference between male and female, adult and non adult, is neither real or substantial and does not have any rational with the object*" of the PWDVA. Further, the term 'adult male person' is contrary to the aim of the PWDVA. Hence, it struck down Section 2(q) of the Act for being unconstitutional.

This judgement confirmed that gender identity cannot be taken as a legal cover to perpetuate violence on women. But, some critics[158] have noted that the judgement did not reflect on the 'gendered' nature of domestic violence in India. This judgement could be misused against domestic violence survivors by women family members of the husband, who may file false counter complaints.

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156 *Hiral Harsora v Kusum Harsora*, (2016) 10 SCC 165, 178-178

157 *Hiral Harsora v Kusum Harsora*, (2016) 10 SCC 165, 193-197. Also see *Lachhmann Das v State of Punjab* ((1963)2 SCR 353); *D. S. Nakara v. Union of India* ((1983) 1 SCC 380); *Subramanian Swamy v CBI* (2014)8 SCC 682

158 Jayna Kothari, *Violence That's Not Gender-Neutral*, The Hindu, 17th November 2016 (available at - http://www.thehindu.com/opinion/op-ed/Violence-that%E2%80%99s-not-gender-neutral/article16643843.ece); Also See, Sanjay Ghose, A Gender Neutral Domestic Violence Law Harms Rather Than Protects Women, The Wire, 3rd November 2016 (avaialable at - https://thewire.in/77445/a-gender-neutral-domestic-violence-law-harms-rather-than-protects-women/)

Equality of opportunity in public employment: Article 16

Ram Kumar Gijroya vs. Delhi Subordinate Services Selection Board, (2016) 4 SCC 754

Mr. Gijroya, a person belonging to the OBC Category, had challenged the decision of the Delhi Subordinate Services Selection Board (DSSSB) of not considering his application for the post of Staff Nurse on account of delay in producing his OBC Certificate. A Single Judge bench of the High Court[159] had allowed the challenge, based on *Pushpa vs. Government of NCT of Delhi*[160]. However, the Division Bench of the High Court[161] overturned the ruling and upheld the Mr. Gijroya's disqualification as he had not applied for the OBC Certificate well in advance and had done so 10 days before the cut-off date. Hence, the appeal to the Supreme court before Chief Justice T.S. Thakur and Justice V. Gopala Gowda.

The central question was whether a candidate who appears in an examination under the OBC category and submits certificate after the last mentioned date in the advertisement is eligible for selection to the post under the OBC category or not?

Ram Kumar Gijroya argued that the stand taken by DSSSB was in variance with the settled position of law in *Tej Pal Singh v NCT*[162] which held that such certificates can be submitted even after the cut-off date fixed by the advertisement. He further relied on the cases of *Karnataka v Uma Devi*[163] and *DTC v Mazdoor Congress*[164] where the court emphasized that the State is meant to be a model employer and must give due importance to the fundamental rights of equality and opportunity in matters of public employment as envisaged under Articles 14 and 16[165]. DSSSB argued that by failing to submit the OBC

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159 *Ram Kumar Gijroya v NCT of Delhi*, WP (C) No. 382 of 2009, order dated 24-11-2010(Del)
160 *Pushpa v. Government of NCT of Delhi*, 2009 SCC OnLine Del 281
161 *Delhi Subordinate Services Selection Board v Ram Kumar Gijroya*, 2012 SCC OnLine Del 472
162 Tej Pal Singh v NCT, 1999 SCC OnLine Del 1092
163 *State of Karnataka v Uma Devi,* (2006) 4 SCC 1
164 *DTC v Mazdoor Congress*, 1991 Supp (1) SCC 600
165 *Ram Kumar Girojiya vs. Delhi Subordinate Services Selection Board*, (2016) 4 SCC 754, 758

certificate within the stipulated time, Ram Gijroya had waived his right for being considered under the reserved category.[166]

The Court emphasised that the conceptual basis for affording reservations, which was to ensure that people from 'educationally and socially backward classes' are given an equal opportunity and representation in public employment.[167] **The court relied heavily on the Delhi High Court's reasoning in *Pushpa and*** *Tej Pal Singh v. Govt (NCT of Delhi)*,[168] **.** ~~It reaffirmed the ruling in *Indira Sawhney & Ors. vs. Union of India*[169] and *Valsamma Paul (Mrs.) vs. Cochin University & Ors.,*[170]. The court also approved of the Delhi High Court's verdict in which held that candidates belonging to SC/ST categories cannot be rejected simply due to the late submission of a caste certificate.~~ Thus, the court set aside the judgement passed by the Division Bench of the High Court and restored the single judge order[171] in favour of Ram Kumar Gijroya.

