IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. 15403 OF 2022

IN THE MATTER OF:-

WOMEN'S VOICE …PETITIONER

Versus

STATE OF KARNATAKA & ORS. …RESPONDENTS

CONVENIENCE COMPILATION

PAPER BOOK ONLY

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE FOR THE PETITIONER: Dr. ANINDITA PUJARI

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Counsel for Petitioner

Date: 13.09.2022

Advocate for the Petitioner

consequence of deletion is that the decree of the courts below as against the deceased becomes final. If the decree is inseparable and the rights of the parties are indivisible between the contesting parties and the deceased, the consequence would be that the suit/appeal stands abated as a whole. But if one of the respondent/respondents or defendant/defendants is already on record, what needs to be done is an intimation to the court by filing a formal application or memo to transpose the existing defendant/defendants or respondent/respondents as legal representatives of the deceased defendant/ defendants or respondent/respondents. In view of the mistake committed by the counsel, the court has to consider the effect thereof. On the facts, we think that cause of justice would get advanced if the misconception as to the procedure on the part of the counsel is condoned and if Respondents 8 and 15 instead of being deleted Respondents 9 and 10 are substituted and transposed as the legal representatives of the deceased Respondent 8 and Respondent 16 is transposed as legal representative of Respondent 15.

14. However, in view of the above findings, on merits the appeal stands dismissed but, in the circumstances, without costs.

(1997) 5 Supreme Court Cases 201

(BEFORE K. RAMASWAMY, S. SAGHIR AHMAD AND G.B. PATTANAIK, JJ.)

Civil Appeal No. 2239 of 1997†

ASHOK KUMAR GUPTA AND ANOTHER .. Appellants;

Versus

STATE OF U.P. AND OTHERS .. Respondents.

And

Writ Petition (C) No. 511 of 1995‡

VIDYA SAGAR GUPTA AND OTHERS .. Petitioners;

Versus

STATE OF U.P. AND OTHERS .. Respondents.

Civil Appeal No. 2239 of 1997 with Writ Petition (C) No. 511 of 1995, decided on March 21, 1997

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† From the Judgment and Order dated 4-8-1993 of the Allahabad High Court in W.P No 3088 of 1993

‡ Under Article 32 of the Constitution of India

fundamental right — Constitution of India, Arts. 16(4-A), (1) & (4), 14, 15(1) & (4), 38, 46, 51-A and 335 — Interpretation of the Constitution — Liberal interpretation should be applied

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E. **Jurisprudence — Law — Objects of — Held, law is a social engineering to remove existing imbalances and to further the progress — Utility of impugned legislation should be adjudged by taking into account the prevailing social conditions and actualities of life — Constitution of India, Arts. 32 and 226 — Judicial review**

F. **Constitution of India — Arts. 141, 32, 16(1) & (4) and 335 — Constitutional issues not directly arising for decision, held, cannot be decided — Hence, decision in *Mandal case* that reservation for Scheduled Castes and Scheduled Tribes in promotion was unconstitutional and deteriorative of efficiency, criticised on that ground — More particularly because there was no evidence in support of the latter part of the decision — Service Law — Reservation — Promotion — Service Law — Promotion — Reservation**

(Para 32)

G. **Constitution of India — Arts. 16(4-A), (1), (4), 14, 15(1), (4), 46, 335 and 368 — Legislative policy behind Art. 16(4-A) — Scope of judicial review — Held, not judicially reviewable on the ground of violation of fundamental rights — However, the policy of reservation in promotion, held, constitutional — Policy — Legislative policy — Service Law — Reservation — Service Law — Promotion — Judicial review — Constitution of India, Arts. 32 and 226 — Judicial review**

H. **Service Law — Reservation — Promotion — Judgment in *Mandal case* in para 860(8) by Jeevan Reddy, J., prospectively overruling *Rangachari case* held, was a majority, and not minority, judgment — Constitution of India, Art. 145(5) — Promotion**

I. **Service Law — Reservation — Reservation in promotion for SCs and STs — Protective discrimination, held, is a part of the constitutional scheme for social and economic justice — To treat unequals as equals would violate Art. 16 — Inequality in fact must be tackled to establish equality in results against mere equality in law — Constitution of India, Arts. 14, 16(1), (4), (4-A), 38 and 46 — Promotion — Scheduled Castes and Scheduled Tribes**

J. **Interpretation of the Constitution — Pragmatic approach and liberal interpretation favoured — An interpretation retarding the progress or impeding social integration, held, not binding on the Supreme Court — The Supreme Court would adopt an interpretation which would achieve the ideals set down in the Preamble of the Constitution aided by Parts III and IV — Constitution of India, Preamble, Parts III and IV**

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M. Constitution of India — Arts. 13(1) & (2), 141, 142, 32 and 16(1) & (4), 14 — Provision in Arts. 13(1) and (2) postulating the laws inconsistent with fundamental rights to be void — Applicability — Held, not applicable to law declared by the Supreme Court under Art. 141 and directions/orders under Art. 142 — A law earlier declared by the Supreme Court when subsequently overruled, held, does not become void ab initio — Hence, postponement of the operation of the judgment in *Mandal case* (holding reservation in promotion to be unconstitutional and overruling *Rangachari case*), for five years, held, was valid and was an extended facet of stare decisis — It did not amount to judicial legislation or to addition of a proviso to Art. 16(4) — Service Law — Reservation — Promotion — Service Law — Promotion — Reservation — Prospective overruling — Overruling from an extended date — Validity — Statute law — Prospective overruling — Words and phrases — "Complete justice" — Scope

In *Indra Sawhney case*, overruling *Rangachari case*, the Supreme Court held reservation in promotion to be unconstitutional but directed the decision to be operative after 5 years from the date of the judgment; however, before expiry thereof, Article 16(4-A) of the Constitution of India came into force from 17-6-1995. In this background, the appellants and writ petitioners challenged the promotion of private respondents to the posts of Superintending Engineers (Civil), Chief Engineer, Level-II (Civil), Chief Engineer, Level-I and Engineer-in-Chief in Public Works Department of the Government of Uttar Pradesh. The grounds of challenge were:

(*i*) that reservation in promotion having been held unconstitutional in *Indra Sawhney case*, known as *Mandal case*, the U.P. Service of Engineers (PWD) (Higher) Rules, 1990 were ultra vires and the promotion of the respondents was unconstitutional;

(*ii*) that reservation in promotion having been declared unconstitutional in *Mandal case*, was void ab initio and vitiated the promotion of the respondents; that the operation of the unconstitutional direction could not be postponed by prospective overruling of *Rangachari ratio*;

(*iii*) that the decision in *Mandal case* to overrule *Rangachari case* prospectively after the expiry of five years from the date of judgment was only a minority opinion and the ratio thereof was unconstitutional and not a majority judgment under Article 145(5) of the Constitution of India;

(*iv*) that the said prospective overruling even if assumed to be a majority judgment, was violative of fundamental rights of the appellants/petitioners under Articles 14 and 16 and, therefore, the power under Article 142 of the Constitution could not be exercised to curtail the said fundamental rights;

(*v*) that having declared the reservation in promotions as void, the prospective overruling was illegal as the same was no part of the doctrine of stare decisis and amounted to judicial legislation or to an addition of a proviso to Article 16(1) or 16(4) of the Constitution.

Rejecting these contentions and dismissing the appeal and the writ petition, the Supreme Court

Held :

Every citizen or group of people has right to a share in the governance of the State. The Scheduled Castes and Scheduled Tribes equally being citizens have a right to a share in the governance of the State, and in the permanent democracy service conditions are assured under Articles 309 to 312-A of the Constitution subject to the provisions of Articles 310, 33 and 34. The right to seek equality of opportunity to an office or a post under the State is a guaranteed fundamental right to all citizens alike under Article 16(1), the specie of Article 14, the genus. (Para 23)

State of Maharashtra v. *Chandrabhan Tale*, (1983) 3 SCC 387 : 1983 SCC (L&S) 391 : 1983 SCC (Cri) 667, *relied on*

Law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under the rule of law. The prevailing social conditions and actualities of life are to be taken into account in adjudging whether or not the impugned legislation would subserve the purpose of the society. (Para 23)

Delhi Transport Corpn. v. *D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213, *relied on*

The historical evidence of disabilities worked against the SCs and the STs received acknowledgement in Articles 17, 15(2) and 29(2). Educational and economic protection is provided to them under Article 46 and their claims in making appointments have been protected by Article 335. (Para 24)

Comptroller & Auditor General of India v. *K.S. Jagannathan*, (1986) 2 SCC 679 : 1986 SCC (L&S) 345 : (1986) 1 ATC 1 : AIR 1987 SC 537, *referred to*

Social justice is a fundamental right and equally economic empowerment is a fundamental right to the disadvantaged. (Para 26)

Consumer Education & Research Centre v. *Union of India*, (1995) 3 SCC 42 : 1995 SCC (L&S) 604, *Air India Statutory Corpn.* v. *United Labour Union*, (1997) 9 SCC 377 : (1996) 9 Scale 70; *Dalmia Cement (Bharat) Ltd.* v. *Union of India*, (1996) 10 SCC 104 : JT (1996) 4 SC 555; *C.E.S.C Ltd* v. *Subhash Chandra Bose*, (1992) 1 SCC 441 : 1992 SCC (L&S) 313; *Murlidhar Dayandeo Kesekar* v. *Vishwanath Pandu Barde*, 1995 Supp (2) SCC 549; *R. Chandevarappa* v. *State of Karnataka*, (1995) 6 SCC 309; *Papaiah* v. *State of Karnataka*, (1996) 10 SCC 533, *relied on*

Equality of status and dignity of the individual will be secured when the employees belonging to SCs and STs are given an opportunity of appointment by promotion in higher echelons of service so that they will have opportunity to strive towards excellence individually and collectively with other employees in improving the efficiency of administration. Equally they get the opportunity to improve their efficiency and opportunity to hold offices of responsibility at hierarchical levels. (Para 26)

It would, therefore, be necessary to consider the effect of reservation in promotion to the Dalits and the Tribes vis-à-vis the employees belonging to the general categories; it is a balancing right to equality in results and adjusting the competing rights of all sections. By abstract application of equality under Article 14, every citizen is treated alike without there being any discrimination. Thereby, the equality in fact subsists. Equality prohibits the State from making discrimination

among citizens on any ground. However, inequality in fact without differential treatment between the advantaged and disadvantaged subsists. In order to bridge the gap between inequality in results and equality in fact, protective discrimination provides equality of opportunity. Those who are unequals cannot be treated by identical standards. Equality in law certainly would not be real equality. In the circumstances, equality of opportunity depends not merely on the absence of disparities but on the presence of abilities and opportunities. De jure equality must ultimately find its *raison d'être* in de facto equality. The State must, therefore, resort to protective discrimination for the purpose of making people, who are factually unequal, equal in specific areas. It would, therefore, be necessary to take into account de facto inequality which exists in the society and to take affirmative action by giving preferences and making reservation in promotions in favour of the SCs and STs or by "inflicting handicaps on those more advantageously placed", in order to bring about equality. Such affirmative action, though apparently discriminatory, is calculated to produce equality on a broader basis by eliminating de facto inequality and placing SCs and STs on the footing of equality with non-tribal employees so as to enable them to enjoy equal opportunity and to unfold their full potentiality. Protective discrimination envisaged in Articles 16(4) and 16(4-A) is the armour to establish the said equilibrium between equality in law and equality in results as a fact to the disadvantaged. The principle of reservation in promotion provides equality in results. (Paras 28 and 30)

Ahmedabad St. Xavier's College Society v. *State of Gujarat*, (1974) 1 SCC 717 : (1975) 1 SCR 173, *Pradeep Jain (Dr)* v. *Union of India*, (1984) 3 SCC 654; *Marri Chandra Shekhar Rao* v. *Dean, Seth G.S Medical College*, (1990) 3 SCC 130 : (1990) 14 ATC 671, *relied on*

From this backdrop, the socio-economic justice assured by Article 46, the Preamble and Article 39 would get practical content and effect so that the dignity of person and equality of status assured to them would become meaningful and real. Harmonious interpretation of all these provisions should, therefore, pave way for the target/goals. So they need to be conjointly read so that every provision/clause/concept in different articles of the Constitution is given full play and effect, and flesh and blood are infused in their dry bones. (Para 31)

Rustom Cavasjee Cooper v. *Union of India*, (1970) 1 SCC 248; *Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213, *relied on*

A.K. Gopalan v. *State of Madras*, 1950 SCR 88 : AIR 1950 SC 27, *held, overruled by Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

Minerva Mills Ltd. v. *Union of India*, (1980) 3 SCC 625; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597, *referred to*

Though it is settled constitutional law that constitutional issues cannot be decided unless the issue directly arises for decision, in *Mandal case*, the Bench decided a non-issue on a constitutional law affecting 22% of the national population and held that Article 16(1) read with Article 16(4) provides right to reservation in initial recruitment. The framers of the Constitution did not intend to provide for reservation in promotion. Since Article 335 speaks of efficiency of administration, reservation in promotion to the SCs and STs, without competition with non-reserved employees would affect efficiency in service and is unconstitutional. It is an admitted case that as there was no issue, nor was any evidence adduced to prove whether efficiency of administration had deteriorated due to reservation in promotion; nor was it pointed out from the facts of any case. (Paras 32 and 33)

Indra Sawhney v *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *criticised*

Maharashtra State Board of Secondary and Higher Secondary Education v *K.S. Gandhi*, (1991) 2 SCC 716; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714; *Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213, *relied on*

Unless one is given opportunity and facility by promotion to hold an office or a post with responsibilities, there would be no opportunity to prove efficiency in the performance or discharge of the duties. Without efficiency one cannot be promoted. How to synthesise both and give effect to the constitutional animation to effectuate the principle of adequacy of representation in all posts or classes of posts in all cadres, service or grade is the nagging question. From that perspective, one is required to examine whether reservation in promotion is constitutionally valid. It is seen that the rules provide promotion from Assistant Engineer to Executive Engineer on the principle of "seniority subject to rejection of the unfit" and from Superintending Engineers onwards, 'merit' is the consideration Even Scheduled Caste and Scheduled Tribe candidates get promoted only on satisfying the above test. In the instant cases neither there is any allegation nor evidence to the effect that the private respondents were not meritorious or were inefficient. (Para 38)

V.T. Rajshekar: "*Merit, My Foot*"; R.H. Tawney. "*Equality*", Pandit Jawaharlal Nehru: "*Independence and After That*", (1949 Edn.), p. 28, *referred to*

What SC and ST employees need is an opportunity and fair chance of promotion to higher posts and offices earmarked for them in the roster where they are not adequately represented. In a clash of competing claims between general category employees on the one hand and SCs and STs on the other, what the authorities need to take into consideration is the aforesaid factors and their service record with an objective and dispassionate assessment. What needs to be achieved by the SC and ST officers so promoted is that they should, on a par with others assiduously devote themselves with character, integrity and honesty in the discharge of the duties of the posts they hold with added willingness and dedication to improve excellence. Thereby the efficiency of administration would automatically get improved and the nation constantly rises to higher levels of achievement. Therefore, it cannot be held that reservation in promotion is bad in law or unconstitutional. (Para 39)

Legislative policy is beyond the pale of assailment on the anvil of violation of the fundamental rights. After *Mandal case* Parliament has given effect to the legislative policy of reservation in promotion as a constitutional scheme. So, the policy of reservation is part of socio-economic justice enshrined in the Preamble of the Constitution and the fundamental rights under Articles 14, 15(1), 15(4), 16(1), 16(4), 16(4-A), 46 and 335, etc. (Para 42)

Vacher & Sons Ltd. v. *London Society of Compositors*, 1913 AC 107 : (1911-13) All ER Rep 241; *Bengal Immunity Co. Ltd.* v *State of Bihar*, (1955) 2 SCR 603 . AIR 1955 SC 661 : (1955) 6 STC 446; *Shri Sitaram Sugar Co Ltd.* v. *Union of India*, (1990) 3 SCC 223 : (1990) 1 SCR 909; *S. Azeez Basha* v. *Union of India*, (1968) 1 SCR 833 : AIR 1968 SC 662, *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597; *Commr. of Commercial Taxes, A.P.* v. *G. Sethumadhava Rao*, (1996) 7 SCC 512 . 1996 SCC (L&S) 630 : (1996) 33 ATC 320; *Union of India* v. *Madhav*, (1997) 2 SCC 332 : 1997 SCC (L&S) 503 : JT (1996) 9 SC 320, *G.S.I.C. Karmachari Union* v. *Gujarat Small Industries Corpn.*, (1997) 2 SCC 339 : 1997 SCC (L&S) 509 : JT (1997) 1 SC 384, *relied on*

A.K. Gopalan v. *State of Madras*, 1950 SCR 88 : AIR 1950 SC 27, *held overruled by Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *G.M., S. Rly.* v. *Rangachari*, (1962) 2 SCR 586 . AIR 1962 SC 36; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 . 1976 SCC (L&S) 227; *Akhil*

Bharatiya Soshit Karamchari Sangh (Rly.) v. *Union of India*, (1981) 1 SCC 246 . 1981 SCC (L&S) 50; *M Venkateswarlu* v. *Govt. of A.P.*, (1996) 5 SCC 167 : 1996 SCC (L&S) 1153; *S Sathyapriya* v. *State of A.P.*, (1996) 9 SCC 466, *referred to*

Right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts depends upon the operation of the conditions of service. Article 16(4-A) read with Articles 16(1) and 14 guarantees a right to promotion to SCs and STs as a fundamental right where they do not have adequate representation consistently with the efficiency in administration. The *Mandal case* has prospectively overruled the ratio in *Rangachari case*, i.e., directed the decision to be operative after 5 years from the date of the judgment; however, before expiry thereof, Article 16(4-A) has come into force from 17-6-1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right. In adjusting the competing rights of the SCs and STs on the one hand and the employees belonging to the general category on the other, the balance is required to be struck by applying the egalitarian protective discrimination in favour of the SCs and STs to give effect to the constitutional goals, policy and objectives referred to hereinbefore. (Para 43)

A.K Bhatnagar v. *Union of India*, (1991) 1 SCC 544 : 1991 SCC (L&S) 601 : (1991) 16 ATC 501, *Indian Administrative Service (S.C.S) Assn., U.P.* v. *Union of India*, 1993 Supp (1) SCC 730 : 1993 SCC (L&S) 252 : (1993) 23 ATC 788; *Akhil Bhartiya Soshit Karamchari Sangh* v. *Union of India*, (1996) 6 SCC 65 : 1996 SCC (L&S) 1346 : JT (1996) 8 SC 274; *Mohd. Shujat Ali* v. *Union of India*, (1975) 3 SCC 76 : 1974 SCC (L&S) 454 : (1975) 1 SCR 449; *Mohd. Bhakar* v. *Y. Krishna Reddy*, 1970 SLR 768 (SC); *State of Mysore* v. *G.N. Purohit*, 1967 SLR 753 (SC); *Ramchandra Shankar Deodhar* v. *State of Maharashtra*, (1974) 1 SCC 317 : 1974 SCC (L&S) 137; *Syed Khalid Rizvi* v. *Union of India*, 1993 Supp (3) SCC 575 : 1994 SCC (L&S) 84 : (1994) 26 ATC 192, *relied on*

Reservation in promotion is constitutionally valid; the posts earmarked for SCs and STs shall be filled up and adjusted with them. The SCs and STs selected in open competition for posts in general quota should be considered appointees to the general posts in the roster as general candidates. The promotions given in excess of the quota prior to the judgment in *Sabharwal case* should not be disturbed. (Para 44)

R.K. Sabharwal v. *State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481, *relied on*

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *referred to*

Even if the rule of strict interpretation is to be applied, Sawant, J. in para 555 of the judgment in *Mandal case* has indicated his concurrence with the conclusions of Jeevan Reddy, J. in para 860(8) which includes directions contained therein. The prospective overruling of *Rangachari case* by Jeevan Reddy, J. is a majority opinion. (Para 45)

R.K. Sabharwal v. *State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481, *relied on*

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *referred to*

To make the right to equality to the disadvantaged SCs and STs meaningful, practical contents of results would be secured only when principles of distributive justice and protective discrimination are applied, as a facet of right to equality enshrined under Article 14 of the Constitution. The discrimination, therefore, by operation of protective discrimination and distributive justice is inherent in the principle of reservation and equality too by way of promotion but the same was

evolved as a part of social and economic justice assured in the Preamble and Articles 38, 46, 14, 16(1), 16(4) and 16(4-A) of the Constitution. (Paras 46 and 21)

State of J&K v. *Triloki Nath Khosa*, (1974) 1 SCC 19 : 1974 SCC (L&S) 19 AIR 1974 SC 1, *relied on*

In the interpretation of the Constitution, words of width are both a framework of concepts and means to achieve the goals in the Preamble. Concepts may keep changing to expand and elongate the rights. Constitutional issues are not solved by mere appeal to the meaning of the words without an acceptance of the line of their growth. The Judges, therefore, should respond to the human situations to meet the felt necessities of the time and social needs; make meaningful the right to life and give effect to the Constitution and the will of the legislature. The Supreme Court as the vehicle of transforming the nation's life should respond to the nation's needs, interpret the law with pragmatism to further public welfare to make the constitutional animations a reality and interpret the Constitution broadly and liberally enabling the citizens to enjoy the rights. (Paras 48 and 51)

State of Karnataka v. *Appa Balu Ingale*, 1995 Supp (4) SCC 469 . 1994 SCC (Cri) 1762; *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305, *relied on*

The Supreme Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Part III and Part IV — a truism, meaningful and a living reality to all sections of the society as a whole by making available the rights to social justice and economic empowerment to the weaker sections, and by preventing injustice to them. (Para 51)

The rule of stare decisis, though one tending to keep consistency and uniformity of decisions, is not an inflexible rule. Whether it shall be followed or departed from is a question entirely within the discretion of the Supreme Court and it does not deter the Supreme Court to depart from it. Stare decisis is not, like the rule of res judicata, a universal, inexorable command. Whether it would be desirable to continue the decision in constitutional questions is one of the choice between competing rights. In the case of private import, the chief desideratum is that the law remained certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of stare decisis. When, however, public interests are involved, and especially, when the question is one of constitutional construction, the matter is otherwise. (Para 53)

Union of India v *Raghubir Singh*, (1989) 2 SCC 754; *Bengal Immunity Co. Ltd.* v. *State of Bihar*, (1955) 2 SCR 603 : AIR 1955 SC 661 : (1955) 6 STC 446, *relied on*

State of Bombay v. *United Motors (India) Ltd* , 1953 SCR 1069 : AIR 1953 SC 252 : (1953) 4 STC 133; *United States of America* v *South-Eastern Underwriters' Assn* , 88 L Ed 1440 : 322 US 533 (1943), *referred to*

It is settled principle right from *Golak Nath ratio* that prospective overruling is a part of the principles of constitutional canon of interpretation. Though *Golak Nath ratio* of unamendability of fundamental rights under Article 368 of the Constitution was overruled in *Kesavananda Bharati case* the doctrine of prospective overruling was upheld and followed in several decisions. The Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling. Articles 32(4) and 142 are designed with words of width to enable the Supreme Court to declare the law and to give such direction or pass such orders as are necessary to do complete justice. Declaration of law under Article 141 is wider than words found or made. The law declared by the Supreme Court is the law of the land. So, the Supreme Court in dealing with the law in supersession of the law declared by

it earlier could well restrict the operation of law, as declared, to the future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. The Supreme Court, therefore, was competent to adjust the competing rights by prospective overruling of the previous decision in *Rangachari case.* The decision in *Mandal case* postponing the operation for five years from the date of the judgment is an instance of, and an extension to the principle of prospective overruling following the principle evolved in *Golak Nath case.* (Para 54)

I.C. Golak Nath v. *State of Punjab*, (1967) 2 SCR 762 : AIR 1967 SC 1643; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1; *Managing Director, ECIL* v. *B. Karunakar*, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704, *relied on*

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *affirmed*

G.M., S. Rly. v. *Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36; *Union of India* v. *Mohd. Ramzan Khan*, (1991) 1 SCC 588 : 1991 SCC (L&S) 612 : (1991) 16 ATC 505, *referred to*

Article 13(2) of the Constitution of India envisages a situation where the State action, be it legislative or executive, violates the fundamental rights in Part III of the Constitution; such law is declared as void but when the previous overruled decision and the new rule laid down by the Court as a stare decisis operates prospectively from a given date, namely, either the date of the judgment or extended date, such judgment or order is not a legislative Act which is void under Article 13(2) but a judicial tool by which the effect of the judgment was given. Therefore, the judgment of the Supreme Court in *Mandal case* declaring that *Rangachari ratio* did not correctly interpret Articles 16(1) and 16(4) of the Constitution is a declaratory law under Article 141 of the Constitution. Clauses (1) and (2) of Article 13 deal with the statute law and not the law declared by the Supreme Court under Article 141 and directions/orders under Article 142. (Para 56)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *G.M., S. Rly.* v. *Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36, *referred to*

Wade: "*Administrative Law*", (7th Edn.), *referred to*

The question then is whether such a declaration is inconsistent with the Constitution or in derogation of the fundamental rights. As held earlier, both the disadvantaged and advantaged sections of the society have equal competing fundamental rights in Part III, i.e., Chapter of Fundamental Rights. The Court in *Mandal case* had obviously recognised the need to adjust the competing rights of both the disadvantaged and advantaged sections of citizens and, therefore, it postponed the operation of that judgment for five years from that date giving an option to the executive to have the law amended appropriately. The power of the Supreme Court under Article 142 is a constituent power transcendental to statutory prohibition. Before exercise of the power under Article 142(2), the Court would take that provision into consideration before taking steps under Article 142(2) and there are no limiting words to moulding of relief or taking of appropriate decision to mete out justice or to remove injustice. The phrase "complete justice" engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution and cannot be cribbed or cabined within any limitations or phraseology. Each case needs examination in the light of its backdrop and the indelible effect of the decision. In the ultimate analysis, it is for the Supreme Court to exercise its power to do complete justice or prevent injustice

arising from the exigencies of the cause or matter before it. The question of lack of jurisdiction or nullity of the order of the Supreme Court does not arise. So, the question of a law being void ab initio or nullity or voidable does not arise. (Para 60)

Union Carbide Corpn. v. *Union of India*, (1991) 4 SCC 584; *Delhi Judicial Service Assn.* v. *State of Gujarat*, (1991) 4 SCC 406; *Vinay Chandra Mishra, Re*, (1995) 2 SCC 584; *Delhi Development Authority* v. *Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622, *relied on*

Prem Chand Garg v. *Excise Commr., U.P.*, 1963 Supp (1) SCR 885 . AIR 1963 SC 996; *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602 : 1988 SCC (Cri) 372, *referred to*

The *Rangachari ratio* was in operation for well over three decades under which reservation in promotions were given to several persons in several services, grades or cadres of the Union of India or the respective State Governments. The Supreme Court, with a view to see that there would not be any hiatus in the operation of that law and, as held earlier, to bring about smooth transition of the operation of law of reservation in promotions, by a judicial creativity extended the principle of prospective overruling and further elongated the principle postponing the operation of the judgment in *Mandal case* for five years from the date of the judgment. This judicial creativity is not anathema to constitutional principle but an accepted doctrine as an extended facet of stare decisis. It would not be labelled as proviso to Article 16(4) as contended for. (Para 61)

G.M., S. Rly. v. *Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36; *I.C. Golak Nath* v. *State of Punjab*, (1967) 2 SCR 762 : AIR 1967 SC 1643, *Managing Director, ECIL* v. *B. Karunakar*, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 . (1993) 25 ATC 704; *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 . 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *referred to*

S.P. Sampath Kumar v. *Union of India*, (1987) 1 SCC 124 : (1987) 2 ATC 82; *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558, *Pannalal Bansilal Pitti* v. *State of A.P.*, (1996) 2 SCC 498, *relied on*

Mahendra Lal Jaini v. *State of U.P.*, 1963 Supp (1) SCR 912 : AIR 1963 SC 1019; *Atam Prakash* v. *State of Haryana*, (1986) 2 SCC 249, *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602 : 1988 SCC (Cri) 372, *Delhi Judicial Service Assn.* v. *State of Gujarat*, (1991) 4 SCC 406, *Waman Rao* v. *Union of India*, (1981) 2 SCC 362 : (1981) 2 SCR 1, *distinguished*

The rule of reservation in promotions was in vogue in the State of Uttar Pradesh right from 1973 and the promotions of Respondents 2 to 10 came to be made from 1981 onwards. The U.P. Service (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 saves the existing policy of reservation in promotions. The judgment in *Mandal case* saves the promotions already made. Therefore, the promotions of the respondents are legal and valid and they do not become void or unconstitutional as contended. (Para 63)

R.K. Sabharwal v. *State of Punjab*, (1995) 2 SCC 745 . 1995 SCC (L&S) 548 : (1995) 29 ATC 481, *relied on*

Appeal and writ petition dismissed H-M/TS/17693/CLA

Suggested Case Finder Search Text (*inter alia*) :

(1) promotion reservation

(2) prospective near overruling

(3) "stare decisis" or precedent*

(4) coi 142

Advocates who appeared in this case :

Raju Ramachandran, Senior Advocate, Rakesh Dwivedi, Additional Advocate General for State, Parag P. Tripathi, Anil Kumar Gupta, R.B. Misra, Arvind Verma, Prashant Kumar, R. Ayyamperumal, Joseph Pookkatt, Dr M.P. Raju, T.U. Rajan, S.P. Sharma and Ms Mary Searia, Advocates, for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (1997) 9 SCC 377 : (1996) 9 Scale 70, *Air India Statutory Corpn.* v. *United Labour Union* 225*e-f*, 235*b-c*
2. (1997) 2 SCC 339 : 1997 SCC (L&S) 509 : JT (1997) 1 SC 384, *G.S.I.C. Karmachari Union* v. *Gujarat Small Industries Corpn.* 221*b-c*, 238*d*
3. (1997) 2 SCC 332 : 1997 SCC (L&S) 503 : JT (1996) 9 SC 320, *Union of India* v. *Madhav* 221*b-c*, 238*g*
4. (1996) 10 SCC 533, *Papaiah* v. *State of Karnataka* 225*f*
5. (1996) 10 SCC 104 : JT (1996) 4 SC 555, *Dalmia Cement (Bharat) Ltd.* v. *Union of India* 225*e-f*
6. (1996) 9 SCC 466, *S. Sathyapriya* v. *State of A.P.* 221*c*
7. (1996) 7 SCC 512 : 1996 SCC (L&S) 630 : (1996) 33 ATC 320, *Commr. of Commercial Taxes, A.P.* v. *G. Sethumadhava Rao* 238*a-b*
8. (1996) 6 SCC 65 : 1996 SCC (L&S) 1346 : JT (1996) 8 SC 274, *Akhil Bhartiya Soshit Karamchari Sangh* v. *Union of India* 223*e*
9. (1996) 5 SCC 167 : 1996 SCC (L&S) 1153, *M. Venkateswarlu* v. *Govt. of A.P.* 221*b-c*
10. (1996) 4 SCC 622, *Delhi Development Authority* v. *Skipper Construction Co. (P) Ltd.* 250*b*
11. (1996) 2 SCC 498, *Pannalal Bansilal Pitti* v. *State of A.P.* 251*d-e*
12. (1995) 6 SCC 309, *R. Chandevarappa* v. *State of Karnataka* 225*f*
13. (1995) 3 SCC 42 : 1995 SCC (L&S) 604, *Consumer Education & Research Centre* v. *Union of India* 225*e*
14. (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481, *R.K. Sabharwal* v. *State of Punjab* 219*c-d*, 239*f*, 240*e*, 241*c-d*, 241*d-e*, 241*e*, 241*f-g*, 253*b-c*
15. (1995) 2 SCC 584, *Vinay Chandra Mishra, Re* 249*g-h*
16. 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762, *State of Karnataka* v. *Appa Balu Ingale* 242*g-h*
17. 1995 Supp (2) SCC 549, *Murlidhar Dayandeo Kesekar* v. *Vishwanath Pandu Barde* 225*f*
18. (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704, *Managing Director, ECIL* v. *B. Karunakar* 247*a*, 251*b*
19. 1993 Supp (3) SCC 575 : 1994 SCC (L&S) 84 : (1994) 26 ATC 192, *Syed Khalid Rizvi* v. *Union of India* 224*a*
20. 1993 Supp (1) SCC 730 : 1993 SCC (L&S) 252 : (1993) 23 ATC 788, *Indian Administrative Service (S.C.S.) Assn., U.P.* v. *Union of India* 223*d-e*
21. (1992) 1 SCC 558, *St. Stephen's College* v. *University of Delhi* 222*d*, 251*c-d*
22. (1992) 1 SCC 441 : 1992 SCC (L&S) 313, *C.E.S.C. Ltd.* v. *Subhash Chandra Bose* 225*e-f*
23. 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *Indra Sawhney* v. *Union of India* 216*d-e*, 217*c-d*, 217*g-h*, 218*c*, 219*c-d*, 219*e-f*, 219*f*, 219*f-g*, 219*g*, 220*b-c*, 220*g-h*, 221*d*, 221*e-f*, 222*a-b*, 222*f*, 223*a*, 223*a-b*, 224*b-c*, 224*c*, 230*c-d*, 237*a-b*, 238*a*, 238*a-b*, 238*b*, 238*f-g*, 239*b*, 239*c*, 239*d*, 240*c*, 240*e-f*, 240*g*, 241*d*, 241*f-g*, 241*h*, 246*g-h*, 248*b*, 248*d-e*, 251*b*, 252*f-g*, 252*g-h*, 253*b-c*

54. 1967 SLR 753 (SC), *State of Mysore* v. *G.N. Purohit* 223*f-g*
55. 1963 Supp (1) SCR 912 : AIR 1963 SC 1019, *Mahendra Lal Jaini* v. *State of U.P.* 251*f-g*
56. 1963 Supp (1) SCR 885 : AIR 1963 SC 996, *Prem Chand Garg* v. *Excise Commr., U.P.* 249*a*, 249*d*
57. (1962) 3 SCR 842 : AIR 1962 SC 305, *Sakal Papers (P) Ltd.* v. *Union of India* 244*c*
58. (1962) 2 SCR 586 : AIR 1962 SC 36, *G.M., S. Rly* v. *Rangachari* 216*f-g*, 217*b*, 217*c-d*, 219*b*, 220*c*, 221*c*, 221*d*, 221*d-e*, 222*a*, 222*e-f*, 222*h*, 223*a-b*, 238*a-b*, 238*b-c*, 238*c*, 239*b-c*, 239*d*, 240*e-f*, 241*g*, 241*h*, 246*g*, 248*b-c*, 250*h*
59. (1955) 2 SCR 603 : AIR 1955 SC 661 . (1955) 6 STC 446, *Bengal Immunity Co. Ltd.* v. *State of Bihar* 237*e*, 245*e-f*
60. 1953 SCR 1069 : AIR 1953 SC 252 : (1953) 4 STC 133, *State of Bombay* v. *United Motors (India) Ltd.* 245*f*
61. 1950 SCR 88 : AIR 1950 SC 27, *A.K. Gopalan* v. *State of Madras* 226*b*, 237*g*
62. 88 L Ed 1440 : 322 US 533 (1943), *United States of America* v. *South-Eastern Underwriters' Assn.* 245*f*
63. 1913 AC 107 : (1911-13) All ER Rep 241, *Vacher & Sons Ltd.* v. *London Society of Compositors* 237*d*

The Judgment of the Court was delivered by

K. RAMASWAMY, J.— Leave granted.

2. This appeal by special leave arises from the judgment dated 4-8-1983 of the Allahabad High Court, Lucknow Bench, in Writ Petition No. 3088 of 1993. The writ petition also arises from the same facts but is filed by different set of officers challenging the promotion of Respondents 2 to 10 (in the writ petition) the 2nd respondent (in the civil appeal) to the posts of Superintending Engineers (Civil), Chief Engineer, Level-II (Civil), Chief Engineer, Level-I and Engineer-in-Chief in Public Works Department of the Government of Uttar Pradesh. The petitioners seek a writ of mandamus to restrain the first respondent from giving effect to the promotions given to Respondents 2 to 10. They also seek a writ of certiorari to quash the orders dated 12-3-1981 appointing the second respondent as Superintending Engineer on ad hoc basis and on regular basis w.e.f. 10-4-1991 as temporary Chief Engineer by order dated 7-11-1994 and orders promoting Harbans Lal and others as Superintending Engineers.

3. The Governor exercising the power under proviso to Article 309 of the Constitution made the Uttar Pradesh Service of Engineers (Public Works Department) (Higher) Rules, 1990 effective from 15-10-1990 (for short "the Rules"). They came into force at once by operation of Rule 1(2). The services comprised thereunder are grouped as Group 'A' posts, consisting of various posts. Under sub-rule (1) of Rule 4 which speaks of "Cadre of the Service", the strength of the service and of each category of the posts shall be such as may be determined by the Government from time to time. Sub-rule (2) gives power to determine the strength of service and of each category of posts until they are ordered to be varied. The posts of Executive

Engineer (Civil), Executive Engineer (Electrical and Mechanical), Superintending Engineer (Civil), Superintending Engineer (Electrical and Mechanical), Chief Engineer Level-II (Civil), Chief Engineer Level-II (Electrical and Mechanical), Chief Engineer Level-I (Civil), and Engineer-in-Chief have been specified under two categories, viz., the permanent and temporary cadre and strength in the respective cadres has been enumerated. In Part III, Rule 5 provides method of recruitment by way of promotion from the substantive posts of Assistant Engineers to the post of Executive Engineers and recruitment by promotion from amongst substantive posts of Executive Engineers to the posts of Superintending Engineers; from the Executive to Superintending Engineer Level-II and from Chief Engineer Level-II to Chief Engineer Level-I and from Chief Engineer Level-I to Engineer-in-Chief respectively. Rule 6 prescribes reservation for the candidates belonging to Scheduled Castes (for short "Dalits") and Scheduled Tribes (for short "Tribes") and other categories in accordance with the orders of the Government in force at the time of recruitment. The qualifying service in the lower cadre for promotion to the higher cadre is also prescribed. The procedure for the determination of vacancies to be reserved under Rule 6 for Dalits, Tribes and other categories has been provided in Rule 7.

4. Rule 8 adumbrates that recruitment to the post of Executive Engineer (Civil) shall be made on the basis of seniority subject to rejection of the unfit and to the post of Superintending Engineer and above shall be made on the basis of merit through a Selection Committee to be constituted of officials specified thereunder. Recruitment to the post of Chief Engineer Level-II is *by the process of screening and selection.* The details thereof are not material, hence omitted. Rule 9 empowers the Government to appoint the selected candidates in the order of seniority. If more than one persons are recruited in one selection by a committee appointed in their behalf, a combined order indicating the names of persons has to be issued in the seniority order as it stood in the earlier cadre. The procedure has been prescribed in Rule 10 for declaration of the probation etc. Rule 11 empowers the Government to confirm the appointee at the end of the probation or the extended probation. Rule 12 prescribes procedure for determination of seniority. The other details are not material, hence are omitted. Rule 18 is a saving provision which provides that nothing in this rule shall affect reservations and other concessions required to be provided for Dalits, Tribes and other special categories of persons in accordance with the orders of the Government issued from time to time in that regard.

5. By proceedings dated 8-3-1973, the Government had provided percentage in reservation for Dalits and Tribes @ 18% and 2% respectively in all services or posts to be filled in by promotion through process of selection either by direct recruitment or by competitive examination or limited departmental examination. The said percentage has been increased to 21% for Dalits and retained 2% for the Tribes under the U.P. Service (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward

Classes) Act, 1994 (for short "the U.P. Act") that came into force with effect from 11-12-1993. It has provided for the first time reservation @ 27% to Other Backward Classes. The 1973 Rules provided that if sufficient number of suitable candidates belonging to Dalits and Tribes were not available against reserved vacancies at the time of selection and if the vacancies were required to be filled up in the public interest, general category employees could be appointed on an ad hoc basis. It had to be so mentioned in their orders of appointment that the promotion/appointments were ad hoc and conferred no rights and that the vacancies would be carried forward to the following year. Carried-forward vacancies could not exceed 45% of the total of such vacancies etc. Under Rule 3 of the 1973 Rules, for suitability purpose, Dalits and Tribes were treated to be same as the general candidates, i.e., the standard of suitability was same for all the candidates. The Dalits and Tribes who fulfilled the minimum required standard of merit would be selected up to the limit of reservation. Under Rule 4, when Dalits and Tribes were promoted substantively or temporarily to the above-reserved vacancies for the first time, their confirmation would be done under normal rules. The rule of the reservation was not applicable again for confirmation in their case.

6. Though the Government omitted under the 1973 Rules reservation in the posts pursuant to which required recruitment by promotion on the principle of seniority subject to rejection of unfit, by the rules issued on 20-3-1974 the Government amended the same and restored recruitment by promotion to the posts on the prescribed percentage. The reservation was limited to those services only where direct recruitment was not more than 50%. The promotion thereafter was to be done according to rules and regulations under those provisions of reservation. The candidates who were eligible and suitable on the basis of seniority and were not found unfit, would be selected up to the reservation limit. Rule 2 of the 1974 Rules provides for promotion to the posts where merit was also the consideration. The selected candidates from amongst the Dalits and Tribes and the general candidates would be shown in separate eligibility lists to each category. The selected candidates were to be placed according to their inter se seniority of the original post. Afterwards, all the three lists were to be compiled according to the inter se seniority and promotions were to be given against the vacancies accordingly and common seniority list was to be maintained. By orders issued on 27-12-1974, it was further clarified that "after reconsideration, the Government has withdrawn the restriction, i.e., this reservation will be limited to those services only where direct recruitment is not more than 50%". The above-referred GO will be treated to be modified accordingly. Thus, the Dalits and Tribes were to get reservation in promotion on all posts/services. By proceedings dated 5-7-1984, it was further amplified, vis-à-vis that these orders referred to hereinbefore thus: "The Government after reconsideration feels it necessary to clarify the process of preparation of separate eligibility lists in this regard."

7. Rule 2 of the 1984 Order provided that:

"The total vacancies for promotion on the basis of seniority subject to rejection of unfit arising in any department/office at any time shall be divided into general candidates and SC/ST candidates on the basis of GOs issued from time to time for reservation in promotions for these special categories. Each category shall be prepared separately in the order of their inter se seniority for available vacancies for each category and selections have been done from such eligibility list for each category on the basis of seniority subject to rejection of the unfit. A combined list shall be prepared after selection of candidates from each category according to their inter se seniority."

8. For ad hoc promotion also the above principle was made applicable. In this legal backdrop, it would, thus, be seen that preceding 1990, promotions in State Service were regulated by above instructions and from the 1990 Rules, they formed the statutory base. The rule of reservation in promotion at all levels has, thus, been provided for the Dalits and Tribes. Under the U.P. Act it was extended to the OBCs only in direct recruitment.

9. When Respondents 2 to 10 were considered and recruited as promotees from the cadre of Executive Engineer to that of Superintending Engineer and above cadres on the basis of merit, the appellants came to challenge their appointments. It was contended in the High Court and reiterated by the learned counsel, M/s Parag P. Tripathi and Anil Kumar Gupta that in *Indra Sawhney* v. *Union of India*[1] known as *Mandal case*[1] eight of the nine Judges, per majority (Ahmadi, J. as he then was, having not participated on this issue) held that appointment by promotion under Articles 16(1) and 16(4) of the Constitution is unconstitutional. In particular, they placed strong reliance on the judgments of Jeevan Reddy, J. speaking for three Judges and Sawant, J. (for himself) in that behalf. They referred to Question No. 7 framed by the Bench and contended that the finding has been recorded in paras 859(7) and 860(8) by Jeevan Reddy, J., in paras 242-243(10) by Pandian, J., in paras 323 and 324-D by Thommen, J. and by Kuldip Singh, J. in para 381, by Sawant, J. in paras 543-553 and by Sahai, J. in paras 623-625. On that premise, it was contended that the 1996 (*sic* 1990) Rules are ultra vires and the promotion of the respondents is unconstitutional. It is also contended that having declared the promotions under Articles 16(1) and 16(4) of the Constitution as unconstitutional, overruling the judgment of a Bench of five Judges of this Court in *G.M., S. Rly.* v. *Rangachari*[2] the same being not correct in law. Jeevan Reddy, J. with whom Kania, C.J. and Venkatachaliah, J., as he then was, had concurred, and Pandian, J. having also concurred, expressly overruled prospectively the applicability of the rule of reservation in promotion operative after a period of five years from 16-11-1992 i.e. the date of the judgment. The contention of the petitioners is that it is only a minority view. The ratio, therefore, is

1 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385
2 (1962) 2 SCR 586 : AIR 1962 SC 36

unconstitutional. Under Article 145(5) of the Constitution, it does not constitute majority judgment.

10. Having declared the reservation in promotion as unconstitutional, it is void ab initio under Article 13(2) of the Constitution. It bears, thereby, no legal or constitutional existence. The promotion made to Respondents 2 to 10 at all levels, therefore, is unconstitutional. The operation of the unconstitutional direction cannot be postponed by prospective overruling of *Rangachari*[2] *ratio*. The judgment of Jeevan Reddy, J. concurred by Pandian, J. being minority judgment, cannot operate prospectively. Even if it is assumed that it is a majority judgment, it is inconsistent with and contrary to the constitutional scheme of Articles 14 and 16 violating the fundamental rights of the appellants/petitioners and, therefore, the power under Article 142 of the Constitution cannot be exercised to curtail the fundamental rights guaranteed in Part III of the Constitution.

11. There is a distinction between the conclusions and directions. Justice Pandian and Justice Sawant expressed their concurrence on the conclusions and not with directions given by Jeevan Reddy, J. The direction for prospective overruling of *Rangachari case*[2] and for operation of *Mandal*[1] *ratio* after five years is only by a minority of four Judges. It being inconsistent with and contrary to the scheme of the Constitution in exercise of the power of judicial review, the Court cannot postpone the operation of the judgment to a future date, which violates their fundamental rights. In support thereof, they placed strong reliance on the judgment in *A.R. Antulay* v. *R.S. Nayak*[3] (SCC para 15) and *Delhi Judicial Service Assn.* v. *State of Gujarat*[4] (SCC para 37). Having declared the reservation in promotions as void, the prospective overruling is illegal as it is no part of the doctrine of stare decisis. In support thereof, they placed reliance on *Waman Rao* v. *Union of India*[5]. Postponement of operation of the judgment amounts to judicial legislation which is inconsistent with the power of judicial review which empowers only to declare the law to be unconstitutional and not to make the law.

12. It is further contended that the exercise of Article 142 to postpone the operation of the judgment after five years amounts to perpetration of void action and is violative of the appellants' fundamental rights guaranteed under Articles 14 and 16(1) of the Constitution. The order under Article 142, being only a remedial measure to do complete justice, cannot operate as a substantive right. The direction to operate the scheme of reservation in promotion for five years is inconsistent with and in derogation of the substantive right to equality guaranteed under Articles 14 and 16(1). Therefore, the scheme is unconstitutional. Prospective operation of *Mandal case*[1] amounts to judicial legislation and amounts to temporary amendment

3 (1988) 2 SCC 602 : 1988 SCC (Cri) 372
4 (1991) 4 SCC 406
5 (1981) 2 SCC 362 : (1981) 2 SCR 1

to the Constitution or an addition in the form of a proviso to Article 16(1) or 16(4) of the Constitution.

13. Shri Rakesh Dwivedi, learned Additional Advocate General, contended that the micro Lexicon surgery conducted by the counsel for the appellants/petitioners to make distinction between conclusions and directions requires no detailed examination. The end result is that five out of eight learned Judges, who opined in the negative on the issue of reservation in promotion directed that reservation, from that date, will continue for five years, while giving liberty to the appropriate Government to make suitable legislative amendments. In fact, the right to promotion is a facet of the right to recruitment to a post or an office under the State. No express provision is required in this behalf in Article 16(1) or 16(4) of the Constitution. After the judgment in *Mandal case*[1], however, the Constitution (77th Amendment) Act was enacted by Parliament which has come into force w.e.f. 17-6-1995 from which date Article 16(4-A) was brought into the Constitution. It provides that "nothing in this article shall prevent the State from making any provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State". Thereby, Parliament has re-manifested its policy that the right to reservation in promotion is a part of the constitutional scheme or public policy in order to accord socio-economic empowerment and dignity of person and status to the Dalits and Tribes. The right to reservation in promotions would be available to Dalits and Tribes in any, class or classes, of posts in the services under the State which in the opinion of the State does not get adequate representation of Dalits and Tribes. This is due to the historical evidence that the Dalits and Tribes are socially, educationally and economically deprived, denied and disadvantaged sections of the society. To make their right to equality meaningful, they are equally entitled to the facilities and opportunities, by way of reservation in promotions, and the State in compliance of the mandate of the Preamble, Articles 14, 21, 38, 46 and 335 of the Constitution, has provided them with the right to equality of opportunity in all posts or classes of posts in the services under the State. Therefore, the majority sections of the society are required to reconcile to and accept the equal fundamental rights of Dalits and Tribes guaranteed under Articles 16 and 14 of the Constitution. The right to reservation in promotions is not an anathema to right to equality enshrined to other general candidates. The competing rights of both should coexist and consistently be given effect by balancing the abstract doctrine of equality and the distributive justice would fill in the gap. Only upholding of affirmative action of the State by pragmatic interpretation under rule of law would enable the State to harmonise competing rights of all sections of the society.

14. There is no dichotomy or distinction between conclusion and directions. Para 860(8) should be read with the conclusions of Sawant, J. in

paras 552 and 555 and, therefore, the opinions of Kania, C.J., Venkatachaliah, Pandian, Sawant and Jeevan Reddy JJ., as the issue of reservation in promotion constitute majority of five Judges under Article 145(5) of the Constitution. The opinion expressed by Jeevan Reddy, J. postponing the operation of the judgment for five years, unless expressly dissented by other Judges, is law declared by majority under Article 145(5) of the Constitution. Prospective overruling is a part of constitutional policy. For its application, different perceptions would be considered and given effect while overruling the prior decision. *Rangachari*[2] *ratio* had operated as constitutional law for over three decades and rights were settled on that basis. Therefore, with a view to enable the appropriate Government to amend the law in that behalf, the operation of the judgment was postponed for five years. It is, therefore, not a judicial legislation but a part of the declaration granted by the Court. In pith and substance, it is a facet of suspending the operation of the judgment for five years so that the constitutional objective of providing reservation in promotions to Dalits and Tribes would operate without any hiatus. The decision in *R.K. Sabharwal* v. *State of Punjab*[6] by a Constitution Bench reaffirms that the decision in *Mandal case*[1] on promotion was by a majority. Obviously *Sabharwal*[6] *ratio* had upheld the principle of reservation in promotions and applied "running account theory" put forth by the State to give practical content to *equality in results* applying the roster points earmarked for the Dalits and Tribes, apart from equal opportunity to them to compete with the general candidates for general posts. The employees from general sections and Dalits and Tribes are integrated in the roster system to harmonise the competing interests. The Dalits and Tribes selected for promotion on merit in open competition are not to be treated as part of the reserved quota. That contemporaneous understanding of the operation of the law is in accordance with the law laid in para 860(8) of *Mandal case*[1]. So, it is a valid direction.

15. The reservation in promotions in all the services or posts under the State of Uttar Pradesh was in vogue from March 1973. The legislature of Uttar Pradesh reiterated the need for continuance of the reservation not only in direct recruitment but also its continuance, as mentioned in the U.P. Act. The U.P. Act came into force w.e.f. 11-12-1993. The judgment in *Mandal case*[1] was delivered on 16-11-1992. All the promotions made prior to that date were held valid in *Mandal case*[1]. The impugned judgment of the High Court was rendered on 4-8-1993 while the Constitution (77th Amendment) Act of 1995 came into force on 17-6-1995. The promotions of the respondents came to be made between 17-11-1992 and 11-12-1993, i.e., within five years of the directions in para 860(8) in *Mandal case*[1] and agreed to by other learned Judges. Therefore, it was contended that the promotions to and appointment of the private respondents is constitutional.

16. He further contended that right to promotion is not a fundamental right to general candidates while it is so in the case of Dalits and Tribes. It is

6 (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481

subject to rules. The policy of the Government as per the constitutional objectives is that the Dalits and Tribes should be given adequate representation in all posts or classes of posts and services under the State. Reservation in promotion is one of the policies under the Constitution and the statutory share in the governance makes no discrimination nor offends Article 14 as the rights of general and reserved employees are to be mutually balanced. The law is always presumed to be constitutional until it is declared otherwise. The Rules and the Act are constitutionally valid. By operation of Article 13(1), pre-constitutional law, if declared void, is void only from the date of the Constitution, namely, from 26-1-1950 and though the post-constitutional law may be void from it inception. To adjust the competing rights of the general and Dalit and Tribe employees, there is no prohibition for this Court to postpone the operation of the judgment in *Mandal case*[1] or to so prospectively overrule *Rangachari*[2] *ratio* as to be operative from expiry of five years from the date of judgment. The intention behind the direction appears to be that the law in the transition, as per the constitutional scheme of reservation in promotions, would be smooth and operate as a continuous scheme. If the Government makes no amendment to the statute, after the expiry of five years, the operation of the scheme of reservation in promotion would come to a stop. By Constitution (77th Amendment) Act, 1995, the scheme of reservation in promotions is continued without any need to bring about amendment to the statutory rules since Article 16(4-A) itself provided constitutional operation of reservation in promotion obviating the necessity to amend all statutory rules.

17. The prospective operation of law for 5 years is consistent with the doctrine of stare decisis as the declaratory law becomes operative thereafter. The ratio of *Antulay case*[3] has no application. Therein, the appellant Antulay was meted out with a hostile discrimination denying him the normal trial and right of appeal and he was subjected to special trial by the High Court, depriving him of the statutory appeal violating his fundamental right to equality. Therefore, this Court had held that the direction given under Article 142 to constitute a separate tribunal presided over by a High Court Judge was inconsistent with the fundamental right to equality guaranteed by Article 14. From that perspective, it was held therein that the exercise of power under Article 142 should be consistent with the constitutional scheme. In *I.C. Golak Nath* v. *State of Punjab*[7] (SCR at p. 808) it was held that the power of this Court under Article 142 is very wide and it cannot be controlled by any statutory prohibition. In *Union Carbide Corpn.* v. *Union of India*[8] (SCC at p. 634 para 83) this Court held that the competing rights are required to be adjusted by balancing them. The Court in *Mandal case*[1], being conscious of the consequences and pervasive effect of its declaration on the policy of reservation in promotions, by the arm of the judicial review, extended the time to enable the executive to suitably amend its law. This

7 (1967) 2 SCR 762 : AIR 1967 SC 1643
8 (1991) 4 SCC 584

Court, therefore, set the time limit up to which existing law would remain in operation, as the selection procedure is a continuous process to fill up existing or anticipated vacancies each year. The gap between equality in law and equality in results was bridged by Article 16(4-A). It is not a case of hostile discrimination meted out to any section of the citizens but one of adjustment balancing the competing rights of two groups of the citizens of the country. The directions issued, in exercise of the power under Article 142, therefore, was not in violation of the fundamental rights of the employees belonging to the general category. The direction issued under Article 142 is, therefore, neither unconstitutional nor contrary to the law. In fact, the direction is to prevent injustice as is provided in Article 46 of the Constitution. In *M. Venkateswarlu* v. *Govt. of A.P.*[9], *Union of India* v. *Madhav*[10], *G.S.I.C. Karmachari Union* v. *Gujarat Small Industries Corpn.*[11] and *S. Sathyapriya* v. *State of A.P.*[12], this Court held that the Constitution (77th Amendment) Act, 1995 has given effect to the law laid down in *Rangachari case*[2] as enshrined in Articles 14 and 16(1) of the Constitution.

18. Shri Raju Ramachandran, learned Senior Counsel appearing for private respondents, while adopting the arguments of Shri Rakesh Dwivedi, argued that the prospective overruling of *Rangachari*[2] *ratio*, the distinction of stare decisis and the constitutional invalidation of a legislative enactment may be kept in view. The ratio in *Rangachari case*[2] having prevailed the field for over three decades, majority in *Mandal case*[1] opined that the ratio in *Rangachari case*[2] would remain operative for a further period of five years. Exercise of the power of judicial review and power under Article 142 are the judicial tools given to this Court to prevent injustice. By judicial craftsmanship, the directions came to be issued to elongate the constitutional and public policy of reservation in promotion until appropriate amendments are brought on statute within five years. He cited instances of staying the operation of the judgments by the High Court pending grant of leave under Article 136. The decision to postpone the effect of *Mandal case*[1] is a legal policy as a part of the inherent power preserved in this Court by Article 142. This Court, by prospective operation of a statute or operation of a judgment has not sanctioned any unconstitutional scheme but intended to postpone the operation of the declaration of law to a future date. In *S.P. Sampath Kumar* v. *Union of India*[13] this Court, with a view to avoid constitutional crisis in dispensation of service dispute between public servants and the appropriate Government or instrumentality, by the administrative tribunals constituted under the Administrative Tribunals Act, instead of declaring the Act ultra vires, issued mandamus to make suitable amendments to the Tribunals Act so as to be consistent with the constitutional scheme. The judicial creativity,

9 (1996) 5 SCC 167 : 1996 SCC (L&S) 1153
10 (1997) 2 SCC 332 : 1997 SCC (L&S) 503 : JT (1996) 9 SC 320
11 (1997) 2 SCC 339 : 1997 SCC (L&S) 509 : JT (1997) 1 SC 384
12 (1996) 9 SCC 466
13 (1987) 1 SCC 124 · (1987) 2 ATC 82

therefore, cannot be cribbed or cabined by any set proposition or standard formulation. They are required to be modulated depending upon the fact-situation in a given case on hand and the consequences of the judgment under consideration. *Rangachari*[2] *ratio* having held the field for three decades, the conclusions and the directions which are integral part of para 860(8) of *Mandal judgment*[1] are part of ratio decidendi and are intended to be operative after a period of five years from the date of the judgment unless, by then, suitable amendments are brought out.

19. Dr M.P. Raju, learned counsel appearing for the intervener, contended that the Dalits and the Tribes have equal constitutional rights. The Constitution has provided in their favour protective and positive discrimination by providing for reservation in promotions as part of equality of opportunity, status, social and economic justice, dignity of person which were given effect to by the Constitution (77th Amendment) Act, 1995. *Reservation in promotion* itself is a fundamental right to the Dalits and Tribes. They claim equality of opportunity at all levels of promotions to the respective cadres/grade/categories of posts. The right to reservation in promotion is required to be balanced with competing right to equality of the general employees. Article 16(4-A) gives effect to that balancing competing right. In *St. Stephen's College* v. *University of Delhi*[14] (SCC para 102) this Court worked out the competing claims by a scheme directing minority institutions to fill up 50% of admissions by the general candidates while ensuring to the minorities their constitutional right under Article 30(1) to admit the students belonging to minority community with balance 50% seats. Such declaration is consistent not only with the scheme of the Constitution but also special protection of the rights of the minorities. Reservation in promotions in Article 16(4-A) also requires same interpretation. If so viewed, there would be no violation of Article 14 or unconstitutionality of the scheme of reservation in promotion or voidity under Article 13(2). The prospective overruling of *Rangachari*[2] *ratio* in *Mandal case*[1] is constitutional and fulfils competing equality between sections of the society.

20. Shri Parag Tripathi, in reply, contended that Article 145(5) requires that for a judgment to be a majority judgment, concurrence of the majority learned Judges constituting the Bench is necessary. There was no need for four other learned Judges to express their concurrence with Jeevan Reddy, J. as they felt that the reservation in promotion is void from the inception, by operation of Article 13(2). Unless they agreed to the view expressed by Jeevan Reddy, J., it could not be a majority judgment. The separate judgments of the learned Judges are self-operative from the date of the judgment in the absence of their express concurrence for prospective overruling of *Rangachari*[2] *ratio*. The prospective overruling evolved under Article 142 is inconsistent with the ratio in *Waman Rao case*[5] which had

14 (1992) 1 SCC 558

held that an amendment to the Constitution violating the fundamental right, unless the Act receives protective umbrella of Schedule IX, is void from the inception. The ratio in *Mandal case*[1] laid by Jeevan Reddy, J. and agreed to by other three Judges does not amount to a statutory law nor it receives any protective umbrella under Schedule IX but is one declared under Article 141. Therefore, *Mandal*[1] *ratio* of prospective overruling of *Rangachari case*[2] is unconstitutional and void ab initio. Article 142, therefore, does not save its voidity; nor can the void order be given effect to or saved by Article 142.

21. In *State of J&K* v. *Triloki Nath Khosa*[15] a Constitution Bench had held that the code of equality and equal opportunity is a charter for equals; equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall substantially within the same class. A classification of employees can, therefore, be made for first identifying and then distinguishing members of one class from those of another. Classification on the basis of educational qualifications made with a view to achieving administrative efficiency was upheld.

22. In service jurisprudence, a distinction between right and interest has always been maintained. Seniority is a facet of interest. When the rules prescribe the method of selection/recruitment, seniority is governed by the ranking given and governed by such rules as was held by a Bench of three Judges in *A.K. Bhatnagar* v. *Union of India*[16]. In *Indian Administrative Service (S.C.S.) Assn., U.P.* v. *Union of India*[17] (SCC paras 14 and 15) another Bench of three Judges had held that no one has a vested right to promotion or seniority but an officer has an interest to seniority acquired by working out the rules. In *Akhil Bhartiya Soshit Karamchari Sangh* v. *Union of India*[18] a Bench to which two of us, K. Ramaswamy and G.B. Pattanaik, JJ., were members, following the above ratio, held that no one has a "vested right to promotion or seniority but an officer has an interest to seniority acquired by working out the rules". It could be taken away only by operation of valid law. In *Mohd. Shujat Ali* v. *Union of India*[19] a Constitution Bench had held that Rule 18 of the Andhra Pradesh Engineering Service Rules which confers a right of actual promotion or a right to be considered for promotion is a rule prescribing conditions of service. In *Mohd. Bhakar* v. *Y. Krishna Reddy*[20] another Bench of three Judges had held that any rule which affects the promotion of a person relates to conditions of service. In *State of Mysore* v. *G.N. Purohit*[21] a Bench of two Judges had held that the rule which merely affects chances of promotion cannot be regarded as varying a

15 (1974) 1 SCC 19 : 1974 SCC (L&S) 19 : AIR 1974 SC 1
16 (1991) 1 SCC 544 : 1991 SCC (L&S) 601 : (1991) 16 ATC 501
17 1993 Supp (1) SCC 730 : 1993 SCC (L&S) 252 : (1993) 23 ATC 788
18 (1996) 6 SCC 65 : 1996 SCC (L&S) 1346 : JT (1996) 8 SC 274
19 (1975) 3 SCC 76 : 1974 SCC (L&S) 454 : (1975) 1 SCR 449
20 1970 SLR 768 (SC)
21 1967 SLR 753 (SC)

condition of service. Chances of promotion are not condition of service. In *Ramchandra Shankar Deodhar* v. *State of Maharashtra*[22] a Constitution Bench had held that a rule which merely affects the chances of promotion does not amount to change in the conditions of service. In *Syed Khalid Rizvi* v. *Union of India*[23] a Bench of three Judges following the above ratio, with approval, had held at p. 602, para 31, that no employee has a right to promotion but he has only the right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are defeasible in accordance with the law.

23. In the light of this normal run of service jurisprudence, the question emerges whether the right to promotion is a fundamental right and the direction of prospective operation of the decision in *Mandal judgment*[1], after five years, violates equality enshrined in Articles 14 and 16(1) and is void under Article 13(2) of the Constitution? Right to reservation itself is a fundamental right under Article 16(1) as was laid in *State of Kerala* v. *N.M. Thomas*[24] which was reiterated in *Mandal case*[1]. The permanent bureaucracy in Part XIV of the Constitution is an integral scheme of the Constitution to aid and assist the political executive in the governance of the country. Abraham Lincoln, one of the greatest Presidents of the United States of America, a noble soul, who laid his life in giving right to equality to the Blacks, a living truth enshrined in 14th Amendment, had stated that democracy, is by the people, of the people and for the people. Democracy governed by rule of law brings about change in the social order only through rule of law. Every citizen or group of people has right to a share in the governance of the State. The Dalits and Tribes equally being citizens have a right to a share in the governance of the State, and in the permanent democracy service conditions are assured under Articles 309 to 312-A of the Constitution subject to the pleasure of the President under Article 310 and also the express exclusion of its applicability to the specified services in Articles 33 and 34. The right to seek equality of opportunity to an office or a post under the State is a guaranteed fundamental right to all citizens alike under Article 16(1), the specie of Article 14, the genus. In *State of Maharashtra* v. *Chandrabhan Tale*[25] it was held that public employment opportunity is a national wealth and all citizens are equally entitled to share it. In *Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress*[26] (SCC at p. 737, para 271) it was held that law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under the rule of law. The prevailing social conditions and actualities of life are to be taken into account in adjudging whether or not the impugned legislation would subserve the purpose of the society.

22 (1974) 1 SCC 317 : 1974 SCC (L&S) 137
23 1993 Supp (3) SCC 575 : 1994 SCC (L&S) 84 : (1994) 26 ATC 192
24 (1976) 2 SCC 310 : 1976 SCC (L&S) 227
25 (1983) 3 SCC 387 : 1983 SCC (L&S) 391 : 1983 SCC (Cri) 667
26 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213

24. That the historical evidence of disabilities worked against the Dalits and the Tribes received acknowledgement in Article 17 which provides for abolition of the practice of untouchability; Article 15(2) which provides prohibition of access to public places and Article 29(2) which provides for prohibition of denial of admission into educational institutions. So social, educational and economic protection is provided to them under Article 46 of the Constitution. Article 335 which is part of the scheme of equality of opportunity in governance of the State in Chapter XVI, by a special provision, enjoins the State that the claims of the members of the Dalits and the Tribes shall be taken into consideration consistently with the efficiency of administration in the making of appointment to service and post in connection with the affairs of the Union or of a State. In *Comptroller & Auditor General of India* v. *K.S. Jagannathan*[27] (AIR paras 21 and 23 : SCC pp. 693 and 694, paras 21 and 23) a Bench of three Judges had held that Article 335 is to be read with Article 46 which enjoins that the State shall promote with special care the educational and economic interests of the weaker sections, in particular, the Dalits and the Tribes and shall protect them from social injustice. Article 38 of the Constitution enjoins the State to secure and protect a social order in which justice, social, economic and political shall inform all the institutions of the national life. The State shall, in particular, strive to minimise the inequalities in income, "facilities" and "opportunities", not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations and endeavour to eliminate inequalities in status. The Preamble of the Constitution assures to every citizen justice, social, economic and political and "equality of status" and opportunity assuring dignity of the individual to integrate all sections of the society in an integrated Bharat.

25. In *Consumer Education & Research Centre* v. *Union of India*[28] and *Air India Statutory Corpn.* v. *United Labour Union*[29] and *Dalmia Cement (Bharat) Ltd.* v. *Union of India*[30] social justice was held by the three-Judge Benches to be a fundamental right approving the view taken in *C.E.S.C. Ltd.* v. *Subhash Chandra Bose*[31]. In *Murlidhar Dayandeo Kesekar* v. *Vishwanath Pandu Barde*[32]; *R. Chandevarappa* v. *State of Karnataka*[33] and *Papaiah* v. *State of Karnataka*[34] right to economic empowerment was held by the two-Judge Benches of this Court to be a fundamental right.

26. It is now settled legal position that social justice is a fundamental right and equally economic empowerment is a fundamental right to the disadvantaged. Article 51-A(*j*) enjoins that it shall be the duty of every

27 (1986) 2 SCC 679 : 1986 SCC (L&S) 345 : (1986) 1 ATC 1 : AIR 1987 SC 537
28 (1995) 3 SCC 42 : 1995 SCC (L&S) 604
29 (1997) 9 SCC 377 : (1996) 9 Scale 70
30 (1996) 10 SCC 104 : JT (1996) 4 SC 555
31 (1992) 1 SCC 441 : 1992 SCC (L&S) 313
32 1995 Supp (2) SCC 549
33 (1995) 6 SCC 309
34 (1996) 10 SCC 533

citizen to strive towards excellence in all spheres of individual and collective activities so that the nation constantly rises to higher levels of endeavour and achievement. Equality of status and dignity of the individual will be secured when the employees belonging to Dalits and Tribes are given an opportunity of appointment by promotion in higher echelons of service so that they will have opportunity to strive towards excellence individually and collectively with other employees in improving the efficiency of administration. Equally they get the opportunity to improve their efficiency and opportunity to hold offices of responsibility at hierarchical levels.

27. In *A.K. Gopalan* v. *State of Madras*[35], per majority, the Constitution Bench had held that the operation of each article of the Constitution and its effect on the protection of fundamental rights is required to be measured independently and not in conjoint consideration of all the relevant provisions. The above ratio was overruled by a Bench of 11 Judges in *Rustom Cavasjee Cooper* v. *Union of India*[36]. This Court had held that all the provisions of the Constitution conjointly be read on the effect and operation of fundamental right of the citizens when the State action infringes the right of the individual. In *D.T.C. case*[26] (SCC at pp. 750-51, paras 297 and 298) it was held that:

> "It is well-settled constitutional law that different articles in the chapter on Fundamental Rights and the Directive Principles in Part IV of the Constitution must be read as an integral and incorporeal whole with possible overlapping with the subject-matter of what is to be protected by its various provisions particularly the Fundamental Rights.
>
> ... The nature and content of the protection of the fundamental rights is measured not by the operation of the State action upon the rights of the individual but by its objects. The validity of the State action must be adjudged in the light of its operation upon the rights of the individuals or groups of individuals in all their dimensions. It is not the object of the authority making the law impairing the right of the citizen nor the form of action taken that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the court to grant relief. In *Minerva Mills Ltd.* v. *Union of India*[37] the fundamental rights and directive principles are held to be the conscience of the Constitution and disregard of either would upset the equibalance built up therein. In *Maneka Gandhi case*[38] it was held that different articles in the chapter of fundamental rights of the Constitution must be read as an integral whole, with possible overlapping of the subject-matter of what is sought to be protected by its various provisions particularly by articles relating to fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights

35 1950 SCR 88 : AIR 1950 SC 27
36 (1970) 1 SCC 248
37 (1980) 3 SCC 625
38 *Maneka Gandhi* v *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597

which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice; social, economic and political, and of equality of status and opportunity which imply absence of unreasonable or unfair discrimination between individuals or groups or classes. The fundamental rights protected by Part III of the Constitution, out of which Articles 14, 19 and 21 are the most frequently invoked to test the validity of executive as well as legislative actions when these actions are subjected to judicial scrutiny. Fundamental rights are necessary means to develop one's own personality and to carve out one's own life in the manner one likes best, subject to reasonable restrictions imposed in the paramount interest of the society and to a just, fair and reasonable procedure. The effect of restriction or deprivation and not of the form adopted to deprive the right is the conclusive test. It is already seen that the right to a public employment is a constitutional right under Article 16(1). All matters relating to employment include the right to continue in service till the employee reaches superannuation or his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution or the rules made under proviso to Article 309 of the Constitution or the statutory provision or the rules, regulations or instructions having statutory favour made thereunder. But the relevant provisions must be conformable to the rights guaranteed in Parts III and IV of the Constitution. Article 21 guarantees the right to live which includes right to livelihood, to a many the assured tenure of service is the source, the deprivation thereof must be in accordance with the procedure prescribed by law conformable to the mandates of Articles 14 and 21 as be fair, just and reasonable but not fanciful, oppressive or at vagary. The need for the fairness, justness or reasonableness of the procedure was elaborately considered in *Maneka Gandhi case*[38] and it hardly needs reiteration."

28. It would, therefore, be necessary to consider the effect of reservation in promotion to the Dalits and the Tribes vis-à-vis the employees belonging to the general categories; it is a balancing right to equality in results and adjusting the competing rights of all sections. In *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*[39] (SCR at p. 252 : SCC at pp. 798-99) through a Bench of nine Judges, this Court pointed out that to establish equality, it would require absolute identical treatment of both the minority and majority. That would result only in equality in law but inequality in fact. The distinction need not be elaborated. It is obvious that equality in law precludes discrimination of any kind whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations. To give adequate representation to the Dalits and Tribes in all posts or classes of posts or

39 (1974) 1 SCC 717 : (1975) 1 SCR 173

services, a reality and truism, facilities and opportunities, as enjoined in Article 38 are required to be provided to them to achieve the equality of representation in real content. In *Pradeep Jain (Dr)* v. *Union of India*[40] a three-Judge Bench of this Court considered the concept of equality under Articles 14 and 15(1) of the Constitution and had held in para 13 at p. 676 thus:

> "... Now the concept of equality under the Constitution is a dynamic concept. It takes within its sweep every process of equalisation and protective discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest that progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground that every individual is entitled to equality of opportunity based purely on merit judged by the marks obtained by him. We cannot countenance such a suggestion, for to do so would make the equality clause sterile and perpetuate existing inequalities. Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities. Where, therefore, there is inequality, in fact, legal equality always tends to accentuate it. What the famous poet William Blake said graphically is very true, namely, 'One law for the Lion and the Ox is oppression'. Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality. It is, therefore, necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about real equality. Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful sections so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence."

29. In *Marri Chandra Shekhar Rao* v. *Dean, Seth G.S. Medical College*[41] (SCC at p. 138) a Constitution Bench to which one of us, K. Ramaswamy, J., was a member, had held in para 8 thus:

> "... Therefore, reservation in favour of Scheduled Tribes or Scheduled Castes for the purpose of advancement of socially or educationally backward citizens to make them equal with other segments of community in educational or job facilities is the mandate of

40 (1984) 3 SCC 654

41 (1990) 3 SCC 130 : (1990) 14 ATC 671

the Constitution. Equality is the dictate of our Constitution. Article 14 ensures equality in its fullness to all our citizens. State is enjoined not to deny to any persons equality before law and equal protection of the law within the territory of India. Where it is necessary, however, for the purpose of bringing about real equality of opportunity between those who are unequals, certain reservations are necessary and these should be ensured. Equality under the Constitution is a dynamic concept which must cover every process of equalisation. Equality must become a living reality for the large masses of the people. Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality. Existence of equality of opportunity depends not merely on the absence of disabilities but on presence of abilities. It is not simply a matter of legal equality. De jure equality must ultimately find its raison d'être in de facto equality. The State must, therefore, resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equals in specified areas. It is necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference and reservation to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about real equality. Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful sections so that each member of the community, whatsoever is his birth, occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence."

30. By abstract application of equality under Article 14, every citizen is treated alike without there being any discrimination. Thereby, the equality in fact subsists. Equality prohibits the State from making discrimination among citizens on any ground. However, inequality in fact without differential treatment between the advantaged and disadvantaged subsists. In order to bridge the gap between inequality in results and equality in fact, protective discrimination provides equality of opportunity. Those who are unequals cannot be treated by identical standards. Equality in law certainly would not be real equality. In the circumstances, equality of opportunity depends not merely on the absence of disparities but on the presence of abilities and opportunities. De jure equality must ultimately find its *raison d'être* in de facto equality. The State must, therefore, resort to protective discrimination for the purpose of making people, who are factually unequal, equal in specific areas. It would, therefore, be necessary to take into account de facto inequality which exists in the society and to take affirmative action by giving preferences and making reservation in promotions in favour of the Dalits and Tribes or by "inflicting handicaps on those more advantageously

placed", in order to bring about equality. Such affirmative action, though apparently discriminatory, is calculated to produce equality on a broader basis by eliminating de facto inequality and placing Dalits and Tribes on the footing of equality with non-tribal employees so as to enable them to enjoy equal opportunity and to unfold their full potentiality. Protective discrimination envisaged in Articles 16(4) and 16(4-A) is the armour to establish the said equilibrium between equality in law and equality in results as a fact to the disadvantaged. The principle of reservation in promotion provides equality in results.

31. From this backdrop, the socio-economic justice assured by Article 46, the Preamble and Article 39 would get practical content and effect so that the dignity of person and equality of status assured to them would become meaningful and real. Harmonious interpretation of all these provisions should, therefore, pave way for the target/goals. So they need to be conjointly read so that every provision/clause/concept in different articles of the Constitution is given full play and effect, and flesh and blood are infused in their dry bones.

32. In *Mandal case*[1] admittedly, the two Government Memorandums provided for reservation to OBCs in initial direct recruitment in Central services. The question of reservation in promotion was a non-issue as conceded in that case itself and across the bar; but the learned Judges, with all due respect and deference to their learned views, decided a non-issue, though objected to on the ground that counsel appearing for the parties had put their heads together and framed the issue and reference was made to a larger Bench so that the issue was decided on that premise. Though it is settled constitutional law that constitutional issues cannot be decided unless the issue directly arises for decision, with due respect, the Bench decided a non-issue on a constitutional law affecting 22% of the national population and held that Article 16(1) read with Article 16(4) provides right to reservation in initial recruitment. The framers of the Constitution did not intend to provide for reservation in promotion. Since Article 335 speaks of efficiency of administration, reservation in promotion to the Dalits and Tribes, without competition with non-reserved employees would affect efficiency in service and is unconstitutional. It is an admitted case that as there was no issue, nor was any evidence adduced to prove whether efficiency of administration was deteriorated due to reservation in promotion; nor was it pointed out from the facts of any case.

33. In *Maharashtra State Board of Secondary and Higher Secondary Education* v. *K.S. Gandhi*[42] (SCC at p. 748, para 37) a Bench of two Judges had held that to prove a fact, inference must be drawn on the basis of the evidence and circumstances. They must be carefully distinguished from conjectures or speculation.

> "The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of

42 (1991) 2 SCC 716

one connected whole. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which is sought to be established. In some cases the other facts can be inferred, as much as is practical, as if they had been actually observed. In other cases the inferences do not go beyond reasonable probability. If there are no positive proved facts, oral, documentary or circumstantial from which the inferences can be made, the method of inference fails and what is left is mere speculation or conjecture. Therefore, when an inference of proof that a fact in dispute has been held established, there must be some material facts or circumstances on record from which such an inference could be drawn."

In the absence of any issue and facts and proof thereof, the inference that reservation in promotion deteriorates the efficiency of administration remains only a conjecture or an opinion based on no evidence. As seen, it is constitutional mandate of the State under Article 335 that to render socio-economic justice and to prevent injustice to the Dalits and Tribes, facilities and opportunities of reservation in promotion should be provided consistently with the efficiency of administration.

34. The question then is: What is the meaning of the phrase "efficiency of administration"? In *D.T.C case*[26] it was observed in SCC p. 741, para 275 that:

> "... The term efficiency is an elusive and relative one to the adept capable to be applied in diverse circumstances. If a superior officer develops liking towards sycophant, though corrupt, he would tolerate him and find him to be efficient and pay encomiums and corruption in such cases stand no impediment. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him/her off by writing confidential reports with delightfully vague language imputing to be 'not up to the mark', 'wanting public relations' etc. At times they may be termed to be 'security risk' (to their activities). Thus they spoil the career of the honest, sincere and devoted officers. Instances either way are galore in this regard. Therefore, one would be circumspect, pragmatic and realistic to these actualities of life while angulating constitutional validity of wide, arbitrary, uncanalised and unbridled discretionary power of dismissal...."

35. V.T. Rajshekar in his "*Merit, My Foot*" (A reply to Anti-Reservation Racists), 1996 published by Dalit Sahitya Academy, Bangalore, has stated that:

> "Nowhere in the world 'merit and efficiency' are given so much importance as in India which is now pushed to the 120th position — virtually the last among different countries in the world. Upper caste rulers of India keep the country's vast original inhabitants — the Untouchables, Tribals, Backward Castes and 'religious minorities' — permanently as slaves with the help of this 'merit' mantra. By 'merit and

efficiency', they mean the birth. Merit goes with the highborn — the blue blood. This is pure and simple racism. That birth and skin-colour have nothing to do with 'merit and efficiency' (brain) is a scientifically proved fact. ... But the ruling class nowhere in the world is concerned with science because science stands for progress. And those interested in progress will have to be human. That is not so in India. If one has to see man's inhumanity to man in its most naked form he must come to India, the original home of racism and inequality. So the 'merit theory' beautifully suits its ruling class or caste."

At p. 10, he states that

"scientists have identified two forces which are perpetually and constantly at work to influence the character, growth and development of the features of every living being in the universe including animals and plants: (1) heredity and (2) environment. Each species produces only its own species. Biology is founded on the cell theory. Cells live and die."

At p. 11, he states that:

" 'Merit and efficiency' are not inherited. They are an acquired quality that has not reached the germ plasma. So, to say that a Brahmin's son alone is a Brahmin and hence has the 'merit' to become a temple priest (archaka) has no scientific basis. Some other influence acts in combination with heredity and that is environment. With the right environment — food, education, free atmosphere — Untouchables can prove better than Brahmins."

At p. 12, he states that genetic factors only provide the potential for human development whereas it is the environmental factors that translate this inherent potential into the full flowering of the personality. Experiments through selective breeding and studies on identical twins have established to a large extent the influence of genetics on behaviour. But what ultimately determines the personality is the interactional influences of heredity and environment. At p. 15, he states that heredity is fixed by parentage but it is not an ideal environment. Opportunity is necessary on merit and efficiency. A genius is only 10% inspiration and 90% perspiration. There is nothing like a born genius. Ramanujan, Indian prodigy on mathematics was given opportunity by the British to prove his genius and was provided with the right environment. Though he was born genius without opportunities, he could not have got recognition. Rajshekar states that "all ruling classes built a theory suited to their needs and try to give a 'scientific' backing to it. Merit and efficiency is a pure Aryan invention, aimed at maintaining their monopoly". He states that "human rights are due to blending of the forces of heredity and the more important environment. The White meritocrats made us believe that the 'Black Negro' is a backward race".

36. Justice O. Chinnappa Reddy, in *K.C. Vasanth Kumar* v. *State of Karnataka*[43] (SCC at pp. 738-740, para 36) had stated thus:

43 1985 Supp SCC 714

"Efficiency is very much on the lips of the privileged whenever reservation is mentioned. Efficiency, it seems, will be impaired if the total reservation exceeds 50%; efficiency, it seems, will suffer if the 'carry-forward' rule is adopted; efficiency, it seems, will be injured if the rule of reservation is extended to promotional posts. From the protests against reservation exceeding 50% or extending to promotional posts and against the carry-forward rule, one would think that the civil service is a Heavenly Paradise into which only the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder. But the truth is otherwise. The truth is that the civil service is no paradise and the upper echelons belonging to the chosen classes are not necessarily models of efficiency. The underlying assumption that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, 'naturally' perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes. There is neither statistical basis nor expert evidence to support these assumptions that efficiency will necessarily be impaired if reservation exceeds 50%, if reservation is carried forward or if reservation is extended to promotional posts. Arguments are advanced and opinions are expressed entirely on an ad hoc presumptive basis. The agelong contempt with which the 'superior' or 'forward' castes have treated the 'inferior' or 'backward' castes is now transforming and crystallising itself into an unfair prejudice, conscious and subconscious, ever since the 'inferior' castes and classes started claiming their legitimate share of the cake, which naturally means, for the 'superior' castes, parting with a bit of it. Although in actual practice their virtual monopoly on elite occupations and posts is hardly threatened, the forward castes are nevertheless increasingly afraid that they might lose this monopoly in the higher ranks of government service and the profession. It is so difficult for the 'superior' castes to understand and rise above their prejudice and it is so difficult for the inferior castes and classes to overcome the bitter prejudice and opposition which they are forced to face at every stage. Always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a Mantra which is whispered by the Guru in the Shishya's ear. The mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better than the ones belonging to those very sections? Why not ask ourselves why 35 years after independence, the position of the Scheduled Castes, etc. has

not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the District Administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it. It may be that for certain posts, only the best may be appointed and for certain courses of study only the best may be admitted. If so, rules may provide for reservation for appointment to such posts and for admission to such courses. The rules may provide for no appropriate method of selection. It may be that certain posts require a very high degree of skill or efficiency and certain courses of study require a high degree of industry and intelligence If so, the rules may prescribe a high minimum qualifying standard and an appropriate method of selection. Different minimum standards and different modes of selection may be prescribed for different posts and for admission to different courses of study having regard to the requirements of the posts and the courses of study. No one will suggest that the degree of efficiency required of a cardiac or a neurosurgeon is the same as the degree of efficiency required of a general medical practitioner. Similarly, no one will suggest that the degree of industry and intelligence expected of a candidate seeking admission to a research degree course need be the same as that of a candidate seeking admission to an ordinary arts degree course. We do not, therefore, mean to say that efficiency is to be altogether discounted. All that we mean to say is that it cannot be permitted to be used as a camouflage to let the upper classes take advantage of the backward classes in its name and to monopolise the services, particularly the higher posts and the professional institutions. We are afraid we have to rid our minds of many cobwebs before we arrive at the core of the problem. The quest for equality is self-elusive, we must lose our illusions, though not our faith. It is the dignity of man to pursue the quest for equality. It will be advantageous to quote at this juncture R.H. Tawney in his classic work '*Equality*' where he says,

> 'The truth is that it is absurd and degrading for men to make much of their intellectual and moral superiority to each other and still more of their superiority in the arts which bring wealth and power, because, judged by their place in any universal scheme, they are infinitely great or infinitely small.... The equality which all these thinkers emphasise as desirable is not equality of capacity or attainment but of circumstances, and institutions, and manner of life. The inequality which they deplore is not the inequality of personal gifts, but of the social and economic environment.... Their views, in short, is that, because men are men, social institutions — property

rights, and the organisation of industry, and the system of public health and education — should be planned, as far as is possible to emphasise and strengthen, not the class differences which divide but the common humanity which unites them....' "

37. Pandit Jawaharlal Nehru, the first Prime Minister of India in his "*Independence and After That*" (Collection of Speeches 1946-49) Publication Division, Government of India [1949 Edn.] at p. 28, has stated that "social equality in the widest sense and equality of opportunity for everyone, every man and woman must have the opportunity to develop to the best of his or her ability. However, merit must come from ability and hard work and not because of caste or birth or riches". This was followed in *Air India Statutory Corpn. case*[29] in para 53 (SCC p. 428, para 53) where it was held that:

"Social equality would develop the sense of fraternity among the members of a social group where each would consider the other as his equal, not higher or lower. A society, which does not treat each of its members as equals, forfeits its right of being called a democracy. All are equal partners in the freedom. Everyone of our ninety-four hundred million people must have equal right to opportunities and blessings that freedom of India has to offer. To bring freedom in a comprehensive sense to the common man, material resources and opportunity for appointment be made available to secure socio-economic empowerment which would ensure justice and fullness of life to workmen, i.e., every man and woman."

In para 43 (SCC p. 419, para 43), it was held that:

"In a developing society like ours, steeped with unbridgeable and ever-widening gaps of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor, the workmen etc. are languishing and to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enlivens the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results."

38. Efficiency in service attracts the well-known parable that insanity cannot be cured until married and marriage cannot be celebrated till insanity is cured. Unless one is given opportunity and facility by promotion to hold an office or a post with responsibilities, there would be no opportunity to prove efficiency in the performance or discharge of the duties. Without

efficiency one cannot be promoted. How to synthesise both and give effect to the constitutional animation to effectuate the principle of adequacy of representation in all posts or classes of posts in all cadres, service or grade is the nagging question. From that perspective, one is required to examine whether reservation in promotion is constitutionally valid. It is seen that the rules provide promotion from Assistant Engineer to Executive Engineer on the principle of "seniority subject to rejection of the unfit" and from Superintending Engineers onwards, 'merit' is the consideration. In other words, the promotion is based on the aforesaid principles. Even employees from Dalits or Tribes get promoted only on satisfying the above test. Appointment by promotion is a facet of recruitment to a service or cadre/grade/class or classes of posts. In fairness on the part of the appellants/petitioners and their learned counsel, none impugned nor alleged that the private respondents are not meritorious or inefficient. No such evidence is placed on record.

39. The fundamental requisites to all employees are honesty, integrity and character, apart from hard work, dedication and willingness to apply themselves assiduously to the responsibilities attached to the office or post and also inclination to achieve improved excellence. What Dalit and Tribe employees need is an opportunity and fair chance of promotion to higher posts and offices earmarked for them in the roster where they are not adequately represented. In a clash of competing claims between general category employees on the one hand and Dalits and Tribes on the other, what the authorities need to take into consideration is the aforesaid factors and their service record with an objective and dispassionate assessment. When the authorities have a power coupled with the constitutional duty, the doctrine of full faith and credit under Article 261 gets due acceptance when done truly and sincerely with an honest, objective and dispassionate assessment by the appropriate authority. There claims need to be considered in that perspective; they should be given promotion, if found eligible, to the posts or classes of posts in the higher cadre, grade, class or category etc. The selecting officer/officers need to eschew narrow, sectarian, caste, religion or regional consideration or prejudices which are deleterious to fraternity, unity and integrity and integration of the nation as unified Bharat. What needs to be achieved by the Dalit and Tribal officers so promoted is that they should, on a par with others assiduously devote themselves with character, integrity and honesty in the discharge of the duties of the posts they hold with added willingness and dedication to improve excellence. Thereby the efficiency of administration would automatically get improved and the nation constantly rises to higher levels of achievement. Therefore, it cannot be held that reservation in promotion is bad in law or unconstitutional.

40. As stated earlier, Article 16(4-A) has come into force w.e.f. 17-6-1995. The appellants/petitioners have sought amendment of the pleadings challenging the vires of Article 16(4-A) of the Constitution and in fairness on the part of the learned counsel, they did not press for consideration

thereof obviously for the reason that its objects are mentioned in the Statement of Objects and Reasons as under:

> "The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th November, 1992 in the case of *Indra Sawhney* v. *Union of India*[1], however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this, it is necessary to amend Article 16 of the Constitution by inserting a new clause (4-A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes."

41. Lord Macnaughten in *Vacher & Sons Ltd.* v. *London Society of Compositors*[44] (AC at p. 118) has laid that a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The above principle was followed by this Court in *Bengal Immunity Co. Ltd.* v. *State of Bihar*[45].

42. This Court in *Shri Sitaram Sugar Co. Ltd.* v. *Union of India*[46] (SCR at pp. 936 and 942 : SCC pp. 245 and 250) through a Constitution Bench, had held that legislative policy is beyond the pale of assailment on the anvil of violation of the fundamental rights. In *S. Azeez Basha* v. *Union of India*[47] (SCR 833 at p. 845) another Constitution Bench had held that it is not the function of the Court to consider the policy underlying the amendment made to the Act nor the Court proposed to go into the merits of the amendment made by that Act [the constitutionality of the underlying policy of the Aligarh Muslim University (Amendment) Act of 1965 was questioned but the Court did not go into the underlying policy except the constitutionality of the Act itself which was upheld by this Court]. Though the doctrine of original intent was given effect to in *Gopalan case*[35], this Court had not accepted the same in *R.C. Cooper case*[36] and the latter was followed in *Maneka Gandhi* v. *Union of India*[38] etc. Therefore, though the doctrine of original intent of reservation in promotion does not expressly find place in

44 1913 AC 107 : (1911-13) All ER Rep 241
45 (1955) 2 SCR 603 : AIR 1955 SC 661 : (1955) 6 STC 446
46 (1990) 3 SCC 223 : (1990) 1 SCR 909
47 (1968) 1 SCR 833 : AIR 1968 SC 662

the speech of Dr Ambedkar, as supported in *Mandal case*[1], it found place in statutory policy engrafted in the rules issued under proviso to Article 309 of the Constitution, which is legislative in character, adopted and explained in the Statement of Objects and Reasons of the Constitution (77th Amendment) Act, 1995, which was declared as constitutional in *Rangachari case*[2]. After *Mandal case*[1] Parliament has given effect to the legislative policy of reservation in promotion as a constitutional scheme. This Court in *Commr. of Commercial Taxes, A.P.* v. *G. Sethumadhava Rao*[48] through a three-Judge Bench, has held that the intention behind introduction of Article 16(4-A) was to remove the defect as pointed out by this Court in *Mandal case*[1]. By legislative judgment, Parliament upheld the ratio in *Rangachari case*[2], *Thomas case*[24] and *Akhil Bharatiya Soshit Karamchari Sangh (Rly.)* v. *Union of India*[49] upholding the rule of reservation in promotion. The interpretation put up therein was given acceptance by legislative amendment. It was, therefore, held that Article 16(4-A) would establish that the interpretation put up in *Rangachari case*[2] etc. received Parliament's approval. It would thus be clear that the principle of rule of reservation is applicable not only to initial recruitment but also in promotions where the State is of the opinion that the Dalits and Tribes are not adequately represented in promotional posts in a class or classes of services under the State. In *G.S.I.C Karmachari Union* v. *Gujarat Small Industries Corpn.*[11] another Bench of three Judges has held that: (SCC p. 341, para 4)

> "... the question of retrospectivity of the policy does not arise; what is being done is to give effect to the constitutional policy of providing adequate representation to the members of the Scheduled Castes and the Scheduled Tribes in all classes of service or posts where they are not adequately represented. Therefore, the arbitrariness does not arise since it is part of the scheme of the Constitution. Unless adequate representation is given to the employees belonging to Scheduled Castes and Scheduled Tribes in promotions also, the adequacy of representation in all classes and grades of service, where there is no element of direct recruitment, cannot be achieved. Obviously, therefore, Article 16(4-A) was brought in the Constitution by Constitution (77th Amendment) Act, after the majority judgment of this Court by a Bench of nine Judges in *Indra Sawhney* v. *Union of India*[1]."

So, the policy of reservation is part of socio-economic justice enshrined in the Preamble of the Constitution, the fundamental rights under Articles 14, 15(1), 15(4), 16(1), 16(4), 16(4-A), 46 and 335 and the other related articles to give effect to the above constitutional objectives. In *Union of India* v. *Madhav*[10] a three-Judge Bench, to which two of us, K. Ramaswamy and G.B. Pattanaik, JJ. were members, also considered the same question and held in para 6 that: (SCC pp. 335-36)

48 (1996) 7 SCC 512 : 1996 SCC (L&S) 630 : (1996) 33 ATC 320
49 (1981) 1 SCC 246 : 1981 SCC (L&S) 50

"... Government evolved reservation in posts or offices under the State as one of the modes to socio-economic justice to Dalits and Scheduled Tribes. Appointment to an office or post in a service under the State is one of the means to render socio-economic justice. The Constitution (77th Amendment) Act, 1995 has resuscitated the above objective to enable the Dalit and Scheduled Tribe employees to improve excellence in higher echelons of service and a source of equality of opportunity in the matter of social and economic status guaranteed by the Preamble to the Constitution. As a consequence, Parliament has removed the lacuna pointed out by this Court in *Mandal case*[1]. Thus, it would be seen that the legal position held by this Court in *Rangachari case*[2] and followed in other cases has been restored and reservation of appointment by promotion would be available to the members of the Scheduled Castes and the Scheduled Tribes as per 50% quota as is maintained by this Court in *Indra Sawhney case*[1]."

43. It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts depends upon the operation of the conditions of service. Article 16(4-A) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as fundamental right where they do not have adequate representation consistently with the efficiency in administration. The *Mandal case*[1] has prospectively overruled the ratio in *Rangachari case*[2], i.e., directed the decision to be operative after 5 years from the date of the judgment; however, before expiry thereof, Article 16(4-A) has come into force from 17-6-1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right. In adjusting the competing rights of the Dalits and Tribes on the one hand and the employees belonging to the general category on the other, the balance is required to be struck by applying the egalitarian protective discrimination in favour of the Dalits and Tribes to give effect to the constitutional goals, policy and objectives referred to hereinbefore.

44. In *R.K. Sabharwal* v. *State of Punjab*[6] the Constitution Bench was called upon to consider whether the reservation in promotion as per the roster was correct in law and, therefore, constitutional and whether the employees belonging to Scheduled Castes have right to be considered for promotion on their own merit, if so, how they are required to be adjusted in the roster prescribed by the Government. The Constitution Bench has pointed out that when the percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserved points, it has to be taken that the posts shown at the reserved points are to be filled from amongst the members of the reserved categories. The candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand, the reserved category candidates can compete for the non-reserved posts. In the event of their appointment to the said posts, their number cannot be added and taken into consideration for working out the percentage of reservation. When the State Government after doing the necessary

exercise makes reservation and provides the extent of percentage of posts to be reserved for the said backward class, then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the backward classes have already been appointed or promoted against the general seats. The fact that considerable number of members of the backward classes have been appointed/promoted against the general seats in the State may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the backward classes are operative, the same have to be followed. It was further held that the reserved vacancies were required to be filled according to the roster like a running account. When the reserved quota is full in the cadre then application of rule of reservation would be stopped until vacancies as per the roster arise and operate. It was also held following *Mandal case*[1] that the judgment therein could be operative prospectively from that date, viz., 10-2-1995 and all the promotions which became settled rights due to reservation in promotion could not be unsettled. As seen earlier, "right to equality", "equality of status and opportunity", duty to "improve excellence", "opportunities and facilities to remove inequality in status" and "social justice", all should be given their due and full play under the rule of law to bring about equality in results to establish an egalitarian social order. It would, therefore, be clear that reservation in promotion is constitutionally valid; the posts earmarked for Dalits and Tribes shall be filled up and adjusted with them. The Dalits and Tribes selected in open competition for posts in general quota should be considered appointees to the general posts in the roster as general candidates. The promotions given in excess of the quota prior to the judgment in *Sabharwal case*[6] should not be disturbed.

45. The further question is whether the judgment in *Mandal case*[1] in para 860(8) by Jeevan Reddy, J. prospectively overruling the ratio in *Rangachari case*[2] is a majority judgment. In this connection, we may, at the outset, refer to Article 145(5) of the Constitution. It postulates that:

> "No judgment and no such opinion shall be delivered by the Supreme Court, save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion."

It would, therefore, be manifest that unless majority Judges comprised in the Bench concur on the opinion or the decision, it would not be a judgment and no such opinion shall be delivered by the Supreme Court. In *Mandal case*[1] on the question of reservation in promotion, eight of the nine Judges participated in the opinion. Of them, Jeevan Reddy, J. spoke for himself, Kania, CJI and Venkatachaliah, J. as he then was. Pandian and Sawant, JJ. also agreed with them. There is a considerable debate on micro lexicon surgery conducted by the learned counsel for the appellants/petitioners drawing a distinction between conclusions and directions contained in para

860(8) and the language used in the concurrent opinions of Pandian and Sawant, JJ. In support thereof, they have placed strong reliance on the wording used by Sawant, J. in paras 552 and 555 on the conclusions and the absence of concurrence with directions. Pandian, J. has expressly agreed in his conclusions and directions. Equally, there was absence of concurrence by other learned Judges. They have also drawn our attention to the dictionary meaning of those words. Having given due consideration, we are of the view that the micro lexicon surgery of the distinction between conclusions and directions leads us nowhere to reach satisfactory solution. One needs to adopt a pragmatic approach to understand the conclusions reached and the directions given as part of the judgment in that behalf. Even if the rule of strict interpretation is to be applied, as is sought by the learned counsel, Sawant, J. in para 555 has indicated his concurrence with the conclusions of Jeevan Reddy, J. in para 860(8) which includes directions contained therein. We have, to our benefit, the contemporaneous understanding that directions in para 860(8) given by Jeevan Reddy, J. is a majority judgment and its gets reinforced from the approval thereof, as followed by the Constitution Bench, in *R.K. Sabharwal case*[6]. The presiding Judge therein, viz., Kuldip Singh, J., who was one of the nine Judges in *Mandal case*[1] participated in the majority opinion on the issue of reservation in promotion. However, no opinion was expressed on the conclusions and directions of Jeevan Reddy, J. in para 860, the Constitution Bench having upheld the rule of reservation in promotion, proceeded to apply the law and worked out the rights of the Dalits in promotions in *R.K. Sabharwal case*[6]. The same do support our conclusion that the Constitution Bench equally understood that the directions contained in para 860(8) constituted majority judgment. Otherwise, the Constitution Bench in *R.K. Sabharwal case*[6] would not have proceeded to consider the right to promotion of the Dalits and question of giving effect to the roster system and the question of percentage of reservation provided in promotions would not have been given effect. The Constitution Bench in that case would have declared that in the light of the majority judgment the reservation in promotions were void ab initio under Article 13(2) and that, therefore, the question of application of the roster would not have arisen. It is true that there is no positive indication or a finding to that effect in *Sabharwal case*[6] but the fact that the presiding Judge therein was one of the members of the nine-Judge Bench in *Mandal case*[1] and that the Constitution Bench considered and upheld the right to reservation in promotion to the Dalits and Backward Classes and applied the roster points to such promotions, itself goes to point out and reassure us that prospective overruling of *Rangachari case*[2] by Jeevan Reddy, J. is a majority opinion. In that view of the matter, the micro lexicon surgery fails.

46. The next questions are whether the prospective overruling of *Rangachari case*[2] to be operative after five years from the date of *Mandal case*[1] amounts to judicial legislation. Is it void ab initio under Article 13(2) of the Constitution? Whether it is violative of the fundamental rights of the

appellant/petitioners and whether the exercise of the power by this Court under Articles 32(4) and 142 of the Constitution is inconsistent with and derogatory to the fundamental rights of the appellants/petitioners and, if so, what would be the consequence? It is settled constitutional principle that to make the right to equality to the disadvantaged Dalits and Tribes meaningful, practical contents of results would be secured only when principles of distributive justice and protective discrimination are applied, as a facet of right to equality enshrined under Article 14 of the Constitution. Otherwise, right to equality will be a teasing illusion. Right to promotion is a method of recruitment from one cadre to another higher cadre or class or category or grade of posts or classes of posts or offices, as the case may be. Reservation in promotion has been evolved as a facet of equality where the appropriate Government is of the opinion that the Dalits and Tribes are not adequately represented in the class or classes of posts in diverse cadres, grade, category of posts or classes of posts. The discrimination, therefore, by operation of protective discrimination and distributive justice is inherent in the principle of reservation and equality too by way of promotion but the same was evolved as a part of social and economic justice assured in the Preamble and Articles 38, 46, 14, 16(1), 16(4) and 16(4-A) of the Constitution. The right to equality, dignity of person and equality of status and of opportunity are fundamental rights to bring the Dalits and the Tribes into the mainstream of the national life. It would, therefore, be imperative to evolve such principle to adjust the competing rights, balancing the claims, rights and interest of the deprived and disadvantaged Dalits and Tribes on the one hand and the general section of the society on the other.

47. The Constitution, unlike other Acts, is intended to provide an enduring paramount law and a basic design of the structure and power of the State and rights and duties of the citizens to serve the society through a long lapse of ages. It is not only designed to meet the needs of the day when it is enacted but also the needs of the altering conditions of the future. It contains a framework of mechanism for resolution of constitutional disputes. It also embeds its ideals of establishing an egalitarian social order to accord socio-economic and political justice to all sections of the society assuring dignity of person and to integrate a united social order assuring every citizen fundamental rights assured in Part III and the directives in Part IV of the Constitution. In the interpretation of the Constitution, words of width are both a framework of concepts and means to achieve the goals in the Preamble. Concepts may keep changing to expand and elongate the rights. Constitutional issues are not solved by mere appeal to the meaning of the words without an acceptance of the line of their growth. The intention of the Constitution is, rather, to outline principles than to engrave details. In *State of Karnataka* v. *Appa Balu Ingale*[50] (SCC at pp. 485, para 34) a two-Judge Bench of this Court, to which one of us, K. Ramaswamy, J. was a member,

50 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762

while interpreting Articles 17 and 15(2) and the Civil Rights Protection Act, held that:

> "Judiciary acts as a bastion of the freedom and of the rights of the people. Jawaharlal Nehru, the architect of Modern India as early as in 1944 stated that the spirit of the age is in favour of equality though the practice denies it almost everywhere, yet the spirit of the age triumphs. The Judge must be attune with the spirit of his/her times. Power of judicial review, a constituent power has, therefore, been conferred upon the judiciary which constitutes one of the most important and potent weapons to protect the citizens against violation of social, legal or constitutional rights. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity on the one hand and formlessness on the other hand in the seamless web of life. The great tides and currents which engulf the rest of the men do not turn aside in their course and pass the Judges idly by. Law should subserve social purpose. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future and to decide objectively disengaging himself/herself from every personal influence or predilections. Therefore, the Judges should adopt purposive interpretation of the dynamic concepts of the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time. The Judge must also bear in mind that social legislation is not a document for fastidious dialects but a means of ordering the life of the people. To construe law one must enter into its spirit; its setting and history. Law should be capable of expanding freedoms of the people and the legal order can, weighed with utmost equal care, be made to provide the underpinning of the highly inequitable social order. The power of judicial review must, therefore, be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are to be removed and social order readjusted through rule of law, lest the force of violent cult gain ugly triumph. Judges are summoned to the duty of shaping the progress of the law to consolidate society and grant access to the Dalits and Tribes to public means or places dedicated to public use or places of amenities open to public etc. The law which is the resultant product is not found but made. Public policy of law, as determined by new conditions, would enable the courts to recast the changing conceptions of social values of yesteryears yielding place to the changed conditions and environment to the common good. The courts are to search for light from among the social elements of every kind that are the living forces behind the factors they deal with. By judicial review, the glorious contents and the trite realisation in the constitutional words of width must be made vocal and audible giving them continuity of life, expression and force when they might otherwise be forgotten or ignored in the heat of the moment or under sway of passions or emotions remain

aroused, that the rational faculties get befogged and the people are addicted to take immediate for eternal, the transitory for the permanent and the ephemeral for the timeless. It is in such surging situation the presence and consciousness and the restraining external force by judicial review ensures stability and progress of the society. Judiciary does not forsake the ideals enshrined in the Constitution, but makes them meaningful and makes the people realise and enjoy the rights."

48. The Judges, therefore, should respond to the human situations to meet the felt necessities of the time and social needs; make meaningful the right to life and give effect to the Constitution and the will of the legislature. This Court as the vehicle of transforming the nation's life should respond to the nation's needs, interpret the law with pragmatism to further public welfare to make the constitutional animations a reality and interpret the Constitution broadly and liberally enabling the citizens to enjoy the rights.

49. In *Sakal Papers (P) Ltd.* v. *Union of India*[51] (SCR at p. 857) it was held by another Constitution Bench thus:

> "It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand, the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions."

50. Common sense has always served in the Court's ceaseless striving as a voice of reason to maintain the blend of change and continuity of order which is sine qua non for stability in the process of change in a parliamentary democracy.

51. Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally. The judicial function of the Court, thereby, is to build up, by judicial statesmanship and judicial review, smooth social change under rule of law with a continuity of the past to meet the dominant needs and aspirations of the present. This Court, as sentinel on the qui vive, has been invested with more freedom, in the interpretation of the Constitution than in the interpretation of other laws. This Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Part III and Part IV — a truism meaningful and a living reality to all sections of the society as a whole by making available the rights to social justice and economic

51 (1962) 3 SCR 842 : AIR 1962 SC 305

empowerment to the weaker sections, and by preventing injustice to them. Protective discrimination is an armour to realise distributive justice. Keeping the above perspective in the backdrop of our consideration, let us broach whether the rights of the employees belonging to the general (*sic* reserved) category are violative of Article 14; inconsistent with and derogatory to the right to equality and are void ab initio.

52. In *Union of India* v. *Raghubir Singh*[52] (SCC at p. 766) a Constitution Bench had held that like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for readjustment in a changing society, a readjustment of legal norms demanded by a changed social context. This need for adopting the law to new urges in society brings home that truth that the life of the law has not been logic, but it has been experience. The law is forever adopting new principles from life at one end and "sloughing off" old ones at the other. The choice is between competing legal propositions rather than by the operation of logic upon existing legal propositions that the growth of law tends to be determined. Interpretation of the Constitution is a continuous process. The concepts engraved therein keep changing with the demands of changing needs and time.

53. The doctrine of stare decisis is ordinarily a wise rule of action, because in most matters, it is more important that the applicable rule of law be a settled right. The rule of stare decisis, though one tending to keep consistency and uniformity of decisions, is not an inflexible rule. Whether it shall be followed or departed from is a question entirely within the discretion of the Court and it does not deter the Court to depart from it. Stare decisis is not, like the rule of res judicata, a universal, inexorable command. Whether it would be desirable to continue the decision in constitutional questions is one of the choice between competing rights. In *Bengal Immunity Co. Ltd. case*[45], considering the question whether the decision of a Constitution Bench referred in the *State of Bombay* v. *United Motors (India) Ltd.*[53], a majority of seven Judges following the dissenting judgment of Stone, C.J. in *United States of America* v. *South-Eastern Underwriters' Assn.*[54] had held that the Court has never committed itself to any rule or policy that it will not bow to the lessons of experience and the force of better reasoning by overruling a mistaken precedent. The doctrine of stare decisis should not be rigidly applied to the constitutional as well as to other laws. In the case of private import, the chief desideratum is that the law remained certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of stare decisis. When, however, public

52 (1989) 2 SCC 754
53 1953 SCR 1069 : AIR 1953 SC 252 : (1953) 4 STC 133
54 88 L Ed 1440 : 322 US 533 (1943)

interests are involved, and especially, when the question is one of constitutional construction, the matter is otherwise. Accordingly the Bench overruled the majority decision. It would, thus, be settled law that in the interpretation of the Constitution or the concepts embodied therein, the application of the doctrine of stare decisis is not an inexorable or a rigid rule. It requires modulation or adherence based upon the need of the constitutional command and social imperatives. It would, therefore, be entirely within the discretion of the Court when it is called upon to consider its application to the given set of circumstances.

54. It is settled principle right from *Golak Nath*[7] *ratio* that prospective overruling is a part of the principles of constitutional canon of interpretation. Though *Golak Nath*[7] *ratio* of unamendability of fundamental rights under Article 368 of the Constitution was overruled in *Kesavananda Bharati case*[55] the doctrine of prospective overruling was upheld and followed in several decisions. This Court negatived the contention in *Golak Nath case*[7] that prospective overruling amounts to judicial legislation. Explaining the Blackstonian theory of law, i.e., Judge discovers law and does not make law, and the efficacy of prospective overruling at p. 808 placitum D to H, this Court by a Bench of eleven Judges had held that the doctrine of prospective overruling is a modern doctrine and is suitable for a fast-moving society. It does not do away with the doctrine of stare decisis but confines it to past transactions. While in strict theory, it may be said that the doctrine involves the making of law, what a court really does is to declare the law but refuses to give retrospectivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make the law. It finds the law but restricts its operation to the future. It enables the courts to bring about a smooth transition by correcting the errors without disturbing the impact of those errors on past transactions. By implication of this doctrine, the past may be preserved and the future protected. The Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling. Articles 32(4) and 142 are designed with words of width to enable this Court to declare the law and to give such direction or pass such orders as are necessary to do complete justice. Declaration of law under Article 141 is wider than words found or made. The law declared by this Court is the law of the land. So, there is no acceptable reason as to why the Court in dealing with the law in supersession of the law declared by it earlier could not restrict the operation of law, as declared, to the future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. This Court is, therefore, not impotent to adjust the competing rights of parties by prospective overruling of the previous decision in *Rangachari*[2] *ratio*. The decision in *Mandal case*[1] postponing the operation for five years from the date of the judgment is an instance of, and an extension to the principle of

55 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

prospective overruling following the principle evolved in *Golak Nath case*[7]. In *Managing Director, ECIL* v. *B. Karunakar*[56] a Constitution Bench of this Court, while overruling (*sic* affirming) *Union of India* v. *Mohd. Ramzan Khan*[57] had held that the benefit of decisions would be given only to the parties to the cases pending before the authorities from the date of the judgment but not to the actions already taken by the date of that judgment. In that behalf in separate but partly dissenting judgment to a limited extent, on the issue of the need to give benefit to the party that approaches the Court in that case, one of us, K. Ramaswamy, J., had held that as a matter of constitutional law retrospective operation of an overruling decision is neither required nor prohibited by the Constitution; it is a matter of judicial attitude depending on the facts and circumstances in each case; the nature and purpose the particular overruling decision seeks to serve are required to be taken into consideration. The Court would look into the justifiable reliance on the overruled case by the administration. All the factors, viz., ability to effectuate the new rule adopted in the overruling case, without doing injustice and whether the likelihood of its operation substantially burdens the administration or retards the purpose, are to be taken into account, while overruling the earlier decision or laying down a new principle. Equally, no distinction could be made between claims involving constitutional rights, statutory right or common law right. The Court is required to adjust the competing rights taking into consideration the prior history of the rule in question, its purpose and effect and to find out whether retrospective operation will accelerate or retard its operation. Therefore, evolving of the appropriate rule to give effect to the decision of the Court overruling its previous precedent, is one of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law operated prior to the date of the judgment overruling the previous law.

55. The question, therefore, is whether such a decision is void when it offends the fundamental rights under Article 13(2) of the Constitution. The doctrine of voidity was dealt with in *Administrative Law* by Wade (7th Edn.) at p. 342, and it is stated that "the truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances". The terms "void ab initio" or "nullity" or "voidable" are descriptive of the status of the legislation or subordinate legislation alleged to be ultra vires for patent or for latent defects before its validity has been pronounced by a court of competent

56 (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704
57 (1991) 1 SCC 588 : 1991 SCC (L&S) 612 : (1991) 16 ATC 505

jurisdiction.* It would, therefore, be of necessity to consider in each case, the effect of the declaration granted by the court before labelling it as void, nullity or voidable, as the case may be.

56. It is seen that Article 13(2) envisages a situation where the State action, be it legislative or executive, violates the fundamental rights in Part III of the Constitution; such law is declared as void but when the previous overruled decision and the new rule laid down by the Court as a stare decisis operates prospectively from a given date, namely, either the date of the judgment or extended date. Judgment or order is not a legislative Act which is void under Article 13(2) but a judicial tool by which the effect of the judgment was given. Therefore, the judgment of this Court in *Mandal case*[1] declaring that *Rangachari*[2] *ratio* did not correctly interpret Articles 16(1) and 16(4) of the Constitution is a declaratory law under Article 141 of the Constitution. It is true that Article 13(1) deals with pre-constitutional law and if it is inconsistent with fundamental rights, it becomes void from 26-1-1950, the date on which the Constitution of India came into force and if a post-constitutional law governed by Article 13(2) violates fundamental rights, it becomes void from its inception. Either case deals with statute law and not the law declared by this Court under Article 141 and directions/orders under Article 142.

57. The question then is whether such a declaration is inconsistent with the Constitution or in derogation of the fundamental rights. As held earlier, both the disadvantaged and advantaged sections of the society have equal competing fundamental rights in Part III, i.e., Chapter of Fundamental Rights. The Court in *Mandal case*[1] had obviously recognised the need to adjust the competing rights of both sections of citizens and, therefore, it postponed the operation of that judgment for five years from that date giving an option to the executive to have the law amended appropriately.

58. In *Union Carbide Corpn.* v. *Union of India*[8] a Constitution Bench was to consider the scope, ambit and limitation of the exercise of the power under Article 142. Therein, the contention raised was that the direction issued was contrary to the statutory provision violating Article 21 of the Constitution and that, therefore, the power under Article 142 could not be exercised in that backdrop. This Court explaining the interplay of inference of prohibition or limitation on the constitutional power and as to when need to exercise the same under Article 142 arises, had pointed out in para 83 thus: (SCC pp. 634-35)

> "It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of

* [**Ed** : The text as appearing on p 342 of Wade: *Administrative Law*, 7th Edn reads :

> "The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects Lord Diplock spoke still more clearly, saying that
>
> 'it leads to confusion to use such terms as 'voidable', 'voidable ab initio', 'void' or 'a nullity' as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction.' "

the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the Apex Court under Article 142(1) is unsound and erroneous. In both *Garg*[58] as well as *Antulay*[3] cases the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 CrPC or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers — limited in some appropriate way — is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Shri Sorabjee, learned Attorney General, referring to *Garg case*[58], said that limitation on the powers under Article 142 arising from 'inconsistency with express statutory provisions of substantive law' must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of 'complete justice' of a cause or matter, the Apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise."

59. In *Delhi Judicial Service Assn.* v. *State of Gujarat*[4] and *Vinay Chandra Mishra, Re*[59] this Court considered its paramount power and duty

58 *Prem Chand Garg* v. *Excise Commr, U P*, 1963 Supp (1) SCR 885 : AIR 1963 SC 996
59 (1995) 2 SCC 584

to protect the limbs of administration of justice from those whose actions created interference with or obstruction to the course of justice. It was held that the failure to exercise the power in such situations, when it is invested specifically for the purpose, is a failure to discharge the duty. The first case deals with a case when the judicial officer in Gujarat was assaulted by the police and in the latter when a practising advocate assaulted a Judge of the High Court, this Court took suo motu action and passed appropriate orders, in spite of absence of specific power to deal with or despite the disciplinary power available under the Advocates Act. In *Delhi Development Authority* v. *Skipper Construction Co. (P) Ltd.*[60] a Bench of two Judges exercised the power under Articles 129 and 142 of the Constitution and not only punished the defrauding party but also directed restoration of the benefits illegally derived to the persons defrauded. The imposition of the punishment, it was held, does not denude the power of the Court; it could issue directions to remedy the wrong done by the contemner including directions to refund the amounts wrongfully derived by the contemner to the rightful persons.

60. It would be seen that there is no limitation under Article 142(1) on the exercise of the power by this Court. The necessity to exercise the power is to do "complete justice in the cause or matter". The inconsistency with statute law made by Parliament arises when this Court exercises power under Article 142(2) for the matters enumerated therein. Inconsistency in express statutory provisions of substantive law would mean and be understood as some express prohibition contained in any substantive statutory law. The power under Article 142 is a constituent power transcendental to statutory prohibition. Before exercise of the power under Article 142(2), the Court would take that prohibition (*sic* provision) into consideration before taking steps under Article 142(2) and we find no limiting words to mould the relief or when this Court takes appropriate decision to mete out justice or to remove injustice. The phrase "complete justice" engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution and cannot be cribbed or cabined within any limitations or phraseology. Each case needs examination in the light of its backdrop and the indelible effect of the decision. In the ultimate analysis, it is for this Court to exercise its power to do complete justice or prevent injustice arising from the exigencies of the cause or matter before it. The question of lack of jurisdiction or nullity of the order of this Court does not arise. As held earlier, the power under Article 142 is a constituent power within the jurisdiction of this Court. So, the question of a law being void ab initio or nullity or voidable does not arise.

61. Admittedly, the Constitution has entrusted this salutary duty to this Court with power to remove injustice or to do complete justice in any cause or matter before this Court. The *Rangachari*[2] *ratio* was in operation for well

60 (1996) 4 SCC 622

over three decades under which reservation in promotions were given to several persons in several services, grades or cadres of the Union of India or the respective State Governments. This Court, with a view to see that there would not be any hiatus in the operation of that law and, as held earlier, to bring about smooth transition of the operation of law of reservation in promotions, by a judicial creativity extended the principle of prospective overruling applied in *Golak Nath case*[7] in the case of statutory law and of the judicial precedent in *Karunakar case*[56] and further elongated the principle postponing the operation of the judgment in *Mandal case*[1] for five years from the date of the judgment. This judicial creativity is not anathema to constitutional principle but an accepted doctrine as an extended facet of stare decisis. It would not be labelled as proviso to Article 16(4) as contended for.

62. In *S.P. Sampath Kumar* v. *Union of India*[13], while noticing that the Administrative Tribunals Act suffered from constitutional invalidity, instead of declaring the Act as invalid, declared that its invalidity would be removed by making necessary suggested amendments thereto so that the law will become consistent with the Constitution. In *St. Stephen's College case*[14] while holding that the orders issued by Delhi University were violative of Article 30(1) of the Constitution, this Court declared that admission by the minority institutions in the ratio of 50:50 between minority students and the general students was constitutional which is another facet of judicial creativity. In *Pannalal Bansilal Pitti* v. *State of A.P.*[61] this Court, instead of declaring that abolition of hereditary trusteeship of the founder of the temple to manage a temple was unconstitutional, declared the law reading it down that the institutions would be managed by a committee of the non-hereditary and hereditary trustees presided over by the hereditary trustee so as to be conducive to proper and efficient management of the endowment or institutions. At the same time, this Court upheld the power to remove hereditary trustees who mismanaged the endowment or committee for acts of misfeasance or malfeasance, as valid. It is settled legal principle of reading down the provisions of a statute by so interpreting them as to make the Act consistent with the constitutional principles. Instances, therefore, are many under which this Court has evolved the appropriate principle to sustain the legislative or executive actions consistent with the constitutional philosophy or principles. *Mahendra Lal Jaini* v. *State of U.P.*[62] relied on by the petitioners, is of no assistance to the facts of this case. Therein, the distinction between the post-constitutional and pre-constitutional law which violated the fundamental rights and the effect thereof under Articles 13(1) and 13(2) was considered. The doctrine of eclipse was pressed into service and explaining the circumstances in which the voidity of the pre-constitutional law and the validity of the post-constitutional law was declared, this Court held that the post-constitutional law violating the

61 (1996) 2 SCC 498

62 1963 Supp (1) SCR 912 : AIR 1963 SC 1019

fundamental rights was stillborn and that, therefore, was void from its inception, while the pre-constitutional law is effective from inception but its voidity supervened when the Constitution came into force. Therefore, it would be void only from 26-1-1950 and the previous operation of the law remained unaffected. The ratio therein, therefore, has no application to the facts in this case. Similarly, the ratio in *Atam Prakash* v. *State of Haryana*[63] is equally inapplicable to the facts of this case. Therein, it was declared that the justification of the right of pre-emption to different classes enumerated in Section 15 of the Punjab Promotion Act was declared ultra vires and inconsistent with the modern concept of equality. Therefore, it was held that the law was not valid. Equally, the ratio in *Waman Rao case*[5] is equally inapplicable. Therein, it was held that a law violating the fundamental rights was void but it remained valid under the protective umbrella of Schedule IX of the Constitution and, therefore, though it was void, it cannot be declared to be void and remained to be a valid law. But a post-constitutional *Kesavananda Bharati*[55] law which did not receive the protective umbrella of Schedule IX is void from its inception. We are not concerned, as stated supra, with statute law in this case. Under those circumstances, the ratio therein is inapplicable to the facts in this case. *A.R. Antulay case*[3] is inapplicable to the facts in this case. Therein, though this Court had directed under Article 142 trial of the appellant by a High Court Judge, it was held that such direction was inconsistent with fundamental rights of equality under Article 21 read with Article 14 with the trial of other similarly circumstanced offenders by a properly constituted court with a right of appeal while the order passed under Article 142 denied him of the equality of trial process. This Court accepted that contention and held that the direction issued on earlier occasion was invalid in law. In that context, the observations came to be made in para 50. The ratio therein is also inapplicable to the facts in this case. In *Delhi Judicial Service Assn.* v. *State of Gujarat*[4] (SCC at p. 452, para 37), it was held that the powers under Articles 32, 136, 141 and 142 are basic structures of the Constitution and cannot be curtailed by statute law. Equally, the same position was reiterated in para 51 therein. The ratio also is inapplicable to the facts in this case as we have already held that the direction in *Mandal case*[1] postponing the operation of the judgment of reservation in promotions for a period of five years is a part of the scheme of judicial review being an innovative device to mete out justice to the Dalits and Tribes giving breathing time to the executive to bring about suitable legislative measures, if they so desired and if no action was taken by amending the law, on expiry of five years, the judgment in *Mandal case*[1] would become operative. Thereafter reservation in promotion would be unconstitutional which invalidity was remedied. As held earlier, this being one of the tools of judicial craftsmanship adopted by exercising the power under Article 142, which is available only to this Court, the directions given are not violative of rights under Article 14 read

63 (1986) 2 SCC 249

with Article 16(1), nor ultra vires the power nor void, nor incompatible or inconsistent with the doctrine of equality enshrined under Article 14 read with Article 16(1) of the Constitution. On the other hand, the power was exercised by this Court under Article 142 read with Article 32 and the direction postponing the operation of the decision for a period of five years is a law of the land under Article 141.

63. It is already seen that the rule of reservation in promotions was in vogue in the State of Uttar Pradesh right from 1973 and the promotions came to be made from 1981 onwards to Respondents 2 to 10. The U.P. Act saves the existing policy of reservation in promotions. The judgment in *Mandal case*[1] saves the promotions already made. In *Sabharwal case*[6] also a Constitution Bench has upheld the validity of the promotions given in excess of the roster; otherwise also those promoted on their own merit were held to be validly promoted. Even excess promotions remained undisturbed and the law became operative only from the date of the judgment. This Court upheld the previous promotions, though in excess of the roster system, as constitutional and valid. Therefore, we hold that the promotions of the respondents are legal and valid and they do not become void or unconstitutional as contended.

64. Both, the appeal and the writ petition, are accordingly dismissed with no order as to costs.

(1997) 5 Supreme Court Cases 253

(BEFORE S.B. MAJMUDAR AND M. JAGANNADHA RAO, JJ.)

STATE OF HARYANA AND ANOTHER .. Appellants;

Versus

RAM CHANDER AND ANOTHER .. Respondents.

Civil Appeal No. 2450 of 1995†, decided on May 9, 1997

A. Service Law — Parity in Employment — Equal pay for equal work — Applicability of the doctrine — Teachers teaching in different educational institutes but course content was the same, the students were required to appear in same type of examinations and the successful students were equally eligible for further admission to degree colleges — Claim for parity in pay scale of teachers in different educational institutes, held, established — Difference in educational qualifications prescribed for their appointment, further held, might have made vital difference but for the fact that the State Government had itself effaced this difference while revising pay scales of its employees on the recommendations of the Pay Revision Committee — Constitution of India, Arts. 39(d), 14 and 16 — Haryana Civil Services (Revised Pay) Rules, 1987

† From the Judgment and Order dated 4-10-1993 of the Punjab and Haryana High Court in L P A No. 1267 of 1993 in C W P No 16543 of 1990

2021 SCC OnLine SC 343

In the Supreme Court of India
(BEFORE D.Y. CHANDRACHUD AND M.R. SHAH, JJ.)

Patan Jamal Vali ... Appellant;

Versus

The State of Andhra Pradesh ... Respondent.

Criminal Appeal No 452 of 2021 (Arising out of SLP(Crl) No 1795 of 2021)

Decided on April 27, 2021

The Judgment of the Court was delivered by

D.Y. CHANDRACHUD, J.:— This judgment has been divided into the following sections to facilitate analysis:

A Factual Background

B Proceedings before this Court

C Analysis

C.1 Intersectionality : The Different Hues of Identity

C.2 Disability and Gender : Twin Tales of Societal Oppression

C.3 The 'Caste' that is Difficult to Cast Away : Protection of Members of Scheduled Castes and Scheduled Tribes

C.4 Section 3(2)(v) of SC & ST Act

C.5 Punishment under Section 376 of the IPC

D Conclusion and Summary of Findings

A Factual Background

2. Leave granted.

3. This appeal arises from a judgment of a Division Bench of the High Court of Andhra Pradesh dated 3 August 2019. The High Court has affirmed the conviction of the appellant for offences punishable under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989[1] and Section 376(1) of the Penal Code, 1860.

4. The appellant has been sentenced to suffer imprisonment for life for each of the above offences, the substantive sentences being directed to run concurrently. In addition, the appellant has been sentenced to pay a fine of Rs. 1,000 for each of the offences and in default to suffer imprisonment of six months.

5. The appellant was residing in Gajulapalli village and was engaged in carrying out manual work for two years prior to the incident. PW2 who is blind since birth used to live with her mother (PW1) and brother (PW3). PW3 and LW5 are the sons of PW1. They were also engaged in manual work together with the appellant, at the same place. The appellant, according to the prosecution, lived in the same village and regularly visited the house of PW1 due to his acquaintance with her sons.

6. At about 9 am on 31 March 2011, PW1 was attending to her household chores at a public tap which was within a distance of fifty feet and her sons were cutting fire wood in the vicinity. The appellant is alleged to have enquired about her sons when PW1 replied that her spouse and sons were chopping fire wood and asked him to wait for a while. After half an hour, on hearing the voice of her daughter (PW2) in distress, she rushed to the house and found that the door was locked from inside. Upon raising an alarm her husband and sons rushed to the house. The appellant opened the door and tried to escape but was apprehended at the spot. Upon entering the house, PW1

observed that PW2 was lying on the ground in a nude condition and was bleeding from her genitals. The clothes of PW2 were torn and stained with blood. Upon enquiry, PW2 is alleged to have stated that the appellant came to the house and enquired about her brothers; he locked the door and fell on her, gagged and raped her.

7. The case of the prosecution is that at 10 am, the Sub-Inspector of Police (PW9), Mahanandi Police Station, who received a call from PW4, a cousin of PW1, rushed to the scene of the occurrence. By that time, the Circle Inspector of Police, Nandyal Rural Police Station had also arrived and the villagers handed over the appellant to him. PW1 furnished a written report to the police which was registered as Crime No 28/2011. PW11 sent the victim to the Government Hospital where she was examined by PW10, the Civil Surgeon at the District Hospital. The medical examination revealed that PW2 was blind. The medical report of the examination of PW2 has been extracted in the judgment of the Sessions Judge and the High Court and reads as follows:

> "(1) Contusion of 1 × 1 cm on left cheek, red in colour, (2) Pubic Hair develop, breast develop (3) Axillary Hair developed. On examination of vagina is lacerated at 4-00 O' clock position, bleeding present. 3 swabs and slides taken from Hymeneal Orifice Vaginal canal and near cervix, vaginal wall sutured with 10 Chromicatgut, hair and nail clippings taken and she i1ssued the wound certificate under Ex.P.6 and gave her final opinion under Ex.P.8 after receiving the report from A.P.F.S.L. and she opined that the evidence is suggestive of penetration of male genital parts."

8. Charges were framed against the appellant under Section 376(1) of the Penal Code and Section 3(2)(v) of the SC & ST Act. To substantiate its case, the prosecution examined eleven witnesses, PWs 1 to 11 in addition to which, it relied on exhibits P1 to P12 and MOs 1 to 8. On the closure of the evidence, the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973. By a judgment dated 19 February 2013 the Special Judge for the Trial of Cases under the SC - ST (POA) Act - Cum - VIth Additional District and Sessions Judge convicted the appellant for offences under Section 3(2)(v) of the SC & ST Act and Section 376(1) of the Penal Code. Based primarily on the testimonies of PW1, PW2 and PW3 the learned Sessions Judge held that:

(i) The appellant had access to PW2 since he was acquainted with her brothers and was regularly visiting the house where she lived with her family;

(ii) The evidence of PW1 and PW2 was corroborated by PW3, the brother of PW2;

(iii) The narration of the incident by PW1 was duly corroborated by an independent witness and neighbour, PW5;

(iv) The oral testimony of the witnesses established that the appellant was apprehended at the scene of occurrence and when PW1 who was accompanied by PW3 and PW4 opened the door of the house, the appellant was apprehended while attempting to escape and PW2 was found bleeding from her injuries lying in a nude condition on the ground;

(v) PW2 who was blind by birth had identified the appellant by his voice which was familiar to her since the appellant was regularly visiting the house;

(vi) PWs 1, 3, 4, 5 apprehended the appellant handed him over to PW11 and the appellant was taken to Mahanandi Police Station;

(vii) PW5 is the neighbour whose house was opposite to that of PW1 and was a natural witness. PW4 though related to PW1 had also corroborated the testimony of PW1;

(viii) The clothes of PW2 had been duly seized;

(ix) The narration of the incident by PW2 was trustworthy and was duly corroborated by PW1 and PW3; and

(x) The oral testimony was consistent with the medical evidence and the deposition of PW10, the doctor at the government hospital who deposed in that regard.

9. The Sessions Judge, in coming to the conclusion that an offence under Section 3 (2)(v) was established observed thus:

"39. Coming to the facts of the present case P.W.11 in the cross examination stated that P.W.1 and P.W.2 did not state before him that since P.W.2 belongs to scheduled caste, accused committed the offence. The learned defence counsel argued that in view of the evidence of P.W.11, the prosecution failed to prove that the accused committed the offence on the ground that the victim belongs to scheduled caste. I do not find any merit in the above argument for the reason that Ex. P.1 discloses that the victim belongs to Madiga of Scheduled Caste. P.W.1 the mother of the victim girl is an illiterate village rustic woman simply because she has not mentioned in the report or in the statement to the police that accused did commit the offence on the ground that the victim belong to scheduled caste is no way fatal to the case of the prosecution to establish the guilt of the accused for the offence under section 3 (2) (v) of SC/ST (POA) Act.

40. It is needless to say that if the victim belongs to upper caste than the caste of the accused, particularly in village atmosphere, I am of the considered view that he would not have done the act and dared to pounce upon her, and commit the offence of rape at her own house at about 9.30 am in morning when her mother was working near the house at public tap and her house is situated in the residential locality. This court is of the view that as the victim girl is helpless, blind and belongs to scheduled caste, so that the accused developed evil eye on her and taken advantage of her loneliness committed the heinous crime of rape against her. Hence I am not convinced with the argument of the learned defence counsel and this court held that the accused committed the act of rape on the victim un-married girl of 19 years at the time of the incident and blind by birth and he did commit the act on the ground that she belongs to scheduled caste and on the impression that she cannot do anything against him. Hence, the prosecution has established the guilt of the accused for the offence under section 3 (2) (v) of SC/ST (POA) Act."

10. On the aspect of sentence, the Sessions Judge observed:

"When questioned about the quantum of sentence in respect of the. offence under section 376 (1) IPC, the accused pleaded to take lenient view stating that he is a poor person and eking out his livelihood by doing coolie work.

In view of the facts and circumstances of the case that it is a heinous crime of rape committed against a blind un-married girl of 19 years of age, I am not inclined to exercise my discretion to give lesser punishment to the accused as it is not a fit case to take a lenient view.

The accused is sentenced to undergo life imprisonment and to pay a fine of Rs. 1,000/- i/d SI for 6 months for the offence punishable under section 376 (1) of IPC and also sentenced to undergo life imprisonment and to pay a fine of Rs. 1,000/- i/d SI for 6 months for the offence under section 3 (2) (v) of SC/ST (POA) Act. Sentences shall run concurrently for the whole life. M.0.1 to M.0.8 shall be destroyed after the expiry of appeal time."

11. The High Court by its judgment dated 3 August 2019 affirmed the conviction and sentence imposed by the Sessions Court. The High Court has held that the testimonies of PW1, the mother of PW2; and of PW2 were consistent and duly corroborated by PW3, the brother of PW2 and by PW4 and PW5. The High Court adverted to the medical evidence and, in particular, the deposition of PW10. The prosecution was held to have established its case beyond reasonable doubt.

12. Before the High Court, it was urged that the ingredients of the offence under Section 3(2)(v) were not established as the offence was not committed "on the

ground" that PW2 belongs to a Scheduled Caste. The High Court declined to accede to the submission, observing:

> "Section 3(2)(v) of the Act provides that the offence gets attracted if it is committed against a person knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such members. Even otherwise still the offence under Section 376(1) I.P.C. is made out."

B Proceedings before this Court

13. On 19 February 2021, this Court at the preliminary hearing of the Special Leave Petition adverted to the submissions of the learned Counsel appearing on behalf of the appellant and passed the following order:

> "2 Mr Harinder Mohan Singh, learned counsel appearing on behalf of the petitioner, has adverted to the findings contained in paragraph 39 of the judgment of the Sessions Court dated 19 February 2013 (Annexure P-12). Learned counsel submits that in view of the expression "on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe" in Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989, which has been interpreted in the decisions of this Court, an offence under this provision has not been established. Hence, the imposition of a sentence of life imprisonment in respect of an offence under Section 376 of the Penal Code, 1860 1860 was not in accordance with law.
>
> 3 Issue notice, confined to the aforesaid submission, returnable in six weeks.
>
> 4 Liberty to serve the Standing Counsel for the State of Andhra Pradesh, in addition."

14. Notice has been issued by this Court confined to the above submission. However, before we proceed to analyse the submission, we are unequivocally of the view that the offence under Section 376(1) has been proved beyond reasonable doubt. The testimonies of PW1, the mother of PW2 and of PW 2, who was sexually assaulted, are clear and consistent. The oral account has been corroborated by the evidence of PW3, PW4 and PW5. The medical evidence, more particularly, the deposition of PW10 clearly establishes that PW2 was sexually assaulted. The appellant was apprehended at the spot in close proximity of the commission of the offence. The offence under Section 376 has been established beyond reasonable doubt. This Court shall now proceed to deal with the question of the conviction and sentence under the SC & ST Act.

C Analysis

C.1 Intersectionality : The Different Hues of Identity

15. The experience of rape induces trauma and horror for any woman regardless of her social position in the society. But the experiences of assault are different in the case of a woman who belongs to a Scheduled Caste community and has a disability because the assault is a result of the interlocking of different relationships of power at play. When the identity of a woman intersects with, *inter alia*, her caste, class, religion, disability and sexual orientation, she may face violence and discrimination due to two or more grounds. Transwomen may face violence on account of their heterodox gender identity. In such a situation, it becomes imperative to use an intersectional lens to evaluate how multiple sources of oppression operate cumulatively to produce a specific experience of subordination for a blind Scheduled Caste woman.

16. A movement for recognition of discrimination and violence emanating from the effects of the interaction of multiple grounds was pioneered by African American women in United States. Kimberly Crenshaw has been credited for coining the term intersectionality. In her seminal work on the subject, she describes the principle with the help of the following hypothetical:

> "Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination." [2]

17. In her article, Crenshaw argues that sex discrimination and race discrimination statutes, as well as the judicial opinions in the United States that she studied are narrowly tailored and address the claims of the most privileged within the targeted group. She states:

> "With Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. I want to suggest further that this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be viewed in terms of sex-or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.""[3] (emphasis added)

18. She further highlights the intersectional nature of gender violence, where she states that:"[t]he singular focus on rape as a manifestation of male power over female sexuality tends to eclipse the use of rape as a weapon of racial terror."

19. Intersectionality can be defined as a form of "oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone...".[4] While the model of intersectionality was initially developed to highlight the experiences of African-American women, there is a growing recognition that an intersectional lens is useful for addressing the specific set of lived experiences of those individuals who have faced violence and discrimination on multiple grounds. A single axis approach to violence and discrimination renders invisible such minority experiences within a broader group since it formulates identity as "totemic" and "homogenous".[5] Laws tend to focus on a singular identity due to the apparent clarity a monistic identity provides in legal analysis where an individual claiming differential treatment or violence can argue that "but for" that identity, they would have been treated in the same way as a comparator. Therefore, their treatment is irrational and unjustified.[6] However, such essentialization of experiences of identity groups creates a problem where intersectional discrimination or violence has occurred. This is because the evidence of discrete discrimination or violence on a specific ground may be absent or difficult to prove.[7] Nitya Iyer has argued that law based on single axis models forces claimants to ignore their own lived reality and "caricaturize themselves so that they fit into prefabricated, rigid categories".[8] Their claim will fail if they are not able to simplify their story to accord with the dominant understanding of how discrimination or violence on the basis of a given characteristic occurs.[9]

20. It is important to note that an analysis of intersectionality does not mean that we see caste, religion, class, disability and sexual orientation as merely "add ons" to the oppression that women may face. This is based on the assumption that gender oppression is oppressive in the same way for all women, only more so for women suffering marginalization on other grounds. However, an intersectional analysis requires us to consider the distinct experience of a sub-set of women who exist at an intersection of varied identities. This is not to say that these women do not share any commonalities with other women who may be more privileged, but to equate the two experiences would be to play down the effects of specific socio-economic vulnerabilities certain women suffer. At its worse it would be to appropriate their pain

to claim a universal subjectivity.

21. There is a fear that intersectionality would open a Pandora's box of "endless new discrete identity categories for every possible permutation of identity"[10]. We can avoid this trap by eschewing an identity-based conception of intersectionality in favour of a systems-based conception. Specifically, as Gauthier De Beco argues, instead of focusing on identity-categories, the intersectionality enquiry should focus on "co-constituted structures of disadvantage that are associated with two or more identity-categories at the same time".[11] By exhibiting attentiveness to the 'matrix of domination'[12] created by the intersecting patterns at play, the Court can more effectively conduct an intersectionality analysis. A legal analysis focused on delineating specific dimensions of oppression running along a single axis whether it be caste, disability or gender fails to take into account the overarching matrix of domination that operates to marginalise an individual. The workings of such a structure have been aptly stated by a woman with visual impairment (due to Albinism) in the following words:

> "I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discriminating against me. I do not fit into discrete boxes of grounds of discrimination.
>
> Even when only one ground of discrimination seems to be relevant, it affects me as a whole person"[13]

22. Intersectionality merely urges us to have "an open-textured legal approach that would examine underlying structures of inequality"[14]. This requires us to analyse law in its social and economic context allowing us to formulate questions of equality as that of "power and powerlessness" instead of difference and sameness.[15] The latter being a conceptual limitation of single axis analysis, it may allow certain intersectional claims to fall through the cracks since such claims are not unidirectional in nature.

23. Intersectional analysis requires an exposition of reality that corresponds more accurately with how social inequalities are experienced. Such contextualized judicial reasoning is not an anathema to judicial inquiry. It will be useful to note the comments of Justice L'Heureaux-Dubé and Justice McLachlin in the Canadian Supreme Court's judgment in *R.* v. *S (RD)*[16] that, "[j]udicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality…this process of enlargement is not only consistent with impartiality; it may also be seen as its essential pre-condition."

24. Single axis models of oppression are a consequence of how historically movements aiming for legal protection of marginalized populations developed. Most political liberation struggles have been focused on a sole characteristic like anti-caste movements, movements by persons with disabilities, feminism and queer liberation. Many such movements have not been able to adequately address the intra-group diversity leading to a situation where the needs of the relatively privileged within the group have received more than a fair share of spotlight. When these liberation struggles were adopted in law, the law also developed into mutually exclusive terrains of different statutes addressing different marginalities failing to take into account the intersectional nature of oppression.

25. In India, the fundamental guarantees under the Constitution provide for such a holistic analysis of discrimination faced by individuals. One of us (Justice DY Chandrachud), in *Navtej Johar* v. *Union of India*[17] applied the intersectional lens to Article 15(1) of the Constitution. In doing so, Justice DY Chandrachud observed that:

> "36. This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim

that the discrimination was based on sex and another ground ('Sex plus') and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex *and* height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics."

(emphasis supplied)

26. Noting how the discrimination caused by intersecting identities amplifies the violence against certain communities (gendered/religious/otherwise), the Justice J.S Verma Committee appointed in the aftermath of the Nirbhaya incident to suggest reforms in Indian criminal law, observed that:

"34. We believe that while certain measures may have been taken over a period of time but they have been too far and too few and they certainly have not attempted to restructure and transform society and its institutions. If there has to be a society which is based on equality of gender, we must ensure that not only does a woman not suffer on account of gender but also not suffer on account of caste or religion in addition. Thus a woman may suffer a double disadvantage - a) because she is a woman, and b) because she belongs to a caste/tribe/community/religion which is disadvantaged, she stands at a dangerous intersection if poor."[18]

27. While intersectionality has made considerable strides in the field of human rights law and anti-discrimination law, it has also emerged as a potent tool to understand gender-based violence. In 1991, Crenshaw applied the concept of intersectionality to study violence against women of colour. She showed how race, gender, poverty, immigrant status and being from a linguistic minority interacted to place these women in violent relationships.[19]

28. To deal with cases of violence against women from intersectional backgrounds, Shreya Atrey proposes the model of intersectional integrity. She notes:

"Intersectional gender violence is about : (i) rejecting violations of bodily and mental integrity when perpetrated based on people's multiple and intersecting identities (intersectionality); and (ii) recognizing that violence should be understood as a whole taking into account unique and shared patterns of violations yielded by intersections of gender, race, caste, religion, disability, age, sexual orientation etc(integrity)."[20]

29. She points out that a failure to consider violence perpetrated based on multiple identities results in an inaccurate portrayal of the violence at issue which may impact the ability to obtain relief. On the other hand, a comprehensive appraisal of the intersectional nature of the violence can translate into an appropriate legal response. [21]

30. The above analysis stresses on the need for the Court to address and unpack the qualitative impact of the various identities an individual might have on the violence, discrimination or disadvantage being faced by them in the society.

C.2 Disability and Gender : Twin Tales of Societal Oppression

31. For many disabled women and girls in India, the threat of violence is an all-too-familiar fixture of their lives, contracting their constitutionally guaranteed freedom to move freely and curtailing their ability to lead full and active lives. This threat of

violence can translate into a nagging feeling of powerlessness and lack of control, making the realization of the promises held by Parts III and IV of our Constitution a remote possibility for women with disabilities.

32. In saying so, we do not mean to subscribe to the stereotype that persons with disabilities are weak and helpless, incapable of charting the course of their lives or to deprive them of the agency and bodily autonomy that we all possess and are entitled to exercise. Such a negative presumption of disability translating into incapacity would be inconsistent with the forward-thinking conceptualization of disabled lives embodied in our law and, increasingly, albeit slowly, in our social consciousness. As Saptarshi Mandal notes, in critiquing the fashion in which the Punjab and Haryana High Court dealt with the testimony of a mentally disabled and partially paralyzed prosecutrix[22], stamping a prosecutrix with the badge of complete helplessness, merely on the basis of disability, is an inapposite course of action. He notes:

> "the entire rationale behind the conviction of the accused turned on sympathy for the helpless prosecutrix and her inability to physically resist the aggressor. Even if one agrees with the judge that there cannot be a single standard of burden of proof for the disabled and the able-bodied, a differentiated scale of burden of proof must be based on the concept of vulnerability, not victimhood."[23]

33. Instead, our aim is to highlight the increased vulnerability and reliance on others that is occasioned by having a disability which makes women with disabilities more susceptible to being at the receiving end of sexual violence. As the facts of this case make painfully clear, women with disabilities, who inhabit a world designed for the able-bodied, are often perceived as "soft targets" and "easy victims" for the commission of sexual violence. It is for this reason that our legal response to such violence, in the instant case as well as at a systemic level, must exhibit attentiveness to this salient fact.

34. As the analysis by the Sessions Judge and High Court makes clear, a critical feature of this case is the fact that PW2 is blind since birth. It would be overly simplistic and reductionist to reduce her personality to her disability alone. Equally, however, the Court has to exhibit sensitivity to the heightened risk of violence and abuse that she was rendered susceptible to, by reason of her disability. We would like to utilize the facts of this case as a launching point to explore a disturbing trend that this case brings into sharp focus and is symptomatic of - that of sexual violence against women and girls with disabilities and to set in motion a thought process for how the structural realities resulting in this state of affairs can be effectively addressed. In this part of the judgment, we will first highlight the unique reasons that make these women more vulnerable to being at the receiving end of sexual violence, with the help of some illustrations. Thereafter, we will outline some challenges that are faced by such women in accessing the criminal justice system generally and the judicial system in particular. We will then outline some measures that can be taken to lower the barriers faced by them. We will finally conclude by outlining the judicial approach which should be adopted for assessing their testimony.

Unique vulnerability of women and girls with disabilities

35. An April 2018 report by Human Rights Watch, titled 'Invisible Victims of Sexual Violence : Access to Justice for Women and Girls with Disabilities in India''[24] offers a thoroughgoing assessment of the problem of sexual violence against women with disabilities. The report documents the stories of 17 survivors of sexual violence - 8 girls and 9 women - who live with a spectrum of physical, sensory, intellectual and psychosocial disabilities.[25]

36. As the report points out, women and girls with different disabilities face a high risk of sexual violence:

> "Those with physical disabilities may find it more difficult to escape from violent

situations due to limited mobility. Those who are deaf or hard of hearing may not be able to call for help or easily communicate abuse, or may be more vulnerable to attacks simply due to the lack of ability to hear their surroundings. Women and girls with disabilities, particularly intellectual or psychosocial disabilities, may not know that non-consensual sexual acts are a crime and should be reported because of the lack of accessible information. As a result, they often do not get the support they need at every stage of the justice process : reporting the abuse to police, getting appropriate medical care, and navigating the court system."[26]

37. In India, no disaggregated data is maintained on the extent of violence against women and girls with disabilities. This poses a formidable obstacle to understanding the problem better and designing suitable solutions. As Rashida Manjoo, the United Nations Special Rapporteur on violence against women, noted, this lack of data "renders the violence committed against women with disabilities invisible."[27]

38. The HRW report points to two studies that quantify the scale of this problem. A 2004 survey in Orissa conducted in 12 districts with 729 respondents found that nearly all of the women and girls with disabilities surveyed were beaten at home, and 25 percent of women with intellectual disabilities had been raped.[28]

39. In the same vein, a 2011 study found that 21 percent of the 314 women with disabilities surveyed had faced emotional, physical or sexual violence from someone other than their intimate partner.[29]

40. The HRW Report brings to light several harrowing examples of circumstances in which a survivor's disability was exploited by those perpetrating sexual violence. To illustrate, the report describes the story of a woman with low vision from Bhubaneshwar, Odisha who alleged that she was raped in June, 2013. The report notes:

"The police did not help ...get legal aid. The staff of the [residential shelter home] helped her to find a lawyer, but the lawyer they found was not free of cost. It has been tough for her to continue with the lawyer. This has affected the progress of the case."[30]

Interaction of disabled survivors of sexual violence with the criminal justice system and the judiciary

41. In the wake of the Nirbhaya rape incident that shocked the conscience of the nation, Indian criminal law underwent a series of changes. The Justice J.S. Verma Committee, set up to suggest amendments to the law, attached special emphasis to creating an enabling environment to enable women with disabilities to report cases of sexual violence and to obtain suitable redress. As the Committee noted:

"6. A special procedure for protecting persons with disabilities from rape, and requisite procedures for access to justice for such persons is also an urgent need. Amendments to the Code of Criminal Procedure, which are necessary, have been suggested."[31]

42. The Committee's suggestions translated into changes in the Penal Code, 1860 and the Criminal Procedure Code. Some key changes were as follows:

(i) When the victim of the offences specified in the provision is either permanently or temporarily mentally or physically disabled, the FIR shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of a special educator or an interpreter, as the case may be.[32] Such information may also be video-graphed.[33]

(ii) The same accommodations, as outlined above, have also been made as regards the recording of confessions and statements.[34] Further, as regards those who are physically and mentally disabled, such a statement shall be considered a statement in lieu of examination-in-chief, obviating the need for it to be recorded

at the time of trial.

(iii) The amendments also sought to put in place a framework to enable victims with disabilities to participate in a test identification parade. In such cases, a judicial magistrate will oversee the procedure to ensure the witness is supported in identifying the accused with a means they find comfortable.[35] This process must be video-graphed.[36]

43. Further, guidance issued by the Union Ministry of Health and Family Welfare notes the challenges faced by survivors with disabilities in reporting cases given the barriers to communication, their dependency on caretakers, their complaints not being taken seriously and the lack of an appropriate environment which encourages them to express their grievances and complaints.[37] In addition, unfamiliar and stressful court environments pose a heightened challenge, during protracted cases, for such women. Lack of information about their entitlements under the law, as well as the right to seek legal representation, compels them to be mute and helpless spectators.[38]

44. Certain concerns have also been highlighted by the Committee on the Rights of Persons with Disabilities in its concluding observations on the initial report on India. These include lack of measures to identify, prevent and combat all forms of violence against persons with disabilities; lack of disaggregated statistical data in National Crime Records Bureau on cases of gender-based violence against women and girls with disabilities, including violence inflicted by intimate partners; limited availability of accessible shelters for women with disabilities who are victims of violence; and lack of effective remedies for persons with disabilities facing violence, including rehabilitation and compensation.[39]

45. While changes in the law on the books mark a significant step forward, much work still needs to be done in order to ensure that their fruits are realized by those for whose benefit they were brought. In this regard, we set out below some guidelines to make our criminal justice system more disabled-friendly.