The reasoning adopted by the Supreme Court in this case is interesting, as it represents a blurring of the lines between the OBC category and the SC/ST category. The conceptual basis of the decision in *Tej Pal Singh* was that a person belongs to a certain category (SC/ST/OBC) by virtue of birth within such category and does not lose that identity on account of any subsequent event. A Certificate simply affirms the identity and does not bestow any status upon the individual. Hence, it cannot be the basis for denial of benefits. However, this argument does not hold in the case of OBCs, where a distinction must be drawn between the creamy and non-creamy layers, and the possibility of progression from the former to the latter would result in the loss of status as an OBC.

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166 *Ram Kumar Girojiya vs. Delhi Subordinate Services Selection Board*, (2016) 4 SCC 754, 759
167 *Ram Kumar Girojiya vs. Delhi Subordinate Services Selection Board*, (2016) 4 SCC 754, 761
168 *Tej Pal Singh v. Govt (NCT of Delhi)*, 2000 (52) DRJ 791
169 *Indira Sawhney & Ors. vs. Union of India*, 993 SC 477 : 1992
170 *Valsamma Paul (Mrs.) vs. Cochin University & Ors.*, 1996 (3) SCC 545
171 *Ram Kumar Gijroya v NCT,* WP(C) No. 382 of 2009

It appears that non submission or late submission of caste certificates has become politically and legally controversial. While the court extended the time for submission, he did not set an outer limit to this concession. This may call to be determined in future cases.

Kulwinder Pal Singh vs. State Of Punjab, (2016) 6 SCC 532

The Punjab Public Service Commission advertised appointments to the posts of the Punjab Civil Services (Judicial Branch). After the examinations, 8 vacant reserved seats were de-reserved and offered to candidates that came next in the general category. Four general category candidates took up these seats, while three candidates declined. Then, the next three general category candidates approached the Administrative Committee to issue them appointment letters. At around the same time, the Supreme Court, in a separate order, directed 22 officers to be appointed to the Punjab Judicial Service. As only 6 posts were available, 16 temporary posts were to be created. The Admin Committee appointed 3 of these candidates covered by the Supreme Court order.

these vacancies were filled by candidates who were previously selected but not appointed to due to a corruption scandal[172] as per Supreme Court order.

As per this order, 22 officers were to be appointed to the Punjab Judicial Service, even though there were only six posts available, which in effect meant that 16 temporary posts would have to be created. The Supreme Court order categorically laid down that these temporary posts would gradually be abolished against the future vacancies that would arise. The Administrative Committee in a meeting held on 6-7-2011 observed that the 3 resultant vacancies would thus be adjusted and consumed with the joining of the candidates pertaining to Sidhu Scam.

Kulwinder Pal Singh and other appellants approached the Punjab and Haryana High Court against this order of Administrative Committee.

The Punjab and Haryana High Court[173] held that the general class appellants cannot claim any legal right against vacant seats created due to non-joining of three general candidate students against seats earmarked for reserved categories. It further held that out of 27 advertised posts for general category candidates, 31 candidates have already joined which is 4 more than advertised posts. Thus, the select list of 2007-08 stands exhausted.

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[172] In Punjab, there was an ongoing litigation regarding selection of judicial officers (Junior Division) in 1998, 1999, 2000 and 2001 known as Sidhu Scam.