(i) The National Judicial Academy and state judicial academies are requested to sensitize trial and appellate judges to deal with cases involving survivors of sexual abuse. This training should acquaint judges with the special provisions, concerning such survivors, such as those outlined above. It should also cover guidance on the legal weight to be attached to the testimony of such witnesses/survivors, consistent with our holding above. Public prosecutors and standing counsel should also undergo similar training in this regard. The Bar Council of India can consider introducing courses in the LL.B program that cover these topics and the intersectional nature of violence more generally;

(ii) Trained special educators and interpreters must be appointed to ensure the effective realization of the reasonable accommodations embodied in the Criminal Law Amendment Act, 2013. All police stations should maintain a database of such educators, interpreters and legal aid providers, in order to facilitate easy access and coordination;

(iii) The National Crimes Record Bureau should seriously consider the possibility of maintaining disaggregated data on gender-based violence. Disability must be one of the variables on the basis of which such data must be maintained so that the scale of the problem can be mapped out and tailored remedial action can be taken;

(iv) Police officers should be provided sensitization, on a regular basis, to deal with cases of sexual violence against women with disabilities, in an appropriate way. The training should cover the full life cycle of a case involving a disabled survivor, from enabling them to register complaints, obtain necessary accommodations, medical attention and suitable legal representation. This training should emphasize the importance of interacting directly with the

disabled person concerned, as opposed to their care-taker or helper, in recognition of their agency; and

(v) Awareness-raising campaigns must be conducted, in accessible formats, to inform women and girls with disabilities, about their rights when they are at the receiving end of any form of sexual abuse.

46. We hasten to add that these suggestions are not a reflection of the manner in which the investigation, enquiry and trial were conducted in the instant case. They simply represent our considered view on the systemic reforms needed to ensure that cases such as the instant one are dealt with in the most appropriate way.

Testimony of disabled prosecutrix:

47. Another feature of the case that we would like to dwell on relates to the testimony of the prosecutrix, PW2. In his judgment, the Sessions Judge noted as follows:

> "21. Identification of the accused by the victim girl : - It is needless to say that identifying the accused basing on the voice is weak type of evidence. Coming to the present facts and circumstances of the case, P.W.2 is blind by birth as the access of the accused to victim proved by the prosecution she can easily identify the accused by hearing his voice. Moreover, P.W.I, P.W.3, P.W.4 and P.W.5 and some others caught hold the accused when he opened the door of the house of P.W.I, on the date of the incident and the evidence of the police officials also corroborates with the witnesses who caught hold of the accused and handed over him to P.W.II and on the instructions of P.W. II, the accused was taken to Mahanandi Police Station. It was suggested to P.W.2 that her statement that she identified the accused with his voice is false. In view of the categorical evidence of P.W.I, P.W.3, P.W.4, so also the admission made by the accused in 313 Cr.P.C examination that he used to visit the house of P.W.I to call the brothers of the victim for doing coolie work, the above suggestion has no legs to stand. The above evidence would amply prove that the victim has successfully identified the accused and her evidence cannot be doubted simply because she is a blind girl."

48. In the High Court, the defense sought to cast doubt on the testimony of the prosecutrix by arguing that she would have been unable to identify the accused due to her disability. While the above plea was not pressed by the appellant in this Court, we would like to take this opportunity to affirm the conclusion of the Sessions Judge and to clarify the position of law on this point.

49. There have been instances where the testimony of a disabled prosecutrix has not been considered seriously and treated at an equal footing as that of their able-bodied counterparts. One such instance is the judgment of this Court in *Mange* v. *State of Haryana*[40], where the testimony of a thirteen year-old girl who was deaf and mute was not recorded and the conviction was confirmed on the account of an eye witness and supported by medical evidence. This Court in affirming the conviction noted that the non-examination of the prosecutrix was not a major infirmity in the prosecution's case "apart from being a child witness, she was also deaf and dumb and no useful purpose would have been served by examining her." We are of the considered view that presumptions of such nature which construe disability as an incapacity to participate in the legal process reflect not only an inadequate understanding of how disability operates but may also result in a miscarriage of justice through a devaluation of crucial testimonies given by persons with disabilities. The legal personhood of persons with disabilities cannot be premised on societal stereotypes of their supposed "inferiority", which is an affront to their dignity and a negation of the principle of equality.

50. A survey and analysis of High Court judgments by Saptarshi Mandal indicates that the testimony of the disabled witnesses is devalued by not recording the

testimony of the prosecutrix at all; or recording it without adherence to correct legal procedure, thereby rendering it ineffectual; dismissal of the testimony for its lack of intelligibility or for not being supported by the condition of her body.[41]

51. This kind of a judicial attitude stems from and perpetuates the underlying bias and stereotypes against persons with disabilities. We are of the view that the testimony of a prosecutrix with a disability, or of a disabled witness for that matter, cannot be considered weak or inferior, only because such an individual interacts with the world in a different manner, vis-a-vis their able-bodied counterparts. As long as the testimony of such a witness otherwise meets the criteria for inspiring judicial confidence, it is entitled to full legal weight. It goes without saying that the court appreciating such testimony needs to be attentive to the fact that the witness' disability can have the consequence of the testimony being rendered in a different form, relative to that of an able-bodied witness. In the case at hand, for instance, PW2's blindness meant that she had no visual contact with the world. Her primary mode of identifying those around her, therefore, is by the sound of their voice. And so PW2's testimony is entitled to equal weight as that of a prosecutrix who would have been able to visually identify the appellant.

C.3 The 'Caste' that is Difficult to Cast Away : Protection of Members of Scheduled Castes and Scheduled Tribes

52. Social movements in India for securing justice to those who have suffered centuries of caste-based discrimination paved way for the enactment of the SC & ST Act in 1989 to prevent commission of atrocities against members of the Scheduled Caste and Scheduled Tribe[42] communities. The Act also falls within the purview of Article 17 of the Constitution, which prohibits untouchability. The Statement of Objects and Reasons of the Act states the following:

"1. Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.

2. Because of the awareness created amongst the Scheduled Castes and the Scheduled Tribes through spread of education, etc., they are trying to assert their rights and this is not being taken very kindly by the others. When they assert their rights and resist practices of un-touchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the government allotted land by the Scheduled Castes and the Scheduled Tribes is resented and' more often these people become victims of attacks by the vested interests of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Castes persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes. Under the circumstances, the existing laws like the protection of Civil Rights Act, 1955 and the normal provisions of the Penal Code, 1860 have been found to be inadequate to check these crimes. A special legislation to check and deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary.

3. The term 'atrocity' has not been defined so far. It is considered necessary that

not only the term 'atrocity' should be defined but stringent measures should be introduced to provide for higher punishments for committing such atrocities. It is also proposed to enjoining, on the States and the Union territories to take specific preventive and punitive measures to protect the Scheduled Castes and the Scheduled Tribes from being victimised and where atrocities are committed, to provide adequate relief and assistance to rehabilitate them."

(emphasis added)

53. While the Statement of Objects and Reasons of the Act specifically mentions commission of rapes against SC & ST women as a form of atrocity committed against the SC & ST communities, it does not specifically articulate the distinct disadvantage women of these communities face on account of casteism, patriarchy and poverty at the same time. Shreya Atrey notes that while the anti-caste movements began in early 1900s and saw active participation of SC & ST women, their oppression was imagined only on the basis of caste rather than patriarchy[43]. On the other hand, the mainstream feminist movement also failed to take into consideration the specific forms of oppression that SC & ST women face not only at the hands of upper caste men but also upper caste women. To reframe the words of the Combahee River Collective Statement, a classic text in US anti-racist feminism - the SC & ST women *struggled together with* SC & ST men against casteism, while they also *struggled with* men about sexism.[44] Adrija Dey in her work has specifically highlighted that class, caste, geography and religion play a pivotal role in how gender violence is perceived and how punishments are meted out in the criminal justice system.[45] How pervasive sexual violence is against women from SC & ST community is emphatically stated by V. Geetha in extract her book titled 'Undoing Impunity':

"As for sexual violence, Dalit women activists understood it to be part of a continuum of violence that Dalit women experienced : in a life-world where food, water, clean living spaces are routinely denied to Dalit women, where their labour was exploited, and no protection available in their places of work, where to be in bondage to a landlord or petty trader was commonplace, and at all times they are viewed as sexually available, and humiliated in their bodily being, sexual violence emerged as not an exceptional act of violence, but the most concentrated expression of a fundamental animus against Dalits"[46]

54. The above discussion highlights the social and economic context in which sexual violence against women from SC & ST communities occurs. This contextualized legal analysis has to be adopted by the Court which is sensitive to the nature of evidence that is likely to be produced in a case where various marginalities intersect. In the present case, a distinct individualized experience for PW2 is created on account of her gender, caste and disability due to her association with wider groups that face a societal disadvantage.

C.4 Section 3(2)(v) of SC & ST Act

55. Section 3(2)(v) of the SC and ST Act as it stood at the material time read as follows:

"3. Whoever not being a member of a Scheduled Caste or Scheduled Tribe ...

(v) commits any offence under the Penal Code, 1860 punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;"

56. Under Section 3(2)(v), an enhanced punishment of imprisonment for life with fine is provided where

(i) The offence is committed by a person who is not a member of a Scheduled Caste or Scheduled Tribe;

(ii) The offence arises under the Penal Code and is against a person or property and is punishable with imprisonment for a term of ten years or more; and

(iii) The offence is committed "on the ground that such person is a member of a Scheduled Caste or Scheduled Tribe" or such property belongs to such a person.

57. The key words are "on the ground that such person is a member of a SC or ST". The expression "on the ground" means "for the reason" or "on the basis of". The above provision (as it stood at the material time prior to its amendment, which will be noticed later) is an example of a statute recognizing only a single axis model of oppression. As we have discussed above, such single axis models require a person to prove a discrete experience of oppression suffered on account of a given social characteristic. However, when oppression operates in an intersectional fashion, it becomes difficult to identify, in a disjunctive fashion, which ground was the basis of oppression because often multiple grounds operate in tandem. Larrisa Behrendt, an aboriginal legal scholar from Australia, has poignantly stated the difficulty experienced by women facing sexual assault, who are marginalised on different counts, to identify the source of their oppression:

> "When an Aboriginal woman is the victim of a sexual assault, how, as a black woman, does she know whether it is because she is hated as a woman and is perceived as inferior or if she is hated because she is Aboriginal, considered inferior and promiscuous by nature?"[47]

58. Being cognizant of the limitation of Section3(2)(v) - as it stood earlier - in dealing with matters of intersectionality, we are however bound to apply the standard that has been laid down in the law. The expression "on the ground" was considered in a two-judge Bench judgment of this Court in *Dinesh Alias Buddha* v. *State of Rajasthan*[48], where the Court speaking through Justice Arijit Pasayat held:

> "15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste."

59. The Court held that in the absence of evidence to that effect, the offence under Section 3(2)(v) would not stand established. This principle was subsequently followed in a two judge Bench judgment of this Court in *Ramdas* v. *State of Maharashtra*[49] where it was held that merely because a woman belongs to the SC & ST community, the provisions of the SC & ST Act would not be attracted in a case of sexual assault. This Court observed that there was no evidence to prove the commission of offence under Section 3(2)(v) of the SC & ST Act.

60. The contours of the terms "on the ground of" have been explicated by this Court in the following cases. In *Ashrafi* v. *State of Uttar Pradesh*[50], a two judge Bench of this Court held that conviction under Section 3(2)(v) of the SC & ST Act cannot be sustained because the prosecution could not prove that the rape was committed only on the ground that the woman belonged to the SC & ST community. This Court speaking through Justice R Banumathi held:

> "9. The evidence and materials on record do not show that the Appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the Appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the Appellant Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained." (emphasis added)

61. In another judgment of this Court in *Khuman Singh* v. *State of MP*[51], Justice R Banumathi speaking for this Court held:

> "As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar"-Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable."
>
> '(emphasis supplied)

62. In the above two extracts, this Court has interpreted Section 3(2)(v) to mean that the offence should have been committed "only on the ground that the victim was a member of the Scheduled Caste." The correctness of this exposition. Is debatable. The statutory provision does not utilize the expression "only on the ground". Reading the expression "only" would be to add a restriction which is not found in the statute. The statute undoubtedly uses the words "on the ground' but the juxtaposition of "the" before "ground" does not invariably mean that the offence ought to have been committed only on that ground. To read the provision in that manner will dilute a statutory provision which is meant to safeguard the Scheduled Castes and Scheduled Tribes against acts of violence which pose a threat to their dignity. As we have emphasized before in the judgment, an intersectional lens enables us to view oppression as a sum of disadvantage resulting from multiple marginalized identities. To deny the protection of Section 3 (2) (v) on the premise that the crime was not committed against an SC & ST person solely on the ground of their caste identity is to deny how social inequalities function in a cumulative fashion. It is to render the experiences of the most marginalized invisible. It is to grant impunity to perpetrators who on account of their privileged social status feel entitled to commit atrocities against socially and economically vulnerable communities. This is not to say that there is no requirement to establish a causal link between the harm suffered and the ground, but it is to recognize that how a person was treated or impacted was a result of interaction of multiple grounds or identities. A true reading of Section 3(2)(v) would entail that conviction under this provision can be sustained as long as caste identity is one of the grounds for the occurrence of the offence. In the view which we ultimately take, a reference of these decisions to a larger bench in this case is unnecessary. We keep that open and the debate alive for a later date and case.

63. If the evidence in this case was sufficient to establish the commission of the offence on the ground that PW2 was a member of a Scheduled Caste, a fresh look at the judgments in *Ashrafi* (supra) and *Khuman Singh* (supra) would have been warranted. However, a close look at the evidence would demonstrate that the prosecution has not led evidence to prove the ingredients of section 3(2)(v). Unfortunately, there has been a serious gap in the evidence on that count. In the present case, PW11 who was the Investigating Officer deposed:

> "PW 1 and PW2 did not state before me that since she belongs to Schedule Caste the accused committed the offence. Part 1 C.D does not disclose in specific that the accused was handed over to the Circle. 'Inspector of police. Witness adds by the time he reached the scene of offence the Sub Inspector and Circle inspector of police were present and the witnesses present there handed over to the accused to them in turn he instructed them to take the accused to Mahanandi Police Station. It is not true to suggest that my statement that the accused was handed over to Sub Inspector of police or Circle Inspector of police is false as accused was not present

at the scene of offence."

64. The Sessions Judge noticed the deposition of PW11. However, the Sessions Judge noted that Exhibit P-1 disclosed that PW 2 belongs to a Scheduled Caste. The Sessions Judge also observed in paragraph 39 of the judgment that PW1, who is the mother of PW2 is an "illiterate village rustic woman" and merely because she did not mention in the report or statement to the police that the accused committed the offence on the ground that PW2 belonged to the Scheduled Caste is not fatal to the case of the prosecution under Section 3(2)(v) of the SC & ST Act. The Sessions Judge has also made observations in that regard in paragraph 40 of the judgment which has been extracted earlier where he stated that the accused would not have dared to commit the crime if PW2 belonged to an upper caste community particularly in a village atmosphere. In appeal, the submission that the ingredients of the offence under Section 3(2)(v) were not established was specifically urged before the High Court. The submission was dismissed with the observation that "even otherwise still the offence under Section 376(1) of the Penal Code is made out". Both the Sessions Judge as well as the High Court have failed to notice the crucial ingredient of Section 3 (2)(v) (as it stood at the material time prior to its substitution by Act 1 of 2016)[52].

65. The issue as to whether the offence was committed against a person on the ground that such person is a member of a SC or ST or such property belongs to such member is to be established by the prosecution on the basis of the evidence at the trial. We agree with the Sessions Judge that the prosecution's case would not fail merely because PW1 did not mention in her statement to the police that the offence was committed against her daughter because she was a Scheduled Caste woman. However, there is no separate evidence led by the prosecution to show that the accused committed the offence on the basis of the caste identity of PW2. While it would be reasonable to presume that the accused knew the caste of PW2 since village communities are tightly knit and the accused was also an acquaintance of PW2's family, the knowledge by itself cannot be said to be the basis of the commission of offence, having regard to the language of Section 3(2)(v) as it stood at the time when the offence in the present case was committed. As we have discussed above, due to the intersectional nature of oppression PW2 faces, it becomes difficult to establish what led to the commission of offence - whether it was her caste, gender or disability. This highlights the limitation of a provision where causation of a wrongful act arises from a single ground or what we refer to as the single axis model.

66. It is pertinent to mention that Section 3(2)(v) was amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which came into effect on 26 January 2016. The words "*on the ground of*" under Section 3(2) (v) have been substituted with "*knowing that such person is a member of a Scheduled Caste or Scheduled Tribe*". This has decreased the threshold of proving that a crime was committed on the basis of the caste identity to a threshold where mere knowledge is sufficient to sustain a conviction. Section 8 which deals with presumptions as to offences was also amended to include clause (c) to provide that if the accused was acquainted with the victim or his family, the court shall presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise. The amended Section 8 reads as follows:

> "8. Presumption as to offences. - In a prosecution for an offence under this Chapter, if it is proved that
>
> (a) the accused rendered [any financial assistance in relation to the offences committed by a person accused of], or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;
>
> (b) a group of persons committed an offence under this Chapter and if it is

proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

[(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.]"

67. The Parliament Standing Committee Report on Atrocities Against Women and Children has observed that, "high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration" and recommends inclusion of provisions of SC & ST Act while registering cases of gendered violence against women from SC & ST communities[53]. However, as we have noted, one of the ways in which offences against SC & ST women fall through the cracks is due to the evidentiary burden that becomes almost impossible to meet in cases of intersectional oppression. This is especially the case when courts tend to read the requirement of "on the ground" under Section 3(2)(v) as "only on the ground of". The current regime under the SC & ST Act, post the amendment, has facilitated the conduct of an intersectional analysis under the Act by replacing the causation requirement under Section 3(2)(v) of the Act with a knowledge requirement making the regime sensitive to the kind of evidence that is likely to be generated in cases such as these.

68. However, since Section 3(2) (v) was amended and Clause (c) of Section 8 was inserted by Act 1 of 2016 with effect from 26 January 2016 these amendments would not be applicable to the case at hand. The offence in the present case has taken place before the amendment, on 31 March 2011. Therefore, we hold that the evidence in the present case does not establish that the offence in the present case was committed on the ground that such person is a member of a SC or ST. The conviction under Section 3(2)(v) would consequently have to be set aside.

C.5 Punishment under Section 376 of the IPC

69. Mr Harinder Mohan Singh, learned Counsel has submitted that as a sequel to the setting aside of the conviction under Section 3(2)(v), the imposition of a sentence of imprisonment for life for the offence under section 376 needs to be modified. In this context, learned Counsel relied upon the provisions of Section 376(1).

70. Now Section 376(1), as it stood at the material time prior to its substitution by Act 13 of 2013, was substituted by the Criminal Law (Amendment) Act 1983 (Act 43 of 1983) with effect from 25 December 1983. Section 376(1) as substituted by the amendment read as follows:

"376. Punishment to rape : (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

71. Essentially, the submission which has been urged on behalf of the appellant is that under Section 376(1) as it then stood, Parliament had made provisions for:

(i) A minimum sentence of seven years;

(ii) The imposition of a sentence of imprisonment for a term of less than seven years for adequate and special reasons to be recorded by the Court;

(iii) A term of imprisonment extending to ten years; and

(iv) A term of imprisonment for life.

72. In the context of (iii) and (iv) above, the words used in Section 376(1) were "but which may be for life or for a term which may extend to ten years".

73. On behalf of the appellant it has been urged that in the present case the Sessions Judge proceeded to impose a term of imprisonment for life on the basis that an offence under Section 3(2)(v) was established. If it is held that the offence under Section 3(2)(v) has not been established, the Sessions Judge, it was urged, erred in taking the view that the court was not inclined to exercise its discretion "to give lesser punishment to the accused". In other words, it was submitted that the Sessions Judge proceeded on the basis that a sentence of imprisonment for life was the norm and there was a discretion to award a lesser punishment, which is erroneous.

74. In evaluating the submission, it is necessary to note that the Sessions Judge came to the conclusion that the appellant was guilty of an offence under Section 3(2)(v) of the SC and ST Act and, independent of that, also of an offence punishable under Section 376(1) of the Penal Code. In considering the sentence to be imposed in respect of the two distinct offences, the Sessions Judge held that:

(i) A sentence of imprisonment for life should be imposed for the offence under Section 376(1); and

(ii) A sentence of imprisonment for life would have to be imposed for the offence under Section 3(2)(v) of the SC and ST Act.

75. For the reasons which we have indicated earlier we have come to the conclusion that the ingredients of the offence under Section 3(2)(v) of the SC and ST Act were not established. The issue which survives for consideration is as to whether the punishment of imprisonment for life in respect of the offence under Section 376(1) should have been imposed.

76. On a plain reading of Section 376(1), as it stood after its insertion with effect from 25 December 1983 by Act 43 of 1983, it is evident that a sentence of imprisonment for life is one of the sentences contemplated by the provision. The Criminal Law Amendment Act 1983 was introduced with the aim of bringing widespread amendments to the laws of rape in the country, making it difficult for the offenders to escape conviction. The stated object and purpose of the Act was:

"There have been pressing demands inside and outside Parliament for the amendment of the law relating to rape so that it becomes more difficult for the offenders to escape conviction and severe penalties are imposed on those convicted. [...]

2. [...] The changes proposed in the Bill have been formulated principally on the basis of the following considerations:—

[...]

(3) minimum punishments for rape should be prescribed;"

77. Pursuant to the above-mentioned objective, Section 376(1) provided that except for cases covered by sub-Section (2), a person committing rape shall be punished with imprisonment of either description for a term which shall not be less than seven years. However, the proviso stipulated that the court may for 'adequate and special reasons' to be mentioned in the judgment impose a sentence of imprisonment for a term of less than seven years. The minimum sentence of seven years could, in other words, be reduced to a lesser term only for adequate and special reasons to be recorded in the judgment. This Court has time and again noted that adequate and special reasons depend on the facts and circumstances of each case. These special and adequate reasons are an exception to the rule and must be used sparingly and interpreted strictly as held by this Court in *State of Madhya Pradesh* v.

Bala[54]. Section 376(1) however also stipulated that the term of imprisonment "may be for life or for a term of ten years".

78. Subsequently, in 2013, post the *Nirbhaya case*, the Criminal Law Amendment Act 2013 was brought into force which amended Section 376(1). The Parliament sought to take a tougher stand on crime against women and limited the discretion of the judiciary regarding imposition of sentences for offences involving rape by providing a minimum punishment of seven years and a maximum punishment of life imprisonment, without any exceptions for reduction of sentence. In 2018, Section 376 has been further amended by the Criminal Law Amendment Act 2018 (Act 22 of 2018) by which the minimum punishment has been enhanced to ten years, with the maximum punishment remaining the same.

79. Having detailed the amendments in Section 376 by the Parliament, we are cognizant that we must apply the law as it was at the time of occurrence of the crime. The range of punishment within which we must exercise our judicial discretion is the imposition of a minimum punishment of 7 years (or less on existence of adequate and special reasons), or 10 years or imprisonment for life. In determining the appropriate sentence, this Court has consistently laid down that we must of necessity be guided by all the relevant facts and circumstances including

(i) The nature and gravity of the crime;

(ii) The circumstances surrounding the commission of the sexual assault;

(iii) The position of the person on whom the sexual assault is committed;

(iv) The role of the accused in relation to the person violated; and

(v) The possibility of the rehabilitation of the offender.

80. The above factors are relevant for the determination of the quantum of punishment as held in *Ravji* v. *State of Rajasthan*[55], *State of Karnataka* v. *Krishnappa*[56], and *State of Punjab* v. *Prem Sagar*[57] among others.

81. In addition to these factors, we must also be alive to the intersectional identity of PW2 and the underlying societal factors within which the offence was committed. PW2 is a woman who is blind since birth and is a member of a Scheduled Caste. These intersectional identities placed her in a uniquely disadvantageous position. The Chhattisgarh Pradesh High Court in *Tekan* v. *State of Madhya Pradesh (Now Chhattisgarh)*[58] dealt with the conviction of a person accused of raping a blind woman on multiple occasions, on the promise of marriage. The High Court was acutely aware of the misuse of the woman's disability by the accused and sentenced him to 7 years of rigorous imprisonment. The conviction and sentence were later upheld by this Court[59]. This Court also dealt with the question of compensation to be paid to the prosecutrix and the physical disadvantage accruing to her on account of her disability. In doing so, Justice M Y Eqbal, speaking for the two-judge bench, noted:

> "15. Coming to the present case in hand, victim being physically disadvantaged, she was already in a socially disadvantaged position which was exploited maliciously by the accused for his own ill intentions to commit fraud upon her and rape her in the garb of promised marriage which has put the victim in a doubly disadvantaged situation and after the waiting of many years it has worsened. It would not be possible for the victim to approach the National Commission for Women and follow up for relief and rehabilitation. Accordingly, the victim, who has already suffered a lot since the day of the crime till now, needs a special rehabilitation scheme." (emphasis supplied)

82. Similarly, we are also aware of the disadvantage faced by women (and persons generally) belonging to the Scheduled Castes and Scheduled Tribes. As explained above, it is difficult and, in our opinion, artificial to delineate the many different identities of an individual which overlap to place them in a disadvantaged position of power and create the circumstances for heinous offences such as rape to occur. At this

point, it would be relevant to note that a series of decisions of this Court rendered by three-judge benches[60] and two-judge benches[61], have stated that "*socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy*". However, it is necessary to understand the context in which this finding was made. In all of these cases, the Court was dealing with the plea of mitigation of sentence awarded by the High Courts or the lower courts on the ground of existence of 'adequate and special reasons' *on account of the accused* being a member of the scheduled caste/tribe; belonging to a rural background; or being illiterate. It is on this count that the Court rejected such a plea given the heinous nature of the crime of rape and the gravity of the criminal act. In our opinion, these judgments do not bar us from taking a holistic view of the various intersectional identities which form a vital part of the facts and circumstances of the act and speak to the nature of the crime.

83. In the present case, several circumstances bearing on the sentence must be borne in mind. First, PW2, who was subjected to a sexual assault was blind since birth. Second, the appellant was known to the brothers of PW2, including PW3. The appellant used to visit the house in which PW2 resided with her parents and brothers. Bereft of eye-sight, PW2 was able to identify the appellant by his voice with which she was familiar. Third, shortly before entering the home of PW2, the appellant enquired of PW1 where her sons were, when he was told that they were not at home. PW1 proceeded with her chores at a public water tap. Taking advantage of the absence of the members of the family from the family home, the appellant entered the house and subjected PW2 to a sexual assault. PW1 has deposed that when she entered the house together with PW3, PW4 and PW5 she found PW2 in a nude condition on the ground bleeding from the injuries sustained on her genitals. The nature and circumstances in which the offence has been committed would leave no manner of doubt that the appellant had taken advantage of the position of the PW2 who was blind since birth. He entered the house, familiar as he was with members of the family, in their absence and subjected PW2 to a sexual assault. PW2 belongs to a Scheduled Caste. The prosecution has not led evidence to prove that the offence, as we have noticed, was committed on the ground that she belongs to a Scheduled caste within the meaning of section 3(2)(v) of the SC and ST Act. This is a distinct issue. But the fact that PW2 belonged to a Scheduled Caste is not a factor which is extraneous to the sentencing process for an offence under Section 376. It is in that context, that we must read the observations of the Sessions Judge with a robust common sense perception of ground realities. The appellant was 27 years old, a mature individual who was working as a coolie together with the brothers of PW2 for a couple of years. The nature and gravity of the offence in the present case is serious in itself and it is compounded by the position of PW2 who was a visually disabled woman. A heinous offence has been committed on a woman belonging to Scheduled Caste. The imposition of a sentence of imprisonment for life cannot be faulted.

D Conclusion and Summary of Findings

84. For the above reasons we have come to the conclusion that the conviction under Section 376(1) and the sentence imposed by the Sessions Judge must be affirmed. In the circumstances we order as follows:

(i) The conviction of the appellant for an offence under Section 3(2)(v) of the SC and ST Act and the sentence imposed in respect of the offence is set aside and the appeal allowed to that extent; and

(ii) The conviction of the appellant for an offence punishable under Section 376(1) of the Penal Code and the sentence of imprisonment for life is upheld. The fine of Rs. 1,000/- and default imprisonment of six months imposed by the Sessions Judge and affirmed by the High Court shall also stand confirmed.

85. The appeal is disposed of in the above terms.
86. Pending application(s), if any, stand disposed of.

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[1] "SC & ST Act"

[2] K. Crenshaw, *Demarginalizing The Intersection Of Race And Sex : A Black Feminist Critique Of AntiDiscrimination Doctrine, Feminist Theory, And Anti-Racist Policies*, University of Chicago Legal Forum, Vol. 4 (1989) 149 ("Crenshaw, Demarginalizing Intersection of Race and Sex").

[3] Id at p. 146.

[4] Mary Eaton, *Homosexual Unmodified : Speculations on Law's Discourse, Race, and Construction of Sexual Identity, in* Legal Inversions : Lesbians, Gay Men and the Politics of the Law, Didi Herman and Carl Stychin eds. (Philadelphia : Temple University Press 1995), p. 46.

[5] Ben Smith, *Intersectional Discrimination and Substantive Equality : A Comparative and Theoretical Perspective*, The Equal Rights Review, Vol. 16 (2016) 74 ("Smith, Intersectional Discrimination").

[6] Ibid, 83.

[7] Ibid, 81.

[8] Nitya Iyer, *Categorical Denials : Equality Rights and the Shaping of Social Identity*, Queen's Law Journal, Vol. 19 (1993-1994) 179.

[9] Ibid.

[10] Smith, Intersectional Discrimination, *supra n.* 5, p. 84.

[11] Gauthier de Boco, *Harnessing the Full Potential of Intersectionality Theory in Human Rights Law : Lessons from Disabled Children's Right to Education in* Intersectionality and Human Rights Law (Shreya Atrey & Peter Dunne, Hart Publishing 2020).

[12] PH Collins, *The Difference That Power Makes : Intersectionality and Participatory Democracy*, 8(1) Revista de Investigaciones Feministas (2017), p. 22, noting:"Intersectionality's emphasis on intersecting systems of oppression suggests that different forms of domination each have their own power grid, a distinctive "matrix" of intersecting power dynamics."

[13] D. Pothier, *Connecting Grounds of Discrimination to Real People's Real Experiences*, 13(1) Canadian Journal of Women and the Law (2001), p. 39, 51.

[14] Smith, Intersectional Discrimination, *supra n.* 5, p. 84.

[15] Ibid.

[16] (1997) 3 S.C.R. 484 at 506-507.

[17] (2018) 10 SCC 1.

[18] Justice JS Verma (Retd.), Justice Leila Seth (Retd.) & Gopal Subramanium, Report of the Committee on Amendments to Criminal Law, 23 January 2013, p. 38 ("JS Verma Committee Report").

[19] K Crenshaw, *Mapping the Margins : Intersectionality, Identity Politics, and Violence against Women of Color*, 43 *Stanford Law Review* 1241 (1991), 1246-50.

[20] Shreya Atrey, *Lifting as We Climb : Recognising Intersectional Gender Violence in Law*, 5 Oñati Socio-legal Series 1512 (2015), 1519-20.

[21] Id at 1531.

[22] *Samitri* v. *State of Haryana*, 2010 SCC OnLine P&H 2245.

[23] Saptarshi Mandal, *The Burden of Intelligibility : Disabled Women's Testimony In Rape Trials*, Indian Journal of Gender Studies, 20 No. 1 (2013) : 1-29, p. 20 ("Mandal, Disabled Women Testimony in Rape Trials").

[24] Human Rights Watch, "*Invisible Victims of Sexual Violence : Access to Justice for Women and Girls with Disabilities in India*", *available at* https://www.hrw.org/report/2018/04/03/invisible-victims-sexual-violence/access-justice-women-and-girls-disabilities, 3 April 2018 ("HRW Report").

[25] HRW Report, *supra n.* 24, p. 12.

[26] *Id* at p. 4.

[27] UN Human Rights Council, "*Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*," A/HRC/26/38/Add.1. *available at* http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-38-Add1_en.doc, 1 April 2014, para 72.

[28] S. Mohapatra and M. Mohanty, "*Abuse and Activity Limitation : A Study on Domestic Violence Against Disabled Women in Odisha*," *available at* http://swabhiman.org/userfiles/file/Abuse%20and%20Activity%20Limitation%20Study.pdf, 2004 referred in HRW Report, *supra n.* 24, at footnote 19.

[29] CREA, "*Count Me In! Violence Against Disabled, Lesbian, and Sex-working Women in Bangladesh, India, and Nepal*", http://www.creaworld.org/sites/default/files/The%20Count%20Me%20In%21%20Research%20Report.pdf, 2011 referred in HRW Report, *supra n.* 24, at footnote 20.

[30] HRW Report, *supra n.* 24, p. 8.

[31] JS Verma Committee Report, *supra n.* 18.

[32] CrPC, Section 154(1) proviso 2, (a).

[33] CrPC, Section 154(1) proviso 2, (b).

[34] CrPC, Section 164 (5A) (a), provisos 1 and 2.

[35] CrPC, Section 54A, proviso 1.

[36] CrPC, Section 54A, proviso 2.

[37] Ministry of Health and Family Welfare, Guidelines and Protocols : Medico-legal care for survivors/victims of sexual violence, 16 May 2019, *available at* https://main.mohfw.gov.in/sites/default/files/953522324.pdf, p. 14.

[38] HRW Report, *supra n.* 24, p. 7.

[39] Committee on the Rights of Persons with Disabilities, *"Concluding Observations on the Initial Report Of India"*, GE.19-18639(E) *available at* https://digitallibrary.un.org/record/3848327?ln=en, 29 October 2019, para 34.

[40] (1979) 4 SCC 349.

[41] Mandal, Disabled Women Testimony in Rape Trials, *supra n.* 23, p. 6.

[42] "SC & ST"

[43] Shreya Atrey, Intersectional Discrimination, Oxford University Press) 2019, p. 69.

[44] Combahee River Collective, *The Combahee River Collective Statement, in* Home Girls : A Black Feminist Anthology, Barbara Smith ed., (New York : Kitchen Table/Women of Color Press, 1983; reprint, New Brunswick, N.J. : Rutgers University Press 2000) 267. The original quote read, "We struggle together with Black men against racism, while we also struggle with Black men about sexism."

[45] A. Dey. *'Others' Within the 'Others' : An Intersectional Analysis of Gender Violence in India*, Gender Issues 36, 357-373 (2019).

[46] V. Geetha, Undoing Impunity : Speech After Sexual Violence, (Zubaan, 2016), Chapter 11.

[47] Larissa Behrendt, *Aboriginal Women and the White Lies of the Feminist Movement : Implications for Aboriginal Women in Rights Discourse*, 1 Australian Feminist Law Journal 1, (1993), p. 35.

[48] (2006) 3 SCC 771.

[49] (2007) 2 SCC 170.

[50] (2018) 1 SCC 742 ("Ashrafi").

[51] Criminal Appeal 1283 of 2019 decided on 27 August 2019 ("Khuman Singh").

[52] Section 3(2)(v) of the SC & ST Act, prior to its amendment, read:

"(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, (v) commits any offence under

the Penal Code, 1860 punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member shall be punishable with imprisonment for life and with fine"

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, w.e.f 26 January 2016, amended Section 3(2)(v) and currently states:

"(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, (v) commits any offence under the Penal Code, 1860 punishable with imprisonment for a term of ten years or more against a person or property [knowing that such person is a member of a Scheduled Caste or Scheduled Tribe or such property belongs to such member] shall be punishable with imprisonment for life and with fine".

[53] Parliament Standing Committee Report on Atrocities Against Women and Children, 15 March 2021, 107 *available at* https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/15/143/230_2021_3_14.pdf.

[54] (2005) 8 SCC 1.

[55] (1996) 2 SCC 175.

[56] (2000) 4 SCC 75.

[57] (2008) 7 SCC 550.

[58] 2014 Cri LJ 1409. Physical disability has been considered as an aggravating factor in sentencing by other High Courts as well. *See, for e.g.*, *Rabindrayan Das* v. *State*, 1992 Cri LJ 269, Orissa High Court.

[59] (2016) 4 SCC 461.

[60] *State of Karnataka* v. *Krishnappa* (2000) 4 SCC 75; *State of Madhya Pradesh* v. *Basodi* (2009) 12 SCC 318.

[61] *State of Karnataka* v. *Raju* (2007) 11 SCC 490; *State of Rajasthan* v. *Vinod Kumar*, (2012) 6 SCC 770; *State of Madhya Pradesh* v. *Santosh Kumar* (2006) 6 SCC 1.

2021 SCC OnLine SC 261

In the Supreme Court of India
(BEFORE D.Y. CHANDRACHUD AND M.R. SHAH, JJ.)

Writ Petition (Civil) No 1109 of 2020

Lt. Col. Nitisha and Others ... Petitioners;

Versus

Union of India and Others ... Respondents.

With
Writ Petition (Civil) No 1469 of 2020
With
Writ Petition (Civil) No 34 of 2021
With
Writ Petition (Civil) No 1223 of 2020
With
Writ Petition (Civil) No 1457 of 2020
With
Writ Petition (Civil) No 1158 of 2020
And With
Writ Petition (Civil) No 1172 of 2020

Writ Petition (Civil) No 1109 of 2020, Writ Petition (Civil) No 1469 of 2020, Writ Petition (Civil) No 34 of 2021, Writ Petition (Civil) No 1223 of 2020, Writ Petition (Civil) No 1457 of 2020, Writ Petition (Civil) No 1158 of 2020 and Writ Petition (Civil) No 1172 of 2020

Decided on March 25, 2021

The Judgment of the Court was delivered by

D.Y. CHANDRACHUD, J.:— This judgment has been divided into the following sections to facilitate analysis:

G.5 WSSCOs belonging to WSES(O) 27-31 and SSC(T&NT) 1-3 who had not completed 14 years of service as on the date of Babita Puniya

H Conclusion and directions

"*I ask no favour for my sex. All I ask of our brethren is that they take their feet off our necks*"[1]

-Late Justice Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States of America

A A long and winding road

2. By the judgment of this Court in *Secretary, Ministry of Defence* v. *Babita Puniya*[2], the claim of women engaged on Short Service Commissions[3] in the Indian Army for seeking Permanent Commission[4] was evaluated and held to be justified. Addressing the background of the dispute, the judgment described this as "a quest for equality of opportunity for women seeking PCs". As the Court observed, "a decade and more spent in litigation, women engaged on Short Service Commissions in the Army seek parity with their male counterparts". The battle for equality has been long drawn, engaging as much with reforming mindsets as with implementing constitutional principles.

3. The path traversed by the Women SSC Officers[5] commenced with a writ petition in public interest before the Delhi High Court in 2003. The judgment of the Delhi High Court which substantially upheld the entitlement of the WSSCOs was rendered on 12 March 2010[6]. The judgment of the Delhi High Court and its directions[7] formed the subject matter of the earlier proceedings before this Court which resulted in the decision in *Babita Puniya* (supra) being rendered on 17 February 2020. Between 12 March 2010, when the Delhi High Court pronounced its judgment, and 17 February 2020, when this Court rendered its decision in *Babita Puniya* (supra), there was no stay of the implementation of the judgment of the Delhi High Court. This, as a matter of fact, was clarified on 2 September 2011 in an order of this Court[8].

4. Despite the above clarification, the judgment of the High Court was not implemented by the Union Government. Several interim orders were issued for directing a stay on the release of the WSSCOs, for reinstatement in service coupled with an entitlement to salary. During the pendency of the appeal before this Court, the Union Government and the Ministry of Defence[9] ("MoD") issued a communication on 25 February 2019 envisaging the grant of PCs to WSSCOs in eight arms or services of the Army (in addition to the existing two streams of Judge Advocate General[10] and Army Education Corps[11] which had already been opened up for PC to WSSCOs). Eventually, in the judgment of this Court dated 17 February 2020, the following directions were issued to the Union Government, while taking on record its policy statement dated 25 February 2019:

"H. *Directions*

69. We accordingly take on record the statement of policy placed on the record in these proceedings by the Union Government in the form of the Letter dated 25-2-2019 and issue the following directions:

(i) The policy decision which has been taken by the Union Government allowing for the grant of PCs to SSC women officers in all the ten streams where women have been granted SSC in the Indian Army is accepted subject to the following:

(a) All serving women officers on SSC shall be considered for the grant of PCs irrespective of any of them having crossed fourteen years or, as the case may be, twenty years of service.

(b) The option shall be granted to all women presently in service as SSC officers.

(c) Women officers on SSC with more than fourteen years of service who do not opt for being considered for the grant of the PCs will be entitled to continue in service until they attain twenty years of pensionable service.

(d) As a one-time measure, the benefit of continuing in service until the attainment of pensionable service shall also apply to all the existing SSC officers with more than fourteen years of service who are not appointed on PC.

(e) The expression "in various staff appointments only" in Para 5 and "on staff appointments only" in Para 6 shall not be enforced.

(f) SSC women officers with over twenty years of service who are not granted PC shall retire on pension in terms of the policy decision.

(g) At the stage of opting for the grant of PC, all the choices for specialisation shall be available to women officers on the same terms as for the male SSC officers. Women SSC officers shall be entitled to exercise their options for being considered for the grant of PCs on the same terms as their male counterparts.

(ii) We affirm the clarification which has been issued in sub-para (*i*) of Para 61 of the impugned judgment [*Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115] and order of the Delhi High Court.

(iii) SSC women officers who are granted PC in pursuance of the above directions will be entitled to all consequential benefits including promotion and financial benefits. However, these benefits would be made available to those officers in service or those who had moved the Delhi High Court by filing the writ petitions and those who had retired during the course of the pendency of the proceedings."

5. This batch of petitions under Article 32 has questioned the manner in which the decision of this Court in *Babita Puniya* (supra) has been implemented.

6. Since the grievance in these proceedings emanates directly out of the steps taken by the Union Government to implement the earlier decision of this Court in *Babita Puniya* (supra), this Court has entertained the petitions under Article 32. Initially, in the counter affidavit filed by the Colonel Military Secretary (Legal) at the Integrated Headquarters of the Ministry of Defence (Army), an objection was raised to the maintainability of the petitions on the ground that the petitioners should be relegated to the pursuit of remedies before the Armed Forces Tribunal. However, this plea has not been pressed in the submissions by Mr. Sanjay Jain, learned Additional Solicitor General[12] appearing on behalf of the Union of India, the MoD and the Indian Army. The respondents, through their written submissions, have also agreed to formulate a policy for granting time-scale promotions to the WSSCOs who have been granted PC. Hence, only the core contested issues which arose in the course of the proceedings are being addressed on merits in this judgment.

B Steps for implementing the decision in Babita Puniya

7. The steps which were taken by the Union Government to implement the decision in *Babita Puniya* (supra) have been elaborated upon in the

(i) Counter Affidavit of the respondents; and

(ii) Written submissions formulated by the ASG.

8. Following the decision in *Babita Puniya* (supra), a governmental sanction was issued on 16 July 2020 for taking administrative steps to fulfill the directions. Accordingly, a set of General Instructions dated 1 August 2020 were issued for the conduct of a special selection proceeding by a "Special No. 5 Selection Board 2020" to screen WSSCOs for the grant of PC "based on existing policy regarding grant of permanent commission...applied uniformly to all SCC officers". These General Instructions were issued by the Integrated Headquarters of MoD (Army) for implementing the guidelines in *Babita Puniya* (supra). The relevant extracts are reproduced below:

"General

1. A Spl No 5 Selection Board (SB) 2020 will be held to screen the Short Service Commissioned WOs of the following courses, who are in service:

S No	Courses	Type of Consideration
(a)	WSES(O) -3 to 14 courses	For PC/To be Released with Pension forthwith (subject to completing 20 yrs pensionable service)
(b)	WSES(O)-15 to 26 courses	For PC/To serve till 20 yrs pensionable service & Released with pension
(c)	WSES(O)- 27 to 31 and SSCW (T&NT) - 1 to 3 courses	For PC/To be Released on completion of the period of Extension already granted

Aim

3. To lay down guidelines for submission of application by the WSES(O)s/SSCW(O)s for consideration for grant of PC by Spl No 5 SB 2020.

Scope

4. Following issues have been covered in the instructions:

a. Guidelines for preparation of application

b. Medical Board

c. Submission of application

d. Detailed checklist for submission of documents

e. Checklist/Misc Instrs for Unit & Sub-Unit Cdrs

Medical Board

9. All officers opting for PC have to undergo a medical board at the nearest Military hospital where facilities of medical specialists are available. The detailed instructions are contained in AO 110/81 & SAI 3/S/70, the extract of the same is as under:—

a. Medical Board Proceedings. Only those officers who are opting for PC and are SHAPE-1 or Permanent Low Medical Category (PLMC) will undergo a medical board as per AFMSF-2(ver 2002). Only one copy (ie original) of medical board proceedings [medical examination report on AFMSF-2 (ver 2002) format] without investigation reports and X-ray, duly approved by the competent authority, is required to be forwarded to MS Branch (MS-7B), through staff (medical) channel. Remaining copies of AFMSF-2 will be forwarded to AG/MP-5&6, DGMS-5 and respective controlling groups at the MS Branch. The medical board proceedings should reach MS Branch (MS 7B) latest by 11 Sep 20.

In case the medical documents are not submitted by the due date, the concerned officer will be considered as not opted for PC and will be dealt with as per the type of consideration mentioned at Para 1 above.

b. Officers with Temporary Low Medical Category (TLMC)

i. Officers with TLMC will submit the proceedings of medical categorization (AFMSF-15)/re-categorization [AFMSF-15A (ver 2002)] giving their present medical category. These documents should reach MS Branch (MS 7B) latest by 11 Sep 20. In case the medical documents are not submitted by the due date, the concerned officer will be considered as not opted for PC and will be dealt with as per the type of consideration mentioned at Para 1 above.

ii. Officers with TLMC, who are otherwise found fit for PC by the Spl No 5 SB, will be given a maximum time period of one year for stabilization of their medical category. Such offrs will forward their medical docu on AFMSF-2 as per Para 9(a) above, on becoming SHAPE-1 of PLVS This time period of one year will be counted from the last date of submission of medical documents as per Para 9(b)(i) above i.e. 11 Sep 20. Beyond the period, result of the board in respect of such offers will be declassified treating them to be medically unfit for PC.

iii. Women officers who are on maternity leave and cannot undertake medical examination, will forward the medical board proceedings vide which they were medically downgraded for maternity leave and follow instructions contained in Para 9 (b)(i) & (ii) above.

c. Eligibility of PC for Officers with PLMC. The low medical category should not be due to medical reasons (whether attributable to military service or not) but should have been caused as a result of casualties suffered in action during operations or due to injury or other disability sustained during duty (for example while traveling on duty, playing organized games under regimental arrangements, during trainings exercises and so on). In addition, medical categories lower than S1 or H2 or A3 or P2 or E2 or H2E2 or H2A3 or H2P2 or E2A3 or E2P2 are NOT ELIGIBLE for grant of PC. Officers are required to forward copies of Court of inquiry, Injury report (IAFZ 2006) and notification of battle casualty, if applicable in support of their medical category……"

(emphasis supplied)

9. Special No. 5 Selection Board was convened between 14 and 25 September 2020 to consider WSSCOs for the grant of PCs. According to the counter affidavit, this was "on same terms and criterion as their male counterparts". 615 WSSCOs were considered for the grant of PCs. The result of the Special No. 5 Selection Board was declared on 19 November 2020. According to the Union of India, Special No. 5 Selection Board was conducted in the following manner:

"[...]

a. The Military Secretary's Branch constituted a Selection Board as per the provisions of Army Order 18 of 1988, which is being uniformly followed for consideration for grant of permanent commission to all SSC male officers and women officers of AEC & JAG. All Board members were from outside the Military Secretary's Branch. A women officer of Brigadier rank from AMC was also a member of the Board.

b. Identity of the officers being considered, was hidden from the Board. Women officers who were being considered by the Board were permitted to attend the Board proceedings as observers. A list of such officers and days of their attendance is given at Annexure - R3.

c. As per the laid down criteria, confidential reports, discipline and vigilance report, if any, honours and awards etc, as on the 5th or 10th years of service, as the case may be, of the women officers, depending upon the terms and conditions opted by the respective officer, was taken into consideration by the Selection Board. This procedure was exactly similar to what was followed for the similarly placed corresponding course & entry (Technical or NonTechnical) made officers.

d. The Board examined the MDS (Master Data Sheet) of each officer, for grant of Permanent Commission and gave independent value Judgement marks without any mutual consultation.

e. The Board then compared the total marks of each officer out of 100, with the marks of the male officer with lowest merit granted permanent commission in her corresponding course & entry (Technical or NonTechnical). Post this, the Board recommended 422 out of 615 officers for grant of Permanent Commission, on merit basis, subject to them meeting the criteria of medical fitness and DV (Discipline and Vigilance). On scrutiny of these 422 officers, it emerged that 57 out of these 422 had not opted for grant of Permanent Commission. Options (choice) of officers being considered, is not disclosed to the board members during the consideration stage to avoid any biasness."

(emphasis supplied)

10. The result of the Special No. 5 Selection Board has been tabulated by the respondents in the following terms:

(i)	Number of WSSCOs considered	615
(ii)	Candidates found fit on merits subject to medical and discipline parameters	422
(iii)	Candidates who did not opt for PC[13]	57
(iv)	Officers not granted PC and being released with pension	68
(v)	Officers not granted PC and being granted extension upto 20 years of pensionable service	106
(iv)	Balance out of (ii)	365
(iv)(a) Candidates found fit on merit and on medical parameters and granted PC		277
(iv)(b) Details of remaining candidates		88
(a) Temporary Low Medical Category		42
(b) Rejected for not meeting the medical criteria		35
(c) Application for non-compliance with AO 110/1981		6
(d) Document under scrutiny		3
(e) Not clear from discipline and vigilance		2

Note : In the above list, 42 candidates who have been placed in the Temporary Low Medical Category have been granted one year stabilization period during which they have an opportunity to restore to the required criterion of medical fitness.

11. The above tabulation, supplied on affidavit by the respondents, does not account for 19 women officers in the breakup. The data provided by the petitioners, on an analysis of the consolidated result of the Special No. 5 Selection Board proceedings, indicates the following figures which aids a comprehensive analysis:

(i)	Number of WSSCOs considered	615
(ii)	Candidates granted PC	277
(iii)	Candidates whose result is withheld for various reasons, including TLMC	90
(iv)	Non-optees for PC:	58
	(a) To be released with pension, forthwith	10
	(b) To continue till 20 years of pensionable service	39
	(c) To continue till the expiry of their contractual period, without pension	9
(v)	Candidates who were not granted PC and to be released from service with pension, forthwith	34
(vi)	Candidates who were not granted PC and permitted to continue till 20 years of pensionable service	90
(viii)	Candidates who were not granted PC and are to continue till the expiry of their contractual period, with no post-retirement pension	66

C Criteria for the grant of PCs

C.1 Medical Criteria

12. One of the issues which has been debated in the present case is in regard to the SHAPE-1 qualification for grant of PC. The Army authorities have, in terms of the General Instructions dated 1 August 2020, stipulated that only those officers who are in SHAPE-1 would be granted PC. Officers in a Temporary Low Medical Category[14], who are otherwise found fit for PC by the Special No. 5 Selection Board are granted a time period of one year (at the maximum) for stablization of their medical category. Within a period of one year, the officers have to forward their medical documentation of having achieved SHAPE-1 status. As regards officers in the Permanent Low Medical Category[15], it has been stipulated that the low medical category should not be due to medical reasons (whether or not attributable to military service) but should be a result of casualties suffered in action during operations or due to injury or other disability sustained during the course of duty.

13. The medical criteria for the grant of PC are governed by Special Army Instructions dated 30 April 1970[16] (as amended from time to time in 1971, 1972, 1973 and 1993) and Army Order 110 of 1981[17]. According to the Union of India, "the criteria of medical fitness applied for grant of permanent commission, are exactly the same as applicable to other SSC officers". Whenever the Special No. 5 Selection Board of an SSC officer is deferred and is held subsequently after the passage of one or two years, an officer has to undertake a fresh medical examination for the Board.

14. Before adverting to SAI 3/S/70 and AO 110/1981, it is necessary to understand the meaning and content of the SHAPE-1 norm, which finds place in Army Order 9 of 2011[18].

Army Order 9 of 2011

15. The expression "SHAPE" has been explained in AO 9/2011 in the following terms:

"30. Medical Classification. Medical classification/reclassification of serving officers will be made by a duly constituted Medical Board after assessing his/her fitness under five factors indicated by the code letter SHAPE which will represent following functions (details thereof given in Appendix 'E'):—

S- Psychological including cognitive function abnormalities

H- Hearing

A- Appendages

P- Physical Capacity

E- Eye Sight"

16. In each of the above factors, the functional capacity for performing military duties is denoted by a descending order of fitness, denoted by numerals 1 to 5. Accordingly, while dealing with functional capacity, AO 9/2011 contains the following specifications:

"31. Functional Capacity. Functional capacity for military duties under each factor will be denoted by numerals 1 to 5 against each code letter indicating declining functional efficiency. These numerals will be used against the word SHAPE to denote the overall medical classification and also against each factor of SHAPE while describing the disability profile. General evaluation of these numerals will denote guidelines for employment of the officers as under:—

"1A- Fit for all duties anywhere.

1B- Fit for all duties anywhere; under medical observation and has no employability restrictions.

2- Fit for all duties but some may have limitations regarding duties which involve severe physical and mental stress and require perfect acuity of vision and hearing.

3- Except 'S' factor, fit for routine or sedentary duties but have limitations of employability, both, job wise and terrain wise as spelt out in Employment Management Index at Annexure II to Appendix 'E' to this Army Order.

4- Temporarily unfit for military duties on account of hospitalization/sick leave.

5- Permanently unfit for military duties."

Special Army Instruction-SAI 3/S/70

17. SAI/3/S/70 was issued on 30 April 1970 to regulate the grant of PCs to SSC officers. According to Para 2(b), the medical category mandating SHAPE-1 was stipulated in the following terms:

"(b) Must be in Medical Category AYE ONE (A-1). Those who have been placed in Medical Category 'A-2', 'B-1' and 'B-2' as a result of casualties suffered in action during operations may also be considered on merits of each case by the Government."

18. Para 2(b) was amended in 1972 (Army Instructions 102/72) in the following terms:

"(b) For medical fitness, the officer should satisfy the following conditions:—

(i) Their medical category (should not be lower than grade 2 under any one of the SHAPE factors excluding 'S' factor in which the grade should not be lower than 1. In exceptional cases grading of 2 in both 'H' and 'E' together may be acceptable.

(ii) The low medical categorisation should not be due to medical reasons whether attributable or not (sic) but should have been caused as a result of causalities suffered in action during operations or due to injury or other disability sustained during duty (for example while travelling on duty, playing, organised games under regimental arrangements, during training exercises and so on).

(iii) They should be found fit for permanent commission in all other respects, through Services Selection Board selection where applicable at which selection they will be given modified tests, taking into account the specific disability in each case."

19. On 1 August 1999, by corrigendum No 14/99, para 2(b)(i) was substituted as stated below:

"Existing Para 2(b)(i) is substituted as under:—

"Their medical category should not be lower than S1 or H2 of A3 or P2 or E2 or H2E2 or H2A3 or H2P2 or E2A3 or E2P2. However, grant of Permanent Commission to low medical

category Short Service Commissioned Officers will be subject to rendition of the requisite certificate in terms of AO 20/75.""

20. The above policy provides a concession to such candidates who have suffered an injury on the line of duty as a result of which their medical category has been lowered. However, the concessions have been qualified. For ease of reference, S1 indicates grade-1 in the S factors; H2 means grade-2 in the H factors and A3 means grade-3 in the A factor. The requirement of being in SHAPE-1 is a pre-requisite, even in respect of such arms and services, where both men and women join at the threshold age of up to 45 years, such as in the Army Medical Corps. While insisting upon the observance of the SHAPE-1 norm for the grant of PC, the Army also envisages a Temporary Low Medical Category - TLMC - under which an officer is given a period of one year, called the category stabilization period, to return to SHAPE-1.

21. In the batch of writ petitions, eighty six petitioners are involved:

(i) 47 petitioners in Writ Petition (C) 1172 of 2020

(ii) 9 petitioners in Writ Petition (C) 1457 of 2020

(iii) 5 petitioners in Writ Petition (C) 34 of 2021

(iv) 1 petitioner in Writ Petition (C) 1469 of 2020

(v) 14 petitioners in Writ Petition (C) 1223 of 2020

(vi) 9 petitioners in Writ Petition (C) 1109 of 2020

(vii) 1 petitioner in Writ Petition (C) 1158 of 2020

22. The Army authorities submitted that out of 86 petitioners, 55 are still in SHAPE-1. Out of the 55, 30 are above the age of 45 going up to 52 years in age. 23 other petitioners have been placed in PLMC, while the remaining 9 have been placed in TLMC.

C.2 Substantive Assessment for PC

Special Army Instruction-SAI 3/S/70

23. SAI 3/S/70 stipulated that "serving short service commissioned officers granted commission under A-III/S/64 will be eligible for the grant of PCs under the terms and conditions of service" as laid down in the instruction. Para 2(b) prescribed medical requirements of SHAPE-1 with certain exceptions for duty-related casualties (extracted in the earlier section of this judgment). Para 5 envisaged that officers whose applications were in order would be called for an interview by the Services Selection Board. Under para 6(b), the Services Selection Boards were to consider the applicants for the grant of PC. The applicants' performance as short service commissioned officers would be evaluated and reckoned by the government in assessing their suitability for the grant of PC. Those found suitable for the grant of PC were to be placed on a panel. PCs would be granted to those found suitable in all respects in the arms or services as the case may be, the final decision resting with the government. Para 89(b) stipulated that

"(b) Permanent commission will be granted depending on the vacancies existing in the Arms or Services and the officers suitable. The officer's choice of Arm/Service will be given due consideration but there is no commitment to give any particular Army Service."

24. Para 10 contained provisions for the manner in which the period as SSC officer would be counted; para 11 for pay and allowances; para 12 for pensionary awards; para 13 for termination of commission and para 14 for other conditions of service.

Army Order 110/1981

25. Officers granted SSC, both technical and non-technical were considered for PCs on the basis of their service performance in the fifth year of their service. AO 110/1981 *inter alia* contained instructions in regard to the submission of applications and evaluation of medical status by the medical boards. Officers who were not desirous of being considered for the grant of PC or for extension of SSC service, and sought release on the expiry of their contractual terms of five years were required to indicate their option. Similarly, officers who were non-optees for permanent commissions but were willing to continue on extended SSC services were required to furnish certain forms.

MoD Policy Letter dated 30 September 1983

26. This specified the criteria for grant of PC to SSC officers. The policy letter envisaged that:

"The Selection Board will assess each officer's performance based on computerized Member Data Sheet. To facilitate the members to arrive at their decision, a computerized Member Data Sheet (MDS) indicating the year wise performance of each officer including performance on

courses, strong points, weak points, disciplinary awards etc., will be made available. The computer evaluation as spelt out in para 4 below will have 80% weightage while 20% weightage will be given to the assessment of the members of the Selection Board."

27. The above policy letter contemplated the preparation of a computerized Member Data Sheet indicating the year-wise performance of the officer. Eighty per cent weightage would be given to the evaluation in the Member Data Sheet[19] while twenty per cent would be assigned for the assessment by the members of the selection board. The members of the selection board were required to take into account the MDS and bear in mind, among other things, performance on courses, strong/weak points, technical assessment and the disciplinary background, for which they would award marks out of 20. The members of the selection board were also required to award the following gradings. besides awarding marks:

(a)	Recommended for Permanent Commission	'B'
(b)	Recommended for Extension only	'BE'
(c)	Rejected for Permanent Commission and extension	'R'
(d)	Withdrawn (for want of sufficient material/administrative reasons)	'W'
(e)	Deferred	'D'

28. Para 4 of the policy letter envisaged that for preparing the evaluation sheets, the following information regarding officers would be computed namely:

(i) QAP : Overall performance of the officer is evaluated by taking the average of figurative assessment of all reporting officers other than "PTO" and "HTO". Average will be worked out for each year as well as for the entire period of officer's service. The latter QAP will be converted into a proportion of 60 marks;

(ii) Honours and Awards : Honours and Awards received by the officer will be allotted marks as under:

Param Vir Chakra/Ashoka Chakra	6
Maha Vir Chakra/Kirti Chakra	4
Vir Chakra/Shaurya Chakra	3
Sena Medal/VSM	2
Mention-in-Despatches	1.5
GOAS's Commendation Card	1

The marks earned for honours and awards were to be added up, subject to the condition that the maximum will not exceed 6 marks.

(iii) Performance grading obtained by the officers on each courses : maximum 10 marks;

(iv) Strong points reflected in each ACR earned by the officer : maximum 4 marks;

(v) Recommendation for PC : a positive recommendation would carry 0 mark while a 'No' would carry minus 2 marks;

(vi) Weak points : Minus 3 marks could be awarded on the reflection of the weaknesses of the officer with reference to qualities of dependability, discipline, integrity and loyalty, financial management, addiction to wine, lack of morals and personal affairs. Any other weak point would be awarded a minus 0.5 mark; and

(vii) Disciplinary awards : the marks would be considered for denial of PC.

29. The marks/average worked out on the above basis were to be duly computed out of a total of 80 marks.

Army Order 18/1988

30. AO 18/1988 formulated the system of selection for the grant of PCs. Para 1 of AO 18/1988 stipulated grant of PC in the 5th year of service to officers:

"Officers granted Short (sic) Service Commission under AI 11/S/64 are considered for grant of Permanent Commission by No. 5 Selection Board on this basis of their record profile, in the fifth year of their service. Option and Medical Board Proceedings are

asked for 3 to 4 months in advance in terms of AO 110/81. The proceedings are approved by the Government."

(emphasis supplied)

31. Under para 2, the first 50 per cent of officers screened by the Selection Board in order of merit were to be granted permanent commission; the next 35 per cent would be granted extension for five years; and the remaining 15 per cent would be released on completing the contractual period of five years' service. Para 3 stipulates that the selection board would be convened twice a year in May and September/October to ensure that officers of a particular course are screened before completing the initial contractual period of five years' service. The composition of Selection Board No. 5 was provided:

"4. The occupation of No. 5 Selection Board to screen SSCOs for PG is as under:

(a) Chairman - Div Cdr (1)

(b) Members - Bde Cdr (2)

Brig on Staff (1) outside Army HQ DDG Org/DDG PS/DDG Rtg(I)

(c) Secretary - Col. MS-7"

32. Under para 6, the gradings to each officer were to be in the following terms:

(a)	Recommended for Permanent Commission	'B'
(b)	Recommended for Extension only	'BE'
(c)	Rejected for Permanent Commission and extension	'R'
(d)	Withdrawn (for want of sufficient material/administrative reasons)	'W'
(e)	Deferred	'D'

33. Para 7 provided for the assessment of the record profile or each candidate:

"7. The undermentioned aspects are taken into account for computer evaluation and assessment by members of the Selection Board:

(a) Annual Confidential Report.

(b) Honours and awards.

(c) Performance on courses

(d) Recommendations for Permanent Commission.

(d) Disciplinary awards.

(e) Strong and Weak Points."

34. Para 8 provided that a minimum of three ACRs would be essential to consider the case of an officer for PC. If an officer did not have the requisite number of ACRs, the case would be withdrawn by the Selection Board and the officer would be granted an extension of one year's service during which, his case would be considered for grant of PC. Para 9 contained a provision for obtaining a "comprehensive service data output" in respect of each officer called the Member Data Sheet. The guidelines for assessment contained in para 13 are extracted below:

"13. Assessment is made in accordance with the criteria approved by the Government. The salient points are given below:

(a) Officers are assessed on the merits of their service performance as reflected in the ACRs and course reports filed in the CR Dossier. Personnel knowledge of an officer neither jeopardizes his selection nor is the basis for favourable consideration of his case.

(b) While evaluating ACRs the possibility of subjective/inflated reporting and fluctuation in performance of officers occasioned by following circumstances, are taken note of:

(i) Last ACR before assessment for PC.

(ii) Set of initiating/reporting officers endorsing more than two reports.

(iii) Period covered by the report, if less than six months.

(c) Rating and assessment in mandatory qualities of loyalty, integrity and dependability are given due weightage.

(d) More weightage are given to reports earned from regimental appointment as opposed to staff/ERE if any.

(e) Low Medical Category of the officer does not influence the assessment as it is an administrative restriction and not a; criteria for assessment."

(emphasis supplied)

35. The requirements of medical fitness were provided in the following terms:

"21. Officers should satisfy the following conditions:

(a) Their medical category should not be lower than grade 2 under any one of the SHAPE factors excluding 'S' factor in which the grade should not be lower than 1. In exceptional cases grading of 2 in both 'H' and 'E' together may be acceptable.

(b) The low medical categorisation should not be due to medical reasons whether attributable or not but should have been caused as a result of casualties suffered in action during operations or due to injuries or other disability sustained during duty, (for example while travelling on duty, playing organized games under regimental arrangements, during training exercise and so on)."

36. Under para 23, SSC officers who are not selected for PC but are fit, suitable and willing would be granted an extension of five years of the SSC period beyond the initial tenure of five years, on the expiry of which they would be released from the Army. Under para 24, officers other than those in an unacceptable low medical category or those charged with disciplinary action would continue to serve for a total period of ten years or until they were granted PC whichever is earlier. Para 34 provided that though SSCOs would be screened only once in the fifth year of service by the Selection Board for PC. In exceptional cases, the cases of officers for PC could be reviewed under a 'Special Review'.

MoD Policy Letter dated 15 January 1991

37. A policy letter was issued by the MoD on 15 January 1991 to regulate the grant of PCs to SSCOs. The policy letter envisaged:

"(a) A maximum of 250 SSCOs will be granted Permanent Commission per year. The number of vacancies for the batches within the year will be allotted in proportion to their *inter se* strength.

(b) Minimum acceptable cut-off grade for grant of Permanent Commission to SSCOs will be 60%. This may, however, be reviewed by Army HQrs. every two years, keeping in view the rating tendencies as at that time.

(c) In case more than the specified number of officers make the grade from the batches considered in a year, the requisite number only, i.e. 250 will be granted Permanent Commission on competitive merit.

(d) All SSCOs, other than non-optees and those considered unfit for retention by the Selection Board, will be granted five year extension."

(emphasis supplied)

38. From the above stipulations it becomes evident that

(i) An annual cap of 250 SSCOs for the grant of PCs was introduced;

(ii) The cut-off grade was fixed at 60 per cent, which was liable to be reviewed after every two years;

(iii) In the event that more than 250 officers were to make the grade from the batches considered for the year, only 250 officers would be granted PC on the basis of competitive merit; and

(iv) Other than SSCOs who did not opt for PC and those found unfit, all other SSCOs would be granted a five year extension.

39. These stipulations make it abundantly clear that a cut-off grade of 60 per cent was provided as the eligibility for the grant of PC. An annual cap of 250 was introduced. In the event that the number of SSCOs who fulfill the eligibility in terms of the 60 per cent grade exceed the cap of 250, *inter se* competitive merit would be the basis for determining those who would form a part of 250 SSCOs who would be granted PC. Consequently, where the number of SSCOs who had qualified fell short of the cap of 250 there was no occasion to apply *inter se* competitive merit. Moreover, the other SSCOs falling beyond the cap of 250 would be granted a five year extension unless they were "non-optees" or unfit for retention.

MoD Policy Letters dated 20 July 2006

40. On 20 July 2006, the Integrated Headquarters of MoD (Army) provided revised terms and conditions of service for men and women SSCOs both in the technical and non-technical branch:

(i) Grant of SSC (non-technical) to male officers : For SSC men officers in the non-technical branch of the Army, a tenure of 14 years' service was provided - an initial period of ten years extendable by four years. They would be entitled to substantive promotions to the rank of Major and Lieutenant Colonel[20] on the completion of 2, 6 and 13 years respectively of reckonable commissioned service. Serving SSCOs were given an option to be governed by the provisions of the revised scheme. Those who opted for the revised scheme who were on extension of service and had already been considered for PC on the completion of the seventh year or those who did not opt for PC on the completion of the seventh year, would not be eligible for further consideration for the grant of PC in the tenth year of service. On the other hand, optees between the fifth and seventh year of service who had not exercised their second option for PC, could be considered again for the grant of PC in the tenth year of service. Officers between the fifth and seventh year of service who had not exercised their second option were allowed to opt to continue under the old scheme;

(ii) Grant of SSC (technical) to men officers Extension of tenure and substantive promotions, including PC on similar terms as those for SSC(non-technical) for SSCO men technical officers in the Army;

(iii) Grant of SSC (technical) to women officers: By a policy letter dated 20 July 2006, the Women Special Entry Scheme (WSES) was closed by providing for the grant of SSC (technical) to women subject to the following conditions:

a. The total SSC tenure would be 14 years - an initial period of 10 years extendable by four years;

b. An option for release was available for newly inducted women officers on the completion of five years of service;

c. Substantive promotions to the rank of Captain, Major and Lt. Col. would be provided at the end of 2, 6 and 13 years respectively of reckonable service; and

d. Serving WSES women officers had an option to opt for the SSC scheme within six months;

(iv) Grant of SSC (non-technical) to women officers : By another policy letter dated 20 July 2006, a similar provision was made for the grant of SSC (non-technical) to women officers. Under the terms of the scheme,

a. The total engagement would be for 14 years (10 years extendable by a further 4 years); and

b. Serving WSES women officers were given an option to opt for the scheme;

Army Order 9 of 2011 including Appendix C and D

41. The aim of AO 9/2011 was to lay down instructions/procedures for carrying out the Annual Medical Examination (AME), Periodical Medical Examination (PME) and medical classification of all Army officers. The AO was to supersede all existing instructions and *inter alia* sought to delineate the criteria for medical classification vis-à-vis functional capacity:

"31. Functional Capacity. Functional capacity for military duties under each factor will be denoted by numerals 1 to 5 against each code letter indicating declining functional efficiency. These numerals will be used against the word SHAPE to denote the overall medical classification and also against each factor of SHAPE while describing the disability profile. General evaluation of these numerals will denote guidelines for employment of the officers as under:

1A- Fit for all duties anywhere.

1B- Fit for all duties anywhere; under medical observation and has no employability restrictions.

2- Fit for all duties but may have some limitations regarding duties which involve severe physical and mental stress and require perfect acuity of vision and hearing.

3- Except 'S' factor, fit for routine or sedentary duties but have limitations of employability, both, job wise and terrain wise as spelt out in Employment Management Index at Annexure II to Appendix 'E' to this Army Order.

4- Temporarily unfit for military duties on account of hospitalization/sick leave.

5- Permanently unfit for military duties."

42. Appendix (C) provides for the male average weight in kilograms based on age group and height with a 10 per cent variation on either side of the average being acceptable. Appendix (D) contemplates a similar table for female average weight in kilograms for different age groups and heights with an acceptable 10 per cent variation from the average.

MoD Policy Letter dated 24 February 2012

43. As a result of the policy letter dated 24 February 2012, there was a revision of the weightage to be ascribed by the No. 5 Selection Board (for grant of PC/extension to SSCOs) as between

(i) The computerized MDS; and

(ii) Value judgment of the members of the Selection Board.

44. In the earlier policy letter dated 30 September 1983, the weightage had been fixed at 80 : 20. This was revised to 95 : 5, thereby reducing the subjective element comprised in the value judgment attributed to members of the Selection Board from 20 per cent to 5 per cent. In preparing the evaluation sheets, averages were to be taken against the following items:

(i) QAP - 75 marks

(ii) Honours and awards - 5 marks

(iii) Games, sports and special achievements - 5 marks

(iv) Performance of courses - 10 marks

(v) Weak points - minus 5 marks

(vi) Non-recommendation for PC-minus 2 marks

45. Para 5 of the policy letter envisages that the marks allotted under the computerized evaluation would be added to the value judgment to assess the overall merits of officers. A minimum acceptable cut-off of 60 per cent was fixed, which had to be reviewed every two years:

> "5. On conduct of the board, the quantified marks for overall performance of the officer would be obtained by adding the value Judgement marks to the Computerised Evaluation. The marks thus obtained would be used to draw out the overall merit of the officers. Minimum acceptable cut-off grade for grant of PC to SSCOs including women officers (sic) will be 60% (this may however be reviewed by MS branch every two years keeping in view the rating tendencies as at that time)."

D Evaluation of the credentials of 615 Women SSCOs

46. The basic issue which falls for determination is in regard to the modalities which have been followed in assessing the 615 WSSCOs for the grant of PC, after the decision of this Court in *Babita Puniya* (supra). In order to obviate any factual dispute, the basis of evaluation is taken from the counter affidavit filed in these proceedings on behalf of the respondents by the Colonel Military Secretary (Legal) at the Integrated Head Quarters of the MoD. The relevant disclosures are contained in the section which titled:"*In Re : The Methodology for Conduct of Special No 5 Selection Board*". The counter discloses that 615 women officers "whose corresponding male counterparts have already been considered" were considered by a Special No. 5 Selection Board between 14 September and 25 September 2020. The process (as disclosed in the counter) is delineated below:

(i) The Military Secretary's Branch constituted a Selection Board in accordance with AO 18/1988. All members of the Board were from outside the Military Secretary's Branch. A woman officer of the rank of Brigadier was a member of the Board, drawn from the Army Medical Corps. The identity of the officers being considered was concealed from the members of the Board. The women officers who were being considered were permitted to attend the proceedings as observers;

(ii) "As per the laid down criteria", confidential reports, discipline and vigilance report (if any), honours and awards "etc", as on the 5th or 10th years of service, of the women officers were taken into consideration. This procedure was "exactly similar" to similarly placed male officers at the entry level;

(iii) The board examined the MDS for each officer for the grant of PC and gave independent value judgment marks without mutual consultation;

(iv) The marks for each officer, out of a total of 100 were compared "with the marks of the male officer with lowest merit granted PC" in their corresponding courses and entry (Technical and Non-Technical);

(v) On the above basis, the board recommended 422 out of 615 officers for the grant of PC on the basis of merit subject to their meeting the criteria of medical fitness, discipline and vigilance;

(vi) Since out of 422 recommended officers, 57 were non-optees after the approval of the Selection Board, medical board proceedings of the remaining 365 approved officers were scrutinized and the result of the Board was declassified on 19 November 2020; and

(vii) Out of 365 women officers 277 have been found fit and granted PC. Results have been withheld for 88 officers comprising of the following:

a. 42 officers are in the TLMC and have been granted a one year period for stabilization;

b. Medical documents have not been received for 6 officers; and

c. 40 officers are either in the PLMC or their results have been withheld on administrative grounds including discipline and vigilance clearance.

47. During the course of hearing and in the written submissions, the ASG informed the Court that out of 615 officers who were considered, 422 were recommended by the Special No. 5 Selection Board for PC on the basis of merit. The remaining 193 officers (615 minus 422 found fit) were not recommended, though 164 out of these officers fulfill the SHAPE-1 criterion and are SHAPE-1 officers even as of date. Further, out of 422, 57 WSSCOs were non-optees. Out of the 365 optee officers who were considered fit for PC by the Special No. 5 Selection Board, 277 WSSCOs were granted PCs after medical scrutiny. Out of the remaining 88 WSSCOs, 42 officers fall in TLMC. The division of the remaining 46 (that is non-TLMC) is that only 35 did not meet the medical criteria, which constitutes less than 10% of the women who were considered fit for PC on merit (10% of 365). 6 officers had not submitted forms compliant with AO 110/1981, 3 officers are under scrutiny and 2 officers are not cleared from the discipline and vigilance angle.

E Submissions

E.1 Submissions of petitioners

48. Mr. P S Patwalia, learned Senior Counsel appearing on behalf of the petitioners in Writ Petition (C) 1109 of 2020 and Writ Petition (C) 34 of 2021 and Ms. Meenakshi Arora, learned Senior Counsel representing the petitioners in Writ Petition (C) 1172 of 2020, urged the following submissions:

Medical Evaluation:

(i) The procedure laid down in the General Instructions dated 01 August 2020 is a mechanical reproduction of the existing procedure for male officers, who are evaluated for PC in their 5th or 10th year of service, without making any modifications;

(ii) The medical criterion laid down in para 9 of the General Instructions is arbitrary and unjust as the women officers who are in the age group of 40-50 years of age are being required to conform to the medical standards that a male officer would have to conform to at the group of 25 to 30 years;

(iii) The women officers who are being offered PC at a belated stage, due to the fault of the respondents, have already undergone medical scrutiny on the completion of their 5th, 10th and 14th years of service when an extension of service was granted to them. Thus, they must be exempted from any medical scrutiny at this stage of the grant of PC;

(iv) There is no material change in the job profile and the nature of the work that is being carried out by the petitioners as SSC officers as compared to the profile attached to their work when they will be granted PC. Accordingly, any existing medical conditions that the women officers face is not an impediment in the discharge of their functions;

(v) The criterion for grant of PC laid down in General Instructions is for officers who are in the service bracket of 5-10 years and does not take into account that the petitioners have served in the Army for 10-25 years;

(vi) The medical criterion does not account for the physiological changes that have occurred due to the passage of time in women officers. These include common changes such as hypertension, obesity, diabetes and changes associated with pregnancy and lactation;

(vii) In comparison to the women officers, the male officers who were granted PC in their 5th or 10th year of service continue to serve in the Army on different ranks, regardless of whether they have undergone any physiological changes. Thus, medical conditions at a later age are not an impediment in the career progression of male officers as once the PC is granted, there is no repeated medical scrutiny;

(viii) Male officers who have been granted PC in their 5th or 10th year of service and have later fallen in the PLMC category are still permitted to continue till the attainment of the age of superannuation for all career courses, promotions to higher ranks, and opportunities of re-employment among others;

(ix) The petitioners at the time of grant of extension of service at their 5th, 10th or 14th year have undergone the necessary medical boards and were found fit to continue in the Army; and

(x) Owing to the physiological changes occurring due to natural processes of aging and hormonal changes occurring due to pregnancy, women officers are naturally downgraded to a category lower than SHAPE-1. Thus, they are unable to meet the stringent criteria laid down by the General Instructions for the grant of PC;

Reliance placed on Annual Confidential Reports[21]:

(xi) The reliance placed on ACRs as a basis to grant PC to women officers is flawed as in the absence of any provision of PC to women officers, the reporting officers used to endorse an "N/A" in the column relating to PC. Since the women officers could only seek an extension of service as SSC officers and not a PC in the Army, the ACRs were filled out by the reporting officers casually, as compared to the ACRs of male officers;

(xii) With respect to the women officers, the columns regarding medical fitness in the ACRs were never filled. In case the women officers were medically unfit, they were not given an opportunity to improve;

(xiii) The ACRs prepared during the term of criterion appointments have a disproportionate and adverse impact on the petitioners, as they quantify participation in junior command courses and other courses such as staff college and specialised courses such as M.Tech. Women officers were either denied the opportunity of attending these courses or if the opportunity was granted, they were not given the benefit of their performance during such courses in the ACRs of that year;

(xiv) The process of filling out ACRs for women officers was not conducted seriously and good grades were not awarded as the officers were not being considered for PC at the time. Thus, the manner of judging and grading of ACRs for women officers was different from that of male officers and the two cannot be placed on an equal footing;

(xv) The current performance of the women officers and their latest ACRs has been completely ignored for the grant of PC. Thus, the hard work and qualifications attained after the 10th year of service have not been taken into account;

(xvi) Reliance was placed on MoD Policy Letter dated 24 February 2012 on the "Criteria for Grant of Permanent Commission/Extension to Short Service commissioned Officers". According to para 3 of this letter, for considering an officer for extension of service/grant of PC, the *overall* performance of the officer is to be evaluated by taking the average assessment of all reporting officers. The average has to be worked out for the entire period of the officer's service. Thus, the exclusion of the recent ACRs of the petitioners for grant of PC is unfair and arbitrary; and

Lack of announcement of vacancies:

(xvii) The respondent has failed to announce the number of vacancies against which PC would be granted to women officers. The number of vacancies available in each batch/service is necessary for an officer to make an informed choice of opting for PC. The respondent failed to earmark the vacancies available to each batch within each service arm for grant of PC.

49. Mr. Sudhanshu S Pandey, learned Counsel appearing on behalf of the petitioners in Writ Petition (C) 1457 of 2020, urged the following submissions:

(i) The women officers have never had a level playing field in the Army since their induction;

(ii) The use of ACRs as a metric for the grant of PC is arbitrary as unlike their male counterparts, the women officers were never given the reasons for non-recommendation for an extension of service/promotion; the assessment criteria for male and female officers in an ACR was entirely different as the women officers were not being considered for future career progression;

(iii) The consideration of ACRs of only the initial few years has led to a situation where women officers who have been granted commendation certificates and honours by the Chief of Army Staff[22] have not been granted PC; and

(iv) In 2001, a new evaluation system called 'UAC' was introduced which was not easily

accessible and was found to be flawed. Although, ACRs were subsequently reintroduced, the UAC has been made a basis for evaluation and grant of PC to women officers.

50. In addition to the above petitioners, certain other women officers who are petitioners have faced specific circumstances which have been highlighted during the proceedings:

(i) The third petitioner in Writ Petition (C) 1109 of 2020, who has been denied PC by the results dated 19 November 2020, was selected to undertake an M.Tech degree course under the auspices of the Army. During the application process for selection, the petitioner was required to give a certificate of remittance dated 28 November 2019 stating that if her service is terminated or released by the Government due to the finalization of court proceedings in the matter concerning the grant of PC, the officer would be liable to pay the Government the cost of the training. On her selection, she was also required to given an undertaking dated 17 July 2020 to serve the Army for a minimum period of 5 years after completion of the course. Under the undertaking, if she obtained release or premature retirement, she would be liable to pay for the cost of the training course. After the denial of PC by the Army on 19 November 2020, a letter dated 1 December 2020 was issued to her demanding recovery of the training cost of the course, to the tune of Rs. 8.5 lakh - 10 lakhs;

(ii) The petitioner in Writ Petition (C) 1469 of 2021 has stated that she is being harassed by the respondent only on account of the fact that she had made a complaint against her Commanding Officer, who had allegedly made sexual advances towards her. Although the petitioner's service was terminated and she was released from service on 14 February 2018, her case was considered for a special review later. On 21 February 2019, she was granted an extension of 4 years in service till 16 March 2021. She has advanced similar arguments against the process for the grant of PC as the other petitioners. During the course of the proceedings, the Court was informed that she is being considered by a Special Review Board and awaiting the results; and

(iii) The petitioners in Writ Petition (C) 34 of 2021 have supported the submissions advanced by other petitioners before the Court. These petitioners are 5 women officers of WSES(O) 27th batch, who were commissioned in the Army as SSC officers on 18 March 2006 and completed their 14 years of service on 18 March 2020. During the grant of PC, the petitioners were considered to fall in the category under Para 1(c) of the General Instructions dated 1 August 2020, that is "*WSES(O)- 27 to 31 and SSCW(T&NT)- 1 to 3 courses : For PC/To be released on completion of the period of extension already granted*". The petitioners contended that while as on the date of the judgment in *Babita Puniya* (supra), they had not completed 14 years of service, as on the date of the General Instructions dated 1 August 2020, they had completed 14 years and 6 months in service. Thus, they were to be considered in the category under Para 1(b) of the General Instructions : *"WSES(O)- 15 - 26 courses* : *For PC/To serve till 20 years of pensionable service and released with pension*". Thus, they have submitted that under the judgment in *Babita Puniya* (supra), in case they are not granted PC and have served for more than 14 years, they should be entitled to continue in service till the attainment of pensionable service.

51. The petitioners in Writ Petition (C) 1223 of 2020, are in the category of women officers belonging to batch 27 to 31, having been in service for 10-14 years. In terms of the General Instructions dated 1 August 2020, they have been placed in the category under Para 1(c), under which in case of non-grant of PC, they would be released on completion of their extension period, without any pension. Mr. Huzefa A Ahmadi, learned Senior Counsel appearing on behalf the petitioners in Writ Petition (C) 1223 of 2020, made the following submissions:

(a) There was no valid basis for differentiating between the women officers of batches 27 to 31 from their seniors in batches 15 to 26 in the General Instructions dated 1 August 2020. The respondents have wrongly interpreted the decision of this Court in *Babita Puniya* (supra) and have denied extension of service till 20 years to WSSCOs who have not been granted PC and who had not completed 14 years of service as on the date of the judgment in *Babita Puniya* (supra); and

(b) In case such women officers from batches 27 to 31 who were in service between 10 years to 14 years, are released on completion of 14 years of service without pension, it would be a gross miscarriage of justice.

E.2 Submissions of the respondents

52. Mr. Sanjay Jain, learned ASG, appeared on behalf of the respondents, assisted by Mr. R

Balasubramaniam, Senior Counsel. Addressing three broad issues on the (i) medical yardsticks for grant of PC; (ii) number of vacancies notified and the criteria for selection; and (iii) process of evaluation through the ACRs, the learned ASG made the following submissions:

Medical Yardsticks for grant of PC

(i) A writ petition under Article 32 is not maintainable for reliefs sought in service matters. The petitioners should have approached the Armed Forces Tribunal with their statutory grievance as has been held by this Court in *Titaghur Paper Mills Co. Ltd.* v. *State of Orissa*[23] (this submission in the counter has not been pressed during the hearing);

(ii) After the decision of this court in *Babita Puniya* (supra), the respondents conducted a Special No. 5 Selection Board between 14 to 25 September 2020 to consider women for PC. 57 out of the 422 women eligible did not opt for PC. Consequently, out of the remaining 365, 277 were found eligible for PC;

(iii) The petitioners, on one hand seek parity with their male counterparts. On the other hand, they are seeking special and unjustified treatment in the eligibility criteria for obtaining PC;

(iv) The General Instructions dated 01 August 2020 are administrative instructions based on the provisions of the SAI 3/S/70 and AO 110/1981. The latter provisions have not been challenged by the petitioners;

(v) The assessment on the medical criteria of a candidate is an intrinsic and inseparable part of the process for grant of PC. It is applicable to men and women alike;

(vi) The acronym 'SHAPE', translates as S' for psychological including cognitive function abnormalities, 'H' for hearing, 'A' for appendages, 'P' for physical capacity and 'E' for eyesight;

(vii) The stringent requirements of SHAPE-1 can be relaxed in the event candidates have suffered injury on the line of duty which renders a low medical categorization permissible;

(viii) The Army follows a concept of TLMC which allows an officer to come back in SHAPE-1 in one year. This concept is applicable to the grant of PC as well;

(ix) No SSC officer has ever been denied an extension of service due to medical reasons. Therefore, the comparison with the petitioner's medical fitness levels at their 5th or 10th year of service is baseless, since extensions were never denied on medical grounds;

(x) The contention that medical fitness cannot be expected forever in service lacks merits. The Army accounts for physiological changes occurring during childbirth and time waivers are provided in accordance with existing policies. Other physiological changes such as obesity and age are independent of gender and the petitioners cannot seek an exemption on that ground. The criteria of TLMC and PLMC are applicable to serving PC officers as well;

(xi) The medical standard of SHAPE-1 weight is as per the age and height of the person. These parameters account for the changes induced by advancement of age in men and women. Therefore, the petitioners' belated consideration for PC does not adversely impact them as against their male counterparts;

(xii) WSSCOs who seek to join the Army Medical Corps[24] can join up to 45 years of age, yet they have to comply with the SHAPE-1 medical category;

(xiii) There are 86 petitioners who are contesting this batch of petitions. Out of these 86 petitioners, 55 are still in SHAPE-1 (out of these 55, 30 women are in the age group of 45-52). 23 petitioners are assigned to the category of PLMC and 9 are placed in TLMC;

(xiv) The respondents have wholeheartedly complied with the directions of this Court in *Babita Puniya* (supra) and had identified 365 women for PC. 277 women have already been granted PC and if certain requirements are fulfilled by allottees, the number could rise up to 330;

(xv) This Court, in consonance with the spirit of Article 33, should not interfere with the medical yardsticks for determination of PC as this could be detrimental to the selected officers and the Army cannot afford to comprise on the rigour of its fitness policies;

Number of Vacancies Notified

(xvi) The MoD, by its letter dated 15 January 1991 had provided that a maximum of 250 SSC officers would be granted PC every year, with a minimum cut-off grade of 60%. In case more than 250 officers would make the grade, then only 250 posts would be granted based on competitive merit. No male officer has been granted PC merely by virtue of qualifying for the 60% cut-off. This policy and cap of 250 vacancies was relaxed for the Special No. 5 Selection Board proceedings, in order to implement *Babita Puniya* (supra), in letter and spirit;

(xvii) The benchmark of assessing the women officers under consideration of PC against the benchmark of the last selected officer with lowest merit in that particular year is a rational policy, since no upper ceiling was notified for vacancies. The PC has to be granted on competitive merit. The policy adopted by the respondent is rational, reasonable and non-discriminatory; and

(xviii) The least meritorious male officer granted PC with the corresponding batch of the WSSCOs is an objective and just benchmark. This yardstick was also adopted by the respondent when PC was offered to women SSC officers in JAG and AEC in 2010;

Process of Evaluation through ACRs

(xix) The ACRs are merely one component of the evaluation for PC, which also includes other factors of (i) honors and awards; (ii) performance on courses; (iii) recommendations for PC; (iv) disciplinary awards; and (v) strong and weak points. In terms of the erstwhile policy dated 15 January 1991 and the existing policy dated 24 February 2012, competitive merit has to be seen *inter se* officers under consideration for grant of PC.

(xx) The decision of this Court in *Brig. Nalin Kumar Bhatia* v. *Union of India*[25] on the inapplicability of value judgement by the Selection Board was premised on its peculiar set of facts where the officer there was the sole person in the batch to be considered for a promotion. The case was not an indictment of policies of *inter se* merit;

(xxi) The Special No. 5 Selection Board were alive to the reality that the column for recommendation of PC for the women officers would be blank. Accordingly, the evaluation was conducted on the assumption that all of the women who had opted for PC were recommended for the grant of PC and accordingly were not granted a 2 mark deduction; and

(xxii) The petitioners in *Babita Puniya* (supra) had contended that the consideration of ACRs for the first 5/10 years of service was a just and valid criterion for granting PC. Belatedly requesting for the entire career record to be considered would be contrary to applicable policies and the directions in *Babita Puniya* (supra).

E.3 The petitioners in rejoinder

53. Responding to the submissions of the ASG, Mr. Patwalia and Ms. Arora, learned Senior Counsel, Mr. Sudhanshu S Pandey and Mr. Mohan Kumar, learned counsel, have submitted thus:

(i) The respondents have admitted that as a special case, the vacancy cap had been lifted for consideration of women officers for PC. The placement of a vacancy cap could be the only reason for a comparative determination of merit for PC;

(ii) In comparison to women officers, 85% to 100% male officers have been granted PC; and

(iii) The total marks for each woman officer were compared to the lowest marks achieved by the male officer who was granted PC, for determination of whether the woman officer would qualify for grant of PC. After this, the women officers were considered against each other on merit and the grant of PC was determined. Thus, the women officers first, had to meet the benchmark of the lowest qualifying male officers and second, compete *inter se* women officers. This is in stark contrast to the male officers who had to meet no external benchmark and were only required to compete among themselves, in the event that they were in excess of 250 candidates.

F Systemic Discrimination

54. At its heart, this case presents this Court with the opportunity to choose one of two competing visions of the antidiscrimination guarantee embodied in Article 14 and 15(1) of the Constitution : formal versus substantive equality. The formal conception of antidiscrimination law is captured well by Anatole France's observation : *"The law, in its majestic equality, prohibits the rich and the poor alike from sleeping under bridges, begging in the streets and stealing bread."*[26]

55. Under the formal and symmetric conception of antidiscrimination law, all that the law requires is that likes be treated alike. Equality, under this conception, has no substantive underpinnings. It is premised on the notion that fairness demands consistency in treatment.[27] Under this analysis, the fact that some protected groups are disproportionately and adversely impacted by the operation of the concerned law or its practice, makes no difference. An apt illustration of this phenomenon would be the United States' Supreme Court's judgment in *Washington* v. *Davis*[28], which held that a facially neutral qualifying test was not violative of the equal protection guarantee contained in the 14th Amendment of the American Constitution merely because African-Americans disproportionately failed the test.

56. On the other hand, under a substantive approach, the antidiscrimination guarantee pursues more ambitious objectives. The model of substantive equality developed by Professor Sandra Fredman views the aim of antidiscrimination law as being to pursue 4 overlapping objectives. She states as follows:

> "First, it aims to break the cycle of disadvantage associated with status or out-groups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension. Finally, substantive equality should facilitate full participation in society, both socially and politically. This is the participative dimension."[29]

57. Recognizing that certain groups have been subjected to patterns of discrimination and marginalization, this conception provides that the attainment of factual equality is possible only if we account for these ground realities. This conception eschews the uncritical adoption of laws and practices that appear neutral but in fact help to validate and perpetuate an unjust *status quo*.

58. Indirect discrimination is closely tied to the substantive conception of equality outlined above. The doctrine of substantive equality and anti-stereotyping has been a critical evolution of the Indian constitutional jurisprudence on Article 14 and 15(1). The spirit of these tenets have been endorsed in a consistent line of authority by this Court. To illustrate, in *Anuj Garg* v. *Hotel Association of India*[30], this Court held that laws premised on sex-based stereotypes are constitutionally impermissible, in that they are outmoded in content and stifling in means. The Court further held that no law that ends up perpetuating the oppression of women could pass scrutiny. Barriers that prevent women from enjoying full and equal citizenship, it was held, must be dismantled, as opposed to being cited to validate an unjust *status quo*. In *National Legal Services Authority* v. *Union of India*[31], this Court recognized how the patterns of discrimination and disadvantage faced by the transgender community and enumerated a series of remedial measures that can be taken for their empowerment. In *Jeeja Ghosh* v. *Union of India*[32] and *Vikash Kumar* v. *Union Public Service Commission*[33] this Court recognized reasonable accommodation as a substantive equality facilitator.

59. The jurisprudence relating to indirect discrimination in India is still at a nascent stage. Having said that, indirect discrimination has found its place in the jurisprudence of this Court in *Navtej Singh Johar* v. *Union of India*[34], where one of us (Chandrachud J), in holding Section 377 of the Penal Code, 1860 as unconstitutional insofar as it decriminalizes homosexual intercourse amongst consenting adults, drew on the doctrine of indirect discrimination. This was in arriving at the conclusion that this facially neutral provision disproportionately affected members of the LGBT community. This reliance was in affirmation of the decision of the Delhi High Court in *Naz Foundation* v. *Government of NCT of Delhi*[35] which had relied on the 'Declaration of Principles of Equality' issued by the Equal Rights Trust Act in 2008 in recognizing that indirect discrimination occurs "*when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary*."[36] Similarly, this Court has recognized the fashion in which discrimination operates by dint of "*structures of oppression and domination*" which prevent certain groups from enjoying the full panoply of entitlements.[37] The focus in antidiscrimination enquiry, has switched from looking at the intentions or motive of the discriminator to examining whether a rule, formally or substantively, "contributes to the subordination of a disadvantaged group of individuals"[38].

60. Indirect discrimination has also been recognized by the High Courts in India[39]. For instance, in the matters of public sector employment, the Delhi High Court in *Inspector (Mahila) Ravina* v. *Union of India*[40] and in *Madhu* v. *Northern Railways*[41], has upheld challenges to conditions of employment, which though appear to be neutral, have an adverse effect on one section of the society. Bhat, J., while analyzing the principles of indirect discrimination in *Madhu* (supra), held:

> "20. This Court itself has recognised that actions taken on a seemingly innocent ground can in fact have discriminatory effects due to the structural inequalities that exist between classes. When the CRPF denied promotion to an officer on the ground that she did not take the requisite course to secure promotion, because she was pregnant, the Delhi

High Court struck down the action as discriminatory. Such actions would inherently affect women more than men. The Court in *Inspector (Mahila) Ravina* v. *Union of India* W.P.(C) 4525/2014 stated,

> "*A seemingly "neutral" reason such as inability of the employee, or unwillingness, if not probed closely, would act in a discriminatory manner, directly impacting her service rights. That is exactly what has happened here : though CRPF asserts that seniority benefit at par with the petitioner's colleagues and batchmates (who were able to clear course No. 85) cannot be given to her because she did not attend that course, in truth, her "unwillingness" stemmed from her inability due to her pregnancy.*""

(emphasis supplied)

61. We must clarify here that the use of the term 'indirect discrimination' is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion[42].

62. The facts of this case present an opportune moment for evaluating the practices of the respondents in evaluation for the grant of PC. In this segment of the judgment, we will first outline the theoretical foundations of the doctrine of indirect discrimination. We will then survey comparative jurisprudence concerning the doctrine, with a view to understand its key constituents and the legal questions surrounding its application, namely the evidentiary burden to be discharged to invoke the doctrine and the standards of justification to be applied. We will then offer a roadmap for understanding and operationalizing indirect discrimination in Indian antidiscrimination law.

63. In evaluating direct and indirect discrimination, it is important to underscore that these tests, when applied in strict disjunction from one another, may end up producing narrow conceptions of equality which may not account for systemic flaws that embody discrimination. Therefore, we will conclude this section with an understanding of a systemic frame of analysis, in order to adequately redress the full extent of harm that certain groups suffer, merely on account of them possessing characteristics that are prohibited axles of discrimination.

F.1 Theoretical Foundations of Indirect Discrimination

64. Hugh Collins and Tarunabh Khaitan explain the concept of indirect discrimination using Aesop's fable of the fox and the stork. They note:

> "Aesop's fable of the fox and the stork invokes the idea of indirect discrimination. The story tells how the fox invited the stork for a meal. For a mean joke, the fox served soup in a shallow dish, which the fox could lap up easily, but the stork could only wet the end of her long bill on the plate and departed still hungry. The stork invited the fox for a return visit and served soup in a long-necked jar with a narrow mouth, into which the fox could not insert his snout. Whilst several moral lessons might be drawn from this tale, it is often regarded as supporting the principle that one should have regard to the needs of others, so that everyone may be given fair opportunities in life. Though formally giving each animal an equal opportunity to enjoy the dinner, in practice the vessels for the serving of the soup inevitably excluded the guest on account of their particular characteristics."[43]

65. Another excellent formulation of the doctrine can be found in the opinion of Advocate General Maduro of the Court of Justice of the European Union (CJEU). He notes that the distinctive attribute of direct discrimination is that the discriminator explicitly relies on a suspect classification (prohibited ground of discrimination) to act in a certain way. Such classification serves as an essential premise of the discriminator's reasoning. On the other hand, in indirect discrimination, the intention of the discriminator, and the reasons for his actions are irrelevant. He pertinently observes:"In fact, this is the whole point of the prohibition of indirect discrimination : even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons."[44]

66. Thus, as long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, we are in the territory of direct discrimination. However, when the focus switches to the effects of the concerned action, we enter the territory of indirect discrimination. An enquiry as to indirect discrimination looks, not at the form of the impugned conduct, but at its consequences. In a case of direct discrimination, the judicial enquiry is confined to the act or conduct at issue, abstracted from the social setting or background fact-situation in

which the act or conduct takes place. In indirect discrimination, on the other hand, the subject matter of the enquiry is the institutional or societal framework within which the impugned conduct occurs. The doctrine seeks to broaden the scope of antidiscrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible.

F.2 Position in the United States

67. The genesis of the doctrine can be traced to the celebrated United States Supreme Court judgment in *Griggs* v. *Duke Power Co*[45]. The issue concerned manual work for which the prescribed qualifications included the possession of a high school education and satisfactory results in an aptitude test. Two facts about the case bear emphasis. First, due to the inferior quality of segregated school education, African-American candidates were disqualified in higher numbers because of the aforementioned requirements than their white counterparts. Second, neither of these two requirements was shown to be significantly related to successful job performance.

68. Construing the prohibition on discrimination embodied in Title VII of the Civil Rights Act of 1964, Chief Justice Burger held:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." He went on:"good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability."[46]

69. On the question of the standard of justification for rebutting a charge of indirect discrimination, the Court held as follows:

> "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[47]

70. *Griggs*, therefore, laid the groundwork for the thinking that meaningful equality does not merely mean the absence of intentional inequality. A statutory manifestation of disparate impact was codified in US law in the shape of the Civil Rights Act of 1991. Section 105[48] of the Civil Rights Act of 1991 makes a practice causing disparate impact a *prima facie* violation. The presumption can be rebutted by establishing that the practice is linked to the job and business. This can be overcome by a showing of alternative, equally efficacious, practices not causing disparate impact.

71. In 2005, in *Smith* v. *City of Jackson*[49], the US Supreme Court construed statutory language in The Age Discrimination in Employment Act, 1967 which proscribed actions which "otherwise adversely affect" an employee. This was read to include disparate impact liability. The Court held that this phrase "focuses on the effects of the action on the employee rather than the motivation for the action of the employer."

72. The third major case on disparate impact liability decided by the US Supreme Court was in 2015, concerning the Fair Housing Act which the Court interpreted as including disparate impact liability.[50] The Court also made instructive observations on the burden of proof that a plaintiff espousing a claim of disparate impact on the basis of statistical disparity must discharge. It held that the plaintiff must be able to establish that the defendant's policy is the cause of the disparity. The Court noted:"A robust causality requirement [...] protects defendants from being liable for racial disparities they did not create."[51] On the standard of justification for rebutting such a claim, the Court held that courts must assess claims of disparate impact liability with caution so that defendants are provided reasonable margin for devising requisite policies that are tailored for their work requirement.

F.3 Position in the United Kingdom

73. In the United Kingdom (UK), the fault-line that separates direct discrimination from indirect discrimination is not the intention of the discriminator. Rather, it is the fact that direct discrimination cannot be justified in any circumstance, while indirect discrimination is susceptible to justification. To quote Baroness Hale:

> "Direct and indirect discrimination are mutually exclusive. You cannot have both at once ... The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim."[52]

74. The statutory definition of indirect discrimination is engrafted in Section 19[53] of the Equality Act, 2010. The definition has 4 salient features. First, it covers provisions, criteria and practices that are applied in a uniform fashion, to those with and without the ground on which discrimination is alleged. Second, the PCP puts, or would put, persons with whom the claimant

shares the relevant ground at a particular disadvantage when compared with persons with whom the claimant does not share it. Third, the claimant herself would be put, or is put, to such disadvantage by the operation of the PCP. Finally, the defendant cannot show the PCP to be a proportionate means of achieving a legitimate aim.

75. An instructive judgment of the UK Supreme Court for us is *Essop* v. *Home Office (UK Border Agency)*[54]. At issue was the allegedly disproportionate impact of an exam called the Core Skills Assessment, to secure public sector employment and promotion in civil services, on "black and minority ethnic (BME)" and older candidates. The Court noted the statistical disparity in the following terms:

> "The BME pass rate was 40.3% of that of the white candidates. The pass rate of candidates aged 35 or older was 37.4% of that of those below that age. In each case, there was a 0.1% likelihood that this could happen by chance. Of course, they did not all fail. No-one knows why the proportion of BME or older candidates failing is significantly higher than the proportion of white or younger candidates failing."

76. The Court outlined the following salient features of indirect discrimination in UK law:

(i) There is no need for the claimant to show why the PCP discriminates against individuals possessing the relevant ground. The fact that the PCP has such a disproportionate impact is sufficient;

(ii) Direct discrimination requires a causal link between the less favourable treatment and the relevant ground. On the other hand, indirect discrimination requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. This difference is rooted in the fact that the aim of direct discrimination is to achieve equality of treatment. On the other hand, indirect discrimination seeks to create a level playing field, by spotting and eliminating hidden barriers which disproportionately affect a particular group, absent a legally acceptable justification;

(iii) The inability of the relevant group to comply with the PCP can be ascribed to a variety of 'context factors'. These can include genetic factors, social understandings, archetypal presuppositions, etc.;

(iv) In order for a claim of indirect discrimination to succeed, it is not necessary to show that every single member of the group possessing the relevant ground was unable to meet the PCP. It is enough to show that the PCP disproportionately disadvantaged members of the concerned group;

(v) It is commonplace for indirect discrimination to be established on the basis of statistical evidence. Such evidence is often able to show the causal link that a particular variable played in arriving at a particular outcome; and

(vi) Finally, the defendant can always rebut a charge of indirect discrimination by showing that there exists a good justification for the PCP at issue.

F.4 Position in South Africa

77. In keeping with the progressive vision of the South African Constitution, Section 9 of the South African Constitution[55] prohibits indirect discrimination. The judicial exegesis of indirect discrimination can first be found in the judgment of the South African Constitutional Court[56] in the case of *City Council of Pretoria* v. *Walker*[57] in which the Court expounded on the doctrine in the following terms:

> "The concept of indirect discrimination, … was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them. In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken."

78. In elaborating on how the impugned provision does not necessarily have to make a suspect classification on the grounds of race, the SACC concluded that differentiation between the treatment of residents of areas which were "historically, and overwhelmingly occupied by black

persons....as opposed to areas which were still overwhelmingly white" was sufficient to evince indirect discrimination on the grounds of race.

79. In a recent judgment in *Mahlangu* v. *Minister of Labour*[58], the SACC had to rule on the constitutionality of Section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act. This provision explicitly excluded domestic workers from the definition of employees under the Act. This had the consequence of depriving domestic workers access to the social security benefits contained in the legislation, in the event of injury, disablement and death. The SACC, *inter alia*, returned a finding that the provision was hit by the constitutional prohibition on indirect discrimination. This was for the reason that domestic workers are predominantly black women. As a result, held the Court:"This means discrimination against them constitutes indirect discrimination on the basis of race, sex and gender."

F.5 Position in Canada

80. In *Ontario Human Rights Commission* v. *Simpsons-Sears*[59], the Canadian Supreme Court expounded the doctrine of indirect discrimination (what it called adverse effects discrimination), while entertaining a challenge under Section 4(1)(g) of the Ontario Human Rights Code[60]. In analyzing whether a work policy mandating inflexible working hours on Friday evenings and Saturdays indirectly discriminated against the Appellant on the basis of her creed, in that her religion required her to strictly observe the Sabbath, the Court noted:

> "18. A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. From the foregoing I therefore conclude that the appellant showed a prima facie case of discrimination based on creed before the Board of Inquiry."

81. It was further noted that the aim of the guarantee against discrimination is "not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant." Thus if the impugned action has the effect to "impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory."[61]

82. The principles laid down in *Ontario HRC* (supra) were consistently applied by the courts in Canada to protect indirect discrimination. In a recent judgment in *Fraser* v. *Canada (Attorney General)*[62], the Canadian Supreme Court was called on to determine the constitutionality of a rule categorizing job-sharing positions as "part-time work" for which participants could not receive full-time pension. Under the job-sharing programme, optees for the programme could split the duties and responsibilities of one full-time position. A large majority of the optees for the job-sharing programme were women, who found it burdensome to carry out the responsibilities of work and domestic work and were particularly hit by the new rule as they would lose out on pension benefits. The Court recognized indirect discrimination as a legal response to the fact that discrimination is "frequently a product of continuing to do things the way they have always been done", as opposed to intentionally discriminatory actions.[63] Pertinently, the Court outlined a 2-step test for conducting an indirect discrimination enquiry. *First*, the Court has to enquire whether the impugned rule disproportionately affects a particular group. As an evidentiary matter, this entails a consideration of material that demonstrates that "membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group". However,

as such evidence might be hard to come by, reliance can be placed on evidence generated by the claimant group itself. Further, while statistical evidence can serve as concrete proof of disproportionate impact, there is no clear quantitative threshold as to the quantum of disproportionality to be established for a charge of indirect discrimination to be brought home. Equally, recognizing the importance of applying a robust judicial common sense, the Court held:"In some cases, evidence about a group will show such a strong association with certain traits-such as pregnancy with gender-that the disproportionate impact on members of that group will be apparent and immediate".[64] Second, the Court has to look at whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Such disadvantage could be in the shape of:"[e]conomic exclusion or disadvantage, [s]ocial exclusion…[p]sychological harms…[p]hysical harms…[or] [p]olitical exclusion", and must be viewed in light of any systemic or historical disadvantages faced by the claimant group."[65]

F.6 Evolving an analytical framework for indirect discrimination in India:

83. A study of the above cases and scholarly works gives rise to the following key learnings. *First*, the doctrine of indirect discrimination is founded on the compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/implicit biases or an inability to recognize how existing structures/institutions, and ways of doing things, have the consequence of freezing an unjust *status quo*. In order to achieve substantive equality prescribed under the Constitution, indirect discrimination, even sans discriminatory intent, must be prohibited.

84. *Second*, and as a related point, the distinction between direct and indirect discrimination can broadly be drawn on the basis of the former being predicated on intent, while the latter is based on effect (US, South Africa, Canada). Alternatively, it can be based on the fact that the former cannot be justified, while the latter can (UK). We are of the considered view that the intention effects distinction is a sound jurisprudential basis on which to distinguish direct from indirect discrimination. This is for the reason that the most compelling feature of indirect discrimination, in our view, is the fact that it prohibits conduct, which though not intended to be discriminatory, has that effect. As the Canadian Supreme Court put it in *Ontario HRC* (supra), requiring proof of intention to establish discrimination puts an "insuperable barrier in the way of a complainant seeking a remedy."[66] It is this barrier that a robust conception of indirect discrimination can enable us to counteract.

85. *Third*, on the nature of evidence required to prove indirect discrimination, statistical evidence that can establish how the impugned provision, criteria or practice is the cause for the disproportionately disadvantageous outcome can be one of the ways to establish the play of indirect discrimination. As Professor Sandra Fredman notes, "Aptitude tests, interview and selection processes, and other apparently scientific and neutral measures might never invite scrutiny unless data is available to dislodge these assumptions."[67] Consistent with the Canadian Supreme Court's approach in *Fraser* (supra), we do not think that it would be wise to lay down any quantitative thresholds for the nature of statistical disparity that must be established for a claimant to succeed. Equally, we do not think that an absolutist position can be adopted as to the nature of evidence that must be brought forth to succeed in a case of indirect discrimination. The absence of any statistical evidence or inability to statistically demonstrate exclusion cannot be the sole ground for debunking claims of indirect discrimination. This was clarified by the European Court of Human Rights in a case concerning fifteen Croatians of Roma origin claiming racial discrimination and segregation in schools with Roma-only classes. In assessing the claims of the fifteen Croatians, the court observed that indirect discrimination can be proved without statistical evidence[68]. Therefore, statistical evidence demonstrating patterns of exclusion, can be *one* of the ways to prove indirect discrimination.

86. *Fourth*, insofar as the fashion in which the indirect discrimination enquiry must be conducted, we think that the two-stage test laid down by the Canadian Supreme Court in *Fraser* (supra) offers a well-structured framework of analysis as it accounts for both the disproportionate impact of the impugned provision, criteria or practice on the relevant group, as well as the harm caused by such impact. It foregrounds an examination of the ills that indirect discrimination seeks to remedy.

87. *Fifth* and finally, while assessing the justifiability of measures that are alleged to have the effect of indirect discrimination, the Court needs to return a finding on whether the narrow provision, criteria or practice is necessary for successful job performance. In this regard, some

amount of deference to the employer/defendant's view is warranted. Equally, the Court must resist the temptation to accept generalizations by defendants under the garb of deference and must closely scrutinize the proffered justification. Further, the Court must also examine if it is possible to substitute the measures with less discriminatory alternatives. Only by exercising such close scrutiny and exhibiting attentiveness to the possibility of alternatives can a Court ensure that the full potential of the doctrine of indirect discrimination is realized and not lost in its application.[69]

F.7 Systemic Discrimination as antithetical to Substantive Equality

88. As noted in the analysis above, the emphasis on intent alone as the key to unlocking discrimination has resulted in several practices, under the veneer of objectivity and "equal" application to all persons, to fall through the cracks of our equality jurisprudence. Indirect discrimination as a tool of jurisprudential analysis, can result in the redressal of several inequities by probing provisions, criteria or practice that have a disproportionate and adverse impact on members of groups who belong to groups that are constitutionally protected from discrimination under Article 15(1). However, it needs to be emphasized that a strict emphasis on using only one of the two tools (between direct and indirect discrimination) to establish and redress discrimination may often result in patterns and structures of discrimination remaining unaddressed.

89. In order to conceptualize substantive equality, it would be apposite to conduct a *systemic* analysis of discrimination that combines tools of direct and indirect discrimination. In the words of Professor Marie Mercat-Bruns[70]:

> "Systemic discrimination posits the need to conceptualize discrimination in terms of workplace dynamics rather than solely in existing terms of an identifiable actor's isolated state of mind, a victim's perception of his or her own work environment, or the job-relatedness of a neutral employment practice with adverse consequences. Systemic discrimination derives from how organizations, as structures discriminate."

90. A particular discriminatory practice or provision might often be insufficient to expose the entire gamut of discrimination that a particular structure may perpetuate. Exclusive reliance on tools of direct or indirect discrimination may also not effectively account for patterns arising out of multiple axles of discrimination. Therefore, a systemic view of discrimination, in perceiving discriminatory disadvantage as a continuum, would account for not just unjust action but also inaction[71]. Structures, in the form of organizations or otherwise, would be probed for the systems or cultures they produce that influence day-today interaction and decision-making.[72] The duty of constitutional courts, when confronted with such a scheme of things, would not just be to strike down the discriminatory practices and compensate for the harm hitherto arising out of them; but also structure adequate reliefs and remedies that facilitate social redistribution by providing for positive entitlements that aim to negate the scope of future harm.

91. The Supreme Court of Canada, in *Action Travail des Femmes* v. *Canadian National Railway Company*[73] analyzed the claim of woman seeking equal employment opportunities in the National Railroad Company. In echoing the mutually reinforcing consequences of direct and indirect discrimination within organizational structures as a systemic feature, the Court noted[74]:

> "systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is a result of "natural forces", for example, that women "just can't do the job".....To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged"

92. In prescribing remedies against systemic discrimination, the Court consciously noted that the remedies do not have to be merely compensatory, but also prospective in terms of the benefit that is designed to improve the situation in the future. The Court structured the remedy as follows:

> "An employment equity program thus is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless....
>
> Secondly, by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability on the job, the employment equity

scheme addresses the attitudinal problem of stereotyping....

Thirdly, an employment equity program helps to create what has been termed a "critical mass" of the previously excluded group in the work place. This "critical mass" has important effects. The presence of a significant number of individuals from a targeted group eliminates the problems of "tokenism"[75].

93. This framework provided in *Canadian National Railway Company* (supra) was followed by the Human Rights Tribunal of Canada, in the case of *National Capital Alliance on Race Relations* v. *Canada (Health and Welfare)*[76], wherein the Court had to examine a case against the Health and Welfare Department of Canada for discriminating against visible minorities by establishing employment policies and practices that deprive visible minorities (race, colour and ethnic origin) of employment opportunities in senior management. The Court conducted a holistic analysis of the organization by collating testimonies of workers in the organization and by engaging experts on statistical analysis and human resource management. The evidence of the expert on human resources was analysed to situate systemic issues ranging from ghettoization of minorities in Canada translating into lesser encouragement for professional ambition. Societal impact of discrimination was evidenced in the informal staffing decisions providing fertile ground for unconscious bias and a broader perception of visible minorities as unfit for management. In upholding the claims of the plaintiffs, corrective measures were prescribed to counteract the effects of systemic discrimination in the workforce.

94. In the United States, the Supreme Court analysed a Title VII claim of workers (represented by the Government) in a trucking company alleging pattern and practice of employment discrimination against "Negroes and Spanish-surnamed Americans" by failing to place them equally with whites in long-distance, line-driver positions[77]. The Court noted certain legal principles that could govern a claim of systemic disparate treatment and used a mixture of statistical patterns with worker testimonies to arrive at a conclusion of systemic discrimination:

"Consideration of the question whether the company engaged in a pattern or practice of discriminatory hiring practices involves controlling legal principles that are relatively clear. The Government's theory of discrimination was simply that the company, in violation of s 703(a) of Title VII, 14 regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons....The ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were "racially premised." ... As the plaintiff, the Government bore the initial burden of making out a prima facie case of discrimination. *Albemarle Paper Co.* v. *Moody*, 422 US 405 (1975), 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280; *McDonnell Douglas Corp.* v. *Green*, supra, 411 US 802, 93 S.Ct. 1824. And, because it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure the regular rather than the unusual practice.... The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination. Upon the basis of this testimony the District Court found that "(n)umerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired." Minority employees who wanted to transfer to line-driver jobs met with similar difficulties. The company's principal response to this evidence is that statistics can never in and of themselves prove the existence of a pattern or practice of discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures. But, as even our brief summary of the evidence shows, this was not a case in which the Government relied on "statistics alone." The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life."[78]

(emphasis supplied)

95. Therefore, once a petitioner could establish a *prima facie* case of discrimination that did not occur as accidental or sporadic instances of conduct, it could prove its case using statistical evidence, witness testimonies and other qualitative methods to establish a preponderance of

systemic discrimination.

96. In 1997, in the United Kingdom, Sir William Macpherson, a retired High Court judge, was commissioned to study institutional racism in the police force. This study was situated in the backdrop of the lacunae in the investigation of a murder of Stephen Lawrence, a Black British teenager. The findings, publicized as the "Macpherson Report" on 24 February 1999[79] concluded that the investigation by the police was marred by incompetence and institutional racism. The report studied prejudices within officers which fed into an institutional culture as follows:

> "6.34....The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people. It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease."

97. Therefore, an analysis of discrimination, with a view towards its systemic manifestations (direct and indirect), would be best suited for achieving our constitutional vision of equality and antidiscrimination. Systemic discrimination on account of gender at the workplace would then encapsulate the patriarchal disadvantage that permeates all aspects of her being from the outset, including reproduction, sexuality and private choices which operate within an unjust structure. In propounding this analysis, this Court is conscious of the practical limitations of every framework to understanding workforces, considering the bulk of litigation against systemic discrimination, would be from members of an organized and formal workforce who would have the wherewithal and evidence of patterns or practices to bolster their claims. For the laboring class in India, which is predominantly constituted by members facing multiple axels of marginalization, litigating their right to work with equality and dignity may be a distant dream. However, it is our earnest hope, that a vision of systemic discrimination, would aid members of even informal workforces who, in addition to battling precarity at their places of work, will be able to assert a right to equality and dignity. A framework that would situate their discrimination, against systemic societal patterns of discrimination that are constituted and compounded by social and economic structures, would help in addressing several fractures that are contributing to inequality in our society.

98. In the dispute at hand, this Court is tasked with a duty to analyse the implementation of its earlier directions in *Babita Puniya* (supra) that struck down a directly discriminatory practice of excluding WSSCOs from PC. The petitioners' claim of further discrimination in implementation, will have to be analyzed from the framework of systemic discrimination (which encompasses indirect discrimination), to determine a constitutional violation. In examining a retroactive grant of PC, a study of the systemic impact of the prolonged denial of PC to women and the evaluation structures and patterns therein, would be indispensable.

G Analysis

99. The fundamental issue is whether the procedure which was followed in evaluating the women SSCOs comports with the requirements of law. In arriving at this determination, we will primarily be guided by the Army Orders, Army Instructions and policy letters of the Union Government which have been set out above and will be further explained below. At this stage, it needs to be emphasized that the issue as regards the applicability of the SHAPE-1 criteria will not be taken up in the first part of the analysis and will be dealt with independently in a subsequent part of this judgment. With this clarification, we proceed to outline the interplay between the Army instructions and policy letters.

G.1 Selection Process & Criteria set by the Army

(i) SAI/3S/70 set out the modalities for the grant of PC to serving SSCOs while making SSCOs eligible to apply for PC. This was *inter alia* subject to the conditions of eligibility spelt out in paragraph 2. These conditions of eligibility were

a. An upper age limit of 27 years;

b. Fulfillment of medical criteria; and

c. Possession of technical qualifications as prescribed by officers seeking PCs in the Corps of Engineers, Signals and EME. The Army instruction provided for interviews by a Service Selection Board. All officers who have been found suitable for the grant of PC would be placed in a panel and the final decision would rest with the government. Para 8b

stipulated that the grant of PCs would depend upon the vacancies existing in the arms or services and the suitability of officers. The form of application at Appendix-A to the Army Instruction *inter alia* stipulated the requirement of the applicant being recommended by the Commanding Officer and the Brigade Commander;

(ii) On 30 September 1983, the criteria for the grant of PC to SSCOs were formulated. The criteria envisaged that the Selection Board will assess each officer's performance on the basis of a computerized MDS. While the computerized evaluation would receive 80 per cent weightage, 20 per cent weightage would be given to the assessment of the members of the Selection Board. The Selection Board was also required to award a grading, besides awarding marks, on whether an officer was recommended for

a. PC; or

b. Extension; or

c. In the alternate was rejected, deferred or withdrawn.

Of the 80 marks earmarked for computerized evaluation, 60 marks were for the Quantitative Assessment of Performance (QAP), 6 for honours and awards, 10 for performance in courses and 4 for strong points. A candidate who was recommended for PC by the reporting officer in the ACR would get a '0' mark for "Yes" and 'minus 2' marks for "No". Minus marks were also be given for weak points.

(iii) On 24 February 2012, a policy letter was issued by the MoD to amend the weightage attributed to the computerised evaluation. This policy currently holds the field. The computerized evaluation was enhanced from 80 per cent to 95 per cent and the subjective evaluation of the members of the Selection Board No 5 was brought down from 20 to 5 per cent. The weightage of 95 per cent assigned to computer evaluation was distributed amongst QAP (75 marks), honours and awards (5 marks), sports and games (5 marks) and performance and courses (10 marks). The recommendation of the reporting officer in the ACR for grant of PC would carry '0' mark, while a negative recommendation carries minus '2' marks. It was envisaged that the marks quantified for overall performance would be obtained by cumulating the value judgment marks to the computerized evaluation. The marks so obtained would be used to draw out the overall merit of the officer. The minimum cut-off grade for SSCOs including women officers would be 60 per cent which could be reviewed every 2 years;

(iv) AO 18/1988 contained provisions in regard to "system for selection for grant of permanent commission of SSCOs". Under para 8 of the AO it was envisaged that the first 50 per cent of officers screened by the Selection Board in the order of merit would be granted PC, the next 35 per cent would be granted extensions for another five years while the remaining 15 per cent officers would be released on competing the contractual period of five years' service. Para 2 of the AO 18/1988, in other words, made it abundantly clear that while at one end of the spectrum 50 per cent of the officers in order of merit would be conferred with PC, at the other end of the spectrum only 15 per cent would be released on completing the contractual term. Between these two ends were officers (35 per cent) who were granted an extension of five years. AO 18/1988 specified in para 4, the constitution of the Selection Board which was to assess performance strictly in accordance with the laid down criteria. Under para 6 gradings were required to be assigned to the officers on whether or not they were recommended for PC or for extension or, in the alternative, to be deferred. Para 7 envisaged that the computer evaluation and assessment by members of the selection board would be based on ACRs, honours and awards, performance in courses, recommendations for PC, disciplinary awards and strong and weak points. A minimum of three ACRs were required as essential to consider the case of an officer for PC. Moreover, the AO stipulated in paragraph 13 that "officers are assessed on the merits of their service performance as reflected in the ACRs and not by the reports filed in the CR dossier". Further, while evaluating the ACRs, the possibility of subjective/inflated reporting and fluctuation in performance of officers were taken note of by, *inter alia*, stipulating that the last ACR before assessment for PC would be taken into consideration. The Army Order also clarified in para 13(e) that the low medical category of the officers would not influence the assessment as it is an administrative restriction and not a criteria for assessment. Moreover, para 21 spelt out the medical requirements (to be considered subsequently in this judgment). Para 23 stipulated that those who are not selected for PC but are otherwise fit and suitable would be granted an

extension of five years beyond the initial term of five years on the expiry of which they would be released from the Army. This is how the SSC engagement (at that time) came to be described as an engagement for 5+5 years. Persons in the PMLC who could not be granted PC would be allowed to continue in service for a full extended tenure of 5 years beyond the initial tenure of 5 years (Para 26). Moreover, under para 34, it was stipulated that SSCOs would be screened only once in the 5th year of service by a selection board for PC. However, in certain circumstances, a special review for the grant of PC was envisaged;

(v) On 15 January 1991, MoD issued a policy letter capping the number of vacancies per year for PC at 250. The minimum acceptable cut-off grade for the grant of PC to SSCOs is 60 per cent which would be reviewed every two years. In the event that more officers, in excess of the ceiling of 250 fulfill the cut - off grade of 60 per cent, the requisite number of 250 officers would be granted PC in competitive merit. All officers, irrespective of the grant of PC, would be given an extension of 5 years, unless they opt out or are considered unfit for retention; and

(vi) MoD's Policy Letters dated 20 July 2006 provided that SSCOs both in the technical and non-technical branch would have a tenure of 14 years - the initial 10 years, extendable by 4 years. Moreover, serving WSES officers were given an option to seek SSC within a period of six months.

100. Now, in the backdrop of the above analysis it becomes necessary to evaluate the methodology which has been followed while considering 615 women SSCOs across several batches for the belated grant of PC, by the constitution of a special board.

G.2 Benchmarking with the Lowest Male Officer

101. The first aspect to be considered in relation to the assessment criteria provided in the General Instructions dated 1 August 2020 is the bench-marking of the marks awarded to WSSCOs with the lowest placed male officer of the corresponding batch. In the course of his submissions, the ASG has argued that "there is a considerable rationale in assessing the women officers on the basis of their first 5/10 years of service (as the case may be) and keeping the above benchmark [that is, for bench-marking them with the lowest selected male officer of the corresponding batch]". The rationale which the ASG put forth can be summarized as follows:

(i) The cut-off of 60 per cent marks is only a criterion of eligibility for considering officers for the grant of PC. This is a minimum cut-off grade applicable both to men and women officers. Securing 60 per cent in itself, which is a threshold criteria, does not automatically entitle an officer to the grant of PC;

(ii) Since 1991, an upper ceiling of 250 vacancies per year for PC was prescribed. The number of candidates above the 60 per cent cut-off, amongst whom the selection for PC would be made, will fluctuate from year to year and hence "the marks of the 250th candidate automatically becomes a benchmark";

(iii) In the present case, while implementing the judgment of this Court in *Babita Puniya* (supra) dated 17 February 2020, the upper limit of 250 vacancies was dispensed with for women officers in order to ensure that no WSSCO who is found eligible on merits and qualified in terms of the medical criterion is denied PC for want of vacancy;

(iv) The decision in *Babita Puniya* (supra) required the Army authorities to offer PC to the WSSCOs at par with their male counterparts. AO 18/1988 had initially stipulated that 50 per cent of the officers falling in the order of merit would be granted PC, 35 per cent would be granted an extension of 5 years and 15 per cent would be released on completing the contractual period of 5 years of service. This governed the earlier regime of SSCOs under which SSCOs were recruited for 5 years and were granted an extension of 5 years. This regime was modified in 2004 when a second extension option up to four years was introduced making it 5+5+4. In 2006, the above regime was revised by the Policy Letter dated 20 July 2006 by MoD, the effect of which was that the SSC regime of 5+5+4 was substituted by a regime of 10+4;

(v) The policy decision of MoD dated 15 January 1991 indicated a cap of 250 SSCOs for the annual grant of PC; a minimum cut-off grade of 60 per cent, and in case more than the specified number of officers make the grade, only 250 would be granted PC on competitive merit;

(vi) Even for male officers, the statistics pertaining to 32 batches would indicate that 67.86 per cent were granted PC and hence there is no discrimination against women SSCOs: and

(vii) In the absence of an upper ceiling of vacancies, the field would be left open for any number of WSSCOs to get PC. To avoid this, a benchmark had to be fixed. The need for fixing a benchmark is indisputable though any benchmark has to satisfy the test of being rational and of not being arbitrary. If two views are possible, the view which has been adopted by the Army authorities must be given preference. Benchmarking the aspirant WSSCOs with the lowest of their male counterparts on merit is an objective criterion.

102. The fundamental postulate in the submissions of the ASG is that since there is a cut-off of 250 vacancies per year for the grant of PC to SSCOs and a minimum of 60 per cent is fixed as the cut-off grade by the Policy Letter dated 15 January 1991 of the MoD, the evaluation of competitive merit is necessary. Though, the WSSCOs in the present case were not subjected to any ceiling of vacancies as a one-time measure, benchmarking (in the submission) became necessary to place them at par with their male counterparts.

103. There is a fundamental fallacy in the entire line of reasoning which has been advanced by the Army authorities both in the counter affidavit as well as in the written submissions of the ASG. The Policy Letter dated 15 January 1991 indicates that

(i) A maximum of 250 SSCOs will be granted PC annually;

(ii) A minimum cut-off grade 60 per cent is fixed, which is reviewable every two years;

(iii) In case more than 250 officers fulfill the cut-off grade of 60 per cent, only 250 would be granted PC on competitive merit; and

(iv) Other than non-optees and those unfit for retention, all others would be granted an extension of 5 years.

104. The clear intent of the policy letter is that the issue of applying competitive merit arises only if more than 250 officers fulfill the cut-off grade annually. If the number of officers who achieved the 60 per cent cut-off is less than 250, then evidently there is no requirement of assessing *inter se* competitive merit among the officers who meet the minimum threshold.

105. In the present case, there are a total of 615 women officers for consideration, across several batches. As many as 32 batches were under consideration. Annexure WR-6 to the written submissions of the Union of India carries the details of PC granted to male officers. The table is extracted below:

DETAILS OF PERMANENT COMMISSION GRANTED TO MALE OFFICERS				
SER No	YEAR OF COMMISSION	PASSING OUT STR	No OF OFFICERS GRANTED PC	PC%
1	Mar/94	107	77	71.96
2	Aug/94	143	106	74.13
3	Mar/95	144	90	62.50
4	Aug/95	109	67	61.47
5	Mar/96	170	113	66.47
6	Aug/96	135	96	71.11
7	Mar/97	35	23	65.71
8	Sep/97	249	178	71.49
9	Mar/98	111	85	76.58
10	Sep/98	173	120	69.36
11	Mar/99	198	141	71.21
12	Sep/99	243	166	68.31
13	Mar/00	168	114	67.86
14	Sep/00	274	159	58.03
15	Mar/01	231	141	61.04
16	Sep/01	248	161	64.92
17	Mar/02	169	108	63.91
18	Sep/02	178	95	53.37
19	Mar/03	161	95	59.01
20	Sep/03	219	115	52.51

21	Mar/04	182	107	58.79
22	Sep/04	271	168	61.99
23	Mar/05	211	138	65.40
24	Sep/05	243	168	69.14
25	Mar/06	225	175	77.78
26	Sep/06	210	156	74.29
27	Mar/07	161	132	81.99
28	Sep/07	183	133	72.68
29	Mar/08	160	128	80.00
30	Mar/09	102	87	85.29
31	Sep/09	148	117	79.05
32	Mar/10	92	77	83.70
	TOTAL	5653	3836	67.86

106. The above table has been filed by the ASG as a part of his submissions, to counter the contention of the women officers that whereas most male officers have been granted PC, the number of women officers is abysmally low. The above chart provides for

(i) The number of male officers passing out;

(ii) The number of male officers granted PC; and

(iii) The percentage of those granted PC under (ii) as a proportion of the officers passing out in (i).

107. The chart, however, suppresses an important feature which is the number of officers who had not opted for being considered for PC (described in the parlance as 'non-optees"). In other words, the percentage of male officers granted PC has been computed in the chart without disclosing the factual details of the number of male officers who had not opted for PC. Only when the number of "optees" is considered against the "non-optees", can the percentage of male officers who were successfully granted PC be accurately determined. This is a significant omission on the part of the Army authorities from which an adverse interference must be drawn. However there is another and more fundamental aspect which emerges from the disclosure which has been made in the above chart by the Army authorities. The chart indicates the number of officers who were granted PC during the course of the selections which took place twice every year. A close reading of the data would show that in a number of years, the male officers who were granted PC was far lower than the ceiling of 250 vacancies prescribed by the policy letter of the MoD dated 15 January 1991. The table below, which is prepared on the basis of the above chart of the Union of India, computes the number of male officers granted PC between 1994 and 2010:

Year of Commission	No. of Officers granted PC	Total Officers granted PC in one year
1994	77 + 106	183
1995	90 + 67	157
1996	113+ 96	209
1997	23 + 178	201
1998	85 + 120	205
1999	141 + 166	307
2000	114 + 159	273
2001	141 + 161	302
2002	108 + 95	203
2003	95 + 115	210
2004	107 + 168	275
2005	138 + 168	306
2006	175 + 156	331
2007	132 + 133	265
2008	128 + 87	215
2009	87 + 117	204
2010	77	77

108. The statistics which have been advanced by the Army authorities disclose two things. Firstly, in a number of years between 1994 and 2010, the ceiling limit of 250 had not been crossed. If the ceiling limit of 250 had not been crossed, the justification which has been offered for benchmarking women officers against the lowest male officers of the corresponding batch turns out to be specious and a red-herring. Evidently, in their anxiety to rebut the submission of the petitioners in regard to the disparity in the percentage of male and female officers granted PC, the statistics which have been placed on the record, completely demolish the case for benchmarking. It is also necessary to understand is that in many years the ceiling of 250 officers was not met and the number of officers that were granted PC were below 250, the question of evaluating officers on the basis of *inter se* competitive merit did not arise. This leads us to the second important aspect, which is, that in certain years such as 1999, 2000, 2001, 2004, 2005, 2006 and 2007, the ceiling of 250 was crossed for the male officers. This again belies the claim that benchmarking is crucial to maintain the integrity of competitive merit for grant of PC, as envisaged by the Policy Letter dated 15 January 1991. The data, in fact, shows that in several years, the ceiling was crossed, which is an indicator of the fact that it has not been applied as a rigid norm.

109. Bearing this in mind, we note the submission of the ASG that for the present year, while implementing the judgment of this Court in *Babita Puniya* (supra) the ceiling of 250 vacancies was not applied as a one-time measure. This further demolishes the so-called rationale for benchmarking which has been offered by the ASG. For the above reason, there can be no manner of doubt whatsoever that the attempt to apply the benchmark of the lowest selected male officer is a ruse to deviate from the judgment of the Court and to bypass the legitimate claim of the WSSCOs. This benchmarking becomes particularly problematic, when coupled with the manner in which the reliance on ACRs was made.

G.3 Reliance on Annual Confidential Reports

110. The next aspect which needs to be analysed is the grievance of the women officers on the reliance placed on their ACRs for determining the grant of PC. The WSSCOs claim that when their ACRs were being written, women who had been appointed on SSC were not entitled to PC and hence their ACRs were written in a casual manner. Now, the narration of the Army Orders and instructions adverted to earlier, demonstrates that the recommendation of the Commanding Officer and the Brigade Commander was necessary for evaluating an officer for the grant of PC. This was reiterated in MoD's Policy Letter dated 30 September 1983, AO 18/1988 and MoD's Policy Letter dated 24 February 2012. The MoD Policy Letter dated 24 February 2012, for instance, clearly specifies the requirement that in every ACR, where the officer has been recommended for PC by the reporting officer, he will be awarded '0' mark, and where he has not been recommended for PC, he will be awarded minus 2 marks. Now, it is an indisputable position that since WSSCOs were not entitled to the grant of PC, this part of the ACRs was invariably left blank.

111. In this context, Army Order 45 of 2001[80] dated 31 December 2001 *inter alia* stipulated in para 124 that "communicating the relevant portions of the assessment by first level of reporting officers, is one of the basic principles for achieving objectivity in the system of reporting". Para 125(c) specifically stipulated that "when ratee is Not Recommended for Promotion or Not Recommended for Permanent Regular Commission/Extension for Short Service Commissioned Officers", even then the assessment by the second or higher-level rank officer must be disclosed. The reasons and justification were to be communicated along with the pen picture to the officer reported upon. On the other hand, it has been accepted by the Army authorities that the ACRs of the WSSCOs on the aspect of the recommendation for PC were left blank for the simple reason that these officers were not being considered for the grant of PC. As a matter of fact, even as late as 23 October 2020, a communication has been addressed by the Secretary Military Branch, Integrated Headquarters of MoD (Army) in the following terms:

"A/17151/5/MS 4 CR Policy 23 Oct 2020

HQ

Southern Comd (MS)
Eastern Comd (MS)
Western Comd (MS)
Central Comd (MS)
Northern Comd (MS)
ARTRAC (MS)

South Western Comd (MS)
SFC (MS)
IDS (MS & SD)
ANC (MS)

ENDORSEMENT OF RECOMMENDATION FOR PERMT COMMISSION IN CRs FOR WOMEN OFFRS

1. As per instrs issued vide ADG PS/AG's Br Letter No PC 32313/PC to Women offr/Admn Instrs/AG/PS-2(a) dt 30 Jul 20, women offrs of the IA will hereinafter be considered for permt commission in all Arms/services. *The same necessitates endorsement of specific recoms (Yes/No) wrt grant of permt commission by Reporting Offrs in CRs of women offrs.* It has however been obs that Reporting offrs are still erroneously endorsing 'NA' in the CR coln related to the same.
2. Above in view, in accordance with instrs above, it is clarified that *Reporting Offrs will mandatorily endorse either 'YES' or 'NO' in the coln of "Recommendation for Permt Commission"* in CRs of all women offrs.
3. The above may pl be disseminated to all concerned for compliance."

112. This indicates that as recently as in October 2020, the same problem of the ACRs of WSSCOs not being endorsed with the recommendation continued to persist. The ASG submitted that this structural problem was corrected by treating all the WSSCOs in the present batch of 615 officers to be recommended for the grant of PC. However, the issue is not confined merely to WSSCOs not being recommended for PC in their ACRs, but instead relates to the broader aspect which permeated the whole process of ACR writing for women.

113. WSSCOs, unlike their male counterparts, were not eligible for being considered PC in the 5th/10th year of their service. The grievance is that the reporting officers treated these WSSCOs differently while writing their ACRs as compared to their male counterparts who were eligible for the grant of PC. For instance, a document titled "Ready Reckoner for Initiating/Reviewing/Endorsing the Confidential Reports, Unit Assessment Cards and Non Initiation Reports"[81] states that in the case of women special entry officers, a recommendation for extension is mandatory. Evidently WSSCOs were being treated differently for the reason that they were not eligible for the grant of PC. Following the decision of this Court in *Babita Puniya* (supra), a study group was constituted by the Integrated Headquarters of MoD (Army) on 2 March 2020 to carry out a "Holistic Appraisal of Induction and Employment of Women Officers in Indian Army"[82]. In this context, the communication dated 2 March 2020, has taken note of the fact that career progression for women officers in terms of their being assigned for Army courses and posting exposure was limited as a result of an option for PC not being available. Noting this anomaly, the document records:

"11. Career Progression. The 'in service' career progression of WOs in terms of detailment for Army courses and posting exposures etc is presently limited keeping in view that option for PC and further career prog was NA. The same will now need to be aligned to male offrs so as to place them on equal footing to compete for Nos 5, No 3 and other SBs. The Study Gp would be required to delve upon this issue in details and may also review the list of male courses applicable for WOs."

114. The above communication which has been issued by Lt. General SK Saini, Vice Chief of Army Staff states that it has the approval of the COAS. The observation in the communication in regard to the limited posting opportunities which were available to women officers is borne out by an earlier communication[83] dated 30 December 2003 of the Military Secretary Branch, Army Headquarters which records that the posting of women officers in "soft field and peace stations is affecting the posting profile of their male counterparts". Consequently, specific directions were issued for the posting of women officers at appointments in peace regions as well as in formations in the field.

115. The above factors must be coupled with the following circumstances, which must be borne in mind while considering the remedial steps necessary to rectify the discrimination which has been suffered by the WSSCOs:

(i) The number of vacancies which were available for the grant of PCs in the batches for which the WSSCOs were being considered over the years has not been disclosed while processing the claims for the grant of PC. As noted earlier, in many cases, the upper ceiling of 250

officers to be granted PC was not met and in some years, this limit was breached. If, as suggested by the tabulated statement produced by the ASG in the written submissions, vacancies were available, the criteria of meeting the benchmarking of the lowest male selected officer is evidently irrational and arbitrary. This rationale, while touted as a manner of including competitive merit, was ignorant of the structural discrimination that was faced by women officers whose ACRs were casually graded, even when compared to the least meritorious male officer in their corresponding batch;

(ii) In the case of male officers, the process of conducting the Special No. 5 Selection Board for considering the grant of PC is initiated by issuing an order declaring the date of the Board in advance so that the preceding three ACRs can be taken into consideration to assess the performance of the officer for the grant of PC. An officer has the option to seek remedial measures before the redressal mechanism to espouse any adverse entry in the ACR. This process has not been followed in the case of the WSSCOs before the Special No. 5 Selection Board was conducted. As an illustration for this, the petitioners have relied on a communication dated 17 January 2020 of the Integrated Headquarters of MoD (Army) which specifically states as follows:

> "Initiation and Despatch of CRs
>
> 14. The cut off CR for consideration by No 5 SB is 31 Oct 2019 vide AO 4512001/MS as amended CO/OC will ensure that CR for the year 2018-19 is forwarded in time in the correct format, vide AO 45/2001/MS as amended, and should reach MS Branch (respective CR library) within specified time Intermediate formation HQs should ensure that the CRs/Spl CR is initiated/endorsed for timely submission Also ensure Spl CR (if initiated) reaches concerned CR Library on or before 31 Mar 2020"

(iii) In the counter affidavit which has been filed by the Col. Military Secretary (Legal) it has been specifically admitted that:

> "15…it is submitted that women officers were considered by No 5 SB in 5th and or 10th year for extension of service only. The criteria of medical fitness for grant of permanent commission and grant of Extension of service are entirely different. No SSC officer has ever been denied extension of service due to medical reasons. Therefore, the contention that since the petitioners were found medically fit at 5th or 10th year of service, as the case may be, when they were considered for extension of service, they should be now considered as fit for grant of permanent commission, are baseless."
>
> (emphasis supplied)

Women officers were considered by Special No. 5 Selection Board in their 5th and/or 10th year of service for extension of service only. In other words, Selection Board 5 was for extension and PC, but the women officers were granted only extensions because the option of PC was not available;

(iv) The ratio between the marks assigned to computer evaluation and the value judgment marks assigned by the members of the Board was initially pegged at 80 : 20 as on 30 September 1983. This came to be altered on 24 February 2012 by MoD's Policy Letter to 95 : 5. In the written submissions tendered by the ASG it has been argued that:

"21. As per Annexure R-5 (page 122-132) [MoD Policy Letter dated 30 September 1983], the quantified profile marks are to be given out of 80, while the marks for value-judgment are to be given out of 20. Juxtaposed, as per Annexure R-6 (page 133-144) [MoD Policy Letter dated 24 February 2012], the same are to be given in the ratio of 95 : 05 (Please see page 134). Depending upon their batch, the petitioners and other similarly placed women SSC officers were assessed either under Annexure R-5 or under Annexure R-6, as was done in the case of their male counterparts as well."

(emphasis supplied)

The above submission indicates that while with effect from 30 September 1983, the value judgment marks were graded out of 20, it was subsequently brought down to 5 marks on 24 December 2012. The above extract indicates that the petitioners and other similarly situated WSSCOs were assessed either under the 30 September 1983 norm or as the case may be the 24 February 2012 norm, depending on their batch. The inherent lack of fairness is evident from the fact that the value judgment marks which were assessed for their male counterparts were by a different Special Board 5 in distinction to the Special Board which considered the case of the WSSCOs. There is a subjectivity inherent in value judgment marks

which is the reason for bringing them down from 20 to 5. The issue is exacerbated in the case of the WSSCOs involved in the present case because the marks for value judgment have been assigned by a completely distinct Board;

(v) It has been admitted in the counter-affidavit that the confidential reports, discipline and vigilance reports if any, and honours and awards as on the 5th or 10th years of service were considered in the case of the women officers. As a consequence of this, the qualifications, achievements and performance of women officers after the 5th or 10th year of service (as the case may be) have been ignored. At this stage, it is necessary to note that para 13(b) of AO 18/1988 specifically contemplates the "last ACR before assessment for PC" being taken into reckoning for grant of PC. Similarly MoD's Policy Letter dated 24 February 2012 specifically contemplates that in evaluating the overall performance of the officer, "the average will be worked out for each year as well as for the entire period of officers' services". Para 4(a) stipulates thus:

> "(a) QAP : Overall performance of the officer is evaluated by taking the average of figurative assessment of all reporting officers other than FTO and HTO. Average will be worked out for each year as well as for the entire period of officers service. The latter QAP will be converted into a proportion of 75 marks." (emphasis supplied)

In spite of the above clear stipulations, it is now an admitted position that the distinguished record of the WSSCOs beyond the 5th/10th year of service has been disregarded. The laurels achieved by them in the service of the nation after the 5th/10th year of service have been ignored;

(vi) It has been submitted on affidavit that even women officers who have been awarded the prestigious commendation card from the COAS have been denied PC. As an example it has been stated that Lt. Col. Shikha Yadav (as well as several other women officers) have been denied PC though they have been awarded the COAS commendation. Lt. Col. Tashi Thapliyal was awarded the Vishisht Seva Mandal. Several women officers who have served in UN Missions overseas have been denied PC. There are women officers who have excelled in national sports events, exemplified by Major Pallavi Sharma who has a proven track record *inter alia* in shooting championships which has been ignored[84];

(vii) In IA 12148 of 2020 in Writ Petition (C) 1172 of 2020 (*Lt. Col. Sonia Anand* v. *Union of India*), a detailed chart has been annexed indicating illustrations of women achievers who have been denied PC. At the cost of enlarging the size of this judgment, it becomes necessary to highlight the tabulated statement. The facts which have been set-forth before the Court have not been denied during the course of the submissions of the ASG:

> "Illustrations : Women Officer Achievers who have been denied Permanent Commission.

Name	Lt Col Anuja Yadav
Course	WS 12
Arms	Engineers
Achievements	First Women officer of an Engineering Regiment. First Indian Woman to be selected for a UN Mission as a Military Observer Instructor in College of Military English Engineer in Charge of Op Wks active formation Outstanding ACRs COAS Commendation Card 01 GOC in C Commendation Card 02 Nos
Remarks	Selected for UN Mission based on initial 6 years ACR
Name	Lt Col Archana Sood
Course	WS 15
Arms	Engineers
Achievements	• First Woman Officer to be posted to 7 Engineer Regiment, Madras Sappers. • Topper of Geographic information officers

	course. Felicitated with a trophy by Engineer in Chief for best student in 2002. 'A' grading in Geographic and Information and remote sensing course from CDAC Pune in 2004. • Shape 1, Mandatory courses JC qualified • First Woman Officer to be handpicked and posted to cops of Military Police as Second in Command of an Infantry Division Provost Unit as a part of a pilot project in 2016 before inducting women jawans in mil police. • First Woman Officer to be posted as Garrison Engineer of an Engineer Park which holds over 21000 tons of operational stores and is responsible for its maintenance, upkeep and issue on the Western front. • Instructor tenures in Cat A and Cat B training establishments. • Called to appear for interviews to UN missions twice in service, based on first seven CRs. • Qualification : BE(Civ), Domain knowledge, survey and remote sensing. • Served in operational area, Counter Insurgency Ops (J&K)
Remarks	
Name	Lt Col Julee
Course	WS 26
Arms	AAD
Achievements	1. Trained first batch of Women constables for Assam Rifles 2014-16 who are doing well and have been employed in J and K off late. 2. Handpicked to train first batch of Women Mil Police soldiers for Indian Army who are under training at CMP centre and school [B]ang[a] lore.. 3. Participated in active CI by doing incident free ROP in Anantnag district during hot scenario of stone pelting in 2016-17 where I got downgraded medically due to strenous(sic) type of field working involving lives of troops. 4. Participated in active ops post Uri attack with Unit. 5. Got COAS commendation in Jan 17 for Assam Rifles. 6. GOC in C SC on the spot commendation for work execution in COVID. 7. Have done all mandatory courses incl LGSC and JC
Remarks	Two tenures of J and K and one Nagaland as my field service.
Name	Lt Col Gopika Bhati
Course	WS 10
Achievements	Qual BA (Hons) 1. Only off[ice]r to receive GOC-in-C Commendation Card for rendering emergency

	duties in Northern Command sector in the year 2016. 2. Active participation in 'OP Cloud burst' : Rescued lives of foreign and Indian nationals. 3. 'OP Parakram' 4. 'OP Vijay' 5. 'OP Rakshak' 6. High Altitude Area HAA and OC 'R' Centre Leh 7. Cl Ops Area and DAAG of Infantry Division in Cl Ops 8. Northern and North-East sector 9. Represented India in Lawn Tennis 10. National level Squash player 11. National level Tennis player 12. Recipient of 'Award of Appreciation' for sports by Govt. of India 13. Recognition by Hon'ble Supreme Court and Indian Media
Remarks	Service profile is mainly towards operations and challenging duties outside comfort zone and in forefront with troops in step with male counterparts throughout the service of 23 years.
Name	Lt Col Saras Handa
Course	WSES(O)- 05
Arm	AOC
Achievements	1. Only Lady Off[icer] to be detailed for UAV logisticians' course in Israel. 2. Participated in Op Vijay and Op Parakram. 3. Posted in CI/Hard Fd/HAA areas like Masimpur, Leimakhong, Leh, Bari Brahmana. 4. One of the first lady off[icer] to be detailed for Advanced Materials Management course (TSS) at CMM Jabalpur. 5. Instrumental in raising the Provision branch of Avn depot. 5. Proficient in French language. Undertook assignments at French language instructor in AFLC, Delhi Cantt (IHQ of MoD, MT 15). 6. Included in the IHQ pool of foreign linguistic pool. 7. Participated in Marathons in High Altitude Area (Leh). 8. A polyglot, double Masters in Microbiology and English, MBA and a Bachelor's in Law.
Remarks	Four ERE assignments, two with EME, One with Avn and Current with Edn. Five Field postings including Counter insurgency and High Altitude areas. Volunteered for Siachen.
Name	Lt Col Nisha Rani
Course	WS 18
Arms	AOC
Achievements	1. Awarded with Army Cdr Commendation Card, SWC

	2. Served as Administrative Off[ice]r in CI ops 3. Served in ERE with Army Aviation Corps 4. Been part of National Integration Camps 5. 2 units awarded with Best DOU while serving as OIC, Inventory Control Wing 6. Participated in EWTs (5 exercise)
Remarks	
Name	Lt Col Navneet Khangura
Course	WS 15
Arms	Signals
Achievements	Qual B.Tech (pre comm) M.Tech (Done myself from BITS Pilani in 2 years online classes but proper physical semester exams subject - SOFTWARE SYSTEMS) 1. First WO Posted to an Infantry Division Signal Regiments 2. First WO Posted to an Armoured Division Signal Regiment 3. First to be selected for UN Mission as Military Observer 4. Instructor Class B at Military College of Telecommunication Engineering 5. Instructor Class A at Military College of Telecommunication Engineering 6. All outstanding ACR 7. Participated in Op Parakaram 8. Done a tenure in CI (Ops) at Jorhat (Assam) 9. Domain Expertise - Cyber Security - : Three years posted as System Manager at Army Cyber Group handling Cyber Audits of Army HQ and PAN India Command HQs, Cyber Forensics, CERT - Even present website of CERT - Army made by Lt Col Navneet Khangura
Remarks	Selected for UN Mission based on CRs of first 4 years of her service
Name	Lt Col Poonam Sharda
Course	WS 19 (Mar 2002)
Arms	Intelligence Corps
Achievements	1. First lady off[ice]r served in CI unit - 21 CIIU Doda under D force which is equivalent to an RR tenure for int off[ice]r 2. First lady off[ice]r from whom PIT for lady off[ice]r as well as for int offer started 3. Satellite imagery interpreter for last eight years 4. Only lady off[ice]r in Int corps who is interrogation cadre qualified
Remarks	
Name	Lt Col Preena Verma
Course	WS21 (08 Mar 2003)
Arms	Engineers
Achievements	1. LLB Officer commissioned in Corp of Engineers 2. First woman officer to be posted with Border

	Road Organisation in Corp of Engineers in 2003 3. Silver medal in First Asian White Water River Rafting Championship in Sept 2003 4. Goc in c-D1 5. Handled law and Dv cases of MES throughout 17 yrs in Cort of Engineers
Remarks	
Name	Vanita Dhaka
Course	WS09
Arms	EME
Achievements	1. Topped the degree course and got DGEME best all rounder officer trophy. First lady off [icer] to achieve this with inst grading 2. Done specialized course. TO course (psychologist) assessor and was done tenures at Selection centre Bangalore and Kapurthala. 3. Presently posted at SI trg of a cat A est Institute of National Integration as a psychologist 4. Passed out with Gold medal from OTA 5. Obtained 'A' grading in YO's 6. Called for interview to UN Msn in Ethiopia & Eritrea (UNMEE) in 2005.
Remarks	
Name	Maj Garima Gulati
Course	SS - 01
Arms	Sigs
Achievements	1. 'A' grading in SODE course. 2. 'A' grading in MLIT course 3. Citation sent for COAS commendation card 4. Participated in EWT and all Exercises within one year of svc as part of 18 IDSR (A) 5. Served in CI area from Dec 2013 till Jun 2016
Remarks	All Outstanding ACR for last 3 years
Name	Lt Col Ritu Srivastava
Course	WS 12
Arms	• AOC
Achievements	1. Goc in C Commendation card - 01 2. GSO 1 tr[ainin]g at ADC reg[imen]t Centre 3. Did 5 important appointments. (AE), All Outstanding AE reports from IO 4. Awarded Van Prahari from Rajasthan State Govt 5. Qualified in computer course from CDAC, Disaster management from NIDM, MBA in supply chain management 6. Prov n proc off[ice]r of two biggest tech COD 7. Subject matter expert in civilian personnel management 8. Participated in Op Parakaram and Op Rakshak
Remarks	
Name	Lt Col Sonali Singh
Course	WS 14 (04 September 1999)

Arms	Army Service Corps
Achievements	1. First WO of HQ 21 Sub Area to be the convoy cdr for Pathankot to Leh convoy in the year 1999 with a strength of 50xALS/10 tonner approx. 2. First WO to be the sole Officer-in-Charge of Ammunition dump, Valla (Amritsar) during OP Parakram. 3. Was appointed the first AAG of HQ 84 Inf Bde and was responsible for segregating the duties of A and Q branch. 4. First WO to be appointed as SSO(Land) in St [atio]n HQ Mamun and handled legal cases pertaining to army land, arbitration cases, hiring of land in consultation with civil administration. 5. Selected as Ad[ministrative] officer of Sainik School.
Remarks	One tenure of J&K and one tenure of Nagaland as my F[iel]d service.
Name	Major Pallavi Sharma
Course	SS 02 (19 SEP 2009)
Arms	EME
Achievements	1. Served in Cl area (03 years) 2. and Op Parakarm. Led the adv party of the DOU to the fwd area during Op Vijay. 3,). Got an Outstanding in the unit. Selected at AMU (Army marksmanship unit) International participation Represented Indian shooting team at Czech Republic and Hannover, Germany (2019) *Represented Services team at 35th National games* *Represented Army in over 20 National level* championships Medals 03* Gold medals 02* Silver medals Shortlisted twice for world mil games (china & Qatar) Table tennis 2017 College of military engineering Pune 3* gold medal in singles, doubles and mixed doubles category 2020-MCEME-1* Gold (single category) Badminton 2014-36 Division Badminton Championship 1*silver medal (singles) 2* gold medal (mixed doubles and double category) 2016-CME badminton tournament 01*silver medal (mixed doubles category) 4. Responsible for implementation of automation of the first Technical Store Section in EME. Did officiating OC in arty brigade workshop Citation from the unit initiated for refurbishing

	Karazes and making mobile ramp girders in just two months. And awarded outstanding Acr. 4. Did OC LRW 114 AER, no breakdown in exercises. 5. Doing mandatory EMEODE after YOs and Ops and logistics. Convocation of technical degree course on 10 Dec next month. 6. Medically Shape One. 503 × tenures in Field in North East and 02 × tenures in J& in criteria appt of Ord. 6. Qualified in CI from CITS Balipara. 7 Received COAS CC in 2020. Meghalaya Governor's Award for best NCC off[ice]r in NER. 8. Project off[ice]r for implementing the Pilot Project of Automation of enrolment of cadets of NCC Dte in NER. 9. Extension taken by the Commanding Officers in two different units in Organisational interest in field and peace. 10. Mostly outstanding ACRs.
Remarks	
Name	Lt Col Mamta Gupta
Course	WS 18
Arms	EME
Achievements	From First batch to do TO (psychologist) course First WO to be posted at selection centre Bangalore, Kapurthala and INI as psychologist First WO to get gold medal and DGEME all rounder officer trophy in degree course Twice got UN mission call Sports person, won stn competitions in many postings Instructor grading Did all arm QM course Conducted PDP for service entry at HRDC as assessor
Name	Lt Col (Dr) Kamalpreet Saggi
Course	WS 15
Arms	EME
Achievements	BE(mechanical) MBA PhD TO (psychologist) course posted at selection center Bhopal as psychologist First WO to get gold medal and DGEME all rounder officer trophy in degree course Twice got UN mission call Sports person, won stn competitions in many postings Instructor grading Did all arm QM course Conducted PDP for service entry at HRDC as assessor
Name	Lt Col Asha Kale
Course	WS 04 (20 Aug 1994)
Arms	AOC

Achievements	1. First WO to be posted to J & K in active CI. Extn of tenure was taken by unit in organisational interest. 2. Deployed in forward area during Op Vijay and Op Parakram. 3. Raised Technical Store Section (TSS) in 14 Corps EME Bn during its raising. Also carried out automation of TSS for the first time in 1999-2000. Was awarded an outstanding ACR. 4. Successfully completed training in CITS Balipara, Assam in 2005. 5. During tenure in NCC Dte NER was Project officer to implement Pilot Project for Automation of cadets enrolment in complete NCC. Extn for 6 months was taken by Dte in organisational interest. 6. Was awarded COAS CC in 2020 and also Meghalaya Governors' Medal for best NCC offr in NER. 7. All ACRs are outstanding after reinstatement.
Remarks	Three ERE tenures...02 with EME and 01 with NCC (Deputation)
Name	Lt Col Ipsa Ratha
Course	WS 15
Arms	ASC
Achievements	Qual B Sc MA in Personnel Management and Industrial Relations 1. Total Regimental service of 10 years in second line and third line Bns. 2. Served as a DAQMG in 25 Inf Div. 3. Served as GS01 SD in 16 Corps 4. Catering Off[ice]r in School of Arty. 5. All outstanding ACR 6. Participated in Op Parakaram 7. Three tenures in CI(Ops) in Northern Command and one tenure in CI(ops) in North East 8. Awarded GOC in C Commendation
Name	Lt Col Inderjeet Kaur
Course	WSES 20
Arms	EME
Achievements	Qual B Tech (E&CE) with DISTINCTION all 4 yrs M Tech (Quality Mgt) from BITS PILANI (CGPA 9.4) YOs grading 'A' 1. 18 yrs of physical service. Served in Strike Corps, ArtyDiv, 2x Base Wksp tenure, Corps Zonal Wksp, EME Bn and Armd Div. 2. Tenented Appt of LPO & Mtrl Control offr in 509 Army Base Wksp, OC LRW in 31 ADSR an indep appt, Admoffr in 505 Army Base Wksp. 3. Participated in OP Parakaram. 4. Served in OP Rakshak.