[173] *Kulwinder Pal Singh v State of Punjab*, 2012 SCC OnLine P&H 2975

The appeal from the High Court was heard by two judges of Supreme Court, Chief Justice T.S. Thakur and Justice R. Banumathi. Kulwinder Pal Singh and other appellants contended that the High Court had erred in finding fault with the de-reservation policy as this was not challenged once the appointments were made. They argued that if certain general candidates were appointed to the de-reserved posts, the same benefit should be extended to the them.

State of Punjab argued that even if the name of a candidate appears in the merit list, it does not generate any indefeasible right of appointment.[174].

The Supreme Court dismissed the appeal, relying on *Rakhi Ray v. High Court of Delhi,* which held that appointments made beyond the number of vacancies advertised violate Articles 14 and 16(1) of the Constitution[175]. Thus, waiting lists cannot be used as a reservoir to fill up vacancies that come into existence after the selection process has ended. As per clause (4-B) of Article 16, unfilled vacancies for SC/STs are to be carried forward independent of the 50% ceiling on reservation, as these vacancies are to be filled only by the specified category. Thus, the Supreme Court agreed with High Court that the deresevation policy undertaken in this matter was wrong in law.

The court also rejected Kulwinder Pal Singh's argument that once some candidates were appointed against the dereserved category, the same cannot be denied by holding dereservation policy illegal[176]. Relying on *UP v Rajkumar Sharma*[177], the court held that Article 14 cannot be used to perpetuate illegality and it does not envisage negative equalities. Merely because some persons have been granted benefits illegally or by mistake, would not confer a right upon the appellants to claim equality[178].

This is an important judgement as it clears the legal position on two issues, legality of deservation policy in light of constitutional provisions safeguarding reservation and application of equality for illegal gains.

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[174] *State of Orissa v. Rajkishore Nanda*, (2010) 6 SCC 777
[175] *Kulwinder Pal Singh vs. State Of Punjab*, (2016) 6 SCC 532, 538
[176] *Kulwinder Pal Singh vs. State Of Punjab*, (2016) 6 SCC 532, 539
[177] *UP v Rajkumar Sharma*, (2006) 3 SCC 330
[178] *Kulwinder Pal Singh vs. State Of Punjab*, (2016) 6 SCC 532, 540

Freedom of Religion: Articles 25 and 26

Chief Secretary, Tamil Nadu v Animal Welfare Board of India, (2017) 2 SCC 144

In 2014, the Supreme Court, in *Animal Welfare Board of India v A. Nagaraja*[179], upheld the 2011 Central Government notification to Prevention of Cruelty to Animals Act, (PCA), which barred animals like Bears, Monkeys, Tigers, Panthers, Lions, Bulls from being exhibited or trained as 'performing animals'. This resulted in a ban on the celebration of *'Jalikattu'*. *Jalikattu'* is a traditional bull-chasing sport of Tamil Nadu which is organised during the harvest festival Pongal. The sport is said to be more than 2000 years old. In current practice, the bulls are physically and mentally tortured, and controlled by grabbing it by the horns or the tail. In another variant, the bull is tied to a long rope and a team of players has to subdue the bull within a specific time to win. In all variants, the aim is to subdue or torture the bull. The Tamil Nadu Government filed a review petition before the Supreme Court to review its decision in *Animal Welfare Board of India v A. Nagaraja*. The matter was heard by a bench comprising Justices Dipak Misra and Rohinton Nariman.

The Tamil Nadu Government first argued that *A. Nagaraja* erred in holding that Tamil Nadu Regulation of Jallikattu Act (TNRJ) (which allows Jallikattu) offends the PCA.[180] The Animal Welfare Board of India argued that *A. Nagaraja* is not flawed. There is a direct collision between the TNRJ and the PCA. One stands for the welfare of animals and the other compels them to participate in an event to satisfy human pleasure.[181] The court upheld *A. Nagaraja* and confirmed that the TNRJ Act is indeed repugnant to the PCA. The aim of the PCA is protection and welfare of animals. On the other hand, Jalikattu is against the welfare of animals and amounts to treating the animal with cruelty.[182]

Secondly, the Tamil Nadu Government argued that *Jallikattu* is a sociocultural event that takes place after harvest and is protected by freedom of religion under Article 25.