	5. Served in OP Rhino. 6. Overall Good/Outstanding ACRs. 7. SHAPE I in Medical Category.
Name	Lt Col Navneet Lobana
Course	WS19
Arms	Engineers
Achievements	First women off[ice]r to do a Garrison Engineer Appointment. Got best GE Trophy in Central Command during the tenure. Done all mandatory courses incl JC with good gradings. Raised a new unit GE Command Test Lab in Udhampur and got outstanding report for the same. Got UN call in 4th year of service but could not proceed due to personal issues. Done instr CL A appt at MEG & Centre, Bangalore. Outstanding/very good ACRs during entire service. Presently doing MTech which is a promotion course After clearing interview and MS criteria.
Remarks	I am pursuing MTech since July 2020 for which MS Branch found me fit & competent • Post Feb judgement
Name	Lt Col Anjali Bisht
Course	Ws 09
Arms	Signals
Achievements	Participated in nationals while representing army team in ski Instr tenure in mctemhow Army Commander Northern Command, commendation card Just been recommended for COAS citation 3rd rank in Lucknow Self volunteered for jc course at 20 years of service and apart being nominated as course senior got B grading Specialised in procurement procedures, endorsed in pen picture.
Remarks	8 out of last ten Acr were graded as outstanding
Name	Lt Col Amandeep Aulakh
Course	WS 10
Arms	Eng[inee]rs
Achievements	Part of the first course to do Combat Engr Yos First lady off[ice]r to be posted in Armd Engr Regt First lady off[ice]r to be posted in an Engr plant unit Actively participated in Op Prakaram being posted in aengr plant unit. Was responsible for detachment maintenance at LC in 15 XXX, carried out inspection on ground of all the dets Done three regti tenures out of which two were in CI/Fd

	Commanded a unit in CI for seven months. Outstanding/Above avg ACRs
Remarks	
Name	Lt Col Ritu Srivastava
Course	WS 12
Arms	• AOC
Achievements	1. Goc in C Commendation card-01 2. GSO 1 trg at AOC regiment Centre 3. Did 5 important appointments. (AE), All Outstanding AE reports from IO 4. Awarded Van Prahari from Rajasthan state Govt 5. Qualified in computer course from CDAC, Disaster management from NIDM, MBA in supply chain management 6. Prov n proc off[ice]r of two biggest tech COD. 7. Subject matter expert in civilian persmgt 8. Participated in Op Parakaram and Op Rakshak.
Remarks	
Name	Lt Col Manreet
Course	WSES 13 (March, 1999)
Arms	AOC
Achievements	1 Outstanding ACRs in AE appointments. 2 Tenanted appointment of Dy Commandant of an Advanced Base Ordnance Depot. Outstanding ACR during the tenure and Name forward for outstanding officer of the corps. 3 Tenanting appointment of second in command in various Units with outstanding and above average ACRs. 4 Officiated as Commanding Officer in Arunachal Pradesh during Doklam dispute when loads ammunition was required to be pushed fwd to Op location. 5 Participated in Op Parakram, Op Vijay and Op Zafran and various Exercises With Troops (EWT) 6 Tenures in CI Ops and Field 7 SHAPE 1 medical category.
Name	Lt Col Karuna Sood
Course	WSES 15 (March, 2000)
Arms	Sigs
Achievements	Present Med Cat SHAPE 1 Civil Qualifications. BSC (PCM) MFC Performance in Army 1. Initially commissioned in the Strike Corps and participated in OP Parakaram 2. Served in Command and Army HQ Units. 3. Considered for UN MSN interview however could not appear due to maternity reasons. 4. Served in CI (Ops) in Northern Command as DAA&OMG.

	5. Commanded NCC boys Bn for one and half year in officiating capacity. 6. Nominated for GTO and first women officer GTO to be posted in SSB (C) Bhopal. 7. Handpicked for appointment of 2IC provost in an Div Provost Unit as part of test bed for posting women officers in CMP. 8. First women officer to be given second tenure of CMP in a elite unit of Delhi. 9. Participated in all ceremonial events of National level for consecutive two and a half years. 10. Presently posted in a Cat B training establishment. 11. Have been rated as above average to outstanding grading in all the UACs/ACRs by IOs in few cases by ROs as well where ever IO was not present.
Name	Lt Col Preetal Parkhi
course	WS 17
Arm	Corps of Sigs
Achievements	Achievement 1. Volunteered for RR posting and served in Force Sig Regt. 2. Served three field tenures in J&K including one each of RR and High altitude. 3. Carried out only AE appts (Comn Coy Cdr of Comd, Corps and Div Sig Regt) from 6th-13th year of service in field and peace and criteria ACR initiated for all those appts. 4. Independently taken entire Unit for EWT as OIC Ex. 5. Chosen for and represented Sigs for demonstrating e-learning capabilities of Indian Army to US delegation. 5. Presently, Single handedly executing Landline Comn projects of Airforce in SWAC
Remarks	

(viii) Of the above officers, it is necessary to emphasize in particular Lt. Col. Navneet Lobana (serial No XIV above). Lt. Col. Lobana is presently pursuing an M.Tech degree course for which she has been deputed by the Army from 30 July 2020. Following the decision not to grant a PC to her, the officer has been asked to refund the cost of the course which is approximately between Rs. 8.5 to 10 lacs. Applications for selection of officers for a Master of Technology in Structures at the College of Military Engineering were invited by the Training Branch, E-i-C's Branch of Integrated Headquarters of MoD (Army), by a communication dated 28 November 2019. Based on a qualitative requirement criterion, the applications were shortlisted and a list of officers eligible for the interview was published on 20 April 2020. Lt. Col. Lobana was interviewed by a panel of DRDO Scientists at the College of Military Engineering, a Board of Officers headed by Brigadier rank officers and member officers from MS Branch 12 (Military Secretary Branch of Corps of Engineers) and Training Branch from E-in-C's Branch. The officer was finally detailed on 10 July 2020 and has given an undertaking to continue to serve the Army for a minimum period of five years. Following her selection for the course, Lt. Col. Lobana moved from her posting at Patiala and reported to the College of Military Engineering, Pune and the course commenced on 30 July 2020. She is the only woman officer who has qualified in 2020 for an M.Tech in the Indian Army. She has been denied PC and has been asked to refund the cost of the course. The issue of medical fitness is not being considered here since it will be dealt with later.

116. The above analysis leads to the conclusion that the process by which WSSCOs, were evaluated for the grant of PC was by a belated application of a general policy that did not redress the harms of gendered discrimination that were identified by this Court in *Babita Puniya* (supra). Additionally, its belated and formal application causes an effect of indirect discrimination. The petitioners submitted that Special No. 5 Selection Board appears to have been more a Board for rejection of candidates, than for selection. Some of the finest women officers who have served the Indian Army and brought distinction by their performance and achievements have been excluded by refusing to consider their achievements on the specious ground that these were after the 5th/10th year of service. They have been asked to benchmark with the last male counterparts from the corresponding batches. The benchmarking criterion plainly ignores that in terms of the MoD Policy Letter dated 15 January 1991 a cut-off of 60 per cent was prescribed and a cap of 250 officers who would be granted PC annually was laid down. Competitive merit was required to be assessed *only* where the number of eligible officers exceeds the ceiling of 250. As the figures which have been disclosed by the Union of India indicate, for the period from 1994-2010, there were years when the ceiling of 250 officers had not been reached. Then there are other years where the total number of male officers granted PC was well in excess of 250. For years during which the ceiling of 250 had not been reached, there is absolutely no justification to exclude the WSSCOs who had fulfilled the cut-off grade on the basis of the benchmarking criteria. Moreover, it is evident that the ceiling of 250 was not regarded as an absolute or rigid criterion as already indicated in the earlier part of this judgment.

117. The evaluation process which has been followed in the case of the WSSCOs has clearly ignored that the writing of their ACRs was fundamentally influenced by the circumstance that at the relevant time an option of PC was not available for women. Even as late as October 2020, the authorities have emphasized the need to duly fill in a recommendation on whether or not WSSCOs should be granted PC. The manner of allocating 20 marks or 5 marks as the case may be, in the subjective assessment has been found to be flawed since male counterparts of the WSSCOs were assessed by an entirely distinct Special No. 5 Selection Board. To make a comparison in regard to the award of subjective marks ranging between 5 and 20 by different sets of boards would be completely unfair and arbitrary. It does not fulfill the avowed purpose of benchmarking which was to compare like with like.

118. In addition to this, an argument on systemic flaws has been advanced by the petitioners that they were not given career enhancement opportunities available to their male counterparts, such as participating in performance courses, and in cases where they did participate in such courses, it was not given due reflection in their ACRs. The ASG in his written submissions has stated that this argument is incorrect and that women officers have done mandatory courses. The only difference, he states, lies in the fact that certain male officers had done additional non-mandatory courses, which would not give any extra advantage as the marks were given only on an average basis. We do not find merit in the submissions of the ASG. While it may be the case that in some instances women officers were given the opportunity to undertake additional courses to enhance their performance, we must also be alive to the other end of the spectrum which is that, at no point during their service were women officers incentivized to take such performance enhancement courses as they were never eligible for grant of PC then. It may have been the case that for extension of their service such performance enhancing measures were not critical. Even if we take the argument of the ASG at its highest and concede that these additional courses would not make any difference since the marks were given on an average, it is still possible that these courses could have impacted the value judgment or the subjective criterion of 20 or 5 marks, as the case may be, in their ACRs. The impact caused by the evaluation of ACRs, particularly on the marks for performance of courses is a stark representation of the systemic discrimination that pervaded the structures of the Army. A formalistic application of pre-existing policies while granting PC is a continuation of these systemic discriminatory practices. WSSCOs were continued in service with a clear message that their advancement would never be equal to their male counterparts. Their ACR evaluations made no difference to their careers, until PC was granted to them by a court mandate in *Babita Puniya* (supra). Accordingly, some women's failure to opt for courses in the past that would strengthen their chances and reflect positively on their ACRs is not a vacuous “exercise of choice” but a consequence of a discriminatory incentive structure.

119. Finally, the above analysis indicates that there has been a flawed attempt to peg the achievements of the WSSCOs at the 5th/10th years of service thereby ignoring the mandate that

the last ACR ought to be considered and the quantitative performance for the entire record of service must be assessed. Considering the ACRs as on the 5th or 10th year of service for grant of PC would have been appropriate, if the WSCCOs were being considered for PC at that point of time. However, the delayed implementation of the grant of PC to WSSCOs by the Army and considering of ACRs only till the 5th/10th year of service has led to a situation where, in effect, the Army has obliviated the years of service, hard work and honours received by WSSCOs beyond their 5th/10th year of service and relegated them back to a position they held, in some cases, more than 10 years ago. The lack of consideration given to the recent performance of WSSCOs for grant of PC is a disservice not just to these officers who have served the nation, but also to the Indian Army, which on one hand salutes these officers by awarding them honours and decorations, and on the other hand, fails to assess the true value of these honours when it matters the most - at the time of standing for the cause of the WSSCOs to realise their rights under the Constitution and be treated on an equal footing as male officers who are granted PC.

120. On the basis of our analysis we have come to the conclusion that while implementing the judgment of this Court in *Babita Puniya* (supra), the Army authorities have attempted to demonstrate the application of a facially neutral standard as between WSSCOs and their male counterparts. The entire approach is indicated in the following averment in the counter affidavit filed by the Military Secretary:

> "That the Petitioners herein on one hand seek to be treated at par with the male counterparts, however, on the other hand, seek special and unjustified treatment in the eligibility conditions."

121. Subsequently, in the course of the written submission, an apology has been tendered in the following terms:

> "11. At this stage, an apology would be in order as regards the equivocality of the last sentence in para 14 of the C/A (pages 21 and 22), which though made in good faith to emphasize the point that the implementation is being done, treating women officers at par with the men officers, ended up, albeit inadvertently, carrying an impression as if the same is being done to complete the rituals. It is submitted that the UoI is immensely proud of the contribution of women officers to the cause of Indian Army. It is submitted that it is not by any pre-planning that a particular number of women SSC officers do not find themselves approved for PC."

122. The fact that there was no pre-planning to exclude women from the grant of PC is irrelevant under an indirect discrimination analysis. As we have noted previously, under this analysis, the Court has to look at the effect of the concerned criteria, not at the intent underlying its adoption. In light of the fact that the pattern of evaluation will in effect lead to women being excluded from the grant of PC on grounds beyond their control, it is indirectly discriminatory against WSSCOs.

123. We must recognize here that the structures of our society have been created by males and for males. As a result, certain structures that may seem to be the "norm" and may appear to be harmless, are a reflection of the insidious patriarchal system. At the time of Independence, our Constitution sought to achieve a transformation in our society by envisaging equal opportunity in public employment and gender equality. Since then, we have continuously endeavored to achieve the guarantee of equality enshrined in our Constitution. A facially equal application of laws to unequal parties is a farce, when the law is structured to cater to a male standpoint.[85] Presently, adjustments, both in thought and letter, are necessary to rebuild the structures of an equal society. These adjustments and amendments however, are not concessions being granted to a set of persons, but instead are the wrongs being remedied to obliterate years of suppression of opportunities which should have been granted to women. It is not enough to proudly state that women officers are allowed to serve the nation in the Armed Forces, when the true picture of their service conditions tells a different story. A superficial sense of equality is not in the true spirit of the Constitution and attempts to make equality only symbolic.

124. Accordingly, the respondents must remove the requirement of benchmarking the WSSCOs with the last male officer who had received PC in their corresponding batches and all WSSCOs meeting the 60% cut-off must be granted PC. Additionally, the calculation of the cut-off at 60%, which must by army orders and instructions be reviewed every 2 years, must be re-assessed to determine if the casual completion of their ACRs is disproportionately impacting the WSSCOs ability to qualify for PC even at that threshold. In light of the systemic discrimination that women

have faced in the Army over a period of time, to call for the adoption of a pattern of evaluation that accounts and compensates for this harsh reality is not to ask for 'special and unjustified treatment'. Rather, it is the only pathway for the attainment of substantive equality. To adopt a symmetrical concept of equality, is to empty the antidiscrimination guarantee under Article 15, of all meaning.

G.4 Medical Criteria

125. The medical criteria for assessing officers for the grant of PC have been specified in Army instructions and Army Orders to which a detailed reference has been made in the earlier part of this judgment. While dealing with the application of the criteria to the WSSCOs in pursuance of the judgment in *Babita Puniya* (supra), it would be necessary to revisit some salient features:

(i) SAI/3/S/70 specifically provided that in order to be eligible to apply for PC, an SSC officer must be in medical category A-1. Those placed in medical categories A-2, B-1 and B-2 as a result of casualties suffered in action during operations could also be considered on the merits of each case by the government;

(ii) Subsequently, when the SHAPE criteria was introduced, para 2(b) was reconstructed in 1972 by AI 102/1972 to stipulate that the medical category should not be lower than grade-II under any of the SHAPE factors, excluding the 'S' factor in which the grade should not be lower than 1. In exceptional cases, it was stipulated that a grading of 2 in both H and E together may be acceptable. A low medical categorization could not be due to medical reasons, but only as a result of casualties suffered in action during operations or due to injury or other disability sustained during duty;

(iii) Subsequently, AO 110/1981 contained a stipulation for medical boards. Para 13 indicated that for officers who are placed in the TLMC, medical board proceedings recorded on form AFMSF-2 are not required until their medical category stabilizes. Upon the stabilization of the medical category, certain procedures had to be followed;

(iv) Army Instruction 75-81 dated 4 November 1978 provided for the terms and conditions of service for officers granted SSC in the Army Medical Corps. While laying down an upper age limit of 45 years, para 3(d) also stipulated that applicants must be in medical category SHAPE-1;

(v) AO 18/1988 stipulates in para 21, that the medical category of an officer seeking PC should not be lower than grade 2 under any of the SHAPE factors, excluding the 'S' factor in which the grade should not be lower than 1. In exceptional cases, grading of 2 in both H and E together acceptable. Moreover low medical categorization should have been caused as a result of casualties suffered in action during operations or due to injuries or other disabilities sustain during duty;

(vi) Army Instruction 14/1999 dated 1 August 1999 amended SAI 3/S/70 by stipulating that

> "Their medical category should not be lower than S1 or H2 or A3 or P2 or E2 or H2E2 or H2A3 or H2P2 or E2A3 or E2P2. However grant of Permanent Commission to low medical category Short Service Commissioned Officers will be subject to rendition of the requisite certificate in terms of AO 20/75"

(vii) AO 9/2011 specifically defines the meaning of the SHAPE criteria and makes detailed provisions in regard to modalities for evaluation of medical fitness. We have already adverted to the meaning and content of the SHAPE criteria in the earlier part of this judgment.

126. The essence of the submission which has been urged on behalf of the petitioners is that the General Instructions dated 1 August 2020 stipulated that only those officers who are SHAPE 1 or in the PLMC will undergo a medical board. Officers with TLMC were required to submit the proceedings of their medical categorization or re-categorization, giving their present medical category. Such TLMC officers who were otherwise found fit for PC by the Special No. 5 Selection Board were given a maximum period of one year of stabilization of their medical category. As regards officers in the PLMC categorization, it was clarified that this should not be due to medical reasons (whether attributable to military service or not) but should have been a result of casualties suffered in action during operations or due to disabilities by other injury sustained during duty such as while traveling on duty, during training exercises or playing organized games under regimental arrangements. In addition, certain specific medical categories were made ineligible for the grant of PC.

127. Now the singular aspect of the medical requirements that must be noticed at the outset is

that there is a broad consistency of policy on the norms, which have to be fulfilled in order for an officer to qualify for the grant of PC. Another important facet which needs to be emphasized is that SHAPE-1 has a specific meaning which is assigned to it under AO 9/2011. 'S' donates the physiological features including cognitive function abnormalities, 'H' stands for hearing, 'A' for appendages, 'P' for physical capacity and 'E' for eye-sight. The requirement of being in grade-1 in each of the five factors of SHAPE is subject to relaxation in terms of exceptions which are clearly spelt out. The policy provides a concession to such candidates who may not have suffered injury on the line of duty as a result of which their medical categorization has been lowered. But this should not be lower than S1 or H2 or A3 or P2 or E2 or A2E2 or H2A3 or H2P2 or E2A3 or E2P2. The exception which has been provided is available if an injury (as distinct from a disease) has been suffered while on the line of duty, irrespective of whether it has been incurred during peace time or in field operations. Officers in the PLMC who fulfill the terms of the exception are granted PC, if they are otherwise found fit on merits. The requirement of fulfilling the SHAPE criteria as explained earlier is a pre-requisite even in such arms or services where both men and women join up to the age of 45 years, as in the case of the Army Medical Corps. The Army follows and adopts the TLMC norm which allows an officer placed in that category to return to SHAPE 1 within the stabilization period of one year. By this, an opportunity is granted to the officer to return to the SHAPE-1 category within one year.

128. Physical fitness is crucial for securing a place in the Army. While exercising judicial review, the Court must be circumspect on dealing with policies prescribed for the Armed Forces personnel in attaining norms associated with physical and mental fitness. In the present case, as disclosed before this Court, out of the initial 87 petitioners contesting the proceedings in 7 writ petitions, 55 are SHAPE 1 going up to the age of 52 years, 23 have been assigned to PMLC, while 9 are placed in TLMC. The material which has been placed on record in the form of AO 9/2011 indicates a classification range of minimum and maximum permissible parameters for each of the five factors comprised within the SHAPE norm. The submission of the respondents is that these parameters have been fixed, keeping in mind the inevitable advancement of age of both men and women officers. Moreover, in refusing to consider the SSC extensions as sufficient evidence of fitness, it has been submitted by the respondents that an unsaid concession is made in terms of medical requirements where an officer has been considered for extension as opposed to when they are considered for grant of PC. Another important aspect which has been emphasized is that out of 615 WSSCOs officers, 422 were found fit on merits for PC subject to fulfillment of medical and discipline parameters. Out of these 422, 57 were non-optees. From the remaining 365, 277 women officers were found fit on merits as well on medical parameters and have been granted PCs. Of the remaining 88, 42 are TLMC and have the opportunity to upgrade this to the required medical parameters within one year. Out of the remaining 46, only 35 were found not to meet the medical criteria. These 35 officers constitute less than ten per cent of the 365 who had opted for the grant of PC and were found fit on merits. Even in the remaining 193 officers (615 minus 422 found fit) that were not considered fit for PC, it was submitted that 164 of these officers fulfilled the SHAPE-1 criterion. This tabulation indicates a significant proportion of WSSCOs, irrespective of their belated consideration, are able to presently meet the prescribed criteria. With respect to the medical criteria prescribed by the Army, we are cognizant that there can be no judicial review of the standards adopted by the Army, unless they are manifestly arbitrary and bear no rational nexus to the objects of the organization. The SHAPE criterion is per se not arbitrary.

129. Having come to the conclusion that the medical criterion is *per se* not arbitrary, it is the Court's responsibility to examine whether it has been equally applied. We cannot shy away from the fact, that these 615 WSSCOs are being subjected to a rigorous medical standard at an advanced stage of their careers, merely on account of the fact that the Army did not consider them for granting them PC, unlike their male counterparts. By the judgment of the Delhi High Court dated 12 March 2010, specific directions were issued for considering the women SSC officers for the grant of PC. This was a decade ago. During the pendency of the appeal from the judgment of the Delhi High Court before this Court, there was no stay on the application of the judgment of the High Court. This was specifically clarified by the order of this Court on 2 September 2011. The intent of the clarification was that implementation of the directions of the High court must proceed. The WSSCOs have submitted with justification that had they been considered for the grant of PC then, as the respondents were directed to do by the decision of the Delhi High Court, they would have met the norms of eligibility in terms of medical parameters. Their male counterparts who were considered for and granted PC at that time are not required to maintain

SHAPE 1 fitness to be continued in service. Serious hardship has been caused by the Army not considering the cases of these WSSCOs for the grant of PC at the relevant time, despite the express clarification by this Court. Though the contempt proceedings against the respondents were stayed, this did not obviate the obligation to comply with the mandate of the judgment of the Delhi High Court especially after a specific clarification that no stay had been granted. Consideration for PC was not just a legitimate expectation on the part of the WSSCOs but a right which had accrued in their favour after the directions of the High Court, which were issued about a decade ago. The WSSCOs who have been excluded on medical grounds in November 2020 have a legitimate grievance that whether they fulfilled the SHAPE 1 criterion has to be determined from their medical status on the date when they were entitled to be considered, following the decision of the Delhi High Court. Such of them who fulfilled the criterion at the material time are entitled to PC and can continue in service so long as they continue to meet the medical standards prescribed for continuance in the Army. In other words, there is no challenge to the criteria for medical fitness prescribed. These WSSCOs do not seek a special dispensation or exemption for themselves, as women. The essence of the dispute is when the SHAPE 1 criterion has to be applied in the peculiar circumstances which have been noted above.

130. Within the SHAPE criterion, para 31 of AO 9/2011 provides for functional capacities. This ranges from category 1A (fit for all duties anywhere) and category 1B (fit for all duties anywhere under medical observation without employability restrictions); category 2 (fit for all duties but with limitations involving severe physical and mental stress); category 3 (except 'S' factor fit for routine or sedentary duties but limitations of employment duties both job wise and terrain wise); category 4 (temporarily unfit for duties on account of hospitality/sick leave); and category 5 (permanently unfit for military duties).

131. It has been submitted by the petitioners that while being in SHAPE 1 is the requirement at the induction or entry level, it is not the requirement for continued service in the Army. Many of their male counterparts who are granted PC in their 5th or 10th year of service are entitled to continue in service, irrespective of whether they continue to be compliant with SHAPE 1 criteria. In fact, the ASG and Mr. Balasubramaniam, learned Senior Counsel, submitted that even for the time scale promotions to the rank of Colonel and Brigadier, there may be no SHAPE-1 requirement. We need not dwell on that aspect since it is an admitted position that SHAPE-1 is not a requirement for continuation in service. The ASG had sought to bolster his submission of SHAPE-1 as a threshold requirement for PC, by relying on the recruitment process for the Army Medical Corps, where even a 45 year old person seeking recruitment, must comply with SHAPE-1 medical criteria. However, a critical assumption that undergirds the grant of PC is the approximate age of persons who would be under consideration. The WSSCOs in this case are not fresh recruits who are due to be considered in their 5th or 10th year of service, nor are they seeking exceptional favors on account of their sex.

132. On one hand, the Army authorities are insistent on relying on the medical criteria as a filtering mechanism for grant of PC to WSSCOs. On the other hand, we have WSSCOs who have legally fought for their rights and are additionally suffering due to the untimely implementation of their hard-won rights. The Army authorities have stated that the medical criterion has been sufficiently adjusted to take into account age related factors. However, the Army authorities are insistent to apply the medical criteria as of today, while simultaneously attempting to freeze the ACRs of the WSSCOs at the 5th or 10th year of service. Indirect discrimination coupled with an exclusionary approach inheres in this application. An enhancement in the qualifications of WSSCOs from their 5th/10th year of service till today, as would be reflected in their recent ACRs, would demonstrate them as an experienced pool of human resource for the Indian Army. However, a reduction of medical fitness below the SHAPE 1 norm at present as a consequence of age or the tribulations of service is not a necessary detriment to the Army when similarly aged male officers with PC (invariably granted in the 5th or 10th year of their service) no longer have to meet these rigorous medical standards for continuing in service. This is further bolstered by the fact that the WSSCOs who are no longer in SHAPE-1, have been meaningfully continuing in service, even after 14 years of service, till the declaration of results of the PC in November 2020.

133. We also must express our anguish at the respondents' failure to implement the judgment rendered by the Delhi High Court in 2010, whose operation was specifically not stayed by this Court in 2011. The conundrum on the applicability of the medical criterion to WSSCOs who are 40-50 years old, has arisen only because of the Army not having implemented its decision in time,

despite the course correction prescribed by the Delhi High Court in 2010. The WSSCOs, a few of whom are petitioners before us today, have persevered for over a decade to gain the same dignity of an equal opportunity at PC. The fact that only around 35 women who are otherwise fit for PC, and 31 women who do not qualify in addition to not meeting the medical criteria, is irrelevant in determining whether each of these women is entitled to equality of opportunity in matters of public employment under Article 16(1) and (2). As observed by a 9 judge bench of this Court in *Justice KS Puttaswamy* v. *Union of India*[86] a *de minimis* rationale is not a permissible exception to invasion of fundamental rights. The Court, speaking through one of us (Chandrachud, J.) had held that "*the de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment*."[87] Similarly, the percentage of women who have suffered as a consequence of the belated application of rigorous medical criteria is irrelevant to the determination of whether it is a violation of Articles 14, 15 and 16 of the Constitution.

134. In rendering the decision in *Babita Puniya* (supra), this Court was mindful of the insidious impact on the generations of women who must have given up on their dreams to serve in the Armed Forces owing to the gendered roadblock on their aspirations, and of the women who must have chosen to opt out of availing an extension to their SSC terms on similar grounds. We must not forget that those women officers who have remained in service are those with the tenacity to hold on and to meet the exacting standards of performance of which the Indian Army has made her citizens proud. It is also important for us to bear in mind that a career in the Army comes with a serious set of trials and tribulations of a transferable service with postings in difficult terrains, even in times of peace. This is rendered infinitely more difficult when society relegates functions of domestic labour, care-giving and childcare exclusively on the shoulders of women. The WSSCOs before us are not just women who have dedicated their lives to the service of the Army, but are women who have persevered through difficult conditions as they trudged along a lengthy litigation to avail the simplest of equality with their male counterparts. They do not come to the Court seeking charity or favour. They implore us for a restoration of their dignity, when even strongly worded directions by the Court in *Babita Puniya* (supra) have not trickled down into a basic assessment of not subjecting unequals to supposedly "neutral parameters".

135. We are unable to accept the ASG's submission on the medical criteria being modulated to account for advancement of age. The timing of the administration of rigorous standards is a relevant consideration for determining their discriminatory impact, and not just an isolated reading of the standards which account for differences arising out of gender. The WSSCOs have been subject to indirect discrimination when some are being considered for PC, in their 20th year of service. A retrospective application of the supposedly uniform standards for grant of PC must be modulated to compensate for the harm that has arisen over their belated application. In the spirit of true equality with their male counterparts in the corresponding batches, the WSSCOs must be considered medically fit for grant of PC by reliance on their medical fitness, as recorded in the 5th or 10th year of their service.

G.5 WSSCOs belonging to WSES(O) 27-31 and SSC(T&NT) 1-3 who had not completed 14 years of service as on the date of Babita Puniya

136. Another aspect of the case relates to the interpretation of the direction in *Babita Puniya* (supra) mandating WSSCOs who have completed 14 years of service as on the date of the judgment to be considered for PC. In the event of their non-approval or non-option, these officers are to be continued in service for 20 years, with benefits of pension. In *Babita Puniya* (supra), the directions issued by this Court, were while accepting the policy decision of the Union Government. The policy decision of the Union Government for the grant of PCs to WSSCOs in all the ten streams where women were granted SSC in the Indian Army was accepted, subject to several conditions which were spelt out in clauses (a) to (g) of direction (1) in paragraph 69 of the judgment. The directions (a) to (c) are again reproduced below as a convenient point of reference:

> "69. [...]
>
> (i) [...]
>
> (a) All serving women officers on SSC shall be considered for the grant of PCs irrespective of any of them having crossed fourteen years or, as the case may be, twenty years of service.
>
> (b) The option shall be granted to all women presently in service as SSC officers.
>
> (c) Women officers on SSC with more than fourteen years of service who do not opt for being

considered for the grant of the PCs will be entitled to continue in service until they attain twenty years of pensionable service.

(d) As a one-time measure, the benefit of continuing in service until the attainment of pensionable service shall also apply to all the existing SSC officers with more than fourteen years of service who are not appointed on PC."

(emphasis supplied)

137. Directions (e), (f) and (g) are not material at this stage. Direction (d) refers to "existing SSC officers with more than 14 years of service". This expression is clearly intended to encompass those WSSCOs who had completed 14 years of service on the date of the judgment. It is important to note that these officers were also granted the benefit of continuing in service until the attainment of pensionable service.

138. The petitioners in *Lt. Col. Reena Gairola* v. *Union of India*[88] and in *Major Nilam Gorwade* v. *Union of India*[89] belong to the group of women officers recruited under the WSES(O)- 27 to 31 and SSCW(T&NT) 1 to 3. These petitioners were commissioned on or after March 2006 and had not completed 14 years of service as on the date of the judgment in *Babita Puniya* (supra). Under the directions in *Babita Puniya* (supra), in case they do not opt for PC or opt for PC and are not granted PC, they will be released at the end of their 14 years of contractual service. The petitioners in these batches would neither be entitled to pension as they would have only completed 14 years of service at the end of their contract, nor would they be given the one time relief granted in *Babita Puniya* (supra) of entitlement to continue in service for 20 years.

139. The petitioners in the above mentioned writ petitions have argued that within their batches (WSES(O) - 27 to 31 and SSCW(T&NT) 1 to 3), 161 women have been granted PC, out of the 284 serving officers. 66 officers who were not approved for PC (allegedly, *inter alia*, as a consequence of the medical criteria and ACR assessment) and 9 officers who did not opt for PC, have to retire at the end of their contractual term of 14 years, with no pension or benefits. It is pertinent to mention that these petitioners were not a party before this Court in *Babita Puniya* (supra) and consequently could not make out a case for their entitlement to a similar relief for extension till they attain pensionable service, in light of the respondents failing to consider them in time, despite the petitioners being beneficiaries of the judgment of the Delhi High Court.

140. The case of the petitioners is also that at the time of rendering of the judgment of the Delhi High Court in 2010, these WSSCOs had completed a maximum of 4 years in service (or less). Once relief was granted to them by the Delhi High Court and the interim order of the Supreme Court, these WSSCOs took a conscious decision based on these reliefs to continue in service, in anticipation that sooner or later, they would be granted PC. Had they been rejected for PC upon the judgment of the Delhi High Court in 2010, that is over a decade ago, it would have been easier for them to make a career shift and seek employment elsewhere.

141. This Court, as a consequence of the constraint of information being provided to it by the parties arraigned before it in *Babita Puniya* (supra), was not alive to the full extent of the cadres who were denied a timely opportunity for PC in their 5th or 10th year of service. Direction (c) and (d), as a one-time measure, attempted to correct the gross injustice that was meted out to women officers who had completed over 14 years in service, and were being considered for PC at a belated stage. The one-time benefit of continuation in service until their 20th year was provided as a corrective exercise for women who have devoted their careers to the Army, in spite of the dignity of PC being elusive to them, merely as a consequence of their gender. The Court's objective in providing for such a cutoff was to compensate for the impact of the discrimination which had denied them timely opportunities and to account for the significant risk and commitment they demonstrated by their continuation in service.

142. It has been brought to our attention that the women officers in the batches of WSES(O) - 27 to 31 and SSCW(T&NT) 1 to 3 face a similar predicament as they are being considered for PC beyond their 10th year in service (in the best case). Similar to the women in the older cadres who were denied opportunities, career progressions and assurances owing to the respondents' failure at the relevant time to ensure gender equality in the forces; the women in the batches who were between 10-14 years of their service were meted the same insecurity. The WSES scheme has been discontinued and the WSES(O) 31, commissioned in 2008, is the last batch to have gained entry in the scheme, rendering it a 'dying cadre'. We have deployed the expression 'dying cadre' not in a pejorative sense. The expression has a specific meaning in service jurisprudence to denote a dwindling class of officers in service. The officers in the consequent batches of SSCW (T&NT) 1 to

3, although part of the new scheme that replaced WSES, will be the only batches who will face an adverse impact of the respondents' failure to implement the Delhi High Court judgement before the 10th year of their service. In exercise of the constitutional power entrusted to this court under Article 142 to bring about substantial justice, we are compelled to extend the benefit of directions (c) and (d) in *Babita Puniya* (supra) to the officers of the abovementioned batches, as a one-time benefit. This one-time extension, would bring parity *inter se* between officers who were discriminated by their non-timely consideration by the respondents.

H Conclusion and directions

143. Based on the above analysis, we are of the view that the evaluation criteria set by the Army constituted systemic discrimination against the petitioners. The pattern of evaluation deployed by the Army, to implement the decision in *Babita Puniya* (supra) disproportionately affects women. This disproportionate impact is attributable to the structural discrimination against women, by dint of which the facially neutral criteria of selective ACR evaluation and fulfilling the medical criteria to be in SHAPE-1 at a belated stage, to secure PC disproportionately impacts them vis-à-vis their male counterparts. The pattern of evaluation, by excluding subsequent achievements of the petitioners and failing to account for the inherent patterns of discrimination that were produced as a consequence of casual grading and skewed incentive structures, has resulted in indirect and systemic discrimination. This discrimination has caused an economic and psychological harm and an affront to their dignity.

144. For the above reasons, we allow the petitions in terms of the following directions:

(i) The administrative requirement imposed by the Army authorities while considering the case of the women SSCOs for the grant of PC, of benchmarking these officers with the officers lowest in merit in the corresponding male batch is held to be arbitrary and irrational and shall not be enforced while implementing the decision of this Court in *Babita Puniya* (supra);

(ii) All women officers who have fulfilled the cut-off grade of 60 per cent in the Special No 5 Selection Board held in September 2020 shall be entitled to the grant of PC, subject to their meeting the medical criteria prescribed by the General Instructions dated 1 August 2020 (as explained in

(iii) below) and receiving disciplinary and vigilance clearance; (iii) For the purpose of determining the fulfillment of direction (ii), the medical criteria stipulated in the General Instructions dated 1 August 2020 shall be applied at the following points of time:

(a) At the time of the 5th year of service; or

(b) At the time of the 10th year of service, as the case maybe.

In case the officer has failed to meet the medical criterion for the grant of PC at any of these points in time, the WSSCO will not be entitled to the grant of PC. We clarify that a WSSCO who was in the TLMC in the 5th/10th year of service and subsequently met the SHAPE-1 criterion after the one year period of stabilization, would also be eligible for grant of PC. Other than officers who are “non-optees”, the cases of all WSSCOs, including the petitioners who have been rejected on medical grounds, shall be reconsidered within a period of one month and orders for the grant of PC shall in terms of the above directions be issued within a period of two months;

(iv) The grant of PC to the WSSCOs who have already been granted PC shall not be disturbed;

(v) The WSSCOs belonging to WSES(O) - 27 to 31 and SSCW(T&NT) 1 to 3 who are not considered to be eligible for grant of PC after the above exercise, will be extended the one-time benefit of direction (c) and (d) in *Babita Puniya* (supra);

(vi) All consequential benefits including the grant of time scale promotions shall necessarily follow as a result of the directions contained in the judgment in *Babita Puniya* (supra) and the present judgment and steps to do so shall be completed within a period of three months from the date of the judgment;

(vii) The candidature of Lt. Col. Navneet Lobana, Petitioner No. 3 in Writ Petition (C) 1109 of 2020, will be reconsidered for grant of PC in terms of the above directions. In case the officer is not granted PC, she will be allowed to complete her M.Tech degree course for which she has been enrolled at the College of Military Engineering, Pune and shall not be required to pay or reimburse any amount towards the course;

(viii) In accordance with pre-existing policies of the respondents, the method of evaluation of ACRs and the cut-off must be reviewed for future batches, in order to examine for a

disproportionate impact on WSSCOs who became eligible for the grant of PC in the subsequent years of their service; and

(ix) During the pendency of the proceedings, the ASG had assured the Court that all the serving WSSCOs would be continued in service, since the Court was in *seisin* of the proceedings. There shall be a direction that this position shall continue until the above directions of the Court are implemented and hence the serving WSSCOs shall be entitled to the payment of their salaries and to all other service benefits.

145. The writ petitions are accordingly disposed of in the above terms.

146. Pending application(s), if any, stand disposed of.

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[1] Late Justice Ginsburg quoted Sara Grimké, noted abolitionist and advocate of equal rights of men and women, while arguing before the Supreme Court of the United States of America in *Sharron A. Frontiero and Joseph Frontiero* v. *Elliot L. Richardson, Secretary of Defense*, et al., 411 US 677 (1973)

[2] "*Babita Puniya*", (2020) 7 SCC 469

[3] "SSCs"

[4] "PC"

[5] "WSSCO"

[6] WP(C) No. 1597 of 2003 (High Court of Delhi)

[7] The directions of the Delhi High Court were in the following terms:

"62.***

(i) The claim of absorption in areas of operation not open for recruitment of women officers cannot be sustained being a policy decision.

(ii) The policy decision not to offer PC to Short Service Commissioned officers across the board for men and women being on parity and as part of manpower management exercises is a policy decision which is not required to be interfered with.

(iii) The Short Service Commissioned women officers of the Air Force who had opted for PC and were not granted PC but granted extension of SSCs and of the Army are entitled to PC on a par with male Short Service Commissioned officers with all consequential benefits. This benefit would be conferred to women officers recruited prior to change of policy as (ii) aforesaid. The Permanent Commission shall be offered to them after completion of five years. They would also be entitled to all consequential benefits such as promotion and other financial benefits. However, the aforesaid benefits are to be made available only to women officers in service or who have approached this Court by filing these petitions and have retired during the course of pendency of the petitions.

(iv) It is made clear that those women officers who have not attained the age of retirement available for the Permanent Commissioned officers shall, however, be reinstated in service and shall be granted all consequential benefits including promotion, etc. except for the pay and allowance for the period they have not been in service.

(v) The necessary steps including release of financial benefits shall be done by the authorities within two (2) months of passing of this order."

[8] The order of this Court in *Ministry of Defence* v. *Babita Puniya*, 2011 SCC OnLine SC 87 provides as follows:

"2.....

What is stayed as interim measure by this Court is action of contempt initiated by the original writ petitioners against the petitioners in special leave petitions. The operation of the impugned judgment [*Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115] is not stayed at all."

[9] "MoD"

[10] "JAG"

[11] "AEC"

[12] "ASG"

[13] "non-optee"

[14] "TLMC"

[15] "PLMC"

[16] "SAI 3/S/70"

[17] "AO 110/1981"

[18] "AO 9/2011", Ref : AO 01/2004/DGMS

[19] "MDS"

[20] "Lt. Col."

[21] "ACR"

[22] "COAS"

[23] (1983) 2 SCC 433

[24] "AMC"

[25] Civil Appeal No 5629 of 2017 decided on 11 February 2020

[26] Anatole France, The Red Lily (1898)

[27] Sandra Fredman, Discrimination Law (Oxford University Press, 2nd edition)2011 at p.8 ("Sandra Fredman, Discrimination Law")

[28] 426 US 229 (1976)

[29] Sandra Fredman, Discrimination Law (supra n. 28), p. 24

[30] (2008) 3 SCC 1

[31] (2014) 5 SCC 438

[32] (2016) 7 SCC 761

[33] 2021 SCC OnLine SC 84

[34] (2018) 10 SCC 1, paras 442-446

[35] (2009) 111 DRJ 1 (DB)

[36] *Id.* at para 93

[37] *Indian Young Lawyers Assn.* v. *State of Kerala*, 2018 SCC OnLine SC 1690, (Chandrachud J., concurring opinion, paragraph 117); *Joseph Shine* v. *Union of India*, 2018 SCC OnLine SC 1676, (Chandrachud J, concurring opinion, para 38) ("Joseph Shine")

[38] *Ibid*, Joseph Shine

[39] *Patel Suleman Gaibi* v. *State of Maharashtra*, 2014 SCC OnLine Bom 4639

[40] Writ Petition (C) 4525 of 2014, Delhi High Court (6 August 2015)

[41] "Madhu", 2018 SCC OnLine Del 6660. A challenge to conditions of employment/promotion in the Army Dental Corps was also made before the Delhi High Court in *Dr. Jacqueline Jacinta Dias* v. *Union of India*, (2018 SCC OnLine Del 12426). However, the challenge could not succeed as the Court failed to discern any manifest bias. In doing so however, the High Court pointed out to the lack of clear norms regarding indirect discrimination in India and noted:

"35... This court is conscious of the fact that indirect discrimination is harder to prove or establish. Hidden biases, where establishments or individuals do not overtly show bias, but operate within a discriminatory environment therefore, is hard to establish. Yet, to show such bias [...], there should have been something in the record-such as pattern of marking, or predominance of some element, manifesting itself in the results declared. This court is unable to discern any; Nor is there any *per se* startling consequence apparent from the granular analysis of the results carried out. Furthermore, equality jurisprudence in India has not yet advanced as to indicate clear norms (unlike legislative rules in the EU and the UK) which guide the courts. Consequently, it is held that the complaint of gender discrimination or arbitrariness is not made out from the record."

[42] Interchangeably referred as "PCP"

[43] Foundations of Indirect Discrimination Law (Hugh Collins and Tarunabh Khaitan (eds), Hart Publishing) 2018 at p.1

[44] *Coleman* v. *Attridge Law*, [2008] IRLR 722

[45] "Griggs", 401 US 424 (1971), 431

[46] *Id*. at p. 431

[47] *Ibid*.

[48] "SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new

subsection:

'(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if--

'(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

'(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

'(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

'(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

'(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

'(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

'(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.'.

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove--Business necessity/cumulation/alternative business practice."

[49] 544 US 228 (2005)

[50] *Texas Department of Housing and Community Affairs* v. *Inclusive Communities Project Inc*, (2015) 135 S.Ct. 2411, per Kennedy J

[51] *Id.* at para 20

[52] *R (on the application of E)* v. *JFS Governing Body*, [2009] UKSC 15, para 57

[53] "19. Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are-age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation."

[54] [2017] UKSC 27

[55] "9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law;

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken;

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination;

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[56] "SACC"

[57] (1998) 3 BCLR 257, paras 31-32

[58] [2020] ZACC 24

[59] "Ontario HRC", [1985] 2 SCR 53

[60] Section 4(1)(g) of the Ontario Human Rights Code prohibited discrimination against an employee with regards to any term or condition of employment on the basis of race, creed, colour, sex, age etc.

[61] *Ontario HRC* (supra n.60) at para 12

[62] ("Fraser"), [2020] SCC 28

[63] *Id.* at para 31

[64] *Id.* at paras 50-72

[65] *Id.* at para 76

[66] *Ontario HRC* (supra n. 60), para 14

[67] *Sandra Fredman, Discrimination Law* (supra n. 28) at p. 187

[68] *Orsus* v. *Croatia*, [2010] ECHR 337, para 153

[69] *Sandra Fredman, Discrimination Law* (supra n. 28) at p. 194

[70] Marie Mercat-Bruns, *Systemic discrimination : Rethinking the Tools of Gender Equality*, European Equality Law Review, Vol. 2 (European Commission, 2018) at p.5-6

[71] *Id.* at p.10-13

[72] Tristin K. Green, *The Future of Systemic Disparate Treatment Law, Berkeley Journal of Employment and Labour Law*, Vol. 32 (2), 2011, 400-454

[73] "Canadian National Railway Company", [1987] 1 SCR 1114

[74] *Id.* at 1139

[75] *Canadian National Railway Company* (supra n. 74) at p.1143 to 1144

[76] 1997 28 C.H.R.R.D 179 (Canadian Human Rights Tribunal)

[77] *International Brotherhood of Teamsters* v. *United States*, 431 US 324 (1977)

[78] *Id.* at p. 334-340

[79] The Stephen Lawrence Inquiry : Report of an Inquiry by Sir William Macpherson of Cluny (February 1999) available at https ://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf#page=375

[80] AO 45/2001/MS-Confidential Reports on Officers

[81] Ref MS Br Letter No A/17151/MS 4 (Coord) dated 20 February 2004, provided that:

"(o) In case of Short Service Commissioned Officers, recommendations for 'PRC/Extension' are mandatory. In case of Women Special Entry Scheme Officers, recommendation for 'Extension' is mandatory. Reasons for 'Not Recommended' should be communicated to the Ratee."

[82] Ref Letter No B/32313/Road Map/AG/PS-2(a) dated 2 March 2020

[83] Ref Letter No 04520/MS Policy dated 30 December 2003

[84] We cite these examples only to reflect the outstanding nature of the service of WSSCOs. We do so in full recognition of the fact that that these instances merely constitute a drop in the ocean of the contribution of women officers in the Armed Forces.

[85] Catharine A. MacKinnon, Towards a feminist theory of state (Harvard University Press 1989) at p.220.

[86] (2017) 10 SCC 1

[87] *Id.* at para 128

[88] Writ Petition (Civil) No. 34 of 2021

[89] Writ Petition (Civil) No. 1223 of 2020

LPA 640/2017

Madhu v. Northern Railway

2018 SCC OnLine Del 6660

In the High Court of Delhi at New Delhi
(BEFORE S. RAVINDRA BHAT AND SANJEEV SACHDEVA, JJ.)

Madhu & Anr. ..... Appellants

Ms. Siza Nair Pal, Advocate with Appellant No. 2 in person.

v.

Northern Railway & Ors. ..... Respondents

Mr. Jagjit Singh with Mr. Preet Singh, Advocates.

LPA 640/2017

Decided on January 17, 2018

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.:— The appellants challenge an order by the Single Judge dismissing their writ petition. They sought directions to include their names in the medical card and privilege passes of Om Prakash Gorawara (hereafter, "Gorawara") and to issue them separate cards. The appellants were Gorawara's wife and daughter; neither are employed, and the first appellant, wife (hereafter "Madhu") is suffering from various chronic ailments. The present proceedings were preceded by a series of litigation between the appellants and second respondent. One of these resulted in applications of maintenance under Section 125 of the Code of Criminal Procedure, 1973. The other cases include proceedings alleging commission of offences under Sections 498A and 406 of the Penal Code, 1860 (IPC). At the end of these litigations, the second respondent started paying maintenance to the appellants.

2. Gorawar is a former employee of Indian Railways, the third respondent. The Indian Railways Medical Manual and the Railway Servant Pass Rules allows for the issue of a REHLS card and establishes the "wife" and "unmarried daughter" as "family" for the purposes of extending medical card and privilege pass facilities to them. The families of current and former railway servants and officers are thus entitled to avail of medical services from railway hospitals so long as they are carrying the REHLS card. Before 2010 the appellants were listed as family/dependents on the medical card of the second respondent. In 2010 the appellants applied for and were denied separate medical cards by the first respondent, Northern Railways (referred to hereafter by name). Before his retirement in 2012, Gorawara removed the appellants' names from his medical card, disentitling them to free medical services that are otherwise available to the dependents of railway employees.

3. A writ petition, W.P.(C) No. 6535/2015, against the decision of Northern Railways taken in 2010 to deny the Appellants the medical card was filed before this court. The court directed the General Manager, Northern Railways to decide the matter expeditiously. On 23.11.2015 the General Manager, Northern Railways issued the speaking order denying the appellants the medical cards and privilege passes, and consequently the use of the free medical facilities. It is against this order of Northern Railways that a writ petition was filed before this court, resulting in the impugned judgment. The Learned Single Judge, rejected the appellants' writ petition, holding that the issue involved a personal dispute and in the absence of nomination of the appellants as family members, by Gorwara, they could not claim the medical and pass

benefits.

4. The Appellants argue that Gorwara had initially declared them as eligible to secure medical facilities from the railways and nominated them as such, but subsequently removed their names. This was done by allegedly applying for a duplicate medical card and omitting the appellants' name in the 'dependants' column of the new medical card. The appellants urge that there is no separation of marital ties between Gorwara and his wife, and thus he cannot disown the Appellants. The Appellants bring to the Court's notice that the Appellants have filed a Criminal Revision Petition to enhance the amount of maintenance. Considering these facts the Appellants contend that the speaking order of 23.11.2015 is arbitrary, discriminatory, and hence unconstitutional.

5. The Appellants also allege a violation of Section 602(2) of the Indian Railway Establishment Code Volume, which states, "*Medical attendance and treatment facilities shall be available, free of charge, to all 'Railway employees' and their 'family members and dependent relatives, irrespective of whether they are in Group A, Group B, Group C, Group D, whether they are permanent or temporary, in accordance with the detailed rules as given in Section 'C' of this Chapter.*" Thus, the Appellants claim that they are entitled to free medical services as the 'family' of Respondent No. 2, a retired railway employee.

6. The Appellants also rely upon the Railway Board Letter No. 2004/H/28/1 RELHS/Card (dated 22.03.2005) wherein provisions were made for eligible family members to procure a RELHS card. The letter notes, "*For Long Term Duration: the original medical card may be deposited with the issuing authority who may issue split medical card to the beneficiaries as requested by them*". Thus, the Appellants contend that it is within Northern Railway's power to issue to the Appellants a separate medical card. It is submitted that the understanding of the Single Judge, in the impugned order that the dispute related to personal issues, is incorrect; it is rather the Railway authorities' omission in ignoring material circumstances and denying them what legitimately ought to be given to them.

7. It is argued besides, that the first appellants' age and medical ailments render her vulnerable because in the absence of any medical card, health and medical facilities would become so expensive as to become inaccessible. Counsel submitted that the official respondents' inability to consider these-as well as the fact that over two decades the appellants are recipients of the medical benefits and railway passes provided by the Railways rules and orders and further ignoring that the behaviour of Gorwara has resulted in direction of competent courts to pay them maintenance, renders the refusal to give them (the appellants) such benefits arbitrary; it also violates their right to life under Article 21 of the Constitution. It is underlined that the status of the appellants as wife and daughter of Gorwara could not have been ignored by the official respondents; therefore, the latter's order was made without application of mind.

8. The primary contention of the Northern Railways is that the facilities of the Medical Card and Privilege Passes are for the use of the railway officers/servants, and have been extended to the family of the railway officer/servant *only on their declaration*. Northern Railways argues that there is no provision in the existing policy that allows for separate medical cards and passes to be provided to the mother and daughter, as these documents cannot be individually requested. Thus, absent a declaration by Gorwara, no medical card can be issued to the Appellants.

9. The contesting private respondent, Gorwara alleges that he is living separately from the Appellants and has no semblance of a family life with them. It is also alleged that the duplicate medical card was issued because the original medical card was lost by him. Gorwara claims that he has completely disowned the Appellants and does not

wish for them to secure the free medical services based on his medical card.

Analysis and Reasoning:

10. Before analyzing the rival submissions of the parties, it is necessary to extract the relevant provisions of the Railway servants' manual. It reads as follows:

> *"603. Section 'C-Scope of medical attendance and treatment.*
>
> *Sub-section I: General.*
>
> *Medical attendance and treatment. - The Railway employees, their family members and dependent relatives are entitled free of charge medical attendance and treatment;*
>
> *Family includes:—*
>
> *i. spouse of a railway servant whether earning or not;*
>
> *ii. son or sons who have not attained the age of 21 years and are wholly dependent on the railway servant;*
>
> *iii. son or sons of the age of 21 and above who are;*
>
> *a. bonafide students of any recognized educational Institution;*
>
> *b. engaged in any research work and do not get any scholarship/stipend;*
>
> *c. working as an articled clerk under the Chartered Accountant;*
>
> *d. invalid, on appropriate certificate from Railway Doctor;*
>
> *iv. unmarried daughters of any age whether earning or not:*
>
> *v. widowed daughters provided they are dependent on the railway servant;*
>
> *vi. legally divorced daughter who is dependent on the railway servant;"*

11. The speaking order, issued pursuant to the order of this court, in the previous writ proceeding, brought by the appellants, reads as follows:

> *"A personal hearing was given by me to Ms. Madhu and Shri. O.P. Gorawara on 30.10.2015. I have gone through the facts of the case as well as personally heard the grievance of both the affected parties.*
>
> *The Indian Railways Medical Manual Vol-I (third edition 2000) for the reason of RELHS and the Railway Servant Pass Rules establish the 'wife' and the 'unmarried daughter' as 'Family' for the purpose of extending the medical and pass facilities to them, irrespective of their earning status/age. However, these facilities are primarily provided to the Railway servant/officer and by virtue of his being employed under the Ministry of Railways. These facilities have further been extended to the family of the Railway servant on his declaration only. There is no provision in the existing frame of policy for providing separate medical card or pass facility to the mother and daughter since the benefit is extended to 'family' of Railway servant/retired servant and cannot be given individually as requested. Hence this request of the petitioner/applicant cannot be acceded to."*

12. A plain and textual reading of the provision (Para 603, quoted previously) clearly shows that spouses and unmarried daughters, dependent upon the income of the spouse/father, fall in the category of "family". The reasoning adopted by the Northern Railways, on the other hand, in this case, is simple-that a declaration is necessary by the railway officer/servant, and it is *based on this declaration* that the dependents of the railway officer/servant will be given the benefit of free medical servants. The Northern Railways' understanding, in the opinion of this court, is utterly flawed. The provision which *entitles* the railway servant and his dependents, i.e. family members, clearly says *"Railway employees, their family members and dependent relatives are entitled free of charge medical attendance and treatment".* The corollary is that those answering the description of "family members", like the railway servants, enjoy the benefits she or he is assured. The *declaration* to be given, in the opinion of the court, by the railway servant, is a mere intimation, and thus *facilitative or*

procedural. No one can argue-and mercifully the Railways is not arguing-that the status of the family members *depends on the declaration.* To accept that submission would be startling, because it would empower a spouse or father, upon caprice, with the blink of an eyelid, without any rhyme or reason, to decide to deprive what his family members would otherwise be entitled to. By way of illustration, if a dependent, unmarried daughter suffering from a chronic ailment such as tuberculosis or acute diabetes, for some reason has a difference of opinion with her father, or a young college going dependent son similarly has differences with his father, but needs urgent surgery and in both cases, are estranged from their father, the father in either case (if he is capricious) can cut off medical aid. Plainly, the interpretation given by the railways, empowering the railway servant to ignore existing status of his family members through unilateral exclusionary declaration, is untenable.

13. This court is of the opinion that the structure of Para 603 is such that the status of spouse, is recognized as long as the relationship of matrimony subsists. In the case of an unmarried and dependent daughter, there is no question of changing the status; by its very nature it is unalterable. Thus, the mere circumstance that one or the other party to a matrimonial bond, is disgruntled or involved in litigation against the other, would not alter the *factum* of relationship, which is *per se* a matter of status.

14. Madhu is suffering from various chronic ailments that have rendered her unemployable. Her daughter has chosen not to secure employment in order to care for her ailing mother. The Constitution of India establishes a welfare state whose duties include the providing of medical care for its citizens. This right is firmly protected within the right to live with dignity under Article 21. Additionally, as an employer, the government must ensure (as Section 603 of the Railway Servants Manual clearly notes) the health of its employees. This reasoning has been laid down by the Supreme Court in *State of Punjab* v. *Ram Lubhaya Bagga* (1998) 4 SCC 117, where the Court stated,

> "*Right of one person correlates to a duty upon another, individual, employer, Government or authority. The right of one is an obligation of another. Hence the right of a citizen to live under Article 21 casts an obligation on the State. This obligation is further reinforced under Article 47, it is for the State to secure health to its citizens as its primary duty. No doubt Government is rendering this obligation by opening Government hospitals and centres, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities for which an employee looks at another hospital.*
>
> [...] *The State can neither urge nor say it has no obligation to provide medical facility. If that were so, it would be ex facie violative of Article 21.*"

15. Thus, by denying the medical facilities to Madhu, Northern Railways is in effect, violating the mandate enshrined in Article 21 of the Constitution.

16. This Court must also keep in mind that the Appellants, under the Constitution, fall within a particular group, i.e. that of "women". The Constitution in Articles 15 and 16 recognises the principle that certain groups have been historically disadvantaged and that post the enactment of the Constitution, actions of the State that discriminate against women (not falling within the exceptions of Article 15(4) and Article 16(4) are constitutionally untenable. Thus, while affirmative action to secure the interests of women is allowed, the Constitution, irreproachably, does not permit discrimination against women. This understanding has been articulated by the Supreme Court in *Jeeja Ghosh* v. *Union of India* (2016) 7 SCC 761 where the court stated,

> "*The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public*

facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society."

17. Since the actions of Northern Railways result in denial of benefits and rights to this special class, it must be closely examined to see if the actions, or their effect, are discriminatory. The Northern Railways contends that the Appellants are not denied the medical card *because they are women*, but rather because their husband and father had not made the requisite declaration. However, this explanation is not enough. It is not sufficient to say that the reasoning of Northern Railways did not *intentionally discriminate* against the Appellants *because they were women*. Law does not operate in a vacuum and the reasoning and consequent decision of Northern Railways must be examined in the social context that it operates and the *effects* that it creates in the real world. Even a facially neutral decision can have disproportionate impact on a constitutionally protected class. This has been recognised by the Supreme Court in *Anuj Garg* v. *Hotel Association of India* (2008) 3 SCC 1 where the Court stated,

"*Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects […] 51. No law in its ultimate effect should end up perpetuating the oppression of women.*"

18. Similar observations were made by the Supreme Court in the landmark case of *R.C. Cooper* v. *Union of India* 1970 SCR (3) 530. The Court stated,

"[…] *To hold that the extent of, and the circumstances in which, the guarantee of protection is available depends upon the object of the State action, is to seriously erode its effectiveness. Examining the problem not merely in semantics but in the broader and more appropriate context of the constitutional scheme which aims at affording the Individual the fullest protection of his basic rights and on that foundation to erect a structure of a truly democratic polity, the conclusion, in our judgment, is inevitable that the validity of the State action must be adjudged in the light of its operation upon the rights of the individual and groups of individuals in all their dimensions.*

[…] *it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim: it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.*"

19. Thus, the touchstone of validity for State action is not the intention behind the action, but rather the actual impact and effect on a citizen's life. This is clearly seen by the observations by the Supreme Court in *Maneka Gandhi* v. *Union of India* 1978 SCR (2) 621 where the Court noted,

"[…] *In testing the validity of the state action with reference to fundamental rights, what the Courts must consider is the direct and inevitable consequence of the State action.*"

20. This Court itself has recognised that actions taken on a seemingly innocent ground can in fact have discriminatory effects due to the structural inequalities that exist between classes. When the CRPF denied promotion to an officer on the ground that she did not take the requisite course to secure promotion, because she was

pregnant, the Delhi High Court struck down the action as discriminatory. Such actions would inherently affect women more than men. The Court in *Inspector (Mahila) Ravina* v. *Union of India* W.P.(C) 4525/2014 stated,

> "*A seemingly "neutral" reason such as inability of the employee, or unwillingness, if not probed closely, would act in a discriminatory manner, directly impacting her service rights. That is exactly what has happened here: though CRPF asserts that seniority benefit at par with the petitioner's colleagues and batchmates (who were able to clear course No. 85) cannot be given to her because she did not attend that course, in truth, her "unwillingness" stemmed from her inability due to her pregnancy.*"

21. The principle that a facially neutral action by the State may disproportionally affect a particular class is accepted across jurisdictions in the world. In Europe for instance, the principle has received statutory recognition. *Council Directive 76/207* (9 February, 1976) states,

> "*the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status…*"

22. *Council Directive 2000/78/EC* (27 February, 2000) defines the concept of 'indirect discrimination' as,

> "*indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*"

23. It is also worth paying attention to the case of *Bilka-Kaufhaus GmbH* v. *Webber von Hartz* (1986) ECR 1607. Bilka was a supermarket that paid all employees who had worked full-time for more than 15 years a pension. Mrs. Webber worked part-time at Bilka for over 15 years, but was denied the pension because she was only a part-time employee. Mrs. Webber alleged that the requirement to be a full-time employee before securing the pension was discriminatory against women, since women were far more likely than men to take up part-time work, so as to take care of family and children. The Court noted,

> "*Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.*"

24. The Canadian Supreme Court has also espoused an understanding of "disparate impact", where the touchstone to examine the validity of an allegedly discriminatory action is whether or not *the effect of the action* has a disproportionate impact on a class of citizens. The Court in *Andrews* v. *Law Society of British Columbia* [1989] 1 S.C.R. 143 noted,

> "*Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.*
>
> […] *The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. These words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by*

the section to those which involve prejudice or disadvantage. The effect of the impugned distinction or classification on the complainant must be considered.

[...] *I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.*"

25. The Canadian Supreme Court had similar observations in *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 where the court noted that discrimination arises when:

"*It arises where an employer* [...] *adopts a rule or standard* [...] *which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.*"

26. Thus, the Court concluded there was no requirement to show that the employer had the *intention* to discriminate against the complainants because of a constitutional prohibited ground, merely that the effect on the constitutionally protected class of people was adverse. The Court also stated,

"*The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.*

[...] *On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited grounds on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.*

[...] *An employment rule honestly made for sound economic or business reasons, equally applicable to all whom it is intended to apply may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.*"

27. The Supreme Court of South Africa made analogous observations regarding discrimination. In *The City Council of Pretoria* v. *Walker Case CCT 8/97* the Court noted,

"*The concept of indirect discrimination, as I understand it, was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.*

In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken."

28. The origin of the idea of "disparate impact" originated in the landmark case of *Griggs* v. *Duke Power Co.* 401 U.S. 424. The Court was faced with the case of an employer who required employees to pass an aptitude test as a condition of employment. The work in question was manual work. Although the same test was applied to all candidates, the Court noted that African-American applicants had long received sub-standard education due to segregated schools. Thus, the employer's requirement disproportionately affects African-America candidates. The Court held in the context of the Civil Rights Act,

> "*The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.*"

29. The reason that the drafters of the Constitution included Article 15 and 16 was because women (*inter alia*) have been subjected to historic discrimination that makes a classification which disproportionately affects them as a class constitutionally untenable. The Northern Railways' decision to not grant the Appellants medical cards clearly has such a disproportionate effect. By leaving an essential benefit such as medical services subject to a declaration by the railway officer/servant, the dependents are subject to the whims and fancies of such employee. The large majority of dependents are likely to be women and children, and by insisting that the railway officer/servant makes a declaration, the Railway authorities place these women and children at risk of being denied medical services.

30. It is irrelevant that the Railways did not deny them the medical card *because the Appellants were women*, or that it is potentially possible that a male dependent may also be denied benefits under decision made by the Railways. The *ultimate effect* of its decision has a disparate impact on women by perpetuating the historic denial of agency that women have faced in India, and deny them benefits as dependents.

31. In light of these facts and the observations made above, we are of the conclusion that the speaking order passed by the Northern Railways on 23.11.2015 is arbitrary, discriminatory and made without application of mind. This court hereby quashes the order dated 23.11.2015 and directs the Northern Railways to include both the appellants' names on the medical card of the second respondent and issue a separate medical card and privilege pass to the Appellants. These directions shall be complied with, within four weeks. The appeal, and consequently, the writ petition is allowed in the above terms; there shall be no order on costs.

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children as per the order dated 19-1-1993 and the learned 2nd Additional Sessions Judge also committed no error in dismissing the revision petition filed by the respondent. The High Court, on the other hand, fell in complete error in holding that the right to claim maintenance of the children under Section 125 CrPC was taken away and superseded by Section 3(1)(*b*) of the 1986 Act and that maintenance was payable to the minor children of Muslim parents only for a period of two years from the date of the birth of the child concerned notwithstanding the provisions of Section 125 CrPC. The order of the High Court cannot, therefore, be sustained. It is accordingly set aside. The order of the trial court and the revisional court is restored. This appeal succeeds and is allowed but without any orders as to cost.

13. The arrears of maintenance in respect of the children shall be paid by the respondent to the appellant-mother, who filed the petition on their behalf, within one year from the date of this order in four equal instalments, payable quarterly. The first instalment shall be paid on or before 15-8-1997 and thereafter every three months. Any single default in the payment of the arrears will entitle the appellant to recover the entire balance amount at once with 12% interest through the trial court in the manner prescribed by the Code. The respondent shall continue to pay maintenance as directed by the trial court, till the children attain majority or are able to maintain themselves and in the case of the daughters, till they get married.

(1997) 6 Supreme Court Cases 241

(BEFORE J.S. VERMA, C.J. AND SUJATA V. MANOHAR AND B.N. KIRPAL, JJ.)

VISHAKA AND OTHERS .. Petitioners;

Versus

STATE OF RAJASTHAN AND OTHERS .. Respondents.

Writ Petitions (Crl.) Nos. 666-70 of 1992†, decided on August 13, 1997

A. **Constitution of India — Arts. 14, 19 & 21 and 15(1), (3), 42, 51-A(a), (e) and 32 & 141 — Rights of working women against sexual harassment in workplaces — Held, they have rights to gender equality, to work with dignity and to a working environment safe and protected from sexual harassment or abuse — In absence of suitable legislation in this sphere, international conventions and norms, so far as they are consistent with the constitutional spirit, can be relied on — Accordingly, guidelines and norms prescribed by the Supreme Court, with the assistance of Solicitor General appearing for Union of India and other counsel, for protection and enforcement of these rights of the women at their workplaces — These guidelines and norms must be strictly observed in all working places by treating them as law declared under Art. 141 — Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region (as accepted by the Chief Justices of Asia and the Pacific at**

† Under Article 32 of the Constitution of India

Beijing in 1995), Art. 10 — Convention on the Elimination of All Forms of Discrimination against Women, Arts. 11 & 24 — CEDAW, Arts. 11, 22, 23, 24 — Protection of Human Rights Act, 1993 — Judicial activism — Legislation by judiciary

B. **Constitution of India — Art. 32 — PIL seeking gender justice for protection and enforcement of fundamental and human rights of working women — Writ of mandamus along with suitable directions can be issued by Supreme Court**

C. **Constitution of India — Arts. 32 and 73 & 50 — PIL — In enforcement of fundamental rights, guidelines and norms can be laid down by Supreme Court to fill up the vacuum in existing legislation — Power of Supreme Court under Art. 32 and executive power of the Union to protect and enforce the fundamental rights and meet the social evil threatening these rights — Analogy of Art. 73 — Judicial activism — Legislation by judiciary**

D. **Constitution of India — Arts. 32 and 51(c), 51-A(e) & (f), 253 & Sch. VII List I Entry 14 — International conventions and norms, consistent with the spirit of the fundamental rights, can be read into those rights for interpreting them in the larger context to promote the objects of the Constitution — In the absence of domestic law on the particular aspect, these conventions and norms as ratified by India, can be relied on by the Supreme Court to formulate guidelines for enforcement of fundamental rights — International Law — International conventions and norms**

The present writ petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21. It was brought as a class action by certain social activists and NGOs with the aim of assisting in finding suitable methods for realisation of the true concept of "gender equality"; and to prevent sexual harassment of working women in all workplaces through judicial process and to fill the vacuum in existing legislation. The immediate cause for the filing of the writ petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. The notice of the petition was given to the State of Rajasthan and the Union of India. The Solicitor General who appeared for Union of India and other counsel who appeared before the Supreme Court rendered needed assistance to the Court to deal with the matter. Disposing of the writ petition

Held :

Each incident of sexual harassment of woman at workplace results in violation of the fundamental rights of "Gender Equality" and the "Right to Life and Liberty". It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(*g*). The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. (Paras 3 and 14)

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(*g*) and 21 of the Constitution and the safeguards against sexual harassment

implicit therein and for the formulation of guidelines to achieve this purpose. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(*c*) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution.

(Paras 10, 7 and 14)

Minister for Immigration and Ethnic Affairs v. *Teoh*, 128 Aus LR 353; *Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527, *relied on*

Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum. By virtue of Article 73 the executive power of the Union is available till Parliament enacts legislation to expressly provide measures needed to curb the evil.