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179 *Animal Welfare Board of India v. A. Nagaraja,* (2014) 7 SCC 648

180 *Chief Secretary, Tamil Nadu v Animal Welfare Board of India*, (2017) 2 SCC 144, 148

181 *Chief Secretary, Tamil Nadu v Animal Welfare Board of India*, (2017) 2 SCC 144, 149

182 *Chief Secretary, Tamil Nadu v Animal Welfare Board of India*, (2017) 2 SCC 144, 156

[183]The court rejected this argument as being far-fetched, imaginative, and totally alien to Article 25.[184]

The third issue was on the scope for the State Legislature to make a law that would run counter to a central Act. The Animal Welfare Board of India argued that the Tamil Nadu law has no connection with Entries 14 and 15 of the State List. The Acts are rooted in Entry 17 of the Concurrent List.[185] Tamil Nadu rebutted that the Central Act has not covered entry 17 in its entirety. In any case, the court should apply the doctrine of pith and substance and uphold the enactment, even if it is held to be a part of the Concurrent List. The Court held that both Acts fall within Entry List 17 of the Concurrent list which covers the subject of prevention of cruelty to animals. There is frontal collision and apparent inconsistency between the PCA and the TNRJ Act. Hence, the central legislation, i.e. PCA, will prevail.

After this decision, the Tamil Nadu Assembly passed a State amendment to the Prevention of Cruelty Act, 1960 to allow *Jalikattu*, but the Supreme Court has refused to stay the new amendment.[186] The matter has now been referred to a Constitution Bench. The Bench will examine the competence of the State Government to enact the amendment, whether the amendment perpetuates cruelty to animals, and if the amendment contradicts *A Nagaraj*.

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[183] *Chief Secretary, Tamil Nadu v Animal Welfare Board of India*, (2017) 2 SCC 144, 148-149

[184] *Chief Secretary, Tamil Nadu v Animal Welfare Board of India*, (2017) 2 SCC 144, 159

[185] *Chief Secretary, Tamil Nadu v Animal Welfare Board of India,* (2017) 2 SCC 144, 149.
Entry 17 reads: "Prevention of cruelty to animals"
Entry 14 reads: "Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.
Entry 15 reads: "Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice."

[186] *Animal Welfare Board of India v. Union of India*, (2018) 2 SCC 645, 646

Restriction on Fundamental Rights in certain cases: Article 33

Mohammad Zubair Corporal v. UOI, (2017) 2 SCC 115

Mohammad Zubair, a corporal in the Air Force was dismissed from service for maintaining a beard in contravention of Service Rules. There were a host of circulars and regulations which prohibited Air Force personnel from sporting a beard or long hair. Notably, Regulation 425 of the Armed Forces Regulations 1964 which prohibited the growth of hair by Armed Forces personnel, except for "personnel whose religion prohibits the cutting of hair or shaving of face."

Mohammad Zubair was enrolled as an Airman on 19th December 2001 and was terminated on 1st September, 2007. After his service termination for keeping a beard, Mohammad Zubair challenged his dismissal in the Punjab and Haryana High Court citing that Regulation 425(b) permitted him to keep beard as it was mandated by Islam and his dismissal from Air Force was wrong. The High Court held that maintaining a beard was not an integral part of Islam and dismissed his petition.

Mohammad Zubair appealed to the Supreme Court. He argued that Regulation 425(b) permitted him to keep his beard. The matter was heard by a three judge bench of Chief Justice T.S. Thakur, Justices D.Y. Chandrachud and L. Nageshwara Rao

Neither the Supreme Court nor Mohammad Zubair went into the constitutionality of Regulation 425(b) to protect his fundamental right. The court began by discussing Article 33, which allows for statutory restrictions on fundamental rights of members of the Armed Forces. The court considered if there was a religious command under Islam which mandated maintaining a beard. Mohammad Zubair's counsel suggested that it was desirable but not mandatory, without looking at the Quran. The court unanimously held this to be the case and dismissed Mohammad Zubair's claim and upheld his termination.