(Paras 3 and 7)

Thus, the power of the Supreme Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The obligation of the Supreme Court under Article 32 for the enforcement of the fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. (Paras 8 and 11)

Some provisions in the "Convention on the Elimination of All Forms of Discrimination against Women" (Articles 11 and 24) as also the general recommendations of CEDAW in this context (Articles 11, 22, 23, 24), as ratified the Resolution on 25-6-1993 with some reservations which are not material in the present context, are of significance. At the Fourth World Conference on Women in Beijing, the Government of India has also made an official commitment, inter alia, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women's Rights to act as a public defender of women's human rights; to institutionalise a national level mechanism to monitor the implementation of the Platform for Action. Therefore, reliance can be placed on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution. (Paras 12 and 13)

In view of the above, and in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, guidelines and norms are hereby laid down for strict observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution.

(Paras 16 and 18)

The GUIDELINES and NORMS prescribed herein are as under:

HAVING REGARD to the definition of "human rights" in Section 2(*d*) of the Protection of Human Rights Act, 1993,

TAKING NOTE of the fact that the present civil and penal laws in India do not *adequately* provide for specific protection of women from sexual harassment in workplaces and that enactment of such legislation will take considerable time,

It is necessary and expedient for employers in workplaces as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. *Duty of the employer or other responsible persons in workplaces and other institutions*:

It shall be the duty of the employer or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. *Definition*:

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as.

(*a*) physical contact and advances;

(*b*) a demand or request for sexual favours;

(*c*) sexually-coloured remarks;

(*d*) showing pornography;

(*e*) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. *Preventive steps*:

All employers or persons in charge of workplace whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(*a*) Express prohibition of sexual harassment as defined above at the workplace should be notified, published and circulated in appropriate ways.

(*b*) The rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(*c*) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(*d*) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. *Criminal proceedings*:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator *or their own transfer.*

5. *Disciplinary action*:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. *Complaint mechanism*:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time-bound treatment of complaints.

7. *Complaints Committee*:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government Department concerned of the complaints and action taken by them.

The employers and person-in-charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government Department.

8. *Workers' initiative*:

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in employer-employee meetings.

9. *Awareness*:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. *Third-party harassment*:

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993. (Para 17)

These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. (Para 18)

R-M/18375/CR

Advocates who appeared in this case :

F.S. Nariman, Senior Advocate (Ms Meenakshi Arora and Ms Niti Dixit, Advocates, with him) for the Petitioners;

T.R. Andhyarujina, Solicitor General (Mukul Mudgal, Ms Suvira Lal, C.V.S. Rao, K.S. Bhati and M.K. Singh, Advocates, with him) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (1993) 2 SCC 746 : 1993 SCC (Cri) 527, *Nilabati Behera* v. *State of Orissa* 251*d-e*
2. 128 Aus LR 353, *Minister for Immigration and Ethnic Affairs* v *Teoh* 251*d*

The Judgment of the Court was delivered by

VERMA, C.J.— This writ petition has been filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. With the increasing awareness and emphasis on gender justice, there is increase in the effort to guard against such violations; and the resentment towards incidents of sexual harassment is also increasing. The present petition has been brought as a class action by certain social activists and NGOs with the aim of focussing attention towards this societal aberration, and assisting in finding suitable methods for realisation of the true concept of "gender equality"; and to prevent sexual harassment of working women in all workplaces through judicial process, to fill the vacuum in existing legislation.

2. The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. That incident is the subject-matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a

working woman may be exposed and the depravity to which sexual harassment can degenerate and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

3. Each such incident results in violation of the fundamental rights of "Gender Equality" and the "Right to Life and Liberty". It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(*g*) "*to practise any profession or to carry out any occupation, trade or business*". Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. *A writ of mandamus* in such a situation, if it is to be effective, needs to be accompanied by directions for prevention, as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

4. The notice of the petition was given to the State of Rajasthan and the Union of India. The learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a law officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms Meenakshi Arora and Ms Naina Kapur who assisted the Court with full commitment, Shri Fali S. Nariman appeared as amicus curiae and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the Court which has enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature.

5. Apart from Article 32 of the Constitution of India, we may refer to some other provisions which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14, 19(1)(*g*) and 21, which have relevance are:

Article 15:

"15. *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.*—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) * * *

(3) Nothing in this article shall prevent the State from making any special provision for women and children." a

Article 42:

"42. *Provision for just and humane conditions of work and maternity relief.*—The State shall make provision for securing just and humane conditions of work and for maternity relief."

Article 51-A:

"51-A. *Fundamental duties.*—It shall be the duty of every citizen of India— b

(*a*) to abide by the Constitution and respect its ideals and institutions, ...;

(*b*)-(*d*) * * *

(*e*) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;" c

6. Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are: d

Article 51:

"51. *Promotion of international peace and security.*—The State shall endeavour to—

(*a*)-(*b*) * * *

(*c*) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and e

* * *"

Article 253:

"253. *Legislation for giving effect to international agreements.*—Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." f

Seventh Schedule:

"*List I — Union List*

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries." g

7. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(*g*) and h

21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(*c*) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till Parliament enacts legislation to expressly provide measures needed to curb the evil.

8. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.

9. The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this Court to govern the behaviour of the employers and all others at the workplaces to curb this social evil.

10. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The international conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

"*Objectives of the Judiciary*:

10. The objectives and functions of the Judiciary include the following:

(*a*) to ensure that all persons are able to live securely under the rule of law;

(*b*) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(*c*) to administer the law impartially among persons and between persons and the State." a

12. Some provisions in the "Convention on the Elimination of All Forms of Discrimination against Women", of significance in the present context are:

Article 11: b

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(*a*) The right to work as an inalienable right of all human beings;

* * * c

(*f*) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

* * *

Article 24: d

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention."

13. The general recommendations of CEDAW in this context in respect of Article 11 are:

"*Violence and equality in employment*: e

22. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the workplace.

23. Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually-coloured remarks, showing pornography and sexual demands, f whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints, procedures and remedies, including g compensation, should be provided.

24. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace."

The Government of India has ratified the above Resolution on 25-6-1993 h with some reservations which are not material in the present context. At the

Fourth World Conference on Women in Beijing, the Government of India has also made an official commitment, inter alia, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women's Rights to act as a public defender of women's human rights; to institutionalise a national level mechanism to monitor the implementation of the Platform for Action. We have, therefore, no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

14. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in *Minister for Immigration and Ethnic Affairs* v. *Teoh*[1] has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

15. In *Nilabati Behera* v. *State of Orissa*[2] a provision in the ICCPR was referred to support the view taken that "an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right", as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

1 128 Aus LR 353
2 (1993) 2 SCC 746 : 1993 SCC (Cri) 527

17. The GUIDELINES and NORMS prescribed herein are as under:

HAVING REGARD to the definition of "human rights" in Section 2(*d*) of the Protection of Human Rights Act, 1993,

TAKING NOTE of the fact that the present civil and penal laws in India do not *adequately* provide for specific protection of women from sexual harassment in workplaces and that enactment of such legislation will take considerable time,

It is necessary and expedient for employers in workplaces as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. *Duty of the employer or other responsible persons in workplaces and other institutions*:

It shall be the duty of the employer or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. *Definition*:

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

(*a*) physical contact and advances;

(*b*) a demand or request for sexual favours;

(*c*) sexually-coloured remarks;

(*d*) showing pornography;

(*e*) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. *Preventive steps*:

All employers or persons in charge of workplace whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(*a*) Express prohibition of sexual harassment as defined above at the workplace should be notified, published and circulated in appropriate ways.

(*b*) The rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(*c*) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(*d*) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. *Criminal proceedings*:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator *or their own transfer.*

5. *Disciplinary action*:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. *Complaint mechanism*:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time-bound treatment of complaints.

7. *Complaints Committee*:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such

Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government Department concerned of the complaints and action taken by them.

The employers and person-in-charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government Department.

8. *Workers' initiative*:

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in employer-employee meetings.

9. *Awareness*:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. *Third-party harassment*:

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

18. Accordingly, we direct that the above guidelines and norms would be strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These writ petitions are disposed of, accordingly.

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[2008] EWHC 1865 (Admin) .

Watkins-Singh, R (on the application of) v. Aberdare Girls' High School & Anor

England and Wales High Court (Administrative Court) (Jul 29, 2008)

ADVOCATES

Helen Mountfield (instructed by Liberty) for the Claimant

Jonathan Auburn (instructed by Evans Quartermaine of Caerphilly) for the Defendant

JUDGES

MR JUSTICE SILBER

IMPORTANT PARAS

1. 72. The first matter which has to be considered is what precisely has to be justified. The defendant contends it is their uniform policy whilst the claimant submits that it is the failure to grant an exemption from that policy so as to permit the claimant to wear the Kara. I have no doubt that the claimant's submission is correct because what is said to be discriminatory in the present case is not the uniform policy itself but the decision of the defendant not to grant an exemption in respect of the Kara. Indeed if this exemption had been granted, the claimant would have had no complaint about the uniform policy.

I. Introduction

1. The issue raised on this application is whether on the particular facts of this case a particular school was entitled as a matter of public law to refuse to allow a Sikh girl to wear at School the Kara, which is a plain steel bangle which has a width of about 50 millimetres which is about one-fifth of an inch and which has great significance for Sikhs. This judgment is fact-sensitive and it does not concern or resolve the issue of whether the wearing of the Kara should be permitted in the schools of this country. Indeed, that is not a question that a court could or should be asked to resolve. Nothing that appears in this judgment seeks to resolve or to throw any light on this problem or the circumstances in which a Kara should be permitted to be worn in schools or any other arena in this country. Indeed it follows that nothing in this judgment is intended to be any comment on the traditions or the requirements of the Sikh or indeed any other religion and community.

2. In recent years, a number of school girls have sought unsuccessfully to challenge rules made by their schools which prevented them from wearing items which they considered necessary as part of their religious faith. Decisions of governors have been upheld which prevented pupils in certain schools wearing the Jihab which is a **long coat-like garment (R (on the application of Begun) v Head Teacher and Governors of Denbigh High School**[2007] 1 AC 100- "Begum"), the wearing of the Niqab veil (R (on the application of X v Head Teacher and Governors of Y School [2008] 2 All ER 249- "X v Y ") and a Silver Ring Thing purity ring (R (on the application of Playfoot) v Governing Body of Millais School [2007] ELR 484- "Playfoot").

3. Each of those applications has been founded largely, if not solely, on the provisions of the Human Rights Act 1998 but in this case the claim is based mainly on the totally different provisions of the Race Relations Act 1976 ("RRA") as amended and the Equality Act 2006 ("EA"), which are provisions on which the claimants in the previous three cases were unable to rely but on which the claimant can and does rely.

4. This present application concerns the wearing of a Kara, which is a small plain steel bangle worn by Sikhs as a visible sign of their identity and faith. It is 5 millimetres wide and is therefore much narrower than a watch strap and many ordinary bangles. As I observed in court, it cannot be seen when the claimant is wearing a long-sleeved sweater.

5. The handing-down of the judgment has been delayed as I wanted to receive (and did receive) submissions from Miss Helen Mountfield counsel for the claimant and from Mr Jonathan Auburn counsel for the defendant on the recent detailed decision of Munby J in R (E) v Governing Body of JFS etc [2008] EWHC 1535 (Admin), which was handed down after the hearing in the present case ended. In addition, there were many post-hearing developments about the race equality policy of the school.

II The Facts

6. In the present case, Sarika Angel Watkins-Singh ("the claimant"), who is acting though her mother and litigation friend, is a 14 year-old Sikh school girl of Punjabi-Welsh heritage, who challenges a decision made on 26 October 2007 and which is continuing by her school Aberdare Girls' High School ("the school") and which has prevented her from wearing a Kara at her school. The claimant contends that these decisions of the Governing Body of the school ("the defendant") were based on errors of law.

7. The school is a maintained girls' non-denominational school in Wales. The Interested Party is the local authority which maintains the school but it has not played any part in these proceedings.

8. The claimant, who was born on 20 September 1983, entered the school in September 2005. Her father was Welsh but he died when she was a year old and when she was five years old, her mother married her step-father. He is an observant Sikh

and the person who the claimant regards as her father. The claimant, who was given a choice as to which religion, if any, she wishes to follow, has selected the Sikh religion, which has become particularly important to her since her visit to India in March 2005.

9. The claimant's school reports have been generally good and she enjoyed being at her school until towards the end of 2006 when she became a victim to various incidents of racial bullying, which she believed that the Head Teacher and the governors did not treat as a serious issue. As at May 2007, the claimant was a prefect and on 4 May 2007, the Head Teacher of the school had written to the claimant's mother congratulating her on the claimant's academic performance.

10. In April 2007, a teacher at the school observed the claimant wearing a bangle, which was her Kara. The teacher asked the claimant to remove it because it contravened the school's uniform policy; which permitted only one pair of plain ear studs and a wrist watch to be worn by pupils. It is not disputed that from April 2007 when the school first sought to prevent the claimant from attending school wearing the Kara, she was and remains an observant, although a non-initiated, Sikh.

11. When the claimant refused to remove, it she sought an exemption from the policy because she stated that wearing her Kara was a matter which was central to her ethnic identity and religious observance as a Sikh. Miss Rosser, who was the Head Teacher at the school, told the claimant's mother in a letter dated 2 May 2007 that "I have no problem with [the claimant] wearing her bracelet if governors agree". She added that if the school were to allow the claimant to wear the Kara until the matter was resolved by the defendant, this would constitute discrimination against many other pupils who were not allowed to wear a cross because of the school's jewellery policy, which was contained in the School's Code of Conduct which provides that:

"Jewellery often poses a health and safety hazard to school activities. Pupils are allowed to wear a wrist watch and one pair of plain metal studs in the ear. No other jewellery is permitted. All jewellery must be removed for PE and swimming. Body piercing is not permitted. Adhesive jewellery to teeth or any part of the body is not allowed. Pupils will have excess or unacceptable jewellery confiscated".

12. The claimant's mother provided information about the Kara to the school but the meeting of the defendant was delayed pending receipt by the defendant of some unspecified national guidance.

13. A meeting of the defendant took place on 13 June 2007 at which it was decided to postpone again the decision as it was thought necessary to obtain advice from the local education authority ("LEA"). In the meantime, the claimant's mother was asked not to allow the claimant to wear the Kara at school but instead she, that is the claimant, should carry it in her bag. The claimant's mother said that she would let the claimant decide whether she wished to do so but the claimant did not return to school until 12 July 2007 after the intervention of the LEA's welfare officer.

14. Upon her return to school, the claimant was interviewed by Miss Rosser and she was told that she would be permitted to attend the school wearing her Kara but only on the condition that she would be taught in isolation and that she would be kept socially segregated from other pupils. Miss Rosser explained this in a letter to the claimant's parents of 12 July 2007. The segregation was strictly enforced and she was even accompanied to the toilet by a member of staff, who waited outside.

15. The defendant refused the request for an exemption and that the claimant would not be allowed to wear the Kara at school. The reasons given for the refusal in the decision letter on 20 July 2007, which arrived at the claimant's home shortly after the end of the Summer term, were that:

"1. The panel has not been convinced that, as part of her religion, it is a requirement that Sarika wears the Kara (bangle) on her wrist. It is suggested that, as an alternative, it is possible that it could be worn/carried elsewhere on her person.

2. If it was to be allowed as an exception to the school rules, it is felt that there is a possibility that Sarika may be singled out as being different from her peers and that such actions may result in bullying or similar repercussions.

3. The wearing of the Kara would give rise to health and safety issues. This would require a risk assessment being conducted prior to a variety of lessons being undertaken, this assessment may require the removal of the item which again would single the pupil out".

16. It is not disputed that those were the defendant's genuine three reasons for refusing the request for an exception. I should add that the claimant has said that she is quite prepared to compromise and remove or cover the Kara with a wrist sweat band during any lessons such as Physical Education where health and safety might be an issue. The claimant's parents appealed against that decision. The claimant meanwhile returned to school on 5 September 2007 but she was unable to wear the Kara because her wrist was swollen. However, when the claimant wore it on 6 September 2007, she was immediately placed in seclusion and I will describe the effect of the seclusion on her in paragraphs 126 to 134 below.

17. The claimant's request for an exemption was finally refused on appeal by the Appeals Committee of the defendant, which met in the absence of the claimant's parents on 26 October 2007 after that committee had refused to postpone the meeting so that a representative of the Valley Race Equality Council could attend. The reasoning of the Appeals Committee of the defendant was merely that "article 9 of the ECHR does not require that one should be allowed to manifest one's religion at any time and place of one's choosing". Surprisingly no reference was made to the provisions of the RRA or the EA, which are the basis of the present application. As I will explain in paragraph 119 below, it appears that the defendant did not consider

the racial and religious aspect of their decision.

18. When the claimant returned to the school after the half term break on 5 November 2007 wearing the Kara, she was the subject of a series of fixed- term exclusions first on 5 November 2007 for one day and second on 6 November 2007 for 5 days. The claimant was not formally told of these exemptions or her right of appeal but her mother indicated by a letter dated 8 November 2007 that she wished to exercise her rights to make representations but on 13 November 2007 the claimant was told that she was being excluded for a fixed term by the Head Teacher of the school.

19. After 5 days of exclusion in any academic term, a pupil is formally entitled to appeal. On 15 November 2007, which was a day after the claimant's sixth day of consecutive fixed- term exclusions had ended, she was told by Miss Rosser, Head Teacher in a letter that she would not be permitted to attend the school wearing the Kara but that this was not an exclusion because the claimant could attend school if she was dressed compatibly with the school's uniform policy. When asked, Miss Rosser explained that she had not decided for how long this exclusion would last. It will be necessary to consider in paragraphs 141 to 153 below whether this was an exclusion and whether the defendant acted lawfully.

20. The claimant continued to feel unable to remove the Kara because of her identity as a Sikh and the present proceedings were commenced on 19 December 2007. The claimant's solicitors unsuccessfully sought interim injunctive relief requiring the school to admit her wearing the Kara pending the outcome of these proceedings.

21. On 22 January 2008, the defendant's Disciplinary Committee held a meeting to consider the claimant's fixed term exclusions on 5 and 6 November 2007. On the following day, the defendant rejected the claimant's appeal. It is also common ground that the reasons that the defendant governing body decided to uphold Miss Rosser's decisions to exclude the claimant were that they considered her actions to be "open, deliberate and persistent defiance of the school's authority". I will return in paragraph 120 below to consider whether the defendant acted in accordance with its duties under section 71 of the RRA when it reached that conclusion.

22. The position is that since 21 February 2008 and pending the outcome of the present proceedings, the claimant is being educated at a different school namely Mountain Ash School which permits her to wear a Kara. Her case is that this has had a disruptive effect on her education and that she wishes to return to be educated at the school provided that she can wear the Kara.

III. The Significance of the Kara to Sikhs

23. There are a number of issues which have to be resolved in this case. It is common ground between the parties that a large number of factual issues need not be resolved but one which I have to deal with is the significance of the Kara to Sikhs. Professor

Eleanor Nesbitt, Professor in Religions and Education at the Institute of Education in The University of Warwick, has written extensively about Sikhism and has made an informative witness statement.

24. In her witness statement she explained that: Guru Gobind Singh (the tenth Guru) is believed to have instructed his first initiates to adopt the "5 K's" in 1699. The 5 Ks are the outward signs required of a Sikh and these are Kesh (uncut hair), Kangha (comb), Kirpan (sword), Kachh (cotton breeches) and Kara (steel or iron bangle).

25. The 5 Ks are important as they are intended to distinguish Sikhs from both their Muslim and Hindu contemporaries. In their origin they are closely associated with armed combat and the Sikhs' history of struggle. When Sikhs learn about these martyrs of Sikh identity, they are told about the readiness of some Sikhs to lose their lives rather than to sacrifice their kesh, and this courage-to the point of martyrdom is emphasised. Thus, the five Ks are regarded as demonstrating both loyalty to the Gurus' teaching and the bravery to be counted at times when even their lives are endangered by this visibility.

26. The Kara is in origin likely to have been a defence for the sword arm. Sikhs explain its symbolism as a circle that reminds them of God's infinity and speak of their being linked ("handcuffed") by it to God. For many it is a reminder to behave in accordance with religious teaching. Hiding the five Ks is a matter of deep sensitivity. It is important that the Ks be visible, but even more important (even if circumstances necessitate that the Kara be temporarily hidden from view) that the Sikh concerned continues to wear it on his/her right arm/wrist.

27. In practice, it is the initiated or amritdhari Sikhs, who observe all 5 Ks and there are of course different levels of devoutness and observance amongst Sikhs. Only a small minority of Sikhs undergo the initiation ceremony or ever intend to. In Professor Nesbitt's extensive experience of working with and studying Sikhs, she has concluded that of the 5 Ks, the Kara is the symbol most commonly worn by Sikhs as an external identification of Sikhism.

28. There has been evidence adduced by the defendant from Mr Jagwinder Singh which purports to be expert evidence on the significance to Sikhs of the Kara. His evidence, which purports to be expert evidence, deals with such matters of his experience of teenagers and how they regard religion as well as the significance of the Kara. Mr. Singh explains that the priority of teenagers, including Sikh teenagers, is that "friends and social groups are a clear first priority with religion and heritage coming significantly down the pecking order of importance". Miss Mountfield quite correctly points out that even though this purports to be an expert's report, it fails to comply with the provisions of the CPR in important respects. The witness statement of Mr Singh fails to contain the very important statement of truth required from an expert (CPR 35Practice Direction paragraph 2.3 and 2.4) and details of his qualifications, instruction and material considered (ibid paragraph 2.2).

29. In those circumstances, I am bound to conclude that I cannot attach any weight to his evidence and Mr. Auburn did not ask me to do so in his oral submissions. Indeed in so far as Mr. Singh's report purports to undermine or contradict Professor Nesbitt's evidence, it has failed to show why her well- reasoned and thoughtful witness statement is in any way erroneous. So my conclusion is that although the claimant is not obliged by her religion to wear a Kara, it is clearly in her case extremely important indication of her faith and this is a view shared for good reason by very many other Sikhs.

30. There are a number of disputes between the claimant and the defendant on factual issues but the only one which is of importance relates to what the effect was on the claimant of being placed in segregation at the school which I will consider in paragraphs 124 to 137 below when considering whether her rights under article 8 of the ECHR have been infringed.

IV The Issues

31. The claims made by the claimant are that:

a) the decisions of the school (whether by the Hearing Panel of the defendants on 20 July 2007 and or the Appeal Panel on 26 October 2007 or subsequently) to refuse to allow the claimant to wear the Kara at school was unlawful as indirect, unjustified race and religious discrimination (Issue A) (see paragraphs 32 to 92 below);

b) the defendant has not complied with its obligations under sections 71 of the RRA in adopting, maintaining and enforcing a uniform policy which had "due regard" to the need (i) to discrimination unlawful racial discrimination; and (ii) to promote equality of opportunity and good relations between persons of different racial groups (Issue B) (see paragraphs 93 to 123below);

c) the imposition of the disciplinary sanctions and in particular the internal segregation and isolation imposed on the claimant contravened her rights under Articles 8 and or 14 when read with Article 8 of the ECHR(Issue C) (see paragraphs 124 to 137 to below);

d) the exclusions imposed and the procedure devised by the defendant in November 2007 failed to follow the requisite procedures required by law and were procedurally unfair (Issue D) (see paragraphs 138 to 153 below);

e) the Head Teacher of the school failed to take into account of the Guidance on Exclusions from Schools and Pupil Referral Units 2004 ("the 2004 Guidance") and/or failed to follow it and or failed to give reasons for departing from it in reaching her decisions formally and informally to exclude the claimant (Issue E) (see paragraphs 154 to 159 below); and

f) the conduct of the Discipline Committee's hearing of 22 January 2008 breached the

requirement of the regulations, departed from the Statutory Guidance without good reason, and breached natural justice.The defendant correctly accepted that this complaint was justified with the consequence that there has to be a further hearing and so I need not say anything more about it.

V Issue A Indirect discrimination

(i) Introduction

32. The concept of racial discrimination in the RRA was widened by section 1(1A) of the RRA, which was introduced in order to give effect to the European Directive, Council Directive 2000/43/ EC of 29 June 2000 ("the 2000 Directive"), which implemented the principle of equal treatment between persons irrespective of racial or ethnic origin. In essence the Directive stated that there should be no direct or indirect discrimination based on racial or ethnic origin. It is noteworthy that Article 6 of the Directive provided that the 2000 Directive should not constitute grounds for reduction in the level of protection against discrimination.

33. The Preamble to the 2000 Directive refers to the International Covenant on the Elimination of All Forms of Racial Discrimination. Article 1(1) of that Covenant makes discrimination unlawful on grounds of race, colour, descent or national or ethnic origin which has the effect or purpose of nullifying or impairing the recognition, enjoyment or exercise of human rights or fundamental freedoms.

34. Section 1(1A) of the RRA provides that:

"(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other as provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons.

(b) which puts that other at that disadvantage, and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim".

35. The claimant contends that as a Sikh, she has been subjected to unlawful indirect discrimination on the grounds of race and religion. In Mandla v. Dowell Lee **[1983] 2AC 548**, the House of Lords held that Sikhs were a racial group defined by ethnic origins for the purpose of the RRA. It is an agreed fact that the claimant is a Sikh and as such she forms part of a "race" for the purposes of the RRA.

36. The claim is also brought under Part II of the EA, which prohibits discrimination on grounds of religion or belief in protected activities and it is not disputed that the

claimant is a Sikh by religion as well as by race. Section 44(a) of the EA defines "religion" as meaning "any religion". Section 45(3) EA defines indirect discrimination on grounds of religion or belief. It provides that:

"A person ("A") discriminates against another ("B") for the purposes of this Part if A applies to B a provision, criterion or practice-

(a) which he applies or would apply equally to persons not of B's religion or belief;

(b) which puts persons of B's religion or belief at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances).

(d) which puts B at a disadvantage compared with some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances) and

(e) which A cannot reasonably justify by reference to matters other than B's religion or belief."

37. Section 49(1) of the EA provides that:

"it is unlawful for the responsible body of an educational establishment listed in the Table to discriminate against a person

(a) in the terms on which it offers to admit him as a pupil,

(b) by refusing to accept an application to admit him as a pupil, or

(c) where he is a pupil of the establishment

(i) in the way in which it affords him access to any benefit, facility or service,

(ii) by refusing him access to a benefit, facility or service,

(iii) by excluding him from the establishment, or

(iv) by subjecting him to any other detriment".

38. It is common ground that in considering the claimant's case on grounds of indirect discrimination whether under the RRA or the EA, it is necessary to go through the following steps, which are:

a) to identify the relevant "provision, criterion or practice" which is applicable;

b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;

c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally; and

(d) whether this policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving a legitimate aim.

(ii) What is the relevant "provision, criterion or practice"?

39. It is common ground that the relevant "provision, criterion and policy" in this case is the school's uniform policy which is made up of the written policy, details of how it was applied and the school's approach to the recognition of exceptions to its general policy. There is also no dispute that the relevant "provision, criterion or practice" was that only one pair of plain stud ear rings was allowed to be worn and that no jewellery beyond that was allowed unless the item was required to be worn as a compulsory requirement of the pupil's religion or culture.

40. The ban on jewellery only applied to the wearing of items and so it did not restrict, for example, the displaying of the item by attaching it to a school bag or carrying it about one's person. There was also nothing to prevent a pupil wearing any item of jewellery outside school and outside school hours although of course the claimant would spend a large part of her waking hours on weekdays at school in term time.

(iii) Which is the pool for the purpose of making a comparison of the relevant disadvantages?

41. The case for the defendant in its written skeleton argument was that there are two possibilities as to who could constitute the pool for the purpose of making a comparison of the relevant disadvantages. They are first that it comprised all pupils at the school who wish to wear jewellery and the second alternative is that consisted of all pupils in the school. The school suggest that the first group is the most appropriate by reason of the nature of the "provision, criteria or practice" to which I referred to in the preceding two paragraphs.

42. In the case of BMA v. Chaudhary, [2007] IRLR 800, the issue was whether there was indirect racial discrimination against the claimant who was a member of the BMA of Asian origin and who, in common with all other members, was entitled to advice and assistance except for the purpose of supporting claims of racial discrimination. The Court of Appeal determined that the findings, there was such a requirement or condition was perverse and it overturned the decision that the requirement or condition constituted indirect racial discrimination. The Court then went on to consider what the situation would have been if there had been such a requirement or condition. It rejected an argument that the pool was all members of the BMA, who might want the support and advice of BMA in proceedings, with Mummery LJ explaining (with my emphasis added) why a wider pool was the

appropriate comparator that:

"202 The wider pool brings into the exercise of comparison people who have no interest in the particular advantage who will actually want the particular benefit in question".

43. Applying that principle to the present case, those "who have no interest in the particular advantage or actually want the particular benefit in question" (which is to wear a Kara or other religious jewellery because of its great importance to them) are those whose cultural beliefs or religious practices are not compromised by the uniform code at the School. This approach is fortified by the conclusions of the House of Lords in Shamoon v Chief Constable of the RUC [2003] 2 All ER 26 in which Lord Nicholls of Birkenhead said in a case of sex discrimination that:

"4 The situation must be such that, gender apart, the situation of the man and the woman are in all respects the same".

44. It is noteworthy that this was the approach adopted by the Constitutional Court of South Africa in MEC for Kwazulu- Natal, **School Liaison Officer and others v. Pillay ...CCT** 51/06 **[2007] ZACC 21**) in which it was held that a rule preventing a Tamil- Hindu girl from wearing a nose stud which was central to her cultural and religious identity was discriminatory on religious and cultural grounds. The court rejected an argument similar to the one put forward in this case that the refusal to offer the girl an exemption to the uniform code was justified to promote uniformity and acceptable conventional among students.

45. In that case, Langer CJ held that the comparator group which was treated better than the claimant was those pupils:

"44 whose sincere religious cultural beliefs or practices, or religious beliefs or practices are not compromised by the [Uniform] Code, as compared to those whose beliefs or practices are compromised".

46. I agree with Miss Mountfield that a similar approach should be adopted in this case and that the comparators to the claimant should be those pupils whose religious beliefs or racial beliefs are not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery, which is required to show the pupil's intimate association with his or her religion or race. During his submissions, Mr. Auburn ultimately accepted correctly in my view that this was the proper approach.

(iv) Disparate Disadvantage or Detriment?

47. It will be recollected that section 1(1A) of the RRA requires the person claiming discrimination to show that he or she has been placed "at a particular disadvantage". Section 45(3) of the EA requires a claimant to show that he or she has been placed "at a disadvantage compared with some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances)". Similarly,

section 49(1) of the EA refers to a "detriment".

48. In this case, it is not disputed that the inability to wear a Kara is the only detriment or the disadvantage which is only suffered by the claimant. Significantly, it is not suffered by the comparators to whom I referred in paragraph 46 above and they are those pupils whose religious beliefs or racial beliefs are not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery which is required to show the pupil's intimate association with the religion or the race concerned. The reason for that is those comparators do not suffer any disadvantage or detriment by the refusal of the defendant to grant an exemption from the uniform policy.

49. So the issue which I have to resolve can now be refined to being a consideration of whether the claimant is placed under a great "disadvantage" or has suffered a "detriment" because she was unable to wear the Kara which she regarded as a manifestation of her religion and race of exceptional importance.

50. The case for the defendant is that the claimant's case does not reach the threshold of showing the appropriate degree of "disadvantage" because it was not a compulsory requirement of the claimant's religion or race to wear the Kara. It is also said in the written skeleton argument that it is impossible for the court to conduct an assessment of the importance to the claimant of not being permitted to wear the symbol.

51. I am unable to accept the contention that there will only be "a particular disadvantage" or "detriment" where a member of the group is prevented from wearing something which he or she is required by his or her religion to wear. In my view, this threshold is too high for five reasons, which I will set out in no particular order of importance.

52. First, the words used in the statutory provisions do not suggest that they require such a high threshold as the defendant contends is the position. The New Shorter Oxford Dictionary defines the word "disadvantage" as "lack of advantage; an unfavourable condition or circumstance" and the word "detriment" is defined as "loss sustained by or damage done to a person or thing". Neither of the these definitions of "a particular disadvantage" or "detriment" indicates that the adverse consequences in question have to reach a particularly high threshold and, in particular not as the defendant contends the position to be, that it has to be an inability to comply with a requirement of a religion or race.

53. The second reason why I do not consider that there will only be "a particular disadvantage" or " detriment" where a member of the group is prevented from wearing something which he or she is required by his or her religion or race to wear is that such an interpretation would mean rewriting the legislative provisions so that after each of the words "a particular disadvantage" or "detriment", it would be necessary to insert the words "in the form of not being able to comply with a requirement of his or her race/ religion" . This is not a permissible step for a court to

take.

54. Third, the words "a particular disadvantage" and "detriment" have to be construed in the light of, and not be inconsistent with, the approach in the recent decision of the Grand Chamber of the European Court of Human Rights in DH & others v Czech Republic [2008] ELR in which it was stated that :

"181.. in Chapman, the court also observed that there could be said to be an emerging international consensus amongst the contracting states of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community".

55. Fourth, there is no statutory provision or in any authority from either Strasbourg or the domestic courts which I have seen which shows or suggests that these words ("a particular disadvantage" or "detriment") require proof of a religious or a racial requirement. Fifth, there is no valid reason of principle put forward by Mr. Auburn which shows why the threshold for "a particular disadvantage" or "detriment" has to be as high as being a requirement of a religion or of race.

56. A. So it becomes necessary to decide if the claimant suffered "a particular disadvantage" or "detriment" when she was precluded from wearing her Kara at school and this entails consideration of how important the Kara is to the claimant. That means reaching a fact-sensitive decision in every case of considering whether the disadvantage identified by a claimant amounts to "a particular disadvantage" or "detriment". So I do not need to, and will not set out, in this judgment definitive and a comprehensive test because the words "a particular disadvantage" or "detriment" are ordinary English words.

56. B On the facts of this case, I believe that there would be a "a particular disadvantage" or "detriment" if a pupil is forbidden form wearing an item when (a) that person genuinely believed for reasonable grounds that wearing this item was a matter of exceptional importance to his or her racial identity or his or her religious belief and (b) the wearing of this item can be shown objectively to be of exceptional importance to his or her religion or race, even if the wearing of the article is not an actual requirement of that person's religion or race.

57. I stress that I am not saying that there will only ever be "a particular disadvantage" or "detriment" if these elements are proved as obviously there will be other cases in which these requirements are satisfied in different ways. There is therefore both a subjective element in (a) and an objective element in (b). My conclusion is that on the facts of this case, I believe that because elements (a) and (b) are satisfied, there will be a" a particular disadvantage" or "detriment" if the claimant is not allowed to wear the Kara.

58. That leads on to the question of how a court should decide if a claimant is genuinely contending that the wearing of an item is of exceptional importance to him or her for religious reasons. Assistance in resolving such a question is to be found in the authorities which throw light on the court's role in identifying a religious belief calling for protection under Article 9 of the ECHR. It is noteworthy that in R (Williamson and others) v Secretary of State for Education **[2005] 2AC 246** Lord Nicholls of Birkenhead (with whom the other members of the Appellate Committee agreed) explained in paragraph 22 that:

(a)" when the genuineness of a claimant's professed belief is in issue in the proceedings, the court will inquire into and decide this issue as an issue of fact ";

(b)" the court is concerned to ensure an assertion of religious belief is made in good faith 'neither fictitious, nor capricious and that it is not an artifice' ";

(c)"..emphatically it is not for the court to embark on an inquiry into the asserted belief and judges its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of other professing the same religion "; and that

(d)" the relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held".

59. Applying those factors in this case, I have little doubt that the claimant genuinely and honestly attaches exceptional importance to wearing her Kara and thereby satisfies the subjective requirement in paragraph 56 (a) above. First, the claimant explains in her witness statement that it is not a piece of jewellery but that it is in her mind "one of the defining physical symbols of being a Sikh" as "it signifies the eternity of life and the bond between a Sikh and his or her Guru". Second, the claimant considers that it is worn on the wrist "as a constant reminder to do good with the hands" and is a religious symbol "which both demonstrates and reminds me of my faith".

60. Third, she has said that wearing the Kara is "extremely important to me". She explains that she has:

"a sense of duty to wear the Kara as well as an expression of my race and culture".

61. Nothing has been suggested to undermine the truthfulness of these comments which I accept as correct and as showing the exceptional importance that the claimant attaches to wearing the Kara. Furthermore I am fortified in reaching that conclusion by the fact that the claimant continued to wear the Kara even though when she was isolated from her friends at school, she must have fully appreciated the problems that

had been caused for by wearing the Kara.

62. I interject to say that it has never been suggested that the claimant insisted on wearing the Kara merely because she was engaged in challenging the authorities at her school. Indeed, as I have explained, until the problems arose with the Kara, she was a school prefect and on May 4 2007, the school had written to the claimant's parents congratulating them on the claimant's achievements. Therefore, I can reject the possibility that she is insisting on wearing the Kara in order to be rebellious or just to defy authority. Indeed, I do not believe that the claimant would have taken the stand which she did if she had not come to the considered decision that wearing the Kara was of exceptional importance to her.

63. That leads on to the second requirement set out in paragraph 54 (b) above which is for there to be "a particular disadvantage" or "detriment", there must be shown objectively that the wearing of a Kara can be shown objectively to be of exceptional importance to his or her religion or race, even if wearing it was not a requirement imposed on the claimant by her religion or race. This entails considering the views of an expert although I appreciate as Lord Nicholls said in the passage set out in paragraph 58 above, objective factors such as source material:

"at most ... may throw light on whether the professed belief is genuinely held".

64. The evidence of Professor Nesbitt, which I accept stresses, as I have explained in paragraphs 23 ff above, the significance of wearing the Kara to Sikhs and that hiding the Kara is a matter of deep sensitivity as is the question is of removing it from the wrist. Professor Nesbitt concludes that:

"in my extensive experience of working with and studying Sikhs, of the 5 Ks the Kara is a symbol most commonly worn by Sikhs as an external identifier of Sikhism".

65. It is noteworthy that Professor Nesbitt explains that the significance of the Kara to Sikh pupils in schools is recognised in the guidance issued by Redbridge, Birmingham and Swansea Council areas, which are areas which have large Sikh populations.

66. Thus I conclude that the claimant suffers a "particular disadvantage" or a "detriment" by not being allowed to wear her Kara at school; the reason for that the wearing of this item can be shown subjectively and objectively to be of exceptional importance to her religion and race as a Sikh even if not a requirement of the religion or race. Of course this is not a "particular disadvantage" or a "detriment" suffered by a comparator who I have described in paragraph 46 above.

67. I conclude that by not being allowed to wear the Kara the claimant is suffering "a particular disadvantage" or "detriment". I am fortified in coming to this conclusion by the reasoning in the recent decision of the Grand Chamber of the European Court of Human Rights in DH & others v Czech Republic (a part of which I referred to in

paragraph 54 above) in which it is worth repeating that it was stated that :-

"181.. in Chapman, the court also observed that there could be said to be an emerging international consensus amongst the contracting states of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community"; and

"186... the court has noted in previous cases that applicants may have difficulties in proving discriminatory treatment. In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination".

68. Both those passages assist the claimant because they show that the court should not impose too high a threshold in seeking to establish prima facie discrimination as to do so would undermine the intension of the legislation.

69. I agree with Miss Mountfield that a policy which imposes, as the school's policy on Kara's does, "a painful choice" for a devout Sikh, like the claimant, between, on the one hand, complying with the customs of a minority ethnic group who values their identity as a member of it and, on the other hand, attending a school which she wishes to attend and which consistently with its rules impose "a particular disadvantage" or a "detriment" on that member of a minority ethnic group.

70. Of course, a person who simply wishes to disobey a rule for another reason unconnected with an identity protected by the RRA or the EA is not subject to the same kind of disadvantage. Thus I reject as incorrect the suggestion that if the claimant is allowed to wear the Kara, other pupils will be entitled to wear jewellery; that argument ignores the need for the "a particular disadvantage" or "detriment" to be of "exceptional importance" to the religion and race of the pupil concerned as I explained in paragraph 56 above. Indeed to equate the claimant's desire to wear a Kara with a desire of another pupil to wear some other form of jewellery is not to compare like with like which is what the Strasbourg Court requires as was explained in Thlimmenos v Greece **(2001) 31 EHRR 50** [44]. So it follows therefore that the claimant has discharged the obligation of showing there was a "particular disadvantage" or a "detriment".

71. Finally, I must deal with the approach of the defendant because in a witness statement, Mr. Peter Scott a Governor of the school explained that he chaired the meeting on 13 June 2007 and he explained that wearing the Kara was seen as "roughly similar" to displaying the Welsh flag because "that is something which engenders emotion, perhaps strong emotion but is not something which either her religion or culture requires her to wear". I regard this as a seriously erroneous comparison

because it totally ignores the critically important religious significance of wearing the Kara which is not shared by wearing the Welsh flag. I have already explained its objective significance in paragraphs 63 to 65 and its significance subjectively to the claimant in paragraphs 59 to 62 above.

(v) Proportionality and Justification

72. The first matter which has to be considered is what precisely has to be justified. The defendant contends it is their uniform policy whilst the claimant submits that it is the failure to grant an exemption from that policy so as to permit the claimant to wear the Kara. I have no doubt that the claimant's submission is correct because what is said to be discriminatory in the present case is not the uniform policy itself but the decision of the defendant not to grant an exemption in respect of the Kara. Indeed if this exemption had been granted, the claimant would have had no complaint about the uniform policy.

73. It is common ground between counsel that the operative test for justification was explained by Balcombe LJ in Hampson v Department of Education and Science **[1989] ICR 179** at 191 F in a judgment (with which Nourse and Parker LJ agreed at pages 196H and 207D) when he said that:

"in my judgment "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".

74. It is settled law that the onus is on the person, who is alleged to have discriminated to justify the discriminatory treatment, and as Mummery LJ recently explained (with my emphasis added in a judgment with which Arden and Longmore LJJ agreed) that:

"the standard of justification in race discrimination is the more exacting EC test of proportionality... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. It is not enough that [the party discriminating] could reasonably consider the means chosen as suitable for attaining that aim" (R (Elias) v Secretary of State for Defence [2006] 1WLR 3213 at 3249 [151]).

75. The reason for these requirements is not difficult to ascertain because both the domestic and the Strasbourg courts have drawn attention to the exceptionally serious effects for society as a whole and the psychological well-being of the individuals of race discrimination and segregation in the educational context. The reasons are, for example, set out by Arden LJ in Elias (supra) where she explains very persuasively why the adverse effect of unlawful discrimination are manifold at pages 3267-8 [269 270] and in DH (Supra). Lord Hoffmann explained in R (Carson) v Secretary of State for Work and Pensions **[2006] 1AC 173** at 182- 183 [16] in respect of characteristics

such as race, cast, noble birth (with my emphasis added) that:

"..the courts as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination."

76. The burden of justification on the defendant means in the words of Munby J in the JFS case (supra) (but with references omitted) that: the defendant must show:

"164 that the measure in question corresponds to a "real need" and that the means adopted must be "appropriate" and "necessary" to achieving that objective. There must be a "real match" between the end and the means. The court must "weigh the justification against its discriminatory effect" with a view to determining whether the seriousness of the alleged need is outweighed by the seriousness of the disadvantage to those prejudiced by the measure always bearing in mind that the more serious the disparate impact the more cogent must be the objective justification"

77. Applying those principles to this case, what must be justified by the defendant is the discriminatory means to achieve the aim of having a uniform policy with its advantages. In order to discharge that burden, Mr Auburn seeks to derive assistance from decisions on justification which were successfully used by schools in the Begum, X v Y School and Playfoot cases to which I referred in paragraph 2 above in which the courts found in respect of claims brought under article 9 of the ECHR that the schools were entitled to prevent pupils wearing some piece of uniform. There is a very sharp distinction between those cases and the present case as many of the aspects of justification relied on in those cases are related to the extremely clearly visible and very ostentatious nature of the religious dress sought to be worn by the claimants in those cases. For example the niqab (which is the large veil which covers the pupil's face except for her eyes) in the X v Y School case was clearly at other end of the spectrum from the Kara which is not only 50 millimetres wide but is only visible if the claimant is not wearing long sleeves. By the same token the jihab (which is a long coat like garment) in the Begum case is infinitely more visible than the Kara.

78. So the niqab and the jihab are many times more visible to the observer than the very small and very unostentatious Kara. In consequence, many of the arguments which were accepted by the courts as justifying prohibiting the wearing at school of the niqab and the jihab do not apply to the Kara. Those arguments include:

a. the contention that allowing pupils to wear a Kara causes substantial difficulties because they stand out. There is no question of being unable to identify and notice a pupil wearing a Kara whilst somebody wearing the niqab or the jihab is very noticeable;

b. the point that the decision not to grant an exemption from the uniform policy for the claimant to wear the Kara would assist in minimising difference of wealth and

style and the pressures which result from marking differences of wealth. Miss Rosser explains that it avoids social pressures and competition; the suggestion in Playfoot that the restriction preventing the wearing of a ring in that case minimised pressures resulting from differences of wealth and style. These arguments do not apply in the present case because the Kara is such a small piece of steel that it cannot be perceived as costing much especially when its cost is compared with the cost of the watches which pupils are allowed to wear;

c. the justification for decision not to permit the claimant to wear the Kara is that the uniform policy fosters a community spirit among the girls whilst also promoting their identity as part of an individual school. Miss Rosser, who makes that point, also explains that it maintains discipline and preserves respect. I readily agree that these matters can in the appropriate case justify a particular uniform policy (see Begum [44]and [58], X v Y School [70] and Playfoot) but I do not accept that they apply to the very unostentatious Kara which is small and usually hidden from view by the claimant wearing a long-sleeved garment. Apart from wearing the Kara, the claimant is quite content to conform with all aspects of the school's uniform policy; and

d. a "floodgates" argument by saying that if non-compulsory items (such as the Kara) were allowed to be worn by pupils, then other pupils would all demand to be allowed to wear all other manner of items. I am unable to accept this argument because the claimant in this case falls in an exceptional category because it was a matter of exceptional importance to her as a Sikh to wear the Kara; She has reasonable grounds for her genuine belief that wearing the Kara is a matter of exceptional importance to her when the wearing of it can be shown to be objectively of exceptional importance to her religion or race and where it has a deep significance for adherers of that religion or members of that race even if not a requirement of that religion or race. Miss Rosser refers to the wearing of a crucifix as being of similar importance to wearing the Kara but there is no evidence that the wearing of it is regarded in the same way as the wearing of the Kara. In other words the school is not justified in having any fear that granting an exemption to the claimant to allow her to wear the Kara would create any further exceptions. Again it is worth repeating that there are many schools in which the wearing of a Kara is permitted to be worn.

79. There are three further matters which the defendant contends constitute justification of its decision not to allow the claimant to wear the Kara. They are first that the rigid uniform policy (which precludes a dispensation being given to the claimant to wear the Kara) prevents bullying; second that according to Miss Rosser that it would be "very difficult" to explain to girls at the school why an exception to

the rule should be made in favour of the claimant; and third if the defendant had acceded to the claimant's request to wear the Kara, this would constitute discrimination against other pupils at the school, who cannot wear jewellery.

80. I cannot understand why a decision to prevent the claimant from wearing the Kara would prevent bullying or would be difficult to explain. The only reason might be ignorance on the part of other pupils at the school first about the importance of a Kara to Sikhs and second in understanding why a decision by the claimant to wear it should be treated with respect. There are at least three reasons why these factors must be unreservedly and categorically refuted.

81. First, the obligation of bodies like the school to educate was explained clearly by the Strasbourg Court in its decision in Serif v Greece **(2001) 31 EHRR 561** at Page 573 when it said that:

"53 Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism but to ensure that competing groups tolerate each other".

82. Second, as I will explain in paragraphs 93 ff below the defendant has a clear and important obligation under section 71 of the RRA when carrying out its functions (which must include deciding what uniform can be worn) to:

"have due regard to the need- (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups".

83. Third, the school has now in place a Race Equality Policy which states (with my emphasis added) that :

(a)"it is committed to working towards race equality, promoting approaches to differences and fostering respect for people of all cultural backgrounds". The policy goes on to state that at the school they encourage pupils "to respect the values of cultures and which [sic] they are unfamiliar. We ensure that every pupil develops a sense of identity that is receptive and respectful to other cultures".

and (b) that:

"our curriculum promotes the respect for other cultures, celebrates diversity and educates against racism, our teaching challenges racial prejudice and stereotypes and fosters a critical awareness of biased, inequality and injustice".

84. Therefore, there is a very important obligation imposed on the school to ensure

that its pupils are first tolerant as to the religious rites and beliefs of other races and other religions and second to respect other people's religious wishes. Without those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multi- cultural society can be built in this country. In any event, in so far as the intention of the uniform policy is to eliminate bullying, there is no rational connection between this objective and eliminating signs of difference.

85. This shows clearly first that the defendant and the school should not have sought to remove the potential cause of tension by refusing to allow the claimant to wear the Kara but second that instead it should have taken steps to ensure that the other pupils understood the importance of wearing the Kara to the claimant and to other Sikhs so that they would then tolerate and accept the claimant when wearing the Kara.

86. There is no validity in Miss Rosser's final point that to allow the claimant to wear the bangle meant that "all other pupils in the school were being discriminated against". I am bound to say that I agree with Miss Mountfield that this contention shows a worrying lack of understanding of the need for equality of respect for those with different ethnic or religious beliefs and that this may mean taking reasonable steps to alter the "usual" rules so as to enable different situations to be dealt with differently. The stark fact is, as I explained in paragraph 78 (d) above, that the other pupils in the school, who are not allowed to wear jewellery are in a totally different position from the claimant as they (unlike the claimant) do not suffer a "particular disadvantage" or "detriment" for reasons of race or religion by not being allowed to wear jewellery.

87. For the purpose of completeness, I should repeat that the health and safety factors relied on by Miss Rosser as justifying her decision are not valid reasons for refusing to allow the claimant to wear the Kara as the claimant has said that she is quite prepared to compromise and to remove or cover the Kara with a wrist sweat band during any lessons such as Physical Education where health and safety might be an issue.

88. None of the arguments put forward by Mr Auburn either individually or cumulatively justify the refusal of the defendant to permit the claimant to wear a Kara at the school and thereby indirectly discriminate against her as a Sikh on grounds of race and religion. In reaching that conclusion I have not overlooked the fact that the school was willing to recognise exceptions to its uniform policy if the items concerned were mandatory requirements of a pupil's religion or culture.

89. In my view, this is far too high a threshold because if a pupil considers for objectively reasonable grounds that the Kara was "one of the defining physical symbols of being a Sikh" and "which both demonstrates and reminds me of my faith", the pupil should be allowed to wear it especially as in this case there is powerful objective evidence which shows that that view is strongly supported within the religion concerned. As I have explained in paragraphs 51to 55 above, no cogent reason was put forward to show the threshold for being permitted to wear a non-

uniform item should be higher in that it would have to be a requirement of the religion.

90. So if I apply the test for determining if the defendant has discharged the burden of justifying its conduct as I set out in paragraphs 73 to 76 above, it seems clear that the attitude of the defendant in discriminating against the claimant on ground of her Sikh race and religion cannot be justified. This attitude is neither necessary nor appropriate to achieving any of the school's objectives. In my view the absence of any acceptable justification for the decision of the defendant to refuse to allow the claimant to wear the Kara shows that there is no justification for the claimant's policy or put in another way, the discriminatory effect far outweighs any justification for the discriminatory treatment of the claimant.

91. I have come to the clear conclusion that one of the reasons why the claimant has been the subject of unlawful discrimination on grounds of her Sikh religion and race has been the total failure of the defendant to comply with its important duties under section 71 of the RRA which I will explain in paragraphs 93 ff below. Indeed this failure would constitute additional grounds for holding that the decision of the defendant was not justified or proportionate.

(vi) Conclusion on indirect discrimination

92. For all those reasons I have come to the conclusion that the decision of the defendants not to grant a waiver to the claimant to permit her to wear the Kara constitutes indirect discrimination on grounds of race under the RRA and on grounds of religion under the EA. If the claimant is permitted to wear the Kara at school, this will be creating an extremely limited exception because at present it is not obvious that there will be other pupils of whatever religion or race who can invoke this exception which is dependent on two matters. The first is the belief of the pupil justified by objective evidence that the wearing of the article is a matter of exceptional importance as an expression of her race and culture. The second factor is the unobtrusive nature of the Kara being 50 mm wide and made of plain steel. The fears of the school that by permitting the claimant to return to school wearing her Kara, it will make great inroads into its uniform policy with many other girls wearing items to show their nationality, political or religious beliefs is in my view unjustified.

VI Issue B. Section 71

(i) Introduction

93. The claimant contends that the defendant has failed in its duties to have an appropriate racial equality policy as required by section 71 of the RRA which states that has the heading "Specified authorities: general statutory duty". It provides (with my emphasis added) that:

"(1) Everybody or other person specified in Schedule 1A or of a description falling

within that Schedule shall, in carrying out its functions, have due regard to the need-

(a) to eliminate unlawful racial discrimination; and

(b) to promote equality of opportunity and good relations between persons of different racial groups.

(2) The Secretary of State may by order impose, on such persons falling within Schedule 1A as he considers appropriate, such duties as he considers appropriate for the purpose of ensuring the better performance by those persons of their duties under subsection (1)".

94. Schedule 1A RRA Part 1 paragraph 46 includes "governing bodies of educational establishments maintained by local authorities". So the board of governors of the school, which is the defendant in this case, is covered. Article 3 of the Race Relations Act 1976 (Statutory Duties) Order 2001 (SI2001/3458) ("the 2001 Order") made under section 71(2) of the RRA provides that:

"(1) A body specified in Part I or II of Schedule 2 to this Order shall, before 31st May 2002,

(a) Prepare a written statement of its policy for promoting race equality (referred to in this article as its "race equality policy") and

b) Have in place arrangements for fulfilling, as soon as is reasonably practicable, its duties under paragraphs (3) or (4) as the case may be.

(2) Such a body shall,

(a) Maintain a copy of the statement, and

(b) Fulfil those duties in accordance with such arrangements.

(3) It shall be the duty of a body specified in Part 1 of Schedule 2 to this order to

(a) Assess the impact of its policies, including its race equality policy, on pupils, staff and parents of different racial groups, including, in particular, the impact on attainment levels of such pupils, and

(b) Monitor, by reference to their impact on such pupils, staff and parents, the operation of such policies, including in particular their impact on the attainment levels of such pupils "

95. Part I of Schedule 2 of the 2001 Order includes the governing body of an educational establishment maintained by a Local Education Authority and so the defendant as the governing body of the school was obliged to comply with the 2001

Order and with section 71 of the RRA.

96. To understand this issue, it is necessary now to stress the clear purpose of section 71 of the RRA, which is to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. As Arden LJ explained in Secretary of State for Defence v Elias [2006] EWCA Civ 1293 at paragraph 274;

"it is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation "

97. The duties under section 71 must be fulfilled whenever a decision is taken which may have an impact on matters contained in it. Compliance should not be treated as a "rearguard action following a concluded decision", but as an "essential preliminary to such decision, inattention to which is both unlawful and bad government". (R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139 per Sedley LJ [3]).

98. The case for the claimant is that the defendant did not have a policy prior to the introduction of the new policy "having due regard to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups" . In consequence, the defendant first did not have due regard to those needs when dealing with the claimant's wish to wear the Kara at school and second did not assess the impact of its race equality policies on the wish of the claimant as a devout Sikh to wear the Kara at school.

99. The defendant contends that it has complied with its duties and it refers to a policy document from which I have quoted in paragraph 83 above and which I will refer to as "the new policy". It is said that it has been in force since July 2007 and so it would cover many events with which this claim is concerned, which occurred after the end of the summer term of 2007. As I will explain, the picture that has emerged during the hearing is of a confused state of affairs in which the policies which the school said were in place in July 2007 were not approved by its governors until December 2007 and that previously, there had been no clear race equality policy in place.

100. There is a dispute between the claimant and the defendant as to when the new policy was implemented. The decision had to be implemented by the Board of Governors and they only did this at their meeting in December 2007 after the present claim was instituted. Nevertheless the evidence of the defendant is that in practice it was adopted with effect from July 2007.

101. In order to resolve this dispute, it is common ground that I have to follow the course adopted in R v. Camden LBC, ex party Cran **[1995] 94 LGR8** at 12 , which is

that the court has to proceed on the factual basis put forward by the defendant or to resolve any disputes of fact in a defendant's favour. Accordingly I will have to assume that the policy was brought into effect in July 2007 which accords with the evidence of the defendant and that the operative day was 1 July 2007.

102. Before that time when the new policy was adopted, the school had on its file only an unsigned and incomplete policy guidance document from the neighbouring authority of Merthyr Tydfil ("the Merthyr Tydfil draft") which, as I will explain, does not satisfy the requirements of section 71.

103. I must now consider whether the defendant complied with its duty separately both before and after 1 July 2007 when I must regard the new policy as having been introduced. I bear in mind Dyson LJ's instruction that "to see whether the duty has been performed, it is necessary to turn to the substance of the decision and its reasoning" (R (Baker) v Secretary of State for Communities [2008] EWCA Civ 141 [37).

(iii)The steps taken by the defendant to comply prior to the implementation of the new policy which is to be assumed to be on 1 July 2007

104. The first witness statement of Miss Maureen Keating, the clerk to the Governors asserted that:

"14 .We have a Race Equality Policy at the school. This was originally adopted in July/ July 2002 [sic]. It was then reviewed with regard to all pupils and the whole school community in July 2005, October 2005, and March 2006. A new draft was published in July 2007 and this is due to be reviewed annually the next occasion being summer 2008."

105. Prior to the coming into force of the new policy, the position according to a witness statement made by Miss Keating was that in 2000/2001 the school wanted to put in place a race equality policy and so it contacted the Local Education Authority for further guidance on the subject. The school was informed that its neighbouring authority namely Merthyr Tydfil County Borough Council had a comprehensive policy already in existence and the school obtained a copy of it, which was the Merthyr Tydfil draft.

106. According to Mrs Keating, the defendant considered this policy which was the Merthyr Tydfil draft and adopted it in July 2002 and that it remained in force until the new policy was drafted but that it was reviewed from time to time. Surprisingly, there is no minute of any meeting at which this policy was discussed. The Merthyr Tydfil draft was entitled "Equal Opportunities Draft Race Equality policy for Merthyr Tydfil Schools". In spite of its title, this document is not a policy document but merely sets out how a policy could be prepared. Indeed headings of it include sections titled:

"Preparing your race equality policy and keeping it up to date",

"Steps to preparing your race equality policy" and

"Steps to maintaining your race equality policy over time".

107. So the position before the new policy was adopted in 2007 was that the School had on its file only an unsigned, incomplete policy guidance document from a neighbouring authority Merthyr Tydfil, which was the Merthyr Tydfil draft and which had apparently never been discussed at a governors' meeting. This is the document of which Miss Keating says in her second witness statement made on the first day of the hearing on 17th June 2008 with my emphasis added that:

"3 our Governors considered .. decided was appropriate .. and adopted in July of 2002. I can confirm that the policy in question was adopted and used at the school from that date until Summer 2007 when a new policy was drafted".

108. The so- called " policy" which the governors had, according to Miss Keating "decided was appropriate and adopted" at material times which was not in fact a policy at all as must have been clear from even a very cursory reading of it. In my view, the Merthyr Tydfil draft is nothing more than a useful draft guidance for Merthyr Tydfil schools on how to prepare a race equality policy and keep it up to date with a proposed framework for a draft policy attached; the gaps in it show that it was not a complete policy which could have been used. Indeed I will explain that there is no evidence to show that it was ever referred to or taken into account when the claimant was seeking to be allowed to wear a Kara and the defendant and the Head Teacher were considering and determining the request.

109. The Merthyr Tydfil draft document provides with comments added in block capitals that:

"4. Leadership, Management and Governance.

Commitment

The School's commitment to equality for all is reflected in our Equal Opportunities Summary and the school's mission statement:

` [LEFT BLANK BY DEFENDANT] '.

Governing Body.

... The Governing Body includes Equalities issues (including Race Equality) as an item on the agenda of all Governing Body meetings and has a governor with responsibility for Equalities, who is ([LEFT BLANK BY DEFENDANT])

People with specific responsibilities

The named person with responsibility for dealing with reported incidents of racism and racial harassment is ([LEFT BLANK BY DEFENDANT])

The Equal Opportunities Co-ordinator is ([LEFT BLANK BY DEFENDANT])"

110. The Merthyr Tydfil draft proceeds to state that that "all policies and strategies are regularly monitored, reviewed and evaluated for their effectiveness in 1) eliminating race discrimination, 2) promoting racial equality and 3) promoting good race relations". It should be noted that despite requests for relevant notes of meetings, there is no evidence of any review of the school's uniform policy in the light of the coming into force of s71 RRA in May 2002 or of the Merthyr Tydfil draft.

111. As there is no evidence that the Merthyr Tydfil draft was ever the subject of review, I must assume that it continued to be the basis on which the defendant sought to comply with its section 71 duty and its duty to have a race equality policy. It clearly fails to comply with the duty and the policy because of the gaps to which I referred and because there is no race equality policy of the kind set out in article 3 of the 2001 Order.

112. What is much more serious is that the defendant did not take into account:

a. the need to reconsider the uniform code in the light of the obligations in section 71(1) or the race equality policy at any time before the claimant tried to wear the Kara to school;

b. the fundamental importance of wearing the Kara to the claimant's religion and race. The defendant and the School (i) did not consider the obligations in section 71(1) or the race equality policy and (ii) did not appreciate but should have appreciated that by not allowing the claimant to wear the Kara because it was not a requirement of being a Sikh, they were not "having regard" to those obligations and that policy;

c. that the wearing of the Kara was a matter of exceptional importance because (i) the claimant genuinely believed for reasonable grounds that wearing this item was a matter of exceptional importance to her racial identity or her religious belief and (ii) the wearing of this item can be shown objectively to be of exceptional importance to her religion or race, even though the wearing of the article is not an actual requirement of that person's religion or race. In a witness statement, Mr. Peter Scott a Governor of the school stated that he chaired the meeting on 13 June 2007 concerning the claimant's application to wear the Kara and he explained that wearing the Kara was seen as "roughly similar" to displaying the Welsh flag because "that is something which engenders emotion, perhaps strong emotion but is not something which either

her religion or culture requires her to wear". I regard this as a seriously erroneous comparison because it totally ignored the critically important religious and racial significance of the Kara as described in paragraphs 24 to 27]above and it shows a disregard for the basis and rationale of section 71; and

d. valid reasons for permitting the claimant to wear the Kara but instead the defendant decided not to permit the claimant to wear the Kara for reasons which I explained in paragraphs 77 to 86 have no validity.

113. It is unfortunate that the defendant did not appear to regard the matters set out in section 71 or in the race equality policy in dealing with the claimant prior to the deemed implementation of the new policy in July 2008. Indeed, as I will now explain, the reasons given by the defendant and the school when dealing with the claimant's application for dispensation to wear the Kara show that no consideration was given to section 71 or the race equality policy.

114. Thus, in the letter of 2 May 2007 referred to in paragraph 11 above, Miss Rosser explained that to allow the claimant to wear "her bracelet" while the defendant considered the matter, would be discrimination against other pupils who wanted to wear a cross. Similarly at the meeting of the "Hearing Committee of the Governing Body" on 13 June 2007, Miss Rosser said that allowing the claimant to wear the Kara would have meant that she would have "discriminated against 95.6% of the school population who were not allowed to wear jewellery". I have also explained in paragraph 111 (c) the attitude of Mr Scott. I am bound to conclude that this approach, which must be based on a failure to appreciate the exceptional significance to devout Sikhs (like the claimant) of the need to wear the Kara, shows a failure on the school's part to comply with the section 71 duty to "promote equality of opportunity and good relations between persons of different racial groups". I stress that there had been no special consideration of the significance of the Kara and the need for the claimant to wear it as described by Professor Niblett as is shown by the defendant's attitude of regarding the Kara as only a piece of jewellery. I believe that the school had failed to consider properly the exceptional significance for racial and religious reasons to the claimant as a devout Sikh of actually wearing the Kara.

(iv) The steps taken by the defendant to comply after the implementation of the new policy which has to be assumed to be on 1 July 2007.

115. In the letter from Mrs Keating of 20 July 2007 to the claimant's mother and step-father the reason given for refusing the claimant's request to wear the Kara in the letter of 20 July 2007 (which are set out in paragraph 15]above) do not show any regard for the new policy. It is said that if the claimant was to be allowed to wear the Kara

"it is felt that there is a possibility that [she] may be singled out as being different from

her peers and that such actions may result in bullying or similar repercussions".

116. In my view, this approach shows an inability to implement a race equality policy and to foster good relations between pupils of different racial groups. The school should have regarded itself under a clear obligation to avoid bullying by explaining to all pupils why it was so important to the claimant to wear the Kara and why they should be tolerant of her. There is nothing in which I have seen in this case which proves to my satisfaction that the teaching staff or the defendant regard it as their duty to fulfil this important obligation. Indeed it does not appear to have been considered by the Head Teacher when she said in her first witness statement that the claimant's education at the school wearing the Kara could not continue even on an interim basis pending the outcome of the present proceedings because it would be difficult to explain this accommodation to different groups to the pupils at the school.

117. A further and continuing breach after the new policy must be regarded as having come into effect in July 2007 was the repeated failure of the school to consider the important aspects of it which I have referred to in paragraph 83 above. In particular the school and the defendants failed in its duty of (a) "fostering respect for people of all cultural backgrounds"; (b) "respect"[ing] the values of cultures [with] which they are unfamiliar"; (c) "ensure [ing] that every pupil develops a sense of identity that is receptive and respectful to other cultures"; (d) "promote [ing] the respect of other cultures, celebrates diversity and educates against racism, our teaching challenges racial prejudice and stereotypes and fosters critical awareness of biased, inequality and injustice".

118. In her witness statement, Miss Keating explained that on 17 July 2007 she convened a meeting with the governors between the Government Support Officer from the Local Education Officer, Mr. Graham Thomas and their legal officer Mr. Paul Nicholls and at this meeting "the Governors received detailed advice from both officers". I would have expected the major issues for discussion to have been first compliance with section 71, and possible unlawful discrimination on grounds of race and religion. All that Miss Keating says was discussed was "various issues such as human rights, religious manifestation, health and safety, previous cases and Sarika's representations". The witness statement records that the governors said after the meeting that they had then received detailed "legal authority and legal advice on the subject" and they would combine it with their own research to come to a decision. It would seem from the description by Miss Keating that the advice was about the Human Rights Act 1998 and surprisingly no mention was made of section 71 or the possibility of there being unlawful discrimination on grounds of race and religion.

119. As I have explained, he claimant's request for an exemption was finally refused on appeal by the Appeals Committee of the defendant, which met in the absence of the claimant's parents on 26 October 2007 after that committee had unfortunately refused to postpone the meeting so that a representative of the Valley Race Equality Council could attend. The reasoning of the Appeals Committee of the defendant was

merely that "article 9 of the ECHR does not require that one should be allowed to manifest one's religion at any time and place of one's choosing". Surprisingly no reference was made to the provisions of the RRA or the EA, which are the basis of the present application. I have concluded that the defendant did not consider the racial aspect of their decision and above all totally ignored its obligations under the new policy referred to in paragraph 117 and the provisions of section 71 of the RRA.

120. Indeed the attitude of the school and the defendant was to regard race issues as completely distinct from uniform policy. The defendant's own notes of the meeting of the Discipline Committee on 22 January 2008 indicated that race equality considerations were irrelevant despite advice on the contrary from the claimant's solicitors and Mr Williams from the Local Education Authority. Mr Lloyd, who chaired the committee, expressly refused to give any regard to section 71 (1) matters in the context of the exclusion hearing in connection with the enforcement of the uniform policy by stating that "the issue was due to a matter of uniform not race". The fact that there was no consideration of the new policy or the section 71 obligations of the school is shown by the fact that the defendant duly informed the claimant's mother and step- father by a letter dated 23 January 2008 that the claimant's exclusion would be upheld explaining merely that:

"The Panel decided that [the claimant] had displayed persistent and open defiance of the school's uniform policy when all other avenues for solving the uniform dispute had been exhausted"

(iv) Conclusions on section 71

121. During most of the relevant time until July 2007, the school had a Race Equality Policy (if at all) only in the most technical sense, and certainly not as a living instrument over which any member of the school community had any ownership, or to which any member of it had displayed any commitment. Surprisingly there is no consideration of section 71 or the race equality policy at any stage and I assume that when the School quite properly sought advice, its attention was not drawn to section 71 or the RRA or the EA. The defendant clearly failed to comply with its section 71 obligations and race equality issues as unfortunately those issues played no part (although they should have played a prominent part) in its decision- making in relation to the claimant's wish to wear a Kara. If, which is not the case, I had been in any doubt on this conclusion, I would have reached it on the basis of the comment of Stanley Burnton J (as he then was) that "if there had been a significant examination of the race relations issues involved there would have been a written record of it" (R (BAPIO Action Limited) v Secretary of State for the Home Department [2007] EWHC 199 (Admin) 199 [69]).

122. I should add that there have been serious complaints made during and after the oral hearings in this case about the way in which the defendant put forward and then had to radically change its evidence relating to how it might have complied with its

section 71 obligations and in particular whether it had a written policy. I am quite satisfied first that there was no wish on the part of the defendant or any representative or adviser of the school to mislead the court and second that the unsatisfactory way in which the evidence on this issue was adduced by the defendant was simply a result of the failure of those involved at the school to understand and to give proper consideration to section 71 matters or the race equality policy. I seriously doubt if the school, its teachers or its governors had prior to the hearing in this case been informed let alone instructed on the significance and of the relevance of the RRA and the EA generally and more particularly to this dispute.

123. In my view, the school totally failed to appreciate its obligations under section 71. Therefore its governors and teachers did not even know what policy (if any) that it had or how it ought to have complied with these statutory obligations. It goes without saying that I expect that the school will now take active steps to ensure that every decision it now takes which falls within the ambit of section 71 takes fully into account the new policy at every stage.

VI. Issue C Article 8

(i) Introduction

124. A further claim by the claimant is that she was taught in segregated conditions over a period of months and ultimately excluded from the school thereby violating her rights under Article 6 of the ECHR or alternatively her rights under Article 14 of the ECHR when read with Article 8. The wording of Article 8 is well known and it requires Member States to afford respect to private life, family life, home and correspondence as well as preventing public authorities from interfering with this right. It is settled law that "private life" in this context includes "the right to establish and develop relationships with others" **(Niemietz v Germany (1992) 16 EHRR 97** paragraph 29). Since Article 8 is potentially a protean right, a failure to accord respect for private life must attain a level of seriousness to fall within the ambit of Article 8 (see Secretary of **State for Work & Pensions v. M** [2007] AC. [83]).

125. The case for the claimant is that the steps taken by the defendant in order to punish the claimant for non-compliance with the uniform policy by means of internal seclusion achieved the level of seriousness so as to violate Article 8. The defendant disagrees as their case is that the claim does not reach the level of severity to engage article 8 and that in any event it can invoke the defences in article 8 (2) . It is common ground that the decision of the House of Lords in R (L) v School Governors [2003] 2 AC 663 means that teaching of a child in segregated circumstances is not an exclusion.

(ii) Is Article 8 engaged?

126. There is a dispute about the effect of the internal seclusion on the claimant and in particular whether it reached the level of seriousness to fall within the ambit of Article

8. A critical feature in determining this issue is the effect of the wrongful treatment on the person subjected to it. The claimant was placed in isolation in school from 12 July 2007 until the end of the summer term on 20 July 2007 save for 2 days when pupils were not required to wear school uniform and then the claimant could mix with the other pupils, she was also placed in isolation in the Autumn Term of 2007. The claimant's evidence was that when she was placed in isolation, she was set work to carry out alone in a separate room from other students. She says that she was prohibited from talking to them during break and lunch time when she had to sit outside a teacher's office.

127. According to the claimant, she was not permitted to go to the toilet without being accompanied by a teacher who waited outside and she was also supervised on a rota basis by two teaching assistants who collected work through her regular classes and brought it to her to carry out. The claimant, unlike the other pupils, was not given any letters or other documents to take home which related to events like charity fund- raising, non- school uniform days or the school newsletter. She, unlike her contemporise, was not taken to the Middle School to meet their new teachers in advance as she and her contemporaries prepared to move up to Year 9 in September 2007. Her evidence was that as a consequence of this treatment, she was crying every night and most days and that she continued having serious headaches and nightmares which she had not had before.

128. The claimant was also placed in isolation from 6 September 2007, which was the second day of the Autumn term and the first day on which she had worn the Kara because on the previous day the swelling of her wrist had prevented her from doing so. This isolation continued until 26 October 2007. The claimant explained that if any student tried to talk to her, they were reprimanded and she was not allowed to communicate with her friends. In other words she was completely segregated. Work was given to her but she said that she had much less homework than she had previously been given.

129. According to the claimant, much work required working with a partner and she did not have anyone to work with because she was in isolation. The claimant also said that she was unable to get clarification or assistance if she did not understand something in the work given to her and that she was precluded from taking part in any school activities which brought her into any contact with other pupils. In addition she could not play netball and that she was not able to take advantage of discussions with career staff.

130. She said that she was very worried and upset about her performance at school because she was isolated and she said that:

"When I was in isolation I felt very unhappy, singled out and alone".

131. The claimant stated that her isolation continued through October 2007 because as I have explained after she returned from her half-term holiday wearing the Kara,

she was excluded by the school for the rest of the day. She claimed that she was also subjected to an intrusive and humiliating interrogation.

132. The defendant and the School reject the picture which the claimant seeks to paint concerning the effect on the claimant of being placed in isolation. For example the Head of the Lower School Miss Lisa Woodrow described the claimant's manner as being:

"usually very content and again she never displayed any visible signs of emotion to indicate to me that she was upset about her being in isolation. She seemed perfectly normal to me and was quite happy within herself. During lunchtimes usually I and another member of staff would have our lunch in a different room with her and again she seemed very content".

133. The clerk to the governors Miss Maureen Keating who worked in the school's office, where the claimant spent some of her time, explained that the claimant was:

"a very nice young lady. She is chatty, friendly and seemed quite content...I remember conversations that we used to have about her interests and hobbies she presented as a polite, well adjusted girl who was happy despite the circumstances prevailing at the time".

134. In answer to the contention that the claimant received less attention from teachers than she would have done, Miss Rosser explained that in these circumstances teachers are directed to assist the pupil more than they would do in a classroom environment as a pupil receives one to one teaching. There is therefore a major conflict in evidence relating to the effect of the claimant on being put in isolation.

135. The only appropriate resolution is to follow the course adopted in R v. Camden LBC, ex party Cran **[1995] 94 LGR8** at 12 which prescribes that the court must proceed on the factual basis as put forward by the defendant or resolve any disputes of fact in a defendant's favour. That principle has been frequently applied.

136. It is not disputed that I should apply that principle in this case which means that I must proceed on the basis that the claimant was content and happy whilst at school during the period of segregation. Miss Mountfield says that even in that event, the claimant's article 8 rights have still been infringed because of her unhappiness at home which is a matter that the school and the defendant have been unable to challenge because they were not there.

137. I am unable to accept that submission because the claimant's case on this issue depends on her being unhappy at home as well as being unhappy at school but the basis of her complaint falls away when, as I have explained, it is necessary to proceed on the basis that she was content at school. In any event, I have doubts as to whether her unhappiness at home would be sufficient to infringe her Article 8 rights. For those

reasons I reject the Article 8 claim which in any event I do not consider adds anything to the claim for unlawful discrimination which I have already upheld. I ought to add that even if the claimant could show that her article 8 rights had been engaged and that the defendant could not rely on article 8(2), it is quite probable that I would have regarded this as a case for "just satisfaction" and not awarded the claimant any damages.

VII. Issue D Procedural unfairness concerning fixed-term exclusion

138. In the light of my finding that the decision not to permit the claimant to wear her Kara at school was unlawful, this issue and the following issues are only of academic interest and so I will deal with them relatively briefly. Miss Mountfield contends that because of the Head Teacher's failure to notify the claimant personally of the fact of exclusion from school on 5 November 2006 for 1 day and on 6 November 2006 for 5 days with the information specified in the Guidance as required by regulation 4 of the Education (Pupil Exclusions Appeals) (Maintained Schools) (Wales) Regulations 2003 ("the 2003 Regulations") for which the defendant is responsible, the defendant acted procedurally unfairly and unlawfully.