Hence it doubted that Article 25 protected the maintenance of a beard by an Airman. Further, the COurt clarified that Article 33 would in any case permit the state by law...[187]

This is a significant matter dealing with Article 33, which restricts the fundamental rights of members of Armed Forces, by law. The court's singular reliance on Mr. Zubair's Counsel's view on the non-essentiality of keeping a beard in Islam, without looking at the Quran, raises concerns. Moreover, the practice of courts going into the essentiality of religious practices and reinterpreting religion has been criticised by many legal scholars.[188]

SEE IF US, UK, CANADA courts have looked at this. Significantly, in other decisions, the courts have been reluctant to curtail significant religious practices.

[187] Page 121

[188] See Rananjoy Sen, *The Indian Supreme Court and the quest for a 'rational' Hindusim*, South Asian History and Culture, Vol 1, 2009, Issue 1 - available at http://www.tandfonline.com/doi/full/10.1080/19472490903387258

Remedies to enforce fundamental rights : Article 32

Pooja Pal Vs. Union of India, (2016) 3 SCC 137

Pooja Pal, the wife of the deceased MLA Raju Pal had approached the Supreme Court under Article 32 of the Constitution, after her request for a CBI investigation was denied by the High Court[189]. The matter was placed before the two judge bench of Justices V. Gopala Gowda and Amitava Roy.

She alleged that her husband's murder was the result of a political conspiracy and the police had been complacent in the same as a result of which there had been a shoddy investigation. She pressed for a fresh, impartial investigation and this could only be carried out by the CBI.

The UP State Government denied the allegation of indifference and apathy by police and CB-CID in investigating the death of Raju Pal. The State Government argued that very narrow grounds exist for ordering CBI investigation and this case does not warrant direction for CBI investigation.[190]

In this case, the two Judge Bench of the Supreme Court was satisfied that the police were inefficient and the trial has "trivialized the cause of justice". Referring to an array of earlier judgements[191], the court held that the investigation conducted by the police was inefficient and a re-investigation may be ordered when the court is of the view that the case was not properly investigated or the trial has "trivialized the cause of justice."[192] The Supreme Court S*tate of West Bengal vs. Committee for Protection of Democratic Rights*[193] which held that High Courts have the power under Article 226 of the Constitution to order investigation by the CBI in a cognizable offence, without seeking the permission of the State

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[189] Pooja Pal v Union of India, 2014 SCC OnLine All 6350

[190] *Pooja Pal v. Union of India & Others,* (2016) 3 SCC 135, 155

[191] Zahira Habibulla H. Sheikh v State of Gujarat, (2004) 4 SCC 158; Also See *Karnel Singh v State of MP*, (1995) 5 SCC 518.

[192] *Pooja Pal v. Union of India & Others,* (2016) 3 SCC 135,167

[193] *State of West Bengal vs. Committee for Protection of Democratic Rights,* (2010) 3 SCC 571

Governmen where the crime may have national and international consequences; or for the enforcement of fundamental rights.

The decision in *Pooja Pal* is a significant judicial pronouncement on the scope of judicial review, particularly in the context of the right to fair trial which is a fundamental right under articles 20 and 21.

Supreme Court's power to do complete justice : Articles 32 & 142

Anita Khushwaha vs. Pushap Sudan, (2016) 8 SCC 509

A 3 Judge bench of the Supreme COurt[194] referred eleven civil cases and two criminal cases to a Constitution Bench, to determine whether these petitions could be transferred to and from courts in Jammu and Kashmir to courts in the rest of India.

A 5 Judge Constitution Bench comprising Chief Justice T. S. Thakur, and Justices Ibrahim Kalifulla, A.K. Sikri, S.A. Bobde and R. Banumathi decided the matter.

Ms. Khushwaha contended that the absence of a specific legal provision in the procedural laws, the Constitution of India, or the Jammu and Kashmir State Constitution does not entirely disable the Supreme Court from transferring any case. She argued that access to justice is a fundamental right under Article 21, and a person whose fundamental right is jeopardised can move the Supreme Court under Article 32. Articles 142 and 32 together give the authority to the court to do 'complete justice'.[195] Hence, the Supreme Court can pass appropriate directions including the transfer of the case to or from a state.