139. Regulation 4 of the 2003 Regulations states that where the Head Teacher of a maintained school (such as the school in this case) excludes any pupil:

"The head teacher must without delay take reasonable steps to inform the relevant person of the following matters

i) the period of the exclusion or; if the pupil is being permanently excluded that he or she is being so excluded;

ii) the reasons for the exclusion;

iii) that he or she may make representations about the exclusions to the governing body and that the excluded pupil may also make representations about the exclusion to the governing body where the pupil is not the relevant person; and

iv) the means by which such representations may be made".

140. The term "the relevant person" means that in respect of the exclusion of a pupil who is aged 11 or over (which of course means the claimant); both that pupil and a parent of hers must be informed. The defendant correctly accepts that it was in breach of these obligations.

141. The next allegation relates to the fact that from 13 November 2006 the defendant refused to permit the claimant to attend school. When the number of days of exclusion in the term had reached 6 days, the school changed the nature of the prohibition upon the claimant attending the school wearing the Kara because she was told by a letter of 15 November 2007 that she may not attend school wearing the

Kara but that this was "not an exclusion". .The claimant's case is that this was a device adopted by the defendant to prevent the claimant from having the right of access to an independent appeal tribunal as is provided for by the 2003 Regulations in the case of an exclusion. Mr Auburn says that all the school was doing was asking the claimant to attend in conformity with the school rules and so this was not an exclusion.

142. I agree with Mr Auburn that for the treatment of the claimant to fall within the concept of "exclusion", there need to be at least two elements, which were (i) a direction to the pupil to stay away and (ii) a direction taken on disciplinary grounds under the Education Act 2002 section 52 (10) as otherwise there would be an "exclusion" where, for example, a direction was given to a pupil to stay away because he or she was contagious.

143. As to (i), the case for the defendant is first that there was no direction to the claimant to stay away but instead the school wanted her to attend but only in conformity with school rules and second that that is not an exclusion. Mr Auburn submits that the Court of Appeal in Spiers v Warrington **[1954] 1QB 61** had held that not to be an exclusion. According to Mr. Auburn, Spiers is a long-standing authority for the proposition that where a pupil arrives at school but not in compliance with school rules and is then refused admission, then he or she cannot say that the school has expelled him or her because the pupil is being expected and encouraged to return to school.

144. The Spiers case was a successful appeal by way of case stated by the school authority against a decision allowing an appeal by a parent from his conviction for failing to ensure that his child attended school regularly. The reason why the child had not attended at school was that she repeatedly turned up in trousers contrary to the dress code of the school. There was first no suggestion that the dress code was unlawful in any way or second, unlike the present case any suggestion that the school had acted wrongfully.

145. Lord Goddard CJ said in a judgment with which Sellers and Havers JJ agreed at page 66 that:

"The head mistress did not suspend this child at all. She was always perfectly willing to take her in; all that she wanted was that she should be properly dressed. Suspending is refusing to admit to the school; in this case the head mistress was perfectly willing to admit this girl but was insisting that she be properly dressed".

146. The only other authority to which I was referred was the Begum case in which two members of the Appellate Committee made observations which, according to Miss Mountfield, were made without the benefit of counsel's submissions but even so, that does not prevent them from being of great value. It is true that in the Begum case, the submissions related to the alleged breach of human rights and not to the

question of whether there had been a failure to comply with domestic statutory procedure (see Lord Hoffmann [57].) Indeed the claimant in Begum was not subject to exclusion and the facts of that case were very different from the present case but two members of the Appellate Committee made some comments relevant to the applicability of Spiers.

147. First, Lord Bingham having quoted the passage from the Spiers case, which I have set out in paragraph 145 above, then said that:

"39. To the [pupil], of course, the case appeared differently: she was being effectively shut out from attending the school by the school's insistence on her compliance with an unjustified rule with which it knew she could not comply. That is not a view of the case which I have accepted, but had it been the correct view (as in another case, on quite different facts, it might) there could be a force in the contention that she was, de facto, excluded. It may be, and of course one hopes, the situation of this kind is a very rare occurrence. I am not, however, sure that it is adequately covered by the existing rules."

148. Second, Lord Scott explained that the decision not to allow the pupil to attend school:

"82 was, in my view a decision taken on disciplinary grounds. The [pupil] was not prepared to abide by the school uniform rules. The decision was taken for that reason. But, none the less, it was not, in my opinion, an "exclusion" of [pupil] for section 64 purposes. A section 64 exclusion is a direction to the pupil to stay out of school. No such direction was ever given to [the pupil]. She was not directed to stay away: she was directed, and encouraged, to return wearing the school uniform. The decision that she would not return was her decision (or that of members of her family), not that of the school. In contrast to a pupil subject to a section 64 exclusion [the pupil] could at any time have returned to the school. This was not in my opinion, a section 64 exclusion".

149. There is a stark difference between the present case and the Spiers case because in the Spiers case, there was no successful challenge to the legality of the rule of the school which led to the pupil staying away while in the present case for the reasons which I have explained, the way in which the rule was applied amounted to indirect racial and religious discrimination and was the consequence of a failure by the defendant to comply with its duties under section 71 of the RRA.

150. So the issue is whether the approach in Spiers and its reasoning set out in paragraph 145 above applies where the school rule which precludes a pupil from attending is unlawful. There are four significant factors which have led me to the conclusion that the reasoning in Spiers does not apply to the present case. First there was no finding or even a suggestion in that case that the uniform policy was unlawful and so that is different from the present case. Second the courts should not do

anything to enforce or permit any entity to enforce an unlawful policy. Third, it is instructive to consider the consequence of permitting a school to enforce an unlawful uniform policy. So if, for example, a school imposed a rule for no justifiable reason that its existing female pupils (but not its existing male pupils) had to shave their heads and that it then suspended any female pupils who arrived at school with unshaven heads. I do not believe that any court would allow that school to rely on what had been said in Spiers to prove that its actions set out in the last sentence did not amount to an exclusion. Adopting the words of Lord Goddard in Spiers, "suspending is refusing to admit to the school" but this applies only in respect of rules made in accordance with the law or, perhaps in Lord Bingham's words in Begum, a rule which was not "unjustified".

151. Finally if the Spiers reasoning applied to the present case, a school could deliberately have rules or it construe its rules in such a way that it would always be able to contend that the Spiers decision meant that a pupil was never excluded or suspended because he or she was being required to agree to such a rule with the consequence that if the pupil did, then the pupil could return to school. I am, of course, not suggesting that in this case, the school was deliberately seeking to avoid the claimant being able to avoid being able to invoke the remedies of being excluded in this way. I am merely giving this example to show the possible alarming consequences of regarding the decision in Spiers as applying to unlawful uniform policy. Mr. Auburn suggests is appropriate.

152. Once the school rule which is said to justify not allowing the pupil to attend was not lawful, the basis of the decision in Spiers no longer applies and this would be one of those situations where in Lord Bingham's words again in Begum that "there could be a force in the contention that she was, de facto, excluded". Indeed I respectfully believe that the same reasoning applies in the present case and so I conclude that the defendant cannot rely on the Spiers case when it gave a direction (which I have found to be unlawful for the reasons set out in Part V above) for the claimant to stay away unless she stopped wearing her Kara at school.

153. It therefore becomes necessary to move on to the next stage, which is stage (ii) as described in paragraph 142 above and which is to consider if the direction to exclude the claimant was taken on disciplinary grounds. As I have explained, from 15 November 2007 the claimant was told that she could not attend the school unless she stopped wearing the Kara and complied with the school's dress code. In my view, that was an exclusion for disciplinary reasons and that was after all the decision of the Appeal Committee in January 2008. Therefore for the reasons, which I have explained, the school's conduct constitutes an exclusion with the consequence that the claimant can invoke the appropriate appeal procedure. This also means that the remaining issue is only of very limited academic interest.

VIII Issue E Failure to follow exclusion guidance or to give reasons for departing from it

154. I stress that this issue is only of very limited academic importance in the light of my other conclusions and so I will deal with it shortly. Under section 52 (4) of the Education Act 2002, Head Teachers and governing bodies (among others) must by law have regard to the relevant guidance which in Wales is, as I explained in paragraph 31 (e) above, the 2004 Guidance.

155. The 2004 Guidance states in paragraph 1 that:

"There is an expectation that the guidance will be followed unless there is a good reason to depart from it".

156. The case for the claimant is that there is no evidence to suggest that the Head Teacher had any proper regard to the 2004 Guidance at the point of excluding the claimant formally and informally from the school. Miss Mountfield contends that if the Head Teacher had given regard to the 2004 Guidance, she would have been aware of the requirement in the Regulations that the claimant herself has to be formally informed of the exclusion under regulation 4 (1) of the 2004 Regulations and for the right to appeal and of the required form of a notification letter. Thus it is said that the Head Teacher failed to take a relevant consideration into account in reaching her decision to exclude both formally and informally the claimant.

157. I have already explained in paragraphs 149 to 152] above that as a result of the Spiers case, I consider that there was a formal exclusion. I accept that the claimant was not formally informed of the exclusion or her right to appeal.

158. One allegation that is made is that the school by failing to give any due regard to the requirements in the RRA in permitting the claimant to be excluded from school it acted in breach of paragraph 15.2 which reminds schools that they are required to take steps to ensure that they will not discriminate against pupils on racial grounds when making a decision about whether to exclude a pupil. I have already explained that I consider this complaint to be justified for the reasons set out in section V above.

159. In my view, this complaint is justified and in those circumstances there is no need to deal with other complaints because the defendant will have to make further decisions in the light of my judgment.

VIII Conclusion

160. I have concluded that the claimant was the subject of acts of indirect discrimination on the grounds of race and religion which were committed by the defendant when it refused to allow her to attend at school wearing the Kara. In addition, the defendant has failed to comply with its duties under section 71 of the RRA. I have also decided that the defendant excluded the claimant when the school sought to suspend her and this was done in a procedurally unfair manner. Furthermore, the school failed to follow the 2004 Guidance in dealing with the claimant. I reject the claimant's claim that the imposition of disciplinary sanctions and

of internal segregation contravened her rights under Articles 8 and or 14 when read with Article 8 of the ECHR.

161. The defendant quite correctly accepted during the hearing that the conduct of its Disciplinary Committee's hearing of 22 January 2008 is defective with the result that another hearing has to take place. After the draft judgment was circulated, Mr. Auburn informed me that the claimant would be permitted to return to the school in September 2008 wearing her Kara but that the defendant sought permission to appeal, which I have refused. Mr. Auburn stated that in those circumstances, the defendant would consider whether to make a renewed application to appeal

162. I must stress that if the claimant is permitted to wear the Kara at school, this will constitutes an extremely limited exception because at present it is not obvious that there will be other pupils of whatever religion or race who can invoke this exception which is dependent on two matters on the very unusual facts of this case. The first is the honest belief of the claimant justified by objective evidence that the wearing of the article is of exceptional importance to her for racial or religious reasons. The second factor is the unobtrusive nature of the Kara being 50 mm wide and made of plain steel. The fear of the school that permitting the claimant to return to school wearing her Kara will lead to an end of its uniform policy with many other girls wearing items to show their nationality, political or religious beliefs is totally unjustified.

163. If they consider that they should permit the claimant to return to school wearing her Kara, I hope that the school will take all possible steps to ensure first that the claimant can become quickly assimilated again within the school and second that there will no bullying of her for racial or religious reasons. This school will no doubt wish to invoke its new policy on racial matters, which is now in force so as to ensure that this conduct does not occur. By the same token, the claimant and her family hopefully will not boast about their apparent success in the present litigation..

164. One of the Governors (Mr. Scott) says in his witness statement that he would welcome guidance on how to handle this type of case. I hope that I have done so but I would stress how important it is to apply the new race equality policy whenever it can be relevant and also to appreciate what defences to a claim of indirect discrimination on grounds of race and religion cannot be maintained.

165. I feel sympathy for all the parties in this case. The claimant deserves very great sympathy for the problems that have been caused to her education by decisions of the school which I consider wrongful. The decision-makers at the school are entitled to some sympathy as I suspect they have acted honestly and that they could not have been instructed properly on the effect of the RRA and the EA.

166. Finally I must express my gratitude to counsel for the admirable written and oral submissions which have been of the highest quality. Although the defendant and the school will be disappointed with the result, they can take consolation from the fact that Mr Auburn argued with commendable skill and fairness all the submissions open

to him especially in the light of the confusion over what race or equality policy (if any) the school had at the relevant times.

SUMMARY

Mr. Justice Silber

1. This is a summary of the judgment which I am about to hand down. It is not part of the judgment and is only being given because of the interest in this case.

2. The main issue raised on this application is whether on the facts of this case, a particular school, (namely Aberdare Girls High School) was entitled as a matter of public law to refuse to allow a 14 year old Sikh pupil Sarika Angel Watkins-Singh to wear on her wrist at school the Kara. It is claimed that the decision to refuse to allow this has resulted in indirect discrimination against Sarika on the grounds of race and religion.

3. The Kara at the centre of the present dispute is a plain steel bangle which has a width of about 5 millimetres which is about a half of an inch. It is worn by Sikhs as a visible sign of their identity and faith.

4. This judgment is fact- sensitive and it does not concern or resolve the issue of whether the wearing of the Kara should be permitted in our schools. Indeed that is not a question that a court could or should be asked to resolve. Nothing that appears in this judgment seeks to resolve or to throw any light on this problem or the circumstances in which a Kara should be permitted to be worn in other schools. It follows that nothing in this judgment is intended to be any comment on the traditions or the requirements of the Sikh religion or race or any other religion or race.

5. There are a number of exceptional features of this case. First, as I have explained, the Kara is 5 millimetres or inch wide and therefore it is much narrower than a watch strap and many ordinary bangles. Second it cannot be observed if the wearer of it is wearing a long-sleeved garment. Third, this is not a case of a pupil not wearing the school uniform but merely wanting to wear the Kara as well as wearing all her uniform. Fourth, wearing the Kara on a wrist is regarded universally by observant Sikhs as a matter of exceptional importance and it symbolises their loyalty to the teaching of their Gurus. Fifth, Sarika readily agrees to cover the Kara for physical education sessions and any activity in which the wearing of the Kara could cause health and safety issues. Finally there are many schools in which the wearing of the Kara is permitted.

6. Sarika is a 14 year old Sikh schoolgirl of Punjabi-Welsh heritage who challenges a decision made last year by her school which is Aberdare Girls High School which has prevented her from wearing a Kara at her school, The school is a maintained girls' non-denominational school in Wales and its governing body is the defendant in the action.

7. The school defends its decision by saying that it has a uniform policy which on the topic of jewellery only allows its pupils to wear ear studs and wrist watches but no other jewellery. The case for Sarika is that the school erred in making this decision because first to her as an observant Sikh wearing the Kara was matter of exceptional importance for religious and racial reasons and second that the school's decision amounts to indirect discrimination on the grounds of race and religion in the light of the provisions of the Race Relations Act 1976 as amended and the Equality Act 2006

8. Sarika entered the school in September 2005. Her father was Welsh but he died when she was a year old and when Sarika was 5 years old her mother married her step-father who is an observant Sikh and who she regards as her father. Sarika was given a choice as to which religion, if any, she wishes to follow and she has selected the Sikh religion which has become particularly important to her since her visit to India in March 2005. There is no dispute that she is an observant Sikh

9. Sarika's school reports have been good and she was a prefect .On 4 May 2007 the Head Teacher of the school wrote to the parent of Sarika stating the school was:

"very pleased with Sarika's progress and she should be congratulated for her achievements".

10. In April 2007, a teacher at the school observed Sarika wearing a bangle, which was her Kara. The teacher asked Sarika to remove it because it contravened the school's uniform policy which permitted only one pair of plain ear studs and a wrist watch to be worn by pupils.

11. When Sarika refused to remove it, she sought an exemption from the uniform policy because she stated she was wearing her Kara as something which was central to her ethnic identity and to her religious observance as a Sikh. The school deferred making a decision on Sarika's request to wear the Kara pending receipt by the school of some unspecified national guidance. The governing body at a meeting on 30 June 2007 at which it again decided to postpone making the decision. In the meantime, Sarika's mother was asked not to allow Sarika to wear the Kara but that she should carry it in her bag. Sarika's mother said that she would let Sarika decide but she did not return to school because of the continuing prohibition on her wearing the Kara until 12 July 2007 after the intervention of the local education authority's welfare officer.

12. When Sarika returned to school, she was interviewed by the Head Teacher and she was told that she was not permitted to attend the school wearing the Kara but that she would be taught in isolation and that she would be kept socially segregated from all the other pupils. The segregation was strictly enforced and she was kept socially segregated from other pupils. Sarika was even accompanied to the toilet by a member of staff who waited outside.

13. By a letter dated 20 July 2007 which was about 3 months after Sarika had first

requested an exemption, the governing body eventually refused her request for an exemption. Sarika's parents appealed against that decision.

14. When Sarika returned to school at the start of the autumn term 2007 and when she wore the Kara, she was immediately placed in seclusion. Sarika's request for an exemption was finally refused on appeal by the Appeals Committee of the governing body on 26 October 2007 .The reasoning of the appeals committee was merely that "Article 9 of the ECHR does not require that one should be allowed to manifest one's religion at any time and place of one's choosing". Surprisingly no reference was made to the provisions of the Race Relations Act or the Equality Act both of which should have been of crucial importance to the governing body in reaching its decision but which were not of such importance.

15. When Sarika returned to school after the half-term break on 5 November 2007 wearing the Kara, she was the subject of fixed-term exclusions first on 5 November 2007 for one day and second on 6 November 2007 for 5 days. Sarika was not formally told of her right of appeal but her mother indicated by a letter dated 8 November 2007 that she wished to exercise her right to make representations. On 13 November 2007, not withstanding this request Sarika was told that she was being excluded for a fixed term by the Head Teacher of the school.

16. After 5 days of exclusion in the academic term, a pupil is formally entitled to appeal and on 15 November 2007 which was a day after Sarika's sixth day of consecutive fixed term exclusions had ended, she was told by Miss Rosser the Head Teacher in a letter first that she would not be permitted to attend the school wearing the Kara but second that this was not an exclusion because Sarika could attend school if she was dressed compatibly with the school's uniform policy that is without wearing the Kara. In answer to a request the Head Teacher said that she had not decided for how long this exclusion of Sarika would last.

17. Sarika felt unable because of her identity as a Sikh to remove the Kara and the present proceedings were commenced. On 22 January 2008, the defendant's disciplinary committee held a meeting to consider Sarika's fixed term exclusion on 5 and 6 November 2007. The following day the school rejected Sarika's appeal on the grounds of Sarika's "open, deliberate and persistent defiance of the school's authority". The school accept that the way in which it conducted this appeal was unfair.

18. The position is that since 21 February 2008 pending the outcome of the present proceedings Sarika is being educated at a different school which permits her to wear a Kara. She remains determined to return as a pupil at Aberdare Girls High School but provided of course that she can wear the Kara.

19. The claim of Sarika that she has been subjected to unlawful indirect discrimination has to be considered against the background of the importance to an observant Sikh like Sarika of wearing the Kara. Professor Eleanor Nesbitt a Professor

in Religion at the University of Warwick has explained that Sikhs have to adopt the 5 Ks which have been part of their religion since 1699. The 5 Ks are outward signs of a Sikh and they include not only Kesh which is uncut hair but also the Kara which is the bangle. In Professor Nesbitt's extensive experience of working and studying Sikhs, she has concluded that of the 5 Ks, the Kara is the symbol most commonly worn by Sikhs as an external identification of Sikhism even though it is not an actual requirement for people not being initiated like Sarika to wear it.

20. Professor Nesbitt explained that the Kara is a circle that reminds Sikhs of God's infinity and it shows that they are linked in other words, they are handcuffed by it to God. Her evidence was that it is important for Sikhs continue to wear the Kara on his or her right arm or wrist.

21. The main claim of Sarika is that the continuing decision of the school not to allow her to wear the Kara at school amounts to discrimination on grounds of religion and race. The first issue was whether when compared with pupils whose religious beliefs or racial beliefs were not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery Sarika was placed in the words of the statutes "at a particular disadvantage" or suffered a "detriment" by not being allowed to wear the Kara.

22. Although it was not a requirement of Sarika's religion or race to wear a Kara, I am quite satisfied that it would be a "particular disadvantage" or "detriment" for an observant Sikh like Sarika to be forbidden for wearing an item which she genuinely believes for reasonable grounds was a matter of exceptional importance to her racial identity or her religious belief and that the wearing of this item can be shown objectively to be of exceptional importance to her religion or race as a Sikh.

23. In this case there is very clear evidence which has not been disputed that the Kara was not a piece of jewellery but to Sarika it was and remains "one of the defining physical symbols of being a Sikh" and "a constant reminder to do good with the hands". Sarika stress that wearing the Kara was "extremely important to her".

24. Obviously the views of a pupil would not and should not be of definitive importance especially if they were not supported by objective evidence showing the exceptional importance to Sarika of wearing the Kara. As I have explained Professor Nesbitt provides this supporting evidence. Indeed the significance of the wearing of the Kara to Sikh pupils in schools is recognised in the guidance issued by other education authorities.

25. I must stress two points. First there was no evidence adduced of any other bracelet or other religious jewellery which would fall into this very exceptional category in which the Kara falls

26. Second the school's attitude in refusing to allow Sarika to wear the Kara was explained by one of their governors when he said that wearing the Kara was seen as

"roughly similar" to displaying the Welsh flag because "that is something which engenders emotion and perhaps strong emotion but is not something which either Sarika's religion or culture requires her to wear". I am afraid I regard this as a seriously erroneously comparison because it totally ignores the critically important religious significance of a Kara which is not shared by the Welsh flag.

27. The school sought to justify its decision to prevent Sarika from wearing the Kara because of its general uniform policy. It pointed to decisions of this court which enabled schools in support of their uniform policy to prevent girls wearing the Moslem niqab which is the veil which covers the vast majority of a pupil's face and the jihab which is a long coat like garment.

28. I have concluded that there is an enormous difference between these very noticeable garments and the unostentatious Kara which is very small and still permits the wearer to wear every other aspect of the uniform policy. Again I reject the attempt of the school to justify its decision to prohibit Sarika from wearing the Kara on the grounds that the wearing of the Kara might be seen as a symbol of affluence but its cost must be minimal when compared with the cost of the watches which all pupils are allowed to wear.

29. Another form of justification put forward by the school was that if Sarika was allowed to wear the Kara it would be widely misunderstood in the school. Even if that were the case, the school has a clear obligation as is indeed set out in its own racial equality policy which includes being committed to "fostering respect for people of all cultural backgrounds" and having a curriculum which "celebrates diversity and educates against racism" .

30. I have concluded that none of these justifications succeeded and that the claim for indirect discrimination on grounds of race and religion succeeds.

31. There were other claims made by Sarika . Of those I found that the school failed to comply with its very important obligations under section 71 of the Race Relations Act 2002 which required it in considering its uniform policy to have "due regard" to the need to end unlawful racial discrimination and promote equal opportunity and good relations between persons of different racial groups. In addition I dismissed the claim brought under the Human Rights Act that Sarika's rights under Article 8 of the European Convention on Human Rights had been infringed.

32. Thus at the end of the day Sarika's claim for discrimination on grounds of race and religion succeeds. After the draft judgment was circulated the School agreed to allow Sarika to return as a pupil in September and to wear her Kara. She will then be entering year 10 and starting her preparations for her GCSE courses. I very much hope that the school will take all possible steps to ensure first that Sarika can become quickly assimilated again within the school and secondly that there will be no bullying of her for racial or religious reasons. By the same token, I hope that Sarika and her friends will not boast over their success in this action.

33. I have refused an application by the defendant for permission to appeal but the Governors of the School have intimated that they will consider making a further application for permission to appeal. I very much hope that if they do make such an application or reach a decision not to do so, they do so speedily as it is clearly in the interests of the claimant that she knows as soon as possible if this litigation is finished or if it is continuing..

34. Finally I must express my sympathy for all parties in this case Sarika deserves great sympathy for the problems that have been caused to her education by the unlawful decisions. The decision-makers at the school sought to act fairly and they are entitled to some sympathy as they could not have been instructed properly on the effect of the Race Relations Act and the Equality Act.

35. I stress again that what I have just said is not part of the judgment which I now hand down

IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE JJ.A)

CIVIL APPEAL NO. 22 OF 2015

BETWEEN

MOHAMED FUGICHA……APPELLANT

AND

METHODIST CHURCH IN KENYA (SUING THROUGH ITS REGISTERED TRUSTEES)....1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

COUNTY DIRECTOR OF EDUCATION ISIOLO COUNTY.....3RD RESPONDENT

DISTRICT EDUCATION OFFICER ISIOLO SUB-COUNTY.....4TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Meru (Makau, J.) dated 5th March 2015) in **PETITION NO. 30 OF 2014)**

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JUDGMENT OF THE COURT

By this appeal, this Court is being asked, to pronounce authoritatively for the very first time as far as we can tell, on the very live and often vexed issue of free exercise of religion in Public Schools in Kenya.

1. BACKGROUND AND PROCEDURAL HISTORY

By a Petition filed before the High Court's Constitutional and Human Rights Division at Nairobi, which was later transferred to the High Court at Meru, the Methodist Church in Kenya, suing through its Registered Trustees (The Church), impleaded as respondents the Teachers Service Commission (TSC), the County Director of Education Isiolo County (CDE) and the District Education Officer Isiolo Sub-County (DEO).

On the facts supporting the Petition, the Church averred that it was the Sponsor of St. Paul's Kiwanjani Day Mixed Secondary School (The School) for which, it provided a five-acre piece of land. The School, founded in the year 2006, had "***a population of 412 students from diverse religious backgrounds***"

and was the best performing school in Isiolo County. It had a school uniform policy prescribed in the admission letter which each student signed upon admission. The respective parents also signed it.

Controversy over the issue of uniform, it was averred, only arose on 22nd June 2014 when, during an Annual General Meeting cum Prize Giving Day, the Deputy Governor of Isiolo County ***"made an informal request that all Muslim girls in the school be allowed to wear* hijab *and white trousers in addition to the prescribed uniform"***. A week later, some ***"unknown people/persons"*** brought the said items into the school and thereafter Muslim girls turned up donning the said items of apparel and open shoes in addition to the school uniform. This led to disharmony and tension.

When asked to revert to the prescribed uniform, the Muslim girls, joined by the boys of their faith "***went on the rampage".*** It was alleged that they "***broke window panes and threatened teachers and Christian students"*** before they walked out of the school and marched to the DEO's office. A month later, the DEO, together with officials from the Ministry of Education and Members of an Interfaith Group, visited the school. After discussion it was "***unanimously agreed***" that the school uniform remain as prescribed in the dress code, but the DEO ***"categorically stated that unless* hijab *and trousers were allowed in the school there would be bloodshed".*** On 30th July 2014, a meeting of the school's Board of Management, (BOM), Parents Teachers Association (PTA) and the Church met and agreed on a return to school formula pursuant to which 214 students reported back to school just before it was closed for the August holidays.

On 27th August 2014, the CDE held a meeting with the Principal, Members of the BOM and the PTA who, however, felt that they were being '*hijacked'*, which the Principal complained about in a letter objecting to directions issued by the CDE on the issue. The CDE proceeded to hold a meeting with parents at the school without the BOM and the PTA at which certain resolutions were arrived at, which, the CDE communicated to the BOM and the Church and directed them to meet before 11th September 2014 "***to decide with finality whether* hijab *and white trousers would be acceptable as part of the school uniform".***

The said meeting was duly held at the school and by a vote of 18 out of 22 present, overwhelmingly voted to maintain the *status quo*. The very next day the CDE held a meeting with a few of her officers and directed that Muslim girls should wear trousers and *hijab* and that the principal of the school be transferred.

The Church considered the transfer of the principal, one GEORGE M. MBIJIWE, who had been the best performer in the County for the previous five consecutive years, to have been "***malicious, irrational, punitive***" for his stand in maintaining school uniform. And it complained to the respondents and the relevant authorities requesting that school rules and regulations be adhered to, the Principal retained, the Church be respected as sponsor of the school and that there be non-interference with its running of the school.

It was further averred that,

"3. The Christian students at the school have felt that the school has accorded Muslim students special or preferential treatment and discriminated against them contrary to Article 27 of the Constitution of Kenya…..

4.The Respondents have erred in failing to play a key role in standardization of school uniforms thus creating economic disparities on religious backgrounds (sic). The respondents' actions have given an impression that the Muslim students have been accorded special and preferential

treatment, a fact that is tantamount to discrimination and the rules of natural justice and the rule of law (sic)"

The Church therefore sought a declaration that the decision to allow Muslim girls to wear *hijab* and trousers was discriminatory, unlawful, unconstitutional and contrary to the school's rules and regulations; and various injunctions to remedy the situation or to provide relief against the said decision.

The Petition was supported by the verifying affidavit of KIMAITA JOHN MACHUGUMA, the Church's Development Co-ordinator of the Isiolo Circuit sworn on 18th September 2014 in which he reiterated and provided documentary proofs for the allegations in the Petition.

In answer to the Petition, the TSC filed a replying affidavit sworn on 3rd November 2014 by its Senior Deputy Director in charge of Teachers Management of Post Primary Teachers, MARY ROTICH. The gist of the affidavit was that the transfer of the school's head teacher was done by the TSC in exercise of its constitutional and statutory functions and was done after a rational consideration of relevant factors without loss, prejudice or injustice to the said teacher. The TSC attacked the Petition against itself as being incompetent for imprecision and an attempt by the Church to usurp the TSC's constitutional, statutory and administrative mandate "***which shall uproot the philosophical concept behind Chapter fifteen Commissions".*** It prayed that the Petition be dismissed with costs.

On behalf of herself and the DEO, MRS. MURERWA SK, the CDE Isiolo County swore a replying affidavit on 17th October 2014 in response to both the Petition and an interlocutory application for injunction filed by the Church. She stated that she did convene a meeting of Senior Education Officers on 10th September 2014 with a view to responding to the issue of wearing hijab and trousers which had caused a lot of unrest at the school. She averred as follows at paragraphs 5 and 6;

"5. THAT in deliberating the issue the meeting was informed by among other issues-

(b) Students of the school had transitioned from Kiwanjani Primary School equally sponsored by the Petitioners where they had been allowed to wear* hijab *headscarf/trousers [and] by being required to cease from adorning (sic) the same, great dissatisfaction arose.

***(c) The neighbouring schools for instance Garbatulla High School also sponsored by the Petitioners, adorned (sic) the* hijab.**

***6. THAT in light of the foregoing, the meeting resolved that itwould be fair and just that the Muslim students be allowed to adorn (sic) the* hijab.**

7. THAT the issue of recommending the transfer of the Principal was resolved after it had become apparent that he would be adamant in effecting the resolutions of the aforementioned meeting. His conduct only served to fun(sic) animosity as opposed to mitigating the situation and was reflected in his contemptuous attitude towards his superiors".

She dismissed as outrageous the allegation that she and her office intended to dissolve the school's BOM and PTA. She urged the dismissal of the Petition and Motion.

The appellant's entry into the fray was by an application filed under Certificate of Urgency on 8th October 2014. In the Motion dated 6th October 2014, the appellant **Mohammed Fugicha** (Fugicha) sought to be enjoined in the proceedings as an Interested Party and/or Respondent to the Petition. He also sought leave to respond to the Church's application for injunction dated 18th September 2014. He prayed that

the conservatory orders granted by the Court on 23rd September 2014 pending the hearing and determination of the Petition be set aside or discharged. He prayed, in the alternative, for an interim order limited to the remainder of that school term allowing the Muslim students at the school to wear the *hijab*; "a scarf and trouser" only.

In his grounds and affidavit in support, Fugicha averred that he was a father to KALO MOHAMMED FUGICHA, AISHA MOHAMMED FUGICHA and SUKU MOHAMMED FUGICHA – all students at the school who were Muslims – and that;

"(e) …wearing of hijab is part and parcel of freedom of conscience, religion, thought and belief as enshrined in Article 32 of the Constitution of Kenya and the same is being restricted and limited and being derogated from its core essential content by the Petitioner contrary to Article 24(2) (e) of the Constitution of Kenya.

Fugicha also raised the following grounds;

(g) THAT Kenya as a member of the United Nations Organization and as a democracy is bound by the United Nations Charter and also bound by the decisions of the United Nations Human Rights Committee the monitoring body created by the 1966 International Covenant on Civil and Political Rights and specifically its General Comment No. 31 in the case of Hudoyberaganova against the state of Uzbekistan [CCPR/82/d/931/2000] which upholds the freedom of Muslim students to dorn (sic) on hijab.

(h) THAT it is the applicant's case that the decision in Republic vs Headteacher, Kenya High School & Anor Ex-parte SMY (a minor suing through her mother and next friend AB [2012] eKLR (THE KENYA HIGH case) against wearing of hijab in school was determined per in curiam and as a consequence it is paramount that after disposal of interlocutory applications, directions do issue referring the matter to the Hon. Chief Justice to appoint a bench of more than one judge to hear the main petition as the Court would be bound by this decision.

(i)THAT the administration at St. Paul's Kiwanjani Mixed Day Secondary School are indirectly forcing Muslim students therein to involuntarily sign a commitment not to wear hijab but to abide by the school uniform and if not, refused entry into the school compound an act which is discriminatory and trampling on the Muslim students rights.

He also swore an affidavit in the same terms and added that his three daughters had been denied entry at the school for wearing the *hijab*, which the school administration felt emboldened to do on account of the conservatory orders issued by the High Court. He asserted the children's legitimate expectation to be allowed to exercise their freedom of conscience, religion, thought and belief by wearing the *hijab*.

By its order made on 15th October 2014, the High Court allowed Fugicha's joinder as an Interested Party in the proceedings. He then swore a replying affidavit on 16th October 2014 in response to the School's application for conservatory orders and injunction dated 18th September 2014. In his said Affidavit, Fugicha averred, *inter alia*, as follows;

"8. THAT the word hijab is an Arabic word literally meaning to cover or a curtain . In Islamic jurisprudence it refers to dress code for women and with respect to school-going children beside the school uniform, customarily the girl students have been a headscarf and a trouser normally plain white in colour covering the legs and the head but leaving the face.

9. THAT I do aver that hijab is religious obligation to all Muslim females who have reached the age of puberty primarily to guard on modesty and decency and being a religious command and a core Islamic faith, belief and practice, it is a sin not to adhere to such a religious command and which to Islamic faith has important religious significance.

10. THAT the forcing of Muslim students not to wear hijab as aforesaid is a painful choice to a steadfast Muslim student to practice and express her religion and Islamic culture and exposes them to suffering in silence and detriment and as such it is exceptionally important and justifiable in the circumstance to be allowed to wear hijab.

….

12. THAT I do aver that wearing of hijab by my daughters and by any Muslim girl students is a manifestation, practice and observance of the Muslim faith and/or religion by those who are steadfast and conscious of their faith (my children included as they are steadfast and are always concerned by not being allowed to wear hijab to which they attach exceptional importance) and as such pursuant to the said constitutional provision a person should not be compelled and/or forced to remove the hijab as it would be forcing the students to engage in an act contrary to the Muslim religion and belief which freedom is protected under our progressive bill of rights.

He further swore as follows;

18. THAT I do aver that it is against the spirit of Article 259 of the Constitution the refusal by the petitioner for Muslim students to wear hijab who are concerned about their modesty and decency as demanded in the Muslim faith, does not promote their dignity or fundamental belief in our religion of Islam, it also does not promote equity by equitably appreciating other persons around us and their religious persuasions and giving them room to practice and manifest their religion. It is an antithesis of inclusiveness by not appreciating the multi cultural aspects of our society and an affront to equality and freedom from discrimination as provided under article 27(1), (4) and (5) of the Constitution of Kenya and which is contrary to the expected interpretation (Article 259 (1) (d)) – a contribution of good governance.

19. THAT I am alive to the fact that the freedom of conscience religion, belief and opinion is subject to limitations but I am advised by my advocates on record Mr. Ali Advocate that Article 24(2) (c) of the Constitution provides that such limitations shall not limit the right or fundamental freedom so far as to derogate from its core or essential content which the actions of the petitioners manifestly are doing and intended to do which will only leave the freedom of conscience, religion, belief and opinion as a paper freedom not protected or given effect.

20. THAT for record purposes, the allegation that a Muslim girl student will look different from those of other faiths if allowed to wear on hijab has no basis as the main school uniform is not affected with the exception of the Muslim head scarf and trouser which are all uniform and plain white in colour. It has not been shown or proved that if such an exemption if granted learning process would be disrupted.

21. THAT I aver that pluralism and diversity can cause tension in any community but authorities cannot purport to remove a cause of tension by eliminating pluralism but they ought to ensure that the diverse groups tolerate and accommodate each other."

The church responded to all those affidavits through a further affidavit sworn by Kimaita John

Machuguma on 21st November 2014. In specific answer to Fugicha's affidavit, the said Machuguma asserted that the *hijab* was a purely uniform issue governed by school rules and not a religious issue as had been made to appear. He also averred that when Fugicha's children reported to the school, they each, with their mother, had signed and agreed to comply with the school rules and regulations.

The court having granted an interim stay of its earlier orders thereby allowing Muslim students at the school "***to wear an* hijab *(a scarf/trouser only)",*** and Fugicha having been enjoined as an Interested Party, the parties recorded a consent order on 21st October 2014 for the *status quo* then prevailing to be maintained until hearing and determination of the Petition. The court granted liberal leave to all parties to file and serve further affidavits within fourteen days and directed that the Petition be determined by way of written submissions to be filed and served in accordance with a time-table it gave. The submissions were thereafter highlighted orally by the parties before the honourable Judge who then considered them and delivered the judgment impugned herein on 5th March 2015.

By that judgment the learned Judge dismissed the school's prayers against the TSC on the question of the transfer of the Principal to another school but on the issue of the *hijab* granted the following orders, as against all the respondents before him;

"***4. An order that the respondents decision to allow Muslim students to wear* hijab*/trousers is discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations at St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby issued.***

5. An order of injunction preventing the respondents from allowing Muslims students from wearing* hijab *contrary to the school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary be and is hereby issued.

6. An order of injunction restraining the respondents from interfering with the petitioner in executing its rightful role as a sponsor in respect of the affairs of St. Paul's Kiwanjani Mixed Secondary School be and is hereby issued.

7. A mandatory injunction compelling the respondents to comply and ensure full compliance with the current school rules and regulations that were executed by the students and parents during the reporting in respect of Kiwanjani Day Mixed Secondary School be and is hereby issued.

8. An order of injunction preventing the respondents from dissolving or purporting to dissolve the current Board of Management and parents Teachers Association of St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby granted until their term of office expires.

9. General damages – Nil

10. An order that school uniform policy do (sic) not indirectly discriminate against interested party's daughters and other Muslim female students.

11. The interested party's cross petition is defective and is struck out.

12. Costs of the petition to the petitioner".

2. THE APPEAL

Aggrieved by that decision, Fugicha filed a Notice of Appeal and then a Memorandum of Appeal raising some eighteen (18) grounds. They can be summarized that the learned Judge erred by;

- Failing to appreciate the principle of direct and indirect discrimination.
- Misapplying the concept of accommodation in discrimination law inherent in **Article 27(4)** and **(5)** of the Constitution and equating the wearing of *hijab* to a conferment special status.
- Failing to appreciate and uphold the importance of *hijab* as a manifestation of religion protected under **Article 32** of the Constitution.

- Holding that allowing *hijab* amounts to elevating Islam over other religions and contrary to Kenya's secular character and the equality principle.

- Dismissing the cross-petition for non-compliance with the **Mutunga Rules** yet it surpassed the informality test therein.

- Misapprehending the law on the rights and role of a sponsor under **Section 27 of the Basic Education Act, 2013.**

- Ignoring evidence on record that school uniform was contentious.

- Failing to uphold the submission that absent a statute expressly limiting the right to manifest religion any limitation thereon through school rules was illegal.

- Holding that the wearing of *hijab* by Muslim female students was discriminative of Christian and other students.

- Holding that the school is a Christian institution yet it is public.

- Being biased in time allocation for highlighting of submissions and prompting the petitioner on costs.

Arguing the appeal before us, **Ms Moza Jadeed,** learned Counsel appearing with **Mr. Ali Mahmud Mohammed** for the appellant, argued those grounds under six distinct themes corresponding with the written submissions previously filed. On the import of the donning of the *hijab* on the part of female Muslim students, learned Counsel submitted that the learned Judge was in error to hold that it amounted to according special treatment to Muslim girls and concomitantly discriminating against non-Christian girls. In doing so, she contended, the learned Judge wholly misdirected himself on the doctrine of discrimination.

Citing **Article 24 (4)** and **(5)** of the Constitution, **Ms. Jadeed** posited that discrimination can be either direct or indirect and both forms are proscribed by the said provision, whether by the State or by an individual. The said provision is in the following terms;

"27 (4) The state not discriminate <u>directly</u> or <u>indirectly</u> against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate <u>directly</u> or <u>indirectly</u> against another on any of the grounds specified or contemplated in clause (4)".

(Our emphasis)

Counsel argued that it was wrong for the learned Judge to assume that any different treatment is discriminatory since it is trite, in her view, that not all different treatment amounts to discrimination, in the same way as not all similar treatment amounts to equality. She referred to the classic statement on **non-discrimination** that was made by Judge Tanaka in the **SOUTH WEST AFRICA CASE**; [1966] ICJ REP that equality does not mean;

"…absolute equality, namely the equal treatment of men without regard to individual concrete circumstances, but it means – relative equality, namely the principle to treat equally what are equal and unequally what are unequal …. To treat unequal matters differently according to the inequality is not only permitted but required"

(her emphasis)

She also cited the case of **FEDERATION OF WOMEN LAWYERS KENYA (FIDA K) & 5 OTHERS –vs- ATTORNEY GENERAL & ANOR** [2011] eKLR where the High Court held that mere differentiation or inequality of treatment does not *per se* amount to discrimination within the prohibition of the equal protection clause of the Constitution; running afoul it only if it is shown that the differentiation is arbitrary or unreasonable, adding that it was not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

Faulting the learned Judge for merely deploying the term **discrimination** without stating whether it was **direct** or **indirect**, Counsel drew a distinction between the two forms. Direct discrimination occurs, in Counsel's submission, when a policy, law or rule intentionally seeks to treat another person or persons less favourably compared to others because of that person's protected ground or particular characteristic as enumerated in Article 27 of the Constitution. Indirect discrimination on the other hand occurs when a person, policy, measure, or criteria though neutral, nevertheless places another person at a disadvantage compared to others because of their characteristic or protected ground.

Learned Counsel pointed out that the school uniform rule at the school was indirectly discriminatory against Fugicha's daughters as well as other Muslim girls because, even though on the face of it neutral, the rule nevertheless disadvantaged them on account of their religion, which is a protected ground or characteristic. The learned Judge was also wrong, it was contended, to hold that allowing Muslim students to don the *hijab* discriminated against the non-Muslin students without showing how it did and without a prayer having been made, and no protected ground having been disclosed by those others. The learned Judge was faulted for presuming that there was discrimination against the non-Muslim girls without such evidence of the same having been tendered yet the burden of persuading the court remains on the Plaintiff or Petitioner, which the church never discharged. The US Supreme Court decision of **TEXAS DEPT OF COMMUNITY AFFAIRS –vs- BURDINE** 450 US 248 (1981) was cited.

Returning to the theme of indirect discrimination, learned Counsel submitted that a claimant succeeds on it upon proof that a perfect decision or policy nevertheless has negative impacts or consequences on him because of his protected ground. Then only would the defendant or violator be required to show that the decision was actuated by a legitimate aim. Reliance was placed on the proof pattern for indirect discrimination which the learned Judge ought to have followed, but erroneously failed to do so.

This was said to have been set out in the English case of **THE QUEEN** on the application of **SARIKA ANGEL WATKINS SINGH (A child acting by SANITA KIMARI SINGH her mother and litigation friend) –VS- THE GOVERNING BODY OF ABERDARE GIRLS' HIGH SCHOOL AND ANOR** [2008]

EWHC 1865 (Admin) where Justice Silber stated that in considering the claimant's case on grounds of indirect discrimination, it is necessary to go through the following steps, which are;

(a) to identify the relevant 'provision criterion or purpose' which is applicable;

(b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantage;

(c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally; and

(d) whether the policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving a legitimate aim."

Relying on that proof pattern, **Miss Jadeed** submitted that on the present case where the school was claiming that allowing the *hijab* would disadvantage the Christian students, the comparator pool would be the Muslim female students said to enjoy the special treatment. This was in line with the thinking of the South African Constitutional Court in **MEC FOR KWAZULU NATAL, SCHOOL LIAISON OFFICER & OTHERS –VS- PILLAY** CCT51/06 [2007] ZACC 21 in determining whether a rule preventing a Tamil-Hindu girl from wearing a nose stud central to her religious identity was discriminatory on religious and cultural grounds. The Chief Justice, Langa identified the comparator group which was treated better than the claimant as those pupils;

"…whose sincere religious or cultural beliefs or practices beliefs or practices are not compromised by the [uniform] code, as compared to those whose beliefs or practices are compromised".

Counsel submitted that it behoved the learned Judge to determine the particular disadvantage suffered by the Christian students *because they were Christian* before he could permissibly hold that they had been discriminated against by allowing the Muslim girls to wear *hijab*. To demonstrate the application of the approach as part of the proof pattern, she referred to the **SARIKA** case (Supra) where a school policy refused a Sikh girl to wear a Kara, a plain steel bangle of 50mm width and great significance to Sikhs. Justice Silber observed thus at par 56B;

"I believe that there would be 'a particular disadvantage' or 'detriment' if a pupil is forbidden from wearing an item when (a) that person genuinely believed for reasonable grounds that wearing this item was a matter of exceptional importance to his or her racial identity or his or her religious belief and (b) the wearing of this item can be shown objectively to be of exceptional importance to his or her religion or race, even if the wearing of the article is not an actual requirement of that person's religion or race". (emphasis added)

Whereas the school was wholly unable to prove, indeed appears to have made no effort to establish these proof patterns, counsel argued, there was ample proof that Fugicha's daughters were indirectly discriminated against by the uniform policy rules on account of their religion.

Counsel next addressed the distinction between ***accommodation*** and special treatment which she blamed the learned Judge for conflating and confusing. She submitted that accommodation, which involves the granting of exception to the common rule, so as to give effect to a request considered to be of exceptional importance to the seeker's religion, is key to non-discrimination. She cited Langa CJ's observation, that the principle of accommodation demands that ***"…the State, an employer or a school***

must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally". In the instant case, the school did not even stand to suffer any additional hardship or expense since Fugicha's daughters and other Muslim girls were seeking to wear *hijab* and trouser, not in lieu of, but in addition to the school uniform, and had in fact offered that the school itself do choose the colour of the *hijab*. The failure to accommodate Fugicha's daughters' request indirectly discriminated against them in their enjoyment of the right to education on the basis of both religion and dress.

This discrimination was the more serious considering that the school, though sponsored by the church, is a **Public** school and is so registered. The Church was under an obligation as a sponsor to ensure respect for the religious beliefs of those of other faiths by dint of **Section 27** of the **Basic Education Act**. That obligation required that the church and the school ensure that Muslim girls, who made up 68% of the female population, be allowed to wear the *hijab*.

Counsel criticized the learned Judge for erroneously holding that allowing the wearing of the *hijab* amounted to elevating the Muslim religion. She first contended that whereas Kenya is a secular State, it is not founded on hostility to religion. Rather, the Constitution itself in the preamble acknowledges the ***Supremacy of Almighty God*** and contains in its 2nd Schedule the ***National Anthem*** which is a prayer invoking God's Lordship over the nation. The Judge therefore misapprehended the principle of separation of Church and State. She expounded that in principle what is constitutionally forbidden is governmental establishment of religion as well as governmental interference with religion but there is ***"room for play on the joints productive of benevolent neutrality which will permit sponsorship without interference".*** She cited the Canadian case of **ZYLBERBEG vs- SADBURY BOARD OF EDUCATION** 1988 CAN L11 189; the US Supreme Court decision of **ABINGTON SCHOOL DISTRICT –vs- SCHEMP** 374 US 203 and referred to Thomas Jefferson's January 1, 1802 letter to the Danberry Baptist Association of the State of Connecticut in which he posited that **"*while secularism seeks not to elevate one religion over the others, it nonetheless does not proscribe its free exercise."***

Thus, in Counsel's view, what secularism and freedom of religion entails is not a strict wall of separation between State and religion, as there must necessarily be a bridge and a conduit between the two. This is in consonance with reading of all of the constitutional provisions harmoniously, which is a cardinal, principle of constitutional interpretation.

Turning to Fugicha's cross-petition, Counsel termed the learned Judge's dismissal of it as erroneous since it did contain material that met and surpassed the informality test under Rule 10(3) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** ("the Mutunga Rules"). That informality, argued Counsel, is firmly founded on **Article 22 (3)** of the Constitution which obligates the Chief Justice to ensure the Rules he promulgates keep formalities to the minimum and allow proceedings to be entertained on the basis of informal documentation. The learned Judge was criticized for adopting a strict and erroneous interpretation of Article 22 (3) and rejecting the cross-petition on the basis of failing to state precisely the provision being infringed in law when, in fact, the provision was disclosed and the nature of violation, namely discrimination on the basis of religion was "alive in the entire Replying Affidavit". The learned Judge was characterized as having misapplied himself by wholesale adoption of the **ANARITA KARIMI NJERU –vs- REPUBLIC NO. 1** [1976-80] 1KLR 1272, (**ANARITA**) jurisprudence yet the context is now different, admitting to and encouraging informality for the advancement of access to justice.

Ms. Jadeed rested by faulting the learned Judge for following the decision of Githua J in the **KENYA HIGH** case (supra) and thereby erroneously accepting that attainment of a "***common or uniform"*** identity was a legitimate aim of the school uniform policy. This was incorrect, submitted Counsel,

because objectively the alleged justification was untenable because there was no relationship between the wearing of a limited form of *hijab* and the achievement of academic excellence. It was neither agreed nor empirically proved by the school, it was contended, that the hijab in any imaginable way disrupted teaching by teachers or comprehension by students or the communication between them during the learning process. The **KENYA HIGH** case (supra) was therefore patently bad law, in Counsel's opinion, because it flagrantly failed to consider or wholly misunderstood the doctrine of indirect discrimination and saw allowing the *hijab* as a prelude to instigation for a deluge of demands for different religious attire by other students which might result in students turning up dressed in a mosaic of colours and, according to Justice Githua, this scenario ***"would invite disorder, indiscipline, social disintegration and disharmony in our learning institutions".***

It was suggested that the proper approach is an appreciation that cohesiveness, while evidently a useful value, does not entail or demand elimination of pluralism. Rather, it is about being, as was held in **SARIKA**, (supra***) "first tolerant as to the religious rites and beliefs of others and second to respect other people's religious wishes."*** Indeed, contrary to what **KENYA HIGH** held, it was urged that the Constitution "***rumbles on the values of pluralism, diversity and cohesiveness".*** Thus, far from being a threat to be discouraged, difference ought to be celebrated. In the words of Langa, CJ in **PILLAY** (supra), "***The display of religion and culture in public is not a parade of horribles but a pageant of diversity which will enrich our schools and in turn our country".***

On behalf of the TSC, **Mr. Anyuor,** learned counsel submitted that as the appellants are not raising any ground touching on the transfer of the schools' Head Teacher which the learned Judge held to have been lawful and there is no challenge to that finding by way of cross-appeal, the TSC considered itself improperly enjoined in this appeal. This is not entirely correct, in our view, and there was no error in naming the TSC as a respondent as our Rules require a party in the Court below to be named and served in an appeal unless the court grants excusive dispensation on application.

Speaking as an officer of the Court, and with our leave, **Mr. Anyuor** opined that whereas the wearing of school uniform is an expression of equality, there is a compelling basis for a small section of the community to be allowed to express their religion by wearing religious symbols or attire, in this case the *hijab*, the wearing which the rest of the respondents herein have no problem with. Indeed, he urged this Court to come up with relevant rules on this issue after an inclusive, consultative process involving all stakeholders. He was categorical that the protection of the rights of the minority through appropriate accommodation should be upheld.

(a) The Church's Case

Opposing the appeal, **Mr. Kurauka**, learned Counsel for the Church first reiterated the factual basis of the dispute which we have already set out herein. He submitted that every institution has rules and they are binding on all who join that institution. In the present case both Fugicha and his daughters signed that they would abide by the school rules which include the uniform rules. Counsel was categorical that **"if you don't agree with the Rule you cannot be allowed into the school"**, which, he proceeded to state rather curiously, was "***not dissimilar to other areas of life such as the military***". He conceded that the school was a public institution but sponsored by the Church, which is a Christian denomination.

Counsel proceeded to urge that the issue of the *hijab* has been litigated upon in 'many cases' and nowhere was it, or other religious attire such as the ***Akorinos'*** headscarf, allowed. He defended that exclusionary jurisprudence as being based on a sound policy of uniformity without any indication of preferential treatment for those seeking to appear different. He denied that a refusal of the *hijab* amounted to discrimination and contended that Fugicha's daughters should have raised the issue at the

very point of admission to the school and it was not open for them to raise it later. When we asked him whether the uniform rules or regulations were cast in stone, **Mr. Kurauka** conceded that they were not, but that they can only be amended by the School's Board of Management.

Counsel submitted further that ***"to allow this appeal and permit the wearing of the* hijab *would lead to chaos in the school as students would go on the rampage".*** He did not say which section of the students would do so. He insisted hotly that Fugicha's daughters were free to go to a Muslim School but "***they cannot be allowed to come and evangelize in schools built by other religions***". He added that "***it would not be appropriate to allow religious beliefs to enter into schools"***. He extolled standardization of school uniforms as "***very critical"*** as children ought to grow up knowing that there can be no preferential treatment, but conceded that schools can legitimately make exceptions in certain areas such as diet.

Mr. Kurauka contended that it was not possible to accommodate every person's conscience or else there would be anarchy. To him, uniformity is a key value and there can be no discrimination in equality. He rooted for maintenance of the *status quo* as established by various decisions of the High Court as ***"to disturb it would lead to many suits."***

Surprisingly, Counsel's only comment on the weight of comparative jurisprudence relied on by the appellant was simply that the cases are distinguishable and that the ones from our HIGH COURT that he cited are applicable to the Kenya situation.

Counsel concluded his submissions by asserting that the learned Judge was right to dismiss the appellant's purported cross-petition which had been "sneaked in" via paragraph 34 of the Replying Affidavit instead of Filing a proper cross-petition. This failed to follow the **ANARITA** (supra) test, it was submitted, was fatally defective and therefore properly rejected.

Mr. Kurauka therefore besought us to uphold the various decisions of the High Court on the subject of religious expression in schools and dismiss the appeal with costs.

(b) Appellant's Reply

In her reply, **Ms Jadeed** reiterated that the appellant's cross-petition was competent having passed the informality test. As to the High Court decisions, she urged us to declare them bad law. She repeated her earlier criticism of the **KENYA HIGH** case (supra) decided by Githua J, and extended it to Lenaola J's decision in the **SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LIMITED --vs- MINISTER FOR EDUCATION & 3 OTHERS** [2014] e KLR (**THE ALLIANCE HIGH** case) which, in her view, was erroneous in that it failed to interrogate the doctrine of indirect discrimination. She emphasized the importance of the values of diversity and cohesiveness which, in her submission, extend to all spheres of life including schools, which are enriched thereby. This has found statutory recognition in **Section 4 (2)** of the **Basic Education Act** which upholds the principles of cohesiveness and diversity and **Section 27 (4)** of the same which obligates sponsors to respect the religious diversity of others.

Responding specifically to the **J.K. (SUING ON BEHALF OF CK) –vs- BOARD OF DIECTORS OF R. SCHOOL & ANOTHER [2014]**e KLR **(THE RUSINGA SCHOOL**) case relied on by the School and the Church, **Ms Jadeed** submitted that in that case, Mumbi Ngugi, J. did acknowledge the need for protection and accommodation of attire donned for religious or cultural purposes as opposed to fashion which had been the basis for the sought exception, and which she could not grant.

Returning to this appeal Counsel contended that the School Rules, upon which the church placed so

much umbrage, stand in conflict with the Constitution and cannot be sustained. Their apparent neutrality is of no moment, she contended, as they do run afoul the Constitution on account of indirect discrimination. She asserted that the scope of the protected right of freedom of religion under **Article 32** of the Constitution goes beyond merely holding or professing a religion and includes also being able to manifest it. Any limitation on the right is permissible only if it complies with **Article 24** which requires the limitation to be by law, which is statutory law, and to the extent that it is reasonable and justifiable in a free and democratic society. The controlling statute, namely the Basic Education Act contains no such limitation to the right. Accordingly, asserted Counsel, the school rules which are of a stature inferior to a statute, cannot limit or negate Fugicha's daughters' rights under both **Articles 32** and **27 (4)** and **(5).**

The sponsor of a public school, argued learned Counsel, had no higher status and its interests could not override the freedom of religion of the students attending at the school. In the instant case the Muslim students had made a polite request to don the hijab even before the Deputy-Governor raised the issue, but the request was improperly rejected by the school.

3. ANALYSIS

As this is a first appeal, we have gone through the entire record, carefully considered the submissions of learned Counsel and given due attention to the authorities, both local and foreign, cited. We have done so cognizant that we proceed by way of a re-hearing, at the end of which we make our own independent conclusions of law and fact. We accord respect to the findings of the first instance Judge but will not hesitate to depart from those findings if the same are based on no evidence, are arrived at by way of a misapprehension of the evidence or the Judge misdirected himself in some material respect which renders the decision erroneous. Our latitude to depart is greater where, as here, the matter in the court below proceeded not on the basis of oral evidence, which would have given the learned Judge the clear advantage of hearing and observing witnesses as they testified, but by way of affidavits and submissions which are on record. This is the more so where the decision turns on, not so much the peculiarity of highly contested facts, but rather the interpretation of certain provisions of the Constitution. See **Rule 29** of the **Court of Appeal** Rules; **SELLE –vs- ASSOCIATED MOTOR BOAT CO. LTD.** [1968] EA 123; **ABDUL HAMEED SAIF –vs- ALI MOHAMMED SHOLAN** [1955] 22 EACA 270.

Even though the Memorandum of Appeal boasts eighteen grounds of appeal, Fugicha's counsel in written submissions as well as in argument before us has merged and crystallized them into six issues. We on our part will address and determine the first four which we think properly and comprehensively capture the points of contention herein, namely;

"a) whether or not documents relating to the proceedings seeking to enforce the Bill of Rights must be formal.

b) whether or not allowing Muslim female students at the school to wear a limited form of* hijab *(scarf and a pair of trousers) discriminates against the other students (read non-Muslim students)

c) whether or not allowing Muslim female students to wear a limited form of* hijab *elevates Islam against other religions and accords its adherents special status contrary to Article 8 of the Constitution

d) whether a school uniform policy can limit the fundamental freedom of religion contained in Article 32 of the Constitution.

a) ***Formality of Documentation in Human Rights Litigation***

It is common ground that the appellant who was enjoined as an interested party at the High Court upon his application did not file a pleading titled a cross-petition. Rather, his claim as against the church, found expression in the Replying Affidavit to the petition. At paragraph 34 he averred in relevant portion as follows;

"…I am also cross-petitioning that the Muslim students be allowed to wear a limited form of hijab (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya and their right to equal protection and equal benefit of the law under Article 27(5) of the Constitution."

Both at the High Court and before us, the church took issue with this mode of pleading alleged violation of rights terming it, essentially, a non-pleading or one introduced through the back door. This view resonated with the learned Judge who, dealing with it as the last of the six issues he framed, concluded that ***"the … cross petition do not (sic) constitute a cross-petition in any shape or substance to be infringed and has not stated the manner in which the alleged rights they are (sic) alleged to be infringed"***. The rather tortured phraseology aside, the learned Judge took the view that the cross-petition was defective because it did not comply with the ***Mutunga Rules*** promulgated pursuant to **Article 22(3)** of the Constitution. He found it to run afoul **Rule 10(2)** in particular which set out the contents of a petition for the protection or enforcement of rights and fundamental freedoms namely;

- ***The petitioner's name and address***
- ***The facts relied upon***
- ***Constitutional provisions violated, the nature of the injury caused or likely to be caused to the petitioner or person in whose name the petitioner has instituted the suit or in a public interest case to the public, class of persons or community***
- ***Defaults regarding any civil or criminal case involving petitioner or any petitioners which is related to the matters in issue in the petition***
- ***Petition to be signed by the petitioner or his advocate***
- ***The relief sought in the petition."***

Fugicha faults the learned Judge's approach to this issue, and not idly in our view, principally for failing to take congnizance of the Mutunga Rules' progenitor, which is the constitution itself, and which expressly required the Hon. the Chief Justice in formulating rules under **Article 22(3)** to ensure that they met certain specified criteria including;

"(b) formalities relating to the proceedings, including commencement of proceedings, are kept to the minimum, and in particular that the Court shall, if necessary, entertain proceedings on the basis of informal documentation".

With respect to the learned Judge, we are unable to find, in the judgment impugned, any indication that this constitutional command for a minimum of formalities was held in view. We are quite clear in our minds that whereas the Hon. the Chief Justice in making the Rules did set out what a petition ought to contain, it cannot have been his intention, and nor could it be, in the face of express constitutional pronouncement, to invest those rules with a stone cast rigidity they cannot possibly possess. It seems to us unacceptable in principle that a creeping formalism should be allowed to claw back and constrict the door to access to justice flung open by the Constitution when it removed the strictures of standing and formality that formerly held sway. We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings

before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer . Within that general rubric of notification to court and respondent, the Constitution, if it says anything at all on this subject, clearly does not lionize form over substance.

Thus, while **ANARITA** and other cases decided prior to the Constitution of 2010 were decided correctly in their context with their insistence on specificity, the constitutional text now doubtless presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times. We are satisfied that there was no doubt at all as to what Fugicha's complaints were, against whom they were, and the provision of the Constitution he alleged had been violated or contravened. A proper reading of his entire affidavit did not warrant the draconian striking out of the 'cross-petition', however presented. We respectfully think that the learned Judge erred by non-directing himself to the express provision of **Article 22(3) (b)** and failing to enquire into whether paragraph 34 of the appellant's replying affidavit passed the ***informality test*** envisioned in the constitutional text.

We think that in the circumstances of this case where the appellant was not a petitioner or a respondent joined into the proceedings as an interested party, his position on the litigation and specific complaints were sufficiently captured in **paragraph 34** of his replying affidavit. The entire affidavit fully addresses the specific grievance of violation of free exercise of religion and discrimination and it is evident from the submissions made by the parties that the matter was fully canvassed unimpeded by the apparent want of form. We note that the learned Judge did, in fact, deal with the merits of the appellant's complaints and we shall proceed to do so as well.

(b) Does allowing Muslim Girls to Don the* Hijab *Discriminate Against the Rest"

The church in its petition averred that;

"32. The Christian students have felt that the school has accorded Muslim students special preferential treatment and discriminated against them contrary to Article 27 of the Constitution of Kenya 2010".

On that basis, it prayed for a declaration that the decision by the respondents at the High Court to permit the wearing of *hijab*/trousers was discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations.

That there is a standard school uniform for girls at St. Paul's Kiwanjani Mixed Day Secondary School is not in dispute. The uniform, communicated to each new student via the admission letter, comprises ***"checked green skirt, a cream blouse, a pair of white socks and stripes and a green long-sleeved pull-over (with the option of a short-sleeved one) a pair of black leather shoes and a dark green tie".*** The request made by or on behalf of Muslim girls was for them to wear, in addition to the standard uniform, a head covering (*hijab*) and a pair of white trousers underneath the uniform skirts. There is no indication nor was it urged that the Christian or other non-Muslim girls at the school made any requests of their own for any exemption or exceptions from the standard uniform based on their religious persuasions, which were then denied.

That notwithstanding, the learned Judge expressed himself as follows, which is worth reproducing *in extenso*;

"162. That even if it is assumed that the 2nd and the 3rd respondents had powers to prescribe the dress code with the St. Paul's Kiwanjani Day Mixed Secondary School, Isiolo County, urging the rights of only Muslim girl students, it would be in my view discriminatory for them to argue the

rights for girls of Muslims alone. The students in the same school who say for example are Akorinos, and others who are not Muslims, would be discriminated by the respondents actions which would be agitating for Muslim girls to adorn (sic) their religious attire and deny other students from other religions to do so. In my view the respondents as public officials would be discriminating students from other religious background by picking one religious group and support it. The respondents actions offends Article 27(1), (2), (4) and (5) of the Constitution, 2010. I find that the respondents cannot be permitted to impose Islam dress code for Muslim girl students in a manner that is not only contrary to the laid down school rules and regulations and also in discriminatory manner against students who are non-Muslims. There is no suggestion nor evidence that was tendered to the effect that the existing rules and regulations are discriminatory against Muslim girl students or any student.

164. That the respondents in their resolution favoured Muslim girl students and did not consider other religions. In doing so, I am of the view that the officials were discriminatory against non-Muslim students by supporting one religion, that is Islamic Religion.

With the greatest respect to the learned Judge, he appears to have framed and decided a question that was not pleaded or urged before him. We do not understand the case before the High Court to have been one of the school arguing that it was being discriminated against. Less still was it a case of non-Muslim students, whether Christian, Akorino or whatever, contending discrimination. Indeed, none of those non-Muslim students or their parents or guardians sought to be or were enjoined in the litigation. To that extent, the learned Judge patently made speculative and gratuitous pronouncements on behalf of imaginary grievants who had neither presented nor made a case before him.

We think the Judge went too far in making pronouncements that discrimination had occurred against Christian and other non-Muslim students. Those pronouncements were not preceeded by allegations made and proof of them established. As with every matter brought for judicial adjudication, the axiomatic position is that he who alleges must prove. In the case of alleged discrimination, it is absolutely essential that its components be clearly identified and interrogated. The process of arriving at a determination of whether or not there has been discrimination follows a clearly discernible proof pattern. It is a logical exercise not left to mere inclination or hunch.

Permitting the concerned Muslim girls to wear the limited *hijab* certainly did entail treating them differently from the rest of the school population and in a manner which entailed a departure or exemption from the applicable school uniform rules. Did the fact that the Muslim girls were thereby treated differently mean that the other students were thereby discriminated against" Were those other students placed at a disadvantage" We think not.

It is not in doubt that equality is a fundamental right recognized in our Constitution as in those of other modern States. Indeed, as far back as 1945, Sir Hersch Lauterpacht in his ***An International Bill of the Rights of Man*** had boldly asserted thus;

"The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties."

In his oft-cited dissent in the **SOUTH WEST AFRICA CASES** (supra) decided half a century ago, Judge Tanaka opined, and we cannot but agree, that the principle of equally before the law is philosophically related to the concepts of freedom and justice and that the content of it is that what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual

difference indicated by the Greek Philosopher Aristotle as ***"justicia commutativa*** and ***justitia distributive."*** So understood;

"[it] does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal …. To treat unequal matters differently according to their inequality is not only permitted but required".

It therefore becomes a desideratum of both justice and logic that equal should be equally treated and unequal unequally treated as called for by the inequality. This immediately and necessarily calls for a level of analysis that is deeper and more nuanced than a mere conclusion of injustice or discrimination on the basis only of different treatment. This is in recognition that justice, fairness or reasonableness may not only permit but actually require different treatment.

This was fully appreciated by a three-Judge bench of the High Court (Mwera, Warsame and Mwilu JJ., as they then were, before they were all elevated to this Court shortly afterwards) in **FEDERATION OF WOMEN LAWYERS FIDA KENYA & 5 OTHERS vs. ATTORNEY GENERAL & ANOR** 2011 eKLR;

"In our view, mere differentiation or unequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases".

This view also resonates with the views of Justice Albie Sachs in the South African Constitutional Court case of **NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY –vs- MINISTER FOR JUSTICE** [1998] ZAAC 15, which we find persuasive;

"The present case shows well that equality should not be confused with uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of differences. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenization of behavior but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment – At best, it celebrates the validity that difference brings to any society".

Given that understanding, it was plainly erroneous for the learned Judge to conclude that the differential treatment of Muslim girls in allowing them to wear the *hijab* contrary to the general school uniform policy applicable to all students was *ipso facto*, and without more, discriminatory of and against the non-Muslim students. Different it was but not discriminatory and unlawful, leading us to the conclusion that the term 'discriminatory' as used conveyed only the loose meaning of different as opposed to the technical legal meaning which we shall advert to later in this judgment.

That pitfall might have been avoided had the learned Judge sought to establish in the first place, whether the discrimination said to have been suffered by the non-Muslim population in the school was direct or indirect, a distinction which the church made no attempt to make beforehand; and also identified the

exact basis or ground, falling within any of the protected grounds in **Article 27(4)** of the Constitution, upon which the unfair or disadvantageous treatment comprising the alleged discrimination was founded. The protected grounds, on the basis of which the Constitution expressly prohibits any person to discriminate against another directly or indirectly are listed in **Article 27(4)** as including ***sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*** We have anxiously and carefully perused the judgment of the High Court and nowhere have we seen a protected ground in respect of the un-named non-Muslim students were discriminated against. Nor have we been able to glean or identify any from the submissions made by the church both at the High Court and before us. We therefore find and hold that there was no factual or legal basis for the holding by the learned Judge that allowing Muslim girls to wear *hijab* favoured Muslim girl students and discriminated against the non-Muslims.

c) ***Whether Limited* Hijab*, Elevates Islam, According it Special Status Contrary to Article 8***

The question of the legality, propriety and constitutional permissibility of allowing Muslim girls to wear the *hijab* to the school lies at the heart of this appeal. Around it have swirled competing narratives with Fugicha arguing that it is a necessary accommodation to avoid indirect discrimination against Muslim girls, while the church argues that to permit the same would be tantamount to elevating, indeed imposing, the Muslim religion and dress code contrary to the neutrality not only of the school rules, but also of **Article 8** of the Constitution which states in peremptly terms that there shall be no state religion thus capturing the secular character of our democracy.

In dealing with this issue, the learned Judge delivered himself in these terms;

"166. The subject school in this petition I find has not imposed any religious conditions to its students nor preferred one religion over another. The subject school has students from diverse religious beliefs and has not infringed the freedom of worship by restricting school uniform, in fact, the school action is non-discriminatory against any religion".

He then proceeded to cite with approval and state to be good law the decision of Githua J in the **KENYA HIGH CASE** (supra) and in particular a long passage therefrom which he quoted as follows;

"The significant and critical role played by standardized dress codes and observance of rules in controlled environments which one would expect to find in any national secondary school in Kenya or say for example in the Armed Forces cannot be overemphasized. It is not disputed that school uniforms assist in the identification of students and gives them a sense of belonging to one community of students. It promotes discipline, unity and harmonious co-existence among students. It instills a sense of inclusivity and unity of purpose. In my view, the most important role played by a standardized school uniform is that it creates uniformity and visual equality that obscures the economic disparities and religious backgrounds of students who hail from all walks of life.

If the court were to allow the applicant's quest to wear hijab in school, the 48 Muslim girls in the school would look different from the others and this might give the impression that the applicants were being accorded special or preferential treatment. This may in all probability lead to agitation by students who profess different faiths to demand the right to adorn (sic) their different and perhaps multi-coloured religious attires of all shapes and sizes which the school administrators will not be in position to resist if the Muslim students are allowed to wear a hijab. The result of this turn of events would be that students will be turning up in school dressed in a mosaic of colours and consequently, the concept of equality and harmonization brought about

by the school uniform would come to an abrupt end. It goes without saying that this kind of scenario would invite disorder, indispline, social disintegration and disharmony in our learning institutions. Such an eventuality should be avoided at all costs since it is the public interest to have order and harmonious co-existence in school. It is also in the public interest to have well managed and disciplined schools in a democratic society.

It is important to bear in mind that the Republic of Kenya is a secular state. This has been pronounced boldly and in no uncertain terms by Article 8 of the Constitution. This in effect means that no religion is more superior than the other in the eyes of the law. Considering that the Kenya High School, just like any other national school is a secular public school admitting students of all faiths and religious inclinations, allowing the applicant's prayer in this motion would in my opinion be tantamount to elevating the applicant and their religion to a different category from the other students who belong to other religions.. This would in fact amount to discrimination of the other students who would be required to continue wearing the prescribed school uniform."

The learned Judge then went on to categorically hold that there should be no exemption of Muslim girls from wearing school uniform so as to avoid the appearance that they were being given preferential treatment and to also forestall a situation wherein students of other faiths would also make their own demands to be allowed to don different religious attires thereby, in effect making of no effect the school uniform policy.

Other than the minor misdirection in the Judge's misapprehending the request to wear the *hijab* as an "exception from school uniform" when in fact it was a supplementation of the school uniform, his appreciation of the facts and the law was essentially correct but only if tested against direct discrimination. Indeed, the school uniform policy was neutral and applied to all students equally so there was nothing facially discriminatory or offensive of any given religion.

The issue in the litigation before the Judge and indeed on a proper engagement with discrimination jurisprudence could not be fully and satisfactorily determined on the test of direct discrimination alone. Full justice to a complaint of discrimination cannot be attained unless the court goes further to enquire whether a rule, policy or action that appears neutral and inoffensive on the face of it does nonetheless become discriminatory in effect or operation. The classic and earliest formulation of this was United States Chief Justice Burger's, in the celebrated anti-discrimination case of **DUKE –vs- POWER CO**. 401 US 424 1970 at p432 that ***"the starting point of any analysis of a civil rights violation is the consequences of discrimination not merely the motive."*** The framers of the 2010 Constitution and the people in promulgating it were alive to this all-important distinction between direct and indirect discrimination and were careful to proscribe both forms in express terms in **Article 27(4).** For a court to fail to enquire into that aspect, especially where, as here, the indirect character of the discrimination is cited and submitted on, is a serious non-direction and amounts to a reversible error of law. This is especially so considering that, as was opined by Canadian Judge Dickson (later CJ) in **R –vs- BIG M. DRUG MART LTD** [1985] 1 S.C.R. 295 (**BIG M DRUG MART)** case, ***"both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation [or any policy]."***

Referring to a similar provision in the South African Constitution, Langa D.P (later CJ) in the case of **CITY COUNCIL OF PRETORIA V WALKER** [1989] ZACC 1 made this perceptive comment with which we respectfully agree;

"The inclusion of both direct and indirect discrimination, within the ambit of the prohibition

imposed by section 8(2) [our Article 27(4)] of the Constitution, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) [our Article 27(4)] of the Constitution."

Now, in order for one to establish that one has been the victim of indirect discrimination, it behoves him to go about a four-step process or proof pattern as was stated by Silber, J. of the English High Court of Justice in **SARIKA**. Even though he gleaned the pattern while considering the Race Relations Act and the Equality Act of England, at its heart the pattern is all about how to prove indirect discrimination and we would adopt and accept it as applicable here. The steps are:

"(a) to identify the relevant 'provision, criterion or practice' which is applicable;

(b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;

(c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally;

(d) Whether this policy is objectively justified by a legitimate aim; and to consider, if the above requirements are satisfied, whether this is a proportionate means of achieving a legitimate aim."

As in **SAKIRA** (supra), where it was contended that a school uniform policy that forbade the claimant, a 14 year-old school girl from wearing a *Kara* which is a plain steel bangle about a fifth of an inch wide with great significance for Sikhs was discriminatory of her, it is common ground that ***"the relevant provision criterion and policy"*** under consideration is the school uniform policy. Its prescription as to what girls should wear has already been set out earlier in the judgment.

As for the ***"pool"*** that should be used to compare the disadvantage suffered by Fugicha's daughters by the fact that the school uniform rules did not allow the wearing of *hijab,* otherwise referred to as the ***"comparator group"***, even the learned Judge of the High Court, while not conducting a deliberate pursuit of the proof pattern we espouse, appears to have treated the appellants as the comparator group receiving favourable treatment at the expense of all other students who are non-Muslim. We are of the view that the reverse is the case in that the wider non-Muslim student body is in fact the comparator. It is they that were treated better than the appellants because their compliance with the school rules did not subject them to any disadvantage or burden violative of their religious beliefs or practices. This conclusion is in tandem with the conclusion reached by the English Court of Appeal in **BMA VS CHAUDHARY [2007] IRLR 800**; the House of Lords in **SHAMOON VS CHIEF CONSTABLE OF THE RUC [2003] 2 ALL ER 26** and the Constitutional Court of South Africa in **PILLAY** (supra). In the last case Langa, C.J. stated that the comparator group treated better or more favourably than the claimant was those learners,

"44… whose sincere religious cultural beliefs or practices, or religious beliefs or practices are not compromised by the Uniform Code, as compared to those whose beliefs or practices are compromised."