Pushap Sudan opposed the transfer petition on the ground that the provisions of the Code of Criminal Procedure, 1973[196] (CrPC) and the Code of Civil Procedure, 1908[197] (CPC) expressly make transfer of cases inapplicable to the State of Jammu & Kashmir.[198] Further, the J&K Code of Civil Procedure, 1977 and J&K Code of Criminal Procedure, 1989 do not have any express provision that permits the transfer of cases to the Supreme Court. Article 139-A, which empowers the Supreme Court to transfer cases pending before High Courts

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[194] *Anita Kushwaha v Pushap Sudan*, Transfer Petition (C) No. 1343 of 2008, wherein it was directed: "These petitions raise an important question as to the power of this court to transfer a civil case from the State of Jammu and Kashmir outside the State and vice versa. This is, in our opinion, a question of constitutional significance requiring interpretation of the provisions of the constitution. Let it be placed for hearing by the Constitution Bench."

[195] Article 142 of Indian Constitution

[196] Section 406 CrPC.

[197] Section 25 CPC

[198] See Section 1 of both CrPC and CPC.

either to itself or to other High Courts, does not extend to Jammu and Kashmir, which is governed by its own Constitution. Thus, there is statutory as well as constitutional bar to transfer a case from and to the courts of Jammu and Kashmir.

The court accepted the Pushap Sudan's argument that there is a statutory bar against transferring cases to and from Jammu and Kashmir.[199] Thereafter, the court considered the scope of the right of 'access to justice' under the Article 21 right to life. It examined whether Articles 142 and 32 empower the Supreme Court to transfer cases to render 'complete justice'. The judgement examined various international instruments, principles of common law, and English and Indian judicial pronouncements to display the existence, recognition, and grant of a right of access to justice and speedy and fair trial as a part of the right to life.[200] The court noted the recommendation of the Commission for Review of the Constitution to insert Article 30A in the Constitution as an explicit right guaranteeing access to courts and speedy justice.[201] The court observed that this is a mere formality, as the right already stands acknowledged under Article 21.[202] The court further expanded the scope of the right to justice by grounding it in Article 14, noting that the protection of this right is necessary to uphold the constitutional mandate of equality before law and equal protection of laws.[203] The Court did not considers JK special status under Article 370.

The court elaborated on the scope of the right of access to justice on four fronts: the State must provide an effective adjudicatory mechanism; the mechanism provided must be reasonably accessible in terms of distance; the process of adjudication must be speedy; and the litigant's access to the adjudicatory process must be affordable.

Next, the court held that its powers under Article 142 could take the form of transferring a case especially if statutory provisions do not provide for such transfers. The court affirmed

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[199] *Anita Khushwaha vs. Pushap Sudan*, (2016) 8 SCC 509, 519

[200] *Anita Khushwaha vs. Pushap Sudan,* (2016) 8 SCC 509, 529. Also see *P.K. Tare v. Emperor* (AIR 1943 Nagpur 26); *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 810; *Maneka Gandhi v. Union of India* (1978) 1 SCC 248; *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494; *Charles Sobhraj v. Suptd. Central Jail* (1978) 4 SCC 104; *Khatri II v. State of Bihar* (1981) 1 SCC 627; *Sheela Barse v. Union of India* (1988) 4 SCC 226.

[201] *Anita Khushwaha vs. Pushap Sudan*, (2016) 8 SCC 509, 527

[202] *Anita Khushwaha vs. Pushap Sudan*, (2016) 8 SCC 509, 527

[203] *Anita Khushwaha vs. Pushap Sudan*, (2016) 8 SCC 509, 528

the principle set out in *Union Carbide Corporation vs. Union of India*[204], which held that the court may transfer cases even if it is not allowed by Article 139-A. Therefore, the extraordinary power available to the court under Article 142 can be invoked if the court is satisfied that not transferring the case will deny the citizen the right of access to justice.[205]

Hence the court allowed the appeal and remanded it back to the 3 judge.

[204] *Union Carbide Corporation vs. Union of India*, (1991) 4 SCC 584
[205] *Anita Khushwaha vs. Pushap Sudan*, (2016) 8 SCC 509, 532