In the instant case, it was never asserted by the Church that any of the non-Muslim students had complained that the school uniform rules curtailed their religious beliefs or practices.

The third element in the proof of indirect discrimination requires the claimant to prove that the ***"provision, criterion or practice",*** in this case the school uniform policy, puts the claimant at a

particular disadvantage or detriment personal to the claimant. It was Fugicha's contention herein, and we do not see any attempt by the church to deny or controvert it, that the wearing of *hijab* is a matter of great importance and significance to Muslim girls so that denying them the right to wear the same places them in an unfavourable and difficult spot where they genuinely consider that their right to manifest their religion by their mode of dress, which they hold to be of exceptional importance, is curtailed and compromised.

In his replying affidavit sworn on 3rd November, 2014, Fugicha averred thus;

*"**7. THAT I do aver that hijab is an Arabic word literally meaning to cover or a curtain. In Islamic jurisprudence it refers inter alia to a mandatory dress code for females of the age of puberty and above when they are outside the homes or in the company of male strangers. This covering (hijab) covers the whole body save for hands, feet, face.***

8. THAT the purpose of hijab is to identify Muslim females and to allow them to guard their modesty and decency. Modesty is a fundamental tenet within Islam. It is thus sinful for Muslim to flout on their hijab.

9. THAT because of these reasons, hijab is a matter of extreme importance to every practicing Muslim female including my daughters and the female students at Kiwanjani Mixed Day Secondary School.

....

*17. **THAT I do aver that wearing of hijab by my daughter and by any Muslim girl students is a manifestation, practice and observance of the Muslim faith and/or religion by those who are steadfast to their faith (my children included) as they are of exceptional importance and as such pursuant to the said constitutional provision [Article 32] a person should not be compelled and/or forced to remove the hijab as it would be forcing the students to engage in an act contrary to the Muslim religion and belief which freedom is supported under our progressive bill of rights."***

By way of emphasis and reiteration of the exceptional significance of the *hijab* to Fugicha's daughters, there was filed in addition a supporting affidavit by Hammad Mohammed Kassim Mazrui, the Chief Kadhi of Kenya. In it he asserted the obligatory nature of the *hijab* confirmed by notable Islamic jurists and ordained in the Quran. He swore that the *hijab* is not a matter of choice but a religious obligation which should not be hindered. He made the distinction that ***"Indeed the* hijab *is a concept that seeks to maintain chastity and modesty and not merely a code of dress"*** and proceeded to state that it is the instrument by which women are able to effectively participate in society as supported by Islam.

As we have already observed, these averments were unchallenged and we have no hesitation in arriving at the conclusion that barring Fugicha's daughers and other Muslim girls from donning the *hijab* did place them at a particular disadvantage or detriment because the *hijab* is genuinely considered to be an item of clothing constituting a practice or manifestation of religion. It is important to observe at this point that it is not for the courts to judge on the basis of some 'independent or objective' criterion the correctness of the beliefs that give rise to Muslim girls' belief that the particular practice is of utmost or exceptional importance to them. It is enough only to be satisfied that the said beliefs are genuinely held.

In **REGINA WILLIAMSON & OTHERS VS. SECRETARY OF STATE FOR EDUCATION AND EMPLOYMENT [2005]2 AC 246** a case involving the clash between parents' religious beliefs that

children should be subjected to corporal punishment and those children's rights to dignity and personal integrity, Lord Nicholls of Birkenhead of the House of Lords stated the role of the courts thus;

"When the genuineness of a claimants' preferred belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited enquiry. The Court is concerned to ensure an assertion of religious belief is made in good faith 'neither fictitious nor capricious, and that it is not an artifice' to adopt the felicitous phrase of Iacobucci, J. in the decision of the Supreme Court of Canada in Syndicat Northcrest vs Anselem (2004) 241 DLR (44)1,27 para 52. But emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of the individual. As Iacobucci, J. also noted, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising."

Later on in his Judgment the law Lord put his finger on the nature of religious belief which unfits it for others' judgment or certification as follows;

"Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the [European] Convention…[our Constitution]."

It is thus clear to us that all persons, those in authority more so, must approach the issue of religious belief with a measure of deliberate caution and circumspection. A person's religious convictions need not make sense to us in order for us to accord them the necessary respect and space for them to flourish. An issue that may appear trifling to one may be of monumental value to another in the realm of religious beliefs. Their validity and the right of their holders to hold religious beliefs are not dependent on general acceptance or majority vote. They are personal to the individual in accordance with their own inner light and must be respected because they are clear, not to the observer, but to the believer. This idea was well-captured by US Supreme Court Justice Jackson for the Court in **WEST VIRGINIA BOARD OF EDUCATION V BARNATTE**, 319 US 624, 319 U.S. 638 (1943);

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to … freedom of worship … and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

That view, with which we agree, resonates with Judge Dickson's seminal idea in **BIG M. DRUG MART** (supra) that ***"the Charter [the Constitution] safeguards religious minorities from the 'tyranny of the majority.'"***

We are satisfied on the uncontested evidence on record that the wearing of the *hijab* was genuinely and deeply considered to be a matter of great, indeed exceptional, religious significance to Fugisha's

daughters and the other Muslim girls. Their desire to wear the same to school was not borne of a skin-deep and artificial or passing fashion fad but rather a serious and conscientious attempt to obey a religious requirement and therefore deserving of both respect and protection.

We therefore do not think that the wearing of the *hijab* can be equated to the donning of dreadlocks for a purely cosmetic or fashion purpose as was the case in the **RUSINGA SCHOOL** case. There, Mumbi Ngugi, J rejected a claim by the mother of a 6 year-old kindergarten pupil that a school's refusal to allow him to sport dreadlocks contrary to the school's Code of Conduct was discriminatory. The Judge concluded, and we would agree with the critical distinction she drew in the process, as follows;

"49. I must observe, as submitted by the respondents' counsel, that the petitioner has not asserted that the minor practices the Rastafaria religion, and that therefore there is violation of his freedom of religion and belief guaranteed under Article 32 of the Constitution.

50. Had she so argued and presented evidence in support, then there would have been a basis, on the persuasive authority of decisions such as DZVOVA vs. MINISTER OF EDUCATION, SPORTS AND CULTURE AND OTHERS AHRLR 189 (2wSC 2007), to find that there was violation of the minors' rights under Article 32. In that case, the Supreme Court of Zimbabwe declared that expulsion of a Rastafarian child from the school in the basis of his expression of his religious belief through his hairstyle is a contravention of Sections 19 and 23 of the Constitution of Zimbabwe. A similar finding was made in relation to dismissal from employment of Rastafaria correctional officers who refused to shave their dreadlocks in Department of Correctional Services and Another vs. Police and Provision Civil Rights Union (PPCRU) and Others [[ZALAC 21; 2011) 32 KJ 2629 (LAC)].

51. What appears to be the case in the matter before us is that the petitioner has made a choice of hairstyle for fashion rather than religious or cultural reasons. She has the right to make this choice. However, while wearing dreadlocks for cultural or religious reasons is, in any view, entitled to protection under the Constitution and should be accorded reasonable accommodation; the sporting of dreadlocks for fashion or cosmetic purpose is not, and an institution such as the respondent is entitled to prohibit it in its grooming code."

(our emphasis)

Proportionality and Justification

Turning now to the twin questions of whether first, the school uniform policy is justified by a legitimate aim and, second, whether the ban of the *hijab* is a proportionate means of meeting that aim, we think that the first does not present much difficulty while the second will inevitably lead to a discussion of the principle or doctrine of accommodation for completeness.

In the **KENYA HIGH** case (supra) Githua, J did capture the utility of school uniforms in the passage we quoted and we would have no difficulty agreeing with it save for the unfortunate use of the military as an example. We think that given the constitutionally recognized limitations of rights that apply to persons serving in the Kenya Defence Forces and the National Police Service **(Art. 24(5))** the analogy was not particularly germane or felicitous. The uses of school uniforms cannot be gainsaid, however Nyamu, J. (as he then was) in **NDANU MUTAMBUKI & 119 OTHERS vs. MINISTER FOR EDUCATION & 12 OTHERS** [2007]e KLR spoke of them, thus, though he may have overstated;

"School uniforms and discipline do constitute and have been generally required as part and

parcel of the management of schools and further constitute basic norms and standards in any democratic society. No doubt the hallmark of a democratic society is respect for human rights, tolerance and broadmindedness. In the case of schools, nothing represents the concept of equality more than school uniforms. Unless it is an essential part of faith it cannot be right for a pupil to wake up one morning and decide to put on headscarf as this derogates from the hallmarks of a democratic society and violates the principles of equality…."

Mr. Kurauka argues essentially that the aims of the standardized school uniform are salutary and self-evident. To him, the uniform applicable to all students signifies equality without preferential treatment. In this he joins many who ***"believe that school uniform plays an integral part in securing high and improving standards, serving the needs of diverse community promoting a positive sense of communal identity and avoiding manifest disparities of wealth and style."*** See **BEGUM, R.** (on the Application of) -**vs- DENBIGH HIGH SCHOOL [2006]2 ALL ER 487; [2007] AC 100**.

Fugisha does not dispute or deny the propriety or utility of a school uniform policy. Indeed, this case is not about whether or not the church should have in place a uniform policy for the school. If anything, the record shows that Fugicha's daughters and other female Muslim students did make attempts to and were always willing to comply with the school uniform policy seeking only to add a limited form of hijab and of colours and design that would not be outlandishly at clash with the prescribed school uniform.

What is on contest in this case is the school's refusal to either relax or enforce the uniform policy in respect of the Muslim students in a manner as would allow them to have the *hijab* ***in addition to*** the uniform. To our mind, the justification that the respondent church and the school are required in law to prove is not the need for school uniforms or a policy on the same, which is uncontested, but rather the failure to grant necessary exemptions therefrom. The burden to prove that justification rests with the person who is alleged to have discriminated, in this case the church and its school. In **JFS** (supra) Murby J stated the alleged discriminator's burden as one to show;

"164. … that the measure in question corresponds to a 'real need' and that the means adopted must be 'appropriate' and 'necessary' to achieving that objective. There must be a 'real match' between the end and the means. The court 'must 'weigh the justification against its discriminatory effect' with a view to determining whether the seriousness of the alleged need is outweighed by the seriousness of the disadvantage of those prejudiced by the measure always bearing in mind that the more serious the disparate impact the more cogent must be the objective justification."

It is upon the court to embark on a careful examination of the reason offered for any discrimination, a duty that reposes on them ***'as guardians of the right of the individual to equal respect'*** in the words of Land Hoffman in **R (CARSON) -vs- SECRETARY OF STATE FOR WORK AND PENSIONS [2006] 1 AC 173 at 182-183.**

Looking at the reasons proferred by the Church as to why the school would not allow the wearing of the *hijab*, they include those set out on the face of its Notice of Motion dated 18th September, 2014, and the supporting affidavit of KIMANA JOHN MACHUGUMA as;

a) ***the need for the Sponsor to be respected and allowed to execute its rightful role in the school affair***

b) the Christian students at the school have felt that the school has accorded Muslims special or preferential treatment and discriminated against them

c) the respondents' actions are unreasonable and tantamount to disrupting school programmes

d) the wearing of hijab by Muslims while non-Muslim students were the prescribed school uniform was causing tension and disharmony in the school.

e) the issue was put to the vote in a meeting of the school's BOM, PTA and the Sponsor on 9th September attended by 22 members and 18 voted for the status quo (no hijab) 3 voted for the hijab and 1 recommended longer skirts for girls.

Those reasons were reiterated by Mr. Kurauka in his submissions before us in which he painted a rather ominous picture of potential breakdown of harmony and an end to tranquility should the Muslim girls be allowed to wear the *hijab*. ***"If you allow this appeal, it will be chaotic as students will go on the rampage"*** he warned. He went on to assert that ***"the Muslim students can go to Muslim schools if they wish and wear the* hijab *but cannot be allowed to come and evangelize in schools built by other religions"*** and that ***"it would not be appropriate to allow religious beliefs to enter into schools"*** and also that ***"it is not possible to accommodate every persons" conscience or else there would be anarchy."***

With great respect to Counsel, we are far from persuaded by the reasons given by the Church and which the learned Judge accepted wholesale as is plain from his adoption of the finding and reasoning of Githua J in the **KENYA HIGH CASE** (supra). Similar arguments were advanced by the respondents in the **SAKIRA** case (supra) and we think that Silber J's answer in rejecting them provides a more coherent and persuasive perspective;

"80. I cannot understand why a decision to prevent the claimant from wearing the Kara would prevent bullying or would be difficult to explain [to the other students who must adhere to the school uniform policy]. The only reason might be ignorance on the part of the school first about the importance of a Kara to Sikhs and second in understanding why a decision by the claimant to wear it should be treated with respect."

Silber J then made reference to the case of **SERIF –VS- GREECE [2001]31 EHRR 20** where the European Court of Human Rights domiciled at Strasbourg had stated emphatically the duty of educational institutions to educate their communities of the values of pluralism and the indispensability of toleration as the cure for the feared tensions;

"53. Although the Court recognizes that it is possible that tension is created in situations where a religious or the communities becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities on such circumstances is not to remove the cause of the tension by eliminating pluralism but to ensure that competing groups tolerate each other."

We do not better them to echo Judge Silber's own words on the subject;

"84.Therefore, there is a very important obligation imposed on the school to ensure that its pupils are first tolerant as to the religious rites and beliefs of other races and religious and second to respect other people's religious wishes. Without those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multicultural society can be built in this country. In any event, in so far as the intention of the uniform policy is to eliminate bullying, there is no rational connection between the objective and eliminating signs of difference."

Judging from the Petition, the motion, the supporting affidavits and the submissions made before the High Court and before us, the Church does not seem to have internalized the intrinsic value of heterogeneity and heterodoxy. It has not seen difference or diversity as a good to be embraced, celebrated and encouraged. Rather, it has approached the matter from the rather narrow stricture, prism or blinkers of the need for discipline and uniformity and seems to consider its position as Sponsor of the school as a sufficient reason to sift out and eliminate difference or plurality in religious expression or manifestation. And this is notwithstanding that it consciously admitted into the school, which is a public school, students of faiths and religions other than its own. It is no answer to say that religion has no room in schools or that those who find difficulty abiding by the restrictions of the school uniform code may well leave and join schools of their own religious persuasion. Such an attitude evinces an intolerable deficit of constitutionalism and, moreover, flies in the face of the guiding principles that govern the provision of basic education in this country. Those principles as set out in **Section 4** of the Basic Education Act, **No. 14 of 2013** include –

"(e) Protection of every child against discrimination within or by an education department or education (sic) or institution on any ground whatsoever

....

(i) promotion of peace, integration, cohesion, tolerance,and inclusion as an objective in the provision of basic education

(j) ***elimination of hate speech and tribalism through instructions that promote the proper appreciation of ethnic diversity and culture in society***

(k) imparting relevant knowledge, skills, attitudes and values to learners to foster the spirit and sense of patriotism, nationhood, unity of purpose, togetherness, and respect

...."

For the school to not only entertain and condone, but actually propound those arguments also speaks to a signal failure to appreciate and to effectuate part of its statutory duties. The same statute; in **Section 59** enumerates the functions of the Board of Management as including to;

"(i) provide for the welfare and observe the human rights and ensure the safety of pupils, teachers and non-teaching staff at the institution;

(k) promote the spirit of cohesion, interpretation, peace, tolerance, inclusion, elimination of hate speech, and elimination of tribalism at the institution ...."

Some of the arguments made by the Church as Sponsor in the matter before us are cause for no little concern as they seem to be entirely at variance with the specific role and duty of a sponsor in relation to students or pupils who adhere to a religion, faith or denomination different from that of the Sponsor. **Section 27** imposes on a Sponsor the obligation of;

"(d) maintenance of spiritual development while safeguarding the denominations or religious adherence of others."

To our mind this is a duty requiring a sponsor to rise above and go beyond the narrow parochialism and insularity of its own religion or denomination and respect the equal right of others to be different in

religious or denominational persuasion. It is a call to broadmindedness and respect for others including those whose creeds and the manner of their manifestation may be unappealing or baffling. It is a duty to uphold the autonomy and dignity of those whose choices are discordant with ours and acknowledgment of heterodoxy in the school setting as opposed to a forced and unlawful artificial and superficial homogeneity that attempts to suppress difference and diversity. The people of Kenya in the Preamble to the Constitution proclaim that we are ***"Proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation."*** That is an ethos that it is incumbent upon all schools to teach to students from an early age. The determination to live in peace and undivided in spite of diversity at the macro national level must be translated and lived at the micro level of school communities.

Diversity is further amplified in **Article 10(4)** the Constitution which declares that among the national values and principles of governance, which are binding on ***"all persons whenever any of them makes or implements public policy decisions"*** is ***"(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized."***

All of these provisions and pronouncements in the Constitution are not mere platitudes. They are not words devoid of significance. Rather, they are firm commitments made by the people of Kenya as part of their vision of the society they wish to live in. They are mutual and reciprocal promises made by and to all Kenyans and they have binding force of law. It is the duty of courts in interpreting the Constitution to ensure that the values which find even further explicit expression on the Bill of Rights are given the broadest meaning and vivified as living, active essentials and not lifeless forms on parchment. Courts must breathe life into the constitutional text and must avoid stifling and constrictive constructions that lead to atrophy and the sapping of its life and vibrancy.

Indeed, the Constitution itself gives an explicit interpretative command in **Article 259(1)**; it shall be construed or interpreted in a manner that –

"(a) promotes its purposes, values and principles

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights

(c) permits the development of the law

(d) contributes to good governance."

In obedience to that explicit direction, we are clear in our minds that the view we have taken that the Muslim girls ought to have been allowed to wear the *hijab* promotes the values and principles of dignity, diversity and non-discrimination. We also advance the law by making a definite finding that what the school did to Fugicha's daughters amounts to indirect discrimination, a concept on which there appears not to have been any judicial engagement from the jurisprudence that has so far flowed from the High Court. We affirm, endorse and uphold the rights of equality and freedom of religion as set out in **Articles 27** and **32** of the Constitution.

We now turn to the doctrine of **accommodation** which we believe will not only lead to development of the law on non-discrimination and freedom of religion in the country but should also, if properly understood, appreciated and applied, contribute to good governance of our schools thus entrenching constitutional and democratic principles.

Accommodation

In contrast to the hardline and fixed position advanced for and on behalf of the Church that Muslim female students should under no circumstances be allowed to wear the *hijab* in obedience to what they honestly and genuinely believe to be their religious duty, a more pragmatic approach is that of accommodation which ought to uphold school uniform while at the same time permitting exceptions and exemptions where merited. Even though the principle of accommodation has not been pronounced on or affirmed by courts in this country as far as we are able to discern, it is not new in comparative jurisprudence. The South African Constitutional Court and High Court have expressed themselves on it on many occasions in matters religion, especially in the context of education and employment. See for instance, **PRINCE –VS- PRESIDENT, CAPE LAW SOCIETY AND OTHERS [2002] 2ACC 1; MINE (PTY) LTD SECUNDA COLLIERIES 2003 (6) SA 254(W); PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA AND OTHERS –VS- MINISTER OF JUSTICE AND OTHERS 1997 (3) SA 925(T).** Chief Justice Langa in **PILLAY** attempts to delineate the content of the principle of accommodation thus (at para 73);

"At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms."

The Canadian Court of Appeal in ***R –vs- VIDEOFLICKS*** [1984] 48 O.R. (2d) 395 held, which would hold true of Kenya, that;

"[The Constitution] determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where religious practices are recognized as permissible exceptions to otherwise justifiable homogenous requirements."

The perils of peripherization, which essentially shuts out persons whose religious convictions cannot allow them to do certain things or require them to do things and behave in certain ways that are different from the dominant views conduct or practice of the majority, was poignantly captured by the South African Constitutional Court which proposed a balancing act in **CHRISTIAN EDUCATION SOUTH AFRICA V MINISTER OF EDUCATION** [2000] ZACC II; 2004(4) SA 757 (CC) as follows;

"The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such society can cohere only if all its participants accept that certain basic norms and standards are binding. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."

Even though the degree to which the mainstream is required to be inconvenienced or put to expense so as to accommodate the minority religious believers has differed from jurisdiction to jurisdiction with the United Supreme Court stating in **TRANS WORLD AIRLINES –vs- HARDISON 432 US 63 (1977) at 84** that an employer should incur only a *"de minimis"* cost while its Canadian counterpart has been emphatic that the duty to accommodate demands the putting of more than negligible effort in **CENTRAL OKANAGAN SCHOOL DISTRICT NO. 23 –vs- RENAUD 1992 CAN LII 81 (SCC.) [1992] 2 SCR 970**,

there is consensus that there is a definite duty to accommodate. We think, as did the South African Constitutional court in **PILLAY** (supra), that the effort required to accommodate has to be more rather than less if the end of diversity is to be meaningful. We are justified in this view by the phraseology employed in **Article 32** of the Constitution. The text goes beyond stating a persons right to ***"manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship"*** to also state at **sub-article (4)** that ***"a person shall not be compelled to act, or engage in any act; that is contrary to the persons' belief or religion."*** Taken together, the two sub-articles create a double duty to accommodate in the form of allowance or accommodation of practice, manifestation or observance that may be different from the majoritarian norm and an exemption from any act which may impinge on and violate the person's belief or religion.

Asserting the indispensability of accommodation in **PILLAY**, (supra) the Chief Justice stated, and we are inclined to agree with his reasoning, thus; (at par 78);

"Two factors seem particularly relevant. First, a reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose , but which nevertheless has a marginalizing effect on certain portions of society.

Second, the principle is particularly appropriate in specific localized contexts such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck."

We are of the same view with regard to the donning of the *hijab* in the case at hand. We find and hold that the school ought to have worked out a reasonable accommodation to enable the Muslim girls to wear the *hijab* considering, especially, that there was a willingness to agree on the colour of such *hijab* so as to rhyme and not overly clash with the school uniform. This thinking also accords with that of the Canadian Supreme Court in **MULTANI –vs- COMMISSION SOLAIRE MARGUERITE BOURGEOYS** [2006] 1SCR 256.

It matters not that Fugicha, in common with the parents of all students did sign the letter of admission together with their daughters when they joined the school binding them to abide by school rules and the stipulated school uniform. We think it to be plainly notorious that with secondary education being so competitive, and from the nature of things, it is impractical and fanciful to expect that a parent and/or a new student joining a school in Form One will have a meaningful opportunity to engage in a negotiation, pre-admission, of whatever exemptions be it in uniform or other activities, that they may need for religious reasons.

We are not prepared to hold that, by merely signing the admission letter or the school rules, a student and/or her parent or guardian is thereby estopped from raising a complaint or seeking exemptions *ex post facto*. Where, as here, the exemptions or accommodation sought are on clear constitutional grounds, it would be escapist even surreal, for a court to point at the signed letter of admission as a bar to assertion of fundamental rights and freedoms. We do not accept that schools are enclaves that are outside the reach of the sunshine of liberty and freedom that the Constitution sheds. Students do not abandon their constitutional rights when they enter the school gate to regain them when they leave. Nor can fundamental rights and freedoms be contracted away in the name and at the altar of education. Schools cannot raise an estoppel against the Constitution. No one can. We are firm in our assessment that students in Kenya are bearers and exercisers of the full panoply guarantees in our Bill of Rights and they are no less entitled to those rights by reason only of being within school gates.

We also think that an education system or any school administration that by word or deed violates the rights of students or condones their violation by others and otherwise diminishes their importance is a danger to the present and future fate of the Bill of Rights, the rule of law and the culture of democracy for true it is that ***"what monkey see, monkey does."*** In violating rights or showing them to be minor irrelevancies, mere inconveniences or optional extras, such schools inculcate a culture of disregard of or contempt for rights and the students graduating from those schools will in their future adult lives be a whole army of rights-abusers steeped in audacious and odious impunity, instead of their defenders. We must set our face firmly against such an eventuality that involves a grave dimunition and dilution of the constitutionally-protected right to have one's inherent dignity protected **(Article 28)** and reaffirm the command in **Article 21(1)** to observe, respect, protect, promote and fulfill the fundamental rights and freedoms in the Bill of Rights.

We think, with respect, that the justification cited by the school and accepted by the learned Judge, who followed in the footsteps of Githua, J in the **KENYA HIGH** case (supra) for the rejection of the plea for *hijab* was hollow and unconvincing. We cannot accept that perfect uniformity of dress, pleasing to the eye and picture-perfect though it be, can be a fair, proportionate or rational basis for discrimination. There does exist a perfect and comprehensive rejoinder to the fear repeated by our Judges that permitting Muslim girls to wear *hijab* would lead to a flood gate of similar demands by other religious groups leading to students ***"arriving in a mosaic of colours"*** and bringing ***"equality and harmonization"*** to ***"an abrupt end"*** and be a harbinger of ***"disorder, indiscipline, social distegration and disharmony in our learning institutions".*** That answer was famously given in pellucid fashion by Chief Justice Langa in **PILLAY** (supra), with which we fully concur and so adopt;

"107. The other argument raised by the school took the form of a 'parade of horribles' or slippery slope scenario that the necessary consequence of a judgment in favour of Ms. Pillay is that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths. This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a 'parade of horrible' but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of one practice does not require the school to permit all practices. If accommodating a particular practice would impose an unreasonable burden to the school, it may refuse to permit it."

(d) *School Rules*

It is clear from what we have said so far that in a free and democratic society, it is woefully insufficient for school administrators to adopt an absurd inflexibility when it comes to enforcement of school rules to govern various aspects of life. The absurdity springs from an imposition and execution a policy of uniformity that fails to have in contemplation, and take into account individual difference and circumstances that may present a compelling case for exemption. This is the more so, as we have stated repeatedly, when the exemptions are sought on the foundations of freedom of religion and the right to non-discrimination, be it direct or indirect.

Speaking as an officer of the Court learned counsel, **Mr. Anyuor** very candidly and helpfully submitted before us that whereas school uniforms are important as expressions of equality, there will always be a

small section of the school community that should be allowed to express their religion by wearing distinct dress such as the *hijab* in this case. He indicated that the 2nd and 3rd respondents, (the TSC and the Education Directors) are "quite happy to have the *hijab* worn" in schools. We think he is right in that submission. He went on to urge us to direct the Ministry of Education to come up with rules to guide schools countrywide in dealing with this issue ensuring that it engages and secures participation of all the relevant stakeholders so that the concept of accommodation can be clarified and entrenched. Indeed, the Ministry should do so in exercise of its regulatory and oversight powers as set out in the Basic Education Act. However, what rules or regulations the Ministry may come up with can only be necessarily general and probably deal with the policy aspect and may take a while to complete.

Furthermore the formulation of case-specific and school sensitive rules or regulations can only be effectively done at the individual school level where the peculiar circumstances and specific diversities of its population and its dynamiccs may be captured and addressed. Participatory democracy, so essential in creating rational communities, is critical and schools should therefore embrace and actuate the same.

In the **PILLAY** case, Justice O'Regan criticized the subject school, and the same criticism may fairly be leveled against the church and school in this case, as well as a vast majority of schools in Kenya who have not formulated clear or any rules for exemptions from the school Code of Conduct, Rules, Regulations or Regimes. Said the Judge, which we find persuasive;

"173. The unfairness I have identified in this case lies in the school's failure to be consistent with regard to the grant of exemptions. It is clear that the school has established no clear rules for determining when exemptions should be granted from the Code of Conduct and when not. Nor is any clear procedure established for processing applications for exemption. Schools are excellent institutions for creating the dialogue about culture that will best foster cultural rights in the overall framework of our Constitution. Schools that have diverse learner populations need to create spaces within the curriculum for diversity to be discussed and understood, but also they need to build processes to deal with disputes regarding cultural and religious rights that arise.

….

176. In this regard I conclude that the school failed in its obligations to the learner. Where a school establishes a code of conduct which may have the effect of discriminating against learners on the grounds of culture or religion, it is obliged to establish a fair process for the determination of exemptions. This principle requires schools to establish an exemption procedure that permits learners, assisted by parents, to explain clearly why it is they think their desire to follow a cultural practice warrants the grant of an exemption. Such a process would promote respect for those who are seeking an exemption as well as afford appropriate respect to school rules. An exemption process would require learners to show that the practice for which they seek exemption is a cultural practice of importance to them, that it is part of the practices of a community of which they form part and which is in a significant way constructs their identity. The school's authorities would in this way gain greater understanding of and empathy for the cultural practices of learners at the school."

O'Regan, J proceeded to agree with her Chief Justice that the court do make an order calling upon the school to effect amendments to its Code of Conduct to provide for granting of exemption from it in the case of religious and cultural practices. She also added, which we find practical and worthy of adoption, that;

"Once they have been adopted, the school should provide a place in its curriculum for the Code

of Conduct to be discussed with all learners in the classroom. That discussion should include a discussion of the principles on which exemptions from the rules are granted and the process whereby it happens. In particular, it seems important to stress that school rules should ordinarily be observed. Where processes are established for exemptions to be granted, they must be followed. Encouraging observance of rules is the first step towards establishing civility in an institution."

We do not conceive of a system of exemptions consistent with the principle of accommodation as a nullification of rules or an invitation to a-free-for-all when it comes to school uniform or the observance of discipline and the other dictates of the school routines. It is not every fanciful, capricious or whimsical request for exemption that will be countenanced or granted. Rules clearly do have their place but they cannot be allowed to infringe or intrude upon the space occupied by religion and belief or make of no effect the express protection granted by the Constitution to the manifestation of the same through "***worship, practice, teaching or observance, including observance of a day of worship"*** as expressly stated in **Article 32(2).** In the hierarchy of norms and the relative weight to be attached thereto, school rules rank way below the Constitution and it is incumbent upon those who formulate and enforce them to ensure that they align and accord with the letter and spirit of it, failing which they would be null, void and of no effect whatsoever. It must be remembered that such rules are not in consonance with the very clear principles for permissible limitations to the fundamental rights and freedoms as stipulated in **Article 24** of the Constitution. Where they conflict with the Constitution it is an altruism that it rules, and they are voided to the extent of the conflict or inconsistency.

This is the proper doctrinal and normative approach with which the High Court ought to have approached the issue of religion in schools in the matter before us. In so far as the **KENYA HIGH**, and the **ALLIANCE HIGH** (supra) cases cited before us by the church did not give full effect to the principles we have engaged with and in particular paid no or insufficient attention to the proscribed **indirect discrimination** and the principle of **accommodation** as the answer to the problem of discrimination, we are unable to accept them as a persuasive guide on how the matter before us should be decided. It is quite clear that the said decisions suffer from a deficit of wider, deeper analysis and turn a full blind eye or are silent on indirect discrimination. They give scant attention to the principle of accommodation with the effect that their conclusions are materially flawed. They therefore cannot aid the Church herein. They also contain some dicta that seem to take too far the notion of secularism in a manner suggestive of hostility to religion that is discordant with the letter and spirit of the Constitution and the most progressive jurisprudence on the subject. They thereby lose their persuasive quotient and must with justification be characterized as being *per in curriam* and therefore no longer good law.

We reiterate and adopt the essential and intimate link between freedom of religion and the cherished dream of a truly free society that was captured by Judge Dickson in **BIG DRUG MART LTD** (supra) thus;

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter [Article 27 of the Constitution]. Freedom must surely be founded on respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is

compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter [the Constitution] is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

To force students to abandon or refrain from a practice or observance dear to them and genuinely held as a manifestation of their religious convictions, as happened herein, violates their conscience, is the antithesis of freedom, is unconstitutional and is therefore null, void and of no force or effect.

4. DISPOSITION

Given our finding and holding herein, this appeal succeeds to the extent that;

(a) the High Court's order that the decision to allow Muslim students to wear *hijab*/trousers is discriminatory, unlawful and unconstitutional is set aside.

(b) the order of injunction preventing the respondents from allowing Muslim students to wear *hijab* contrary to school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby quashed and set aside.

(c) The mandatory injunction compelling the respondents to comply and ensure full compliance with the current school rules and regulations that were executed by the students and parents during the reporting in respect of St. Paul's Kiwanjani Day Mixed Secondary School is set aside to the extent that it prohibits Muslim female students from wearing the *hijab*/trousers in addition to the school uniform.

(d) The order that the school uniform policy does not indirectly discriminate against the interested parties Fugicha's daughters or other Muslim female students is set aside and substituted with an order that the said uniform policy indirectly discriminates against the interested partys' daughters and other Muslim female students in so far as it prohibits and prevents them from manifesting their religion through the practice and observance of wearing the *hijab*.

(e) the order striking out the interested party's cross-petition as defective is set aside and substituted with an order allowing the said cross petition.

(f) The order granting the costs of the petition to the petitioner is set aside and substituted with a order that each party do bear its own costs

We in addition direct as follows;

(1) That the Board of Management of St. Paul's Kiwanjani Day Mixed Secondary School do immediately initiate, after due consultation with its stakeholders in particular the parents and students a process of amendment of the relevant school rules touching on the school uniform so as to provide for exemptions to be granted to accommodate those students whose religious beliefs require them to wear particular

items of clothing **in addition to the school uniform**.

(2) This judgment be immediately served upon the Cabinet Secretary for Education for his perusal and consideration with a view to formulating and putting in place rules, regulations and/or directions after due consultations for the better protection of the fundamental right to freedom of religion and belief under **Article 32** of the Constitution and equality and freedom from discrimination under **Article 27** of the Constitution for all pupils and students in Kenya's educational system.

(3) Each party shall bear its own costs of this appeal.

We conclude this judgment with an explanation that it is delivered later than the date on which it was first reserved and outside of the period set by the Rules of this Court due to pressure of work and the voluminous amount of case law and other material with which we had to engage in what is clearly a case of great public importance raising fundamental questions of first impression. We are most grateful to counsel appearing before us for their industry in assembling jurisprudence from within the jurisdiction and further afield and for their cogent and incisive submissions which were of great assistance. If there is any authority we have not referred to, it is not for our non-consideration of it, but out of satisfaction that the point is otherwise already amply made.

Dated and delivered at Nyeri this 7th day of September, 2016.

P. N. WAKI

……

JUDGE OF APPEAL

R. N. NAMBUYE

……..……..

JUDGE OF APPEAL

P. O. KIAGE

……..……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: Maraga, CJ & P; Ibrahim, Ojwang, Njoki & Lenaola SCJJ)

PETITION 16 OF 2016

– BETWEEN –

METHODIST CHURCH IN KENYA.....PETITIONER

– AND –

1. MOHAMED FUGICHA

2. TEACHERS SERVICE COMMISSION

3. COUNTY DIRECTOR OF EDUCATION - ISIOLO COUNTY

4. DISTRICT EDUCATION OFFICER - ISIOLO SUB-COUNTY.....RESPONDENTS

(*An appeal from the Judgment of the Court of Appeal at Nyeri (Waki, Nambuye & Kiage JJ.A)*

in Civil Appeal No. 22 of 2012 dated and delivered on 7th September, 2016)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The amended petition of appeal dated 10th January 2017 is based upon Article 163 (4) (a) of the Constitution, Section 15(2) of the Supreme Court Act, and Rules 9 and 33 of the Supreme Court Rules, 2012. It is supported by an affidavit sworn by Kimaita John Machuguma on 7th October 2016, in his capacity as development co-ordinator of the petitioner.

[2] The petitioner seeks the reliefs that:

a. the petition be allowed;

b. the Judgment of the Court of Appeal at Nyeri in Civil Appeal No. 22 of 2015 dated 7th September 2016 be set aside;

c. this Court be pleased to declare that the 1st respondent herein had no cross-petition, within the meaning of Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) or of

Article 22 of the Constitution;

d. if this Court, like the Court of Appeal, decides to deem paragraph 34 of the 1st respondent's replying affidavit (sworn on 4th November, 2014) to be a *cross-petition*, the cause should be referred back to the High Court for fresh hearing, involving all interested and affected parties; and

e. costs of this petition, and for the proceedings at the Court of Appeal, be awarded to the petitioner herein.

[3] The petition is founded upon 24 grounds, which may be thus summarised:

a. the Court of Appeal erred in granting reliefs and Orders that were not sought in the appeal by the 1st respondent herein;

b. the Court of Appeal erred in finding and holding that paragraph 34 of the petitioner's affidavit sworn by Mohamed Fugicha on 4th November 2014 constituted a *cross-petition*, and in proceeding to determine the appeal on such a premise;

c. the Court of Appeal erred in failing to find that, upon determining that paragraph 34 of the appellant's replying affidavit sworn on 4th November 2014 constituted a cross-petition, it was obliged to give an opportunity to the respondents in such a cross-petition to defend themselves;

d. the Court of Appeal had adopted a wrong perception of the proceedings before the High Court, and on that basis reached the erroneous finding that there was no factual or legal basis for the trial Judge to hold that allowing Muslim girls to wear *hijab* favoured such students, and discriminated against the non-Muslims;

e. the Court of Appeal erred in finding that the petitioner violated Articles 8, 27 and 32 of the Constitution; and

f. the Judgment of the Court of Appeal offends Articles 24, 27, 50 and 159 of the Constitution, as it purports to resolve matters of religious controversy that belong in the province of constitutional amendment and of legislation.

B. BACKGROUND

[4] The cause in the High Court pitted the Methodist Church in Kenya against the Teachers Service Commission, the County Director of Education, Isiolo County, the District Education Officer, Isiolo Sub- County, and an interested party, Mohamed Fugicha – a parent with three students enrolled at St. Paul's Kiwanjani Day Mixed Secondary School.

[5] The factual background preceding the petition in the High Court is as follows. The Church affirmed that it was the sponsor of the school, located on a five-acre piece of land, where it had been set up in 2006, and had a population of 412 students of diverse religious backgrounds.

[6] The Church averred that the School had a school uniform policy prescribed in the admission letter which each student and his or her parents duly signed, upon admission. In any event, controversy arose over the issue of the uniform, on 22nd June 2014. It was stated that the source of this controversy was an informal request by the Deputy Governor of Isiolo County, that all Muslim girls in the school be allowed to wear the *hijab* and white trousers, in addition to the prescribed uniform.

[7] It was averred that, a week later, unknown persons brought the *hijab* and white trousers for the Muslim girls, who subsequently reported to the school donning them. This conduct, it was stated, led to tension and disharmony. It was averred that when the school requested adherence to the established uniform code, the Muslim girls and boys engaged in protests, breaking window panes, and menacing teachers and Christian students, before trooping to the District Education Officer's offices, apparently to entreat official endorsement of their conduct.

[8] It was averred that, on 9th September 2014, the 3rd respondent directed the school's Board of Management, the Parent Teachers Association and the Church to meet and exhaustively discuss the *hijab* and white trouser issue. It is alleged that out of the 22 members who attended the meeting, 18 voted for *status quo* to remain; three voted in favour of *hijab* and trousers, and one recommended longer skirts for girls.

[9] It was averred that contrary to the majority decision of 9th September 2014, the 3rd respondent directed that the Muslim girls should wear *hijab* and white trousers. She directed, besides, that the principal of the School be transferred elsewhere; and a transfer letter to that effect was issued on 12th September 2014.

[10] The petitioner, aggrieved by this series of events, filed a Constitutional Petition in Nairobi which was transferred to Meru High Court, and registered as Petition No. 30 of 2014. The petition sought nine reliefs, their essence being as follows:

i. a declaration that the respondents' decision to allow Muslim students to wear hijab/trousers was discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations;

ii. an injunction preventing the respondents from allowing Muslim students to wear hijab/trousers contrary to the school's rules and regulations;

iii. an Order to quash the decision of the 3rd respondent of 12th September, 2014 purporting to transfer the principal from the school;

iv. an injunction restraining the respondents from interfering with the petitioner in executing its rightful role as a sponsor of the affairs of the school;

v. a mandatory injunction compelling the respondents to comply and ensure full compliance with current school rules and regulations;

vi. an injunction preventing the respondents from dissolving or purporting to stultify the current Board of Management and the Parents-Teachers Association of the school; and

vii. general damages, any other relief, costs and interest.

[11] All the respondents, alongside an interested party joined to the suit on 15th October 2014, contested the petition. The interested party in his affidavit, dated 3rd November 2014 (paragraph 34), thus deponed:

"... I am also cross-petitioning that Muslim Students be allowed to wear a limited form of *hijab* (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya and their right to equal protection and equal benefit of the law under Article 27 (5) of the Constitution."

[12] *Makau J*, proceeded to outline the issues for determination as follows:

i. whether the petitioner had *locus standi* to file the petition;

ii. whether the petition as against 1st respondent was premature;

iii. whether the respondents' decision to allow Muslims students to wear *Hijab*/Trouser was discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations;

iv. whether an injunction preventing the respondents from allowing Muslims students to wear *hijab*/trousers contrary to the school's rules and regulations could issue;

v. whether the school uniform policy indirectly discriminated against the interested party's daughters and other Muslim female students; and

vi. whether the interested party's cross-petition was defective.

[13] By Judgment delivered on 5th March, 2015, *Makau J* allowed the petition, finding as follows: the petitioner had *locus standi* to file the petition; the petition against the 1st respondent was premature, for non-exhaustion of the dispute resolution

mechanism; the petitioner could not interfere with the constitutional, statutory and administrative mandate of the 1st respondent, of performing teaching-service management.

[14] Consequently, he issued the following Orders:

i. the respondents' decision to allow Muslim Students to wear *hijab*/trousers was discriminatory, unlawful, unconstitutional and contrary to the rules and regulations of the school;

ii. injunction preventing the respondents from allowing Muslim students to wear *hijab*, contrary to the rules and regulations of the school;

iii. injunction restraining the respondents from interfering with the petitioner in executing its rightful role as sponsor, in respect of the affairs of the school;

iv. mandatory injunction compelling the respondents to ensure full compliance with the school rules and regulations;

v. injunction preventing the respondents from dissolving or purporting to dissolve the Board of Management and the Parents-Teachers Association of the school;

v. the school uniform policy did not indirectly discriminate against the interested party's daughter and other Muslim female students; and

vi. the interested party's cross-petition was found defective, and was for striking out.

[15] Aggrieved, the interested party sought redress in the Court of Appeal. His memorandum of appeal contained eighteen grounds, which the Appellate Court sustained, holding that the trial Judge had erred, by:

- failing to appreciate the principle of direct and indirect discrimination;
- misapplying the concept of accommodation in discrimination law, inherent in Article 27(4) and (5) of the Constitution, and equating the wearing of *hijab* to a conferment of special status;
- failing to appreciate and uphold the importance of *hijab* as a manifestation of religion, protected under Article 32 of the Constitution;
- holding that allowing *hijab* amounts to elevating Islam over other religions and contrary to Kenya's secular character and the equality principle;
- dismissing the *cross-petition* for non-compliance with the *Mutunga Rules*;
- misapprehending the law on the rights and role of a sponsor under Section 27 of the Basic Education Act, 2013;
- ignoring evidence on record, that the issue of school uniform was contentious;
- failing to uphold the submission that, in the absence of a statute expressly limiting the right to manifest religion, any limitation thereon through school rules was illegal;
- holding that the wearing of *hijab* by Muslim female students was discriminatory towards Christian and other students; and
- holding that the school is a Christian institution, yet it is public.

[16] The Appellate Court focused its deliberations upon four issues, namely:

a. whether or not documents relating to proceedings seeking to enforce the Bill of Rights must all be formal;

b. whether or not allowing Muslim female students at the school to wear a limited form of *hijab* (scarf and a pair of trousers) discriminates against the other students;

c. whether or not allowing Muslim female students to wear a limited form of *hijab* elevates Islam against other religions, and accords its adherents special status contrary to Article 8 of the Constitution; and

d. whether a school uniform policy can limit the fundamental freedom of religion contained in Article 32 of the Constitution.

[17] On 7th September 2016, the Appellate Court determined that a proper reading of the appellant's affidavit in the High Court did not warrant the striking out of the *cross-petition,* in spite of any shortcoming in it. It was the Appellate Court's view that the learned Judge erred by not directing himself to the express provision of Article 22(3) (b), and by failing to enquire into whether paragraph 34 of the appellant's replying affidavit passed the *informality test contemplated in the constitutional text.*

[18] The appellate Judges allowed the appeal. They held that the trial Judge's finding that allowing Muslim girls to wear *hijabs* favoured Muslim girls and prejudiced the non-Muslims, had no legal or factual basis. They also made a definite finding that the School's strictures upon Mr. Mohamed Fugicha's daughters amounted to *indirect discrimination.*

[19] The Appellate Court set aside the Orders of injunction, as well as that striking out the interested party's cross-petition as defective, and substituted it with an Order allowing the said cross-petition. Aggrieved, the petitioner filed the instant appeal, prompting contest by the 1st to 4th respondents.

C. SUBMISSIONS MADE BY COUNSEL

(i) Petitioner

[20] The petitioner submitted that paragraph 34 of the replying affidavit did not meet the requirements of a *cross-petition*: for it was inconsistent with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) principle and procedure Rules, 2013 otherwise known as the *Mutunga Rules,* which required a reasonable degree of precision in depicting of any infringement of fundamental rights and freedoms.

[21] The petitioner contended that upon the Court of Appeal making a finding that paragraph 34 contained a *'cross-petition',* it ought to have sent it back to the High Court for hearing, as the petitioners were not afforded an opportunity to respond to it.

[22] The petitioner further submitted that the effect of the Appellate Court's decision was to hold that Rule 10 (2) of the *Mutunga Rules* violate Article 22 (3) (b) of the Constitution, yet such a standpoint was neither pleaded nor canvassed by parties.

[23] The petitioner furthermore submitted that, allowing the prevalence of one religion over another in a public institution, would amount to discrimination against a myriad of other religions not accorded the same freedom of expression.

[24] The petitioner relied, for comparative experience, on Article 8 of the Constitution, drawing analogy with the United States Constitution which states that "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*" – also known as the Establishment Clause. It was urged that this clause had been scrutinized in ***Engel v. Vitale***, 370 U.S. 421 (1962), and the recital of a Christian prayer at the beginning of the School year was declared to be unconstitutional.

[25] To the same intent, the petitioner cited other cases of a comparative kind: ***Kruzifix-Urteil*** [crucifix Decision] (May 16, 1995), BVerfGE 93; ***Everson v. Board of Education 330,*** U.S. 1 (1947); ***Stone v. Graham***, 449 U.S. 39 (1980); ***Sahin v. Turkey Application*** 44774/98 2004; ***Dahlab v. Switzerland*** (Application No 42393/98; ***Wisconsin v. Yoder*** 406 U.S. 205 (1972); and the ***Headscarf Decision***, BVerfGE 108.

[26] On the strength of such decisions, the petitioner urged that only Parliament, as the democratically-elected body, and not the Court of Appeal, can determine matters of religious and secular controversy that involve the limitation of rights, as enshrined in Articles 24, 27, 50 and 159 of the Constitution.

[27] The petitioner also contended that the Appellate Court had disregarded the trite principle of law that *parties are bound by their pleadings*, when it came to the conclusion that the school uniform policy indirectly discriminated against the Muslim students, despite the fact that the school's rules and regulations had not been challenged in any Court.

[28] The petitioner lastly contested certain directions of the Appellate Court, addressed to the Cabinet Secretary for Education and the Attorney General, as having no factual or legal basis – as they were not parties to the proceedings.

(ii) 1st Respondent

[29] The 1st respondent submitted that the Court of Appeal had quite properly upheld his *cross-petition,* because paragraph 34 and the entire replying affidavit transcended the *informality test* contemplated in Rule 10 (3) of the *Mutunga Rules.* Yet this Rule, it was urged, is derived from Article 22 (3) (b) of the Constitution, which signals that the said Rules are designed to assist, and not hinder the prosecution of human rights violations.

[30] It was urged that the petitioner had an opportunity to respond to the *cross-petition*, at both the High Court and the Appellate Court, though it had squandered the opportunity. This notwithstanding, the 1st respondent urged that he had prosecuted his *cross-petition* at the High Court, and the petitioner had responded to the substance of it.

[31] The 1st respondent further submitted that since the High Court had dealt with the *merits* of the *cross-petition*, the Appellate Court rightly considered the same, making appropriate Orders which, by no means, did impinge on the petitioner's Article-50 right to fair hearing. He thus perceived as misplaced, the petitioner's invocation of Article 27 of the Constitution, in contesting the Court of Appeal's stand.

[32] The 1st respondent finally submitted that he had duly shown indirect discrimination embodied in the school uniform policy or rule, at the Appellate Court. He thus urged this Court to uphold the Court of Appeal's decision.

(iii) 2nd Respondent

[33] The 2nd respondent submitted that the claim against it arose from its decision to transfer Mr. George M. Mbijiwe who was at the material time the Principal of the School; and that the High Court dismissed the petitioner's case against this respondent who in the Court of Appeal, did not raise any cause of action against the 2nd respondent. It was in that context urged that the Appellate Court did not interfere with the High Court's finding, with respect to the 2nd respondent.

[34] Though not a party to the dispute in the Appellate Court, the 2nd respondent nonetheless submitted that it had invoked the *'principle of accommodation',* to allow the Muslim students to wear the *hijab* and white trousers. The 2nd respondent had besides, urged the said Court to accommodate the pertinent Cabinet Secretary's policy guide on the question, for educational institutions in general – and this had been allowed.

[35] The 2nd respondent in addition submitted that the petitioner had raised no cause of action against it in the instant petition, and urged that the petition against it be dismissed with costs.

(iv) 3rd and 4th Respondents

[36] The 3rd and 4th respondents limited their submissions to the issue as to whether the Court of Appeal erred in failing to find that wearing a *hijab* by Muslim girl students violated the Constitution. They urged that the 'freedom of religion' ought to be upheld, as required by the terms of the Constitution, and that in that process and in relation to the instant matter, both Article 53 of the Constitution and the provisions of the Basic Education Act, 2013 ordained that the best interests of the child required an education that is holistic in orientation.

[37] The 3rd and 4th respondents also urged that the petitioner had not shown how its rights would be prejudiced if the Muslim students were accommodated in the relevant religious particulars. It was in that regard urged that the prevailing conditions in this case had to be distinguished from those attendant upon the case law called in aid by the petitioner.

D. ISSUES FOR DETERMINATION

[38] The foregoing review revolves the main themes for this Court's determination to be as follows:

i. whether paragraph 34 of the 1st respondent's replying affidavit constituted a cross-petition; and

ii. whether this Court should interfere with the Court of Appeal's decision.

E. ANALYSIS

(i) Cross-petition and interested parties.

[39] The guiding provisions on cross-petitions are to be found in Rules 10 and 15 (3) of the *Mutunga Rules* – the latter providing as follows:

"The respondent may file a cross -petition which shall disclose the matter set out in Rule 10 (2)."

Rule 10 (2) then provides as follows:

"The petition shall disclose the following—

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

"(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom."

[40] In addressing the cross petition, the status of the 1st respondent in the High Court petition cannot be overlooked. The 1st respondent was admitted to the suit as an 'interested party.' The question then arises as to whether an 'interested party' has the capacity to institute a 'cross petition'.

[41] The *Mutunga Rules* define 'interested party' as:

"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation".

[42] This Court, in ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 others,*** Petition No. 12 of 2013 [2014] eKLR, thus observed of *interveners*, or interested parties:

"[14] *Black's Law Dictionary, 9th Edition,* ***defines 'intervener' (at page 897) thus:***

'One who voluntarily enters a pending lawsuit because of a personal stake in it';

[and defines 'interested party' (at p.1232) thus:]

'A party who has a recognizable stake (and therefore standing) in a matter….'

"[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio.* ***He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"***

[43] It thus emerges quite plainly that the High Court can join interested parties to proceedings, where necessary. That is why In ***Meme v. Republic*** [2004] 1 EA 124; [2004] 1 KLR 637, the High Court observed that a party could be enjoined in a matter on the basis of certain considerations viz:

"(i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation."

[44] On the same lines of reasoning, the High Court, in ***Judicial Service Commission v. Speaker of the National Assembly and Attorney General***, High Court Constitutional and Human Rights Division Petition No. 518 of 2013, 2013 [eKLR] (*Odunga J.)* has thus stated (paragraph 4):

"The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as 'a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation'. From the foregoing it is clear that an interested party as opposed to an *amicus curiae* ***or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."***

[45] The inference commends itself that, the trial court was well within its rights to admit Mr. Fugicha as an interested party, in the instant case.

[46] In the above context, the petitioner's cause in the High Court was that the respondents had accorded the Muslim students preferential treatment by allowing them to wear *hijab*/trousers, in departure from the School's rules and regulations on uniform; and that this amounted to discrimination against the Christian students, contrary to the terms of Article 27 of the Constitution.

[47] Essentially, the petitioner's case was therefore that the respondents had not kept uniformity of dressing standards for all students, and that this entailed a disparity that rested upon religious practice. The petitioner had urged that its intent was to secure standard rules for all, as a factor of regularity in institutional practice.

[48] The 1st respondent in the High Court was the Teachers Service Commission. The petitioner's grievance against it was that it had transferred the principal of the school on account of his stand regarding the established school uniform. The claim against the 1st respondent was dismissed by the learned High Court Judge, on the basis that: it was premature, as the petitioner had not properly invoked the provisions of the Constitution; the Court cannot interfere with the constitutional, statutory and administrative functions of the 1st respondent; the principal of the school had not appealed against, or sought review of the 1st respondent's decision, and the petitioner had not exhausted the available dispute resolution mechanism to address the matter.

[49] The 2nd respondent was the County Director of Education. The petitioner's grievance against this party was that he had directed that Muslim girls should wear *hijab* and white trousers, contrary to the agreement at the meeting of 9th September 2014 involving the School's Board of Management, the Parents-Teachers Association and the petitioner. The 3rd respondent was the District Education Officer, against whom the claim was that she had categorically stated that 'unless the Hijab and trousers were allowed in the School, there would be bloodshed.'

[50] The 2nd and 3rd respondents' case in the High Court was made through a replying affidavit sworn on 17th October 2014 by the 2nd respondent, on behalf of herself and the 3rd respondent. She stated that the decision to allow the Muslim students to adorn *hijabs* was only meant to mitigate the animosity that had caused much unrest in the school, and to allow the students to settle down

and prepare for national examinations.

[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of *hijab* would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution. It is on this basis that he *cross-petitioned at paragraph 34 of his replying affidavit,* for the Muslim students to be allowed to wear the *hijab,* in accordance with Articles 27 (5) and 32 of the Constitution.

[52] The cross-petition was expressed in straight terms: "**I am swearing this affidavit in opposition to the petition herein for it to be dismissed with costs, and … I am also cross-petitioning that Muslim Students be allowed to wear a limited form of *hijab* (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya, and their right to equal protection and equal benefit of the law under Article 27 (5) of the Constitution."**

[53] What should we make of a cross-petition fashioned as such" Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in ***Francis Karioki Muruatetu & Another v. Republic & 5 others,*** Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

"Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. ***An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court"*** [emphasis supplied].

[54] In like terms we thus observed in ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others***, Civil Appeal No. 290 of 2012 (paragraph 24):

"A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

[55] Against such a background, the trial Court ought not to have entertained issues arising from the cross-petition by the interested party, especially in view of Article 163 (7) of the Constitution which provides that '*All courts, other that the Supreme Court, are bound by the decisions of the Supreme Court."* Moreover, this cross-petition did not comply with Rule 15 (3) of the *Mutunga Rules* which speaks to a *respondent* filing a cross-petition; and it was also not in conformity with Rule 10 (2) of these Rules. Rule 10(3) cannot also be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained therein.

[56] We further note that the petition is unyielding that the *cross – petition* did not meet the set out requirements, it was defective and inconsistent with the *Mutunga Rules, further,* they argue that consideration of the same by the Appellate Court violated their right to fair trial denying them opportunity to prepare and canvass the issue raised in the *cross-petition.*

[57] We agree that the issues set out in the cross-petition did not afford the opportunity for the Petitioner to respond to the same effectively. Firstly, because it introduced a different cause of action from that raised in the original Petition; and secondly, because it was not framed in a manner, for which there was a known laid out procedure for an exhaustive response. The fact, that the petitioner may have referred to the issues therein through oral arguments, *could not,* as wrongfully determined by both the High

Court and the Court of Appeal, have amounted to formal pleadings in response to those issues. As such we find that both superior Courts violated the Petitioner's right to be heard, as provided for under Articles 25 and 50 of the Constitution.

[58] Furthermore and with due respect to the Appellate Court, we are persuaded that the *cross-petition* was improperly before the High Court, and ought not to have been introduced by an interested party, and in that light, it should not and could not have been entertained by the Court of Appeal; neither court having proper jurisdiction to do so.

[59] In the same breadth, we recognize that the issue as contained in the impugned cross petition is an important national issue, that will provide a jurisprudential moment for this Court to pronounce itself upon in the future. However, to do so, it is imperative that the matter ought to reach us in the proper manner, so that when a party seeks redress from this court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to this Apex Court. In view of this, it is our recommendation that should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court.

(ii) Should this Court interfere with the Court of Appeal's decision"

[60] Our findings above would effectively dispose prayer (c) of the petition before us that a declaration be made that the 1st respondent herein had no proper cross-petition to be determined. It also disposes of prayer (c) which was an alternative to prayer (d). That leaves us with prayers (a) and (b) – that the judgment of the Court of Appeal be set aside with costs.

What were the orders of the Court of Appeal" They were that:

"[p.75] The High Court's order that the decision to allow Muslim students to wear hijab/trousers is discriminatory, unlawful and unconstitutional is set aside.

a. The order of injunction preventing the respondents from allowing Muslim students to wear hijab contrary to school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby quashed and set aside.

b. The mandatory injunction compelling the respndents to comply and ensure full compliance with the current school rules and regulations that were executed by the students and parents during the reporting in respect of St. Paul's Kiwanjani Day Mixed Secondary School is set aside to the extent that it prohibits Muslim female students from wearing the hijab/trousers in addition to the school uniform.

c. The order that the school uniform policy does not indirectly discriminate against the interested parties Fugicha's daughters or other Muslim female students is set aside and substituted with an order that the said uniform policy indirectly discriminates against the interested partys' daughters and other Muslim female students in so far as it prohibits and prevents them from manifesting their religion through the practice and observance of wearing the hijab.

d. The order striking out the interested party's cross-petition as defective is set aside and substituted with an order allowing the said cross petition.

e. The order granting the costs of the petitionto the petitioner is set aside and substituted with an order that each party do bear its own costs.

We in addition direct as follows:

1. That the Board of Management of St. Paul's Kiwanjani Day mixed Secondary School do immediately initiate, after due consultation with its stakeholders in particular the parents and students a process of amendment of the relevant school rules touching on the school uniform so as to provide for exemptions to be granted to accommodate those students whose religious beliefs require them to wear particular items of clothing in addition to the school uniform.

2. This judgment be immediately served upon the Cabinet Secretary for Education for his perusal and consideration with a view to formulating and putting in place rules, regulations and/or directions after due consultations for the better protection of the

fundamental right to freedom of religion and belief under Article 32 of the Constitution and equality and freedom from discrimination under Article 27 of the Constitution for all pupils and students in Kenya's educational system.

3. Each party shall bear its own costs of this appeal.

To our minds, once we have found that there was no proper cross-petition to be addressed by either of the Superior Courts, it follows that orders (a) (b) (c) (d) and (e) as well as the additional orders (1) and (2) must be set aside.

On costs, noting the nature of matter and the circumstances of parties, we shall exercise discretion and order that each party ought to bear its costs.

F. THE DISSENTING JUDGMENT OF OJWANG, SCJ

A. INTRODUCTION

[61] In a delicate social-cum-religious issue regarding the governing rules for national educational institutions, which featured in litigation in the trial and appellate Courts, there was but *one* primary question: must the Muslim students be subjected, in common with students of other religious persuasions, to an approved school uniform which proscribes the *hijab*"

[62] The *hijab* is defined in the *Concise Oxford English Dictionary,* 12th ed. (Angus Stevenson and Maurice Waite) (Oxford: Oxford University Press, 2011) (p. 673) as: "a head covering won in public by some Muslim women"; "the religious code which governs the wearing of such clothing".

[63] The cause at the first instance, in the High Court, pitted the Methodist Church in Kenya against, firstly the Teachers Service Commission; secondly the County Director of Education for Isiolo County; thirdly the District Education Officer for Isiolo Sub-County; and lastly – and quite significantly – a party referred to as "interested party", Mohammed Fugicha, a parent with three students enrolled at St. Paul's Kiwanjani Day Mixed Secondary School.

[64] The fact that the party most intimately concerned as complainant in the cause, had been denoted as "interested party" at first instance, but now before this Court appears as the *first respondent*, tells a tale that carries the *objective substance of the litigation*, as well as the *intent*, and the *scheme of the matter* coming up before the Supreme Court: the justice of the case revolves around *Mohamed Fugicha*, the parent of the school children in respect of whom the right to the *hijab* is sought.

B. CAUSE RESTING ON ONE QUESTION: THE *HIJAB*

[65] The Methodist Church of Kenya, the appellant, affirmed that it was the sponsor of the relevant school, which was located on a five-acre parcel of land, from which it had operated since 2006, and now serving a student-population of 412 students, of *diverse religious backgrounds.*

[66] The appellant stated that the School had a dress-code policy prescribed by the admission letter, which each student and his or her parents duly signed upon admission. Controversy, by the appellant's averment, had arisen on 22 June 2014, in relation to the dress-code. The origin of the controversy had been an informal request by the Deputy Governor of Isiolo County that all Muslim girls in the School be allowed to wear the *hijab* and white trousers, in addition to the prescribed uniform. Subsequently, it was averred, unknown persons brought the *hijab* and white trousers for the Muslim girls, who thereafter donned the same. Such action, it was averred, occasioned tension and disharmony. When the School demanded adherence to the established uniform-code, the Muslim girls and boys engaged in protests, breaking window panes, and menacing teachers and students of Christian tradition, before entreating with District education officials seeking endorsement of the Muslim cause.

[67] It is clear from the depositions in the trial Court that, on 9 September 2014, the 3rd respondent had directed the School's Board of Management, the Parents-Teachers Association and the Church to meet and exhaustively deliberate upon the *hijab* issue. The petitioner, who was dissatisfied with the scheme and outcomes of such deliberations, lodged Petition No. 30 of 2014 which came up before the High Court at Meru, and the essence of which raised constitutional issues. The petitioner sought, *inter alia*:

a. a declaration that the respondents' decision to allow Muslim students to wear the *hijab* was discriminatory, unlawful, unconstitutional and contrary to the School's rules and regulations;

b. an injunction preventing the respondents from allowing Muslim students to wear the *hijab* contrary to the School's rules and regulations;

c. an injunction restraining the respondents from interfering with the petitioner in executing its proper role as sponsor of the processes of the school;

d. a mandatory injunction compelling the respondents to comply and ensure full adherence to the School's rules and regulations.

[68] As already noted, the 1st respondent, who constitutes the very backbone of this ultimate appellate cause, features in the High Court proceedings only in a somewhat peripheral depiction, as "interested party" – an equivocation no less matched by the labelling of his motion before that Court, masked as "cross-petition." In a true suit scenario, the "interested party" at the trial stage would have appeared as a primary party, a *defendant*, and quite clearly, would have been entitled to lodge a cross-petition in the ordinary sense.

[69] From the tenor of this dissenting Judgment, it will already be clear that the 1st respondent before the Supreme Court was much more than just an "interested party' before the trial Court. No less clear is it that the most crucial question – if not the *sole question,* for most practical purposes – before the High Court was the *constitutional right of dress-choice* in accordance with recognized religious orientation, and its relevance and priority, within the schooling process. *(It is precisely the same constitutional question that had preoccupied the Appellate Court in its motions;* and it is that same constitutional preoccupation that, quite clearly, now falls to this apex Court).

C. TRIAL, PETITION, CROSS-PETITION

[70] Running parallel to the misnomer in the High Court was the ill-applied concept of "cross-petition" – the "interested party" in his affidavit of 3 November 2014 (para. 34) thus deponing:

"… I am also cross-petitioning that Muslim students be allowed to wear a limited form of *hijab* ***(a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya and the right to equal protection and equal benefit of the law under Article 27 (5) of the Constitution".***

[71] Even with such open questions as to the status of "interested party", and "cross-petition", the High Court found it proper to *determine the core issue* – namely, the *hijab* as part of the school uniform; and from such a stand, *the Appellate Court too, departed not.*

[72] Was such a stand, before the first two superior Courts, a *judicious and valid* one" Ought the Supreme Court to stand by the two Courts" Is this a choice guided by supreme principle of constitutional character" Or is it a matter well meriting resolution on the basis of *technicalities of ordinary statutory or related prescriptions"*

[73] Article 159 (2) (d) and (e) of the Constitution of Kenya, 2010 thus stipulates:

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

…

d. justice shall be administered without undue regard to procedural technicalities; and

e. the purpose and principles of this Constitution shall be protected and promoted".

[74] The said Article 159 (e) requires the Courts of justice to uphold "the purpose and principles of this Constitution". The abode of such "purposes and principles" is *Article 10,* clause (b) of which calls upon us to uphold:

"human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized".

[75] A regular scheme for thus discharging the judicial mandate is embodied in a number of statutes. A typical such statute is the *Civil Procedure Act (Cap. 21, Laws of Kenya),* Section 1A (1) of which thus provides:

"The overriding objective of this Act and the rules made hereunder is to facilitate the** just, expeditious, proportionate **and** affordable resolution **of the civil disputes governed by the Act."

[76] It is within such a framework of discharge of mandate that the High Court *(Makau, J.)* did proceed to make its findings and Orders of 5 March 2015 – wherefrom *an appeal* duly proceeded to the Court of Appeal. The original theme of the cause, the *hijab*, remained *the real question in contention* at the Court of Appeal, where the mover was the "interested party" before the High Court, canvassing *constitutional issues* in relation to school dress-code.

[77] The primary questions on first appeal directly or indirectly touched on the *hijab* as a concurrent element in the school dress-code – these being:

(i) that the High Court Judge failed to appreciate the manifestations of direct and indirect discrimination;

(ii) that the Judge had misapplied the concept of "accommodation" in the law relating to discrimination, in the terms of Article 27 (4) and (5) of the Constitution, by perceiving the *hijab* as a symbol of special status;

(iii) that the Judge failed to appreciate the importance of the *hijab* as a religious observance, protected under Article 32 of the Constitution;

(iv) that the Judge arrived at the wrong conclusion, that allowing the *hijab* was tantamount to the elevation of Islam above other religions, contrary to Kenya's secular character, and to the equality principle;

(v) that the trial Judge had erred in dismissing the "cross-petition" on the basis of bare technicalities of procedure;

(vi) that the trial Judge had misapprehended the law on the role of a sponsor, such as the Methodist Church of Kenya, under Section 27 of the Basic Education Act, 2013;

(vii) that the trial Judge erred by ignoring the evidence on record, that the issue of appropriate school uniform was a contentious one;

(viii) that the trial Judge failed to uphold the submission that, in the absence of a statute qualifying the mode of practice of religion, any restriction thereof, through school rules, lacked legality;

(ix) that the trial Judge erred in holding that the wearing of the *hijab* by Muslim female students was discriminatory towards Christian and other students;

(x) that the trial Judge erred in holding the School to be a Christian institution, whereas it was a public institution in every sense.

D. CROSS-PETITION, TECHNICALITIES, CONSTITUTIONAL PRINCIPLE

[78] The definitional technicalities attached to the terms "interested party" and "cross-petition", did not deter the Appellate Court, which, quite properly in my opinion, addressed itself to the fundamental cause, and dispensed justice with the requisite judicial authority. *This* is the kernel of my departure from the Judgment rendered by the majority in this case.

[79] The Appellate Court, on 7 September 2016, rightly, in my view, determined that a proper reading of the appellant's affidavit at the High Court did not warrant the striking-out of the interested party's *cross-petition,* in spite of such shortcoming as it

had. There would be no justification for overlooking the Constitution's requirement (Article 22 (3) (b)) that any "formalities relating to the proceedings, including commencement of the proceedings, are *kept to the minimum,* and in particular that the court shall, if necessary, *entertain proceedings on the basis of informal documentation"*.

[80] I find no basis for departing from the stand of the Appellate Court Judges: that the trial Judge's finding disallowing Muslim girls wearing the *hijab* in school, was devoid of any legal or factual merits.

E. CROSS-PETITION: DOES ITS MODE OF LABELLING DETERMINE THE RIGHTS OF PARTIES"

[81] Notwithstanding the *hijab* question standing as the main subject in this whole case, it is the Bench-majority's standpoint that the 1st respondent had no right to pursue it at first instance, or in the appellate process: only because he had appeared as *"interested party"*. It is the majority's stand that the Appellate Court, once it beheld a *"cross-petition" from an "interested party"*, was duty-bound to remit it back to the High Court, to conduct a fresh hearing upon it, before it might subsequently wend its way to the Appellate Court. From the facts attending the proceedings, however, it is abundantly clear that the trial Judge *did deal* with the *merits of the "cross-petition*".

[82] Such a position is well vindicated by the record. The *petitioner* did indeed submit, before the High Court, that para. 34 of the interested party's replying affidavit would not properly constitute a *cross-petition*. On this point, *the trial Judge made reference to counsel's submissions*, and thus observed (para. 105 of the Judgment):

"[Learned counsel] Mr. Kibe Mungai in response to the interested party's submission … referred to the interested party's replying affidavit dated 5 November 2014 under paragraph 34 and submitted that the interested party is attempting to link the issues of religious rights to the right to education. Under Article 32 of the Constitution of Kenya, 2010 he submitted [that] the rights are enjoyable subject to limitations set out in the Constitution. That such rights are limited in Kenya to ensure [consistency] with Article 8 of the Constitution of Kenya, 201 which states [that] there shall be no State religion".

[83] The learned Judge proceeded as follows (para. 106):

"Counsel submitted that there is no allegation that the uniform denies Muslim students religious rights, adding [that] under the Constitution it is compulsory for every child to be in school, and that under Article 27 of the Constitution … the right to equality in education allows access to schoo[ling]. He urged [that] there was no allegation of denial of education on [the] ground of religion. He urged [that on the basis of] Article 24 of the Constitution …] religious rights can be limited – urging that if the interested party wants** hijabs, **he can have the matter taken to Parliament and/or Constitutional Court".

[84] That the trial Judge intimately took up the *hijab* question, deliberated upon it, and elaborately pronounced himself thereupon, is still more evident from the terms of para. 117 of the Judgment:

"Mr. Kibe Mungai responded that there is no connection for Muslim girls wearing** hijab, **and the right [for] Muslim girls to secure compulsory education. He submitted that under [the] Basic Education [Act, 2013] nothing turns on the** hijab. **He pointed out that [the] interested party's point is in the case of [Muslim girls] being educated [, being allowed to] enjoy special status by wearing [by the] Islamic [dress] code. He submitted that [this] has nothing to do with education, but is a religious claim for [special] status. He submitted [that] such [a] claim is discriminatory and offends Article 27 of the Constitution."

[85] In yet more evidence as to the trial Court's attention to the *hijab* theme, the learned Judge thus remarked [para. 118]:

"Mr. Kibe Mungai responded that under para. 34 of the interested party's replying affidavit, he was trying to make out a case that [the prescribed] school uniform violated the interested party's right to religion. He urged [that] Article 32 of the Constitution has to be placed in [the] context of school. He submitted that there is admission of Muslims in school, and the [pertinent] religious beliefs are [duly] respected …, not violated."

[86] What is the import of such *detailed statements emanating from the trial Judge"* It is quite evident that the petitioner was accorded a *substantial hearing,* on the "*cross-petition"* – regardless of the technicality attending the formal lodgement of the "cross-petition". It is of no legal consequence, in my perception, that the replying affidavit was inelegant in para. 34, with 1st respondent herein averring that he was *"cross-petitioning"*. (To recall, the Constitutional charter [Article 159 (2) (d)] declares that *"justice shall*

be administered without undue regard to procedural technicalities"; and Article 22 (3) (b) declares that *"[any] formalities relating to proceedings … are [to be] kept to the minimum").*

[87] The "interested party's" stance was that the "cross-petition" *did indeed go to the very core of the live dispute before the trial Court,* with the petitioner then seeking as the crucial prayers, Orders such as would entail distinct compromise to the position of Muslim students, to wit:

(i) a declaration that the respondents' decision to allow Muslim students to wear the *hijab* was *discriminatory, unlawful, unconstitutional and contrary to the rules and regulations of the school;*

(ii) an injunction preventing the respondents from allowing Muslim students to wear the *hijab.*

[88] Quite to the contrary, the 1st respondent herein, at the trial Court stage, asked the Court to allow Muslim girl-students to don a limited form of *hijab*, in line with their entitlement under Articles 27 (5) and 32 of the Constitution. The matter was *squarely dealt with by the trial Court,* and *a determination made which became the subject of appeal.* Is this a matter for remittal to the High Court" I seriously doubt it, both on the substance of the law, and as a question of systematic, efficient and professional administration within the judicial portfolio.

[89] While it is the case that the reference to "cross-petition" had been inexact in a technical sense, it is for recognition that such flaw was, as a matter of law, *mitigated by the superior processes of both the High Court and the Appellate Court,* which reaffirmed the cause embodied in the "cross-petition", appraised the pertinent question, and made the governing pronouncement thereupon.

F. FINDINGS: CONSIDERATIONS OF MERIT

[90] The trial Judge held the dress code as applied by the 2nd and 3rd respondents to be unlawful, thus pronouncing himself (para. 188):

"The interested party has not alleged that the Christian students are enjoying special preferential treatment over Muslim students. It is my view that … allowing Muslim girl students to [don] the religious attire would amount to discrimination against Christian students and other students at St. Paul's Kiwanjani Mixed Day Secondary School. In addition to the above, it had not been demonstrated that the school uniform is offensive to Muslim girl students to warrant court interference".

[91] The Appellate Court, by contrast, was of the view that the concepts of justice, fairness or reasonableness would not only permit, but in fact *do require, differential treatment.* Such, in my perception, is an eminently rational stand, and is for upholding. The Appellate Court rightly, in my opinion, found that: "there was no factual or legal basis for the holding by the learned [trial] Judge that, allowing Muslim girls to wear the *hijab* favoured Muslim girl students, and discriminated against non-Muslims"; and "the petitioner paid no, or insufficient, attention to the proscribed indirect discrimination and the principle of accommodation, as the answer to the problem of discrimination". It is my standpoint that the scheme of jurisprudence outlined by the Appellate Court, on the relevant question, is appositely pragmatic and rational, and well reflects the desirable judicial stand.

[92] I apprehend the terms of Article 259 (1) of the Constitution, with regard to the prescriptions that this charter is to be "interpreted in a manner that" (a) "promotes its purposes, values and principles", (b) "advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights", (c) "permits the development of the law" and (d) "contributes to the good governance" – to ordain that *it devolves to the Judge to assign objective meaning and constructive perception to the unbounded prescriptions of the constitutional norm.*

[93] I consider the same precept to extend to *all statute laws, or particular provisions thereof, so cast as to bear unbounded normative prescriptions.*

[94] It is in that context that I now interpret the terms of Section 27 (d) of the Basic Education Act, 2013 (Act No. 14 of 2013): imposing upon a school's sponsor (such as the petitioner herein) the obligation of "maintenance of spiritual development while safeguarding the denominations or religious adherence of others".

[95] It is my standpoint, in departure from the Bench majority, that all the applicable terms of the Constitution and of the

enacted law, do entail the finding – precisely in keeping with that of the Appellate Court – that a *right balance amidst people holding different faiths,* in the multi-cultural environment prevailing at the pertinent school, will by no means be jeopardized on account of the variation to the school dress-code. I would, therefore, have dismissed the appeal.

G. PREFERRED EDICT

[96] It would have been my edict that the Board of Management, St. Paul's Kiwanjani Day Mixed Secondary School, do forthwith initiate, after due consultation with its stakeholders (in particular the parents and students), a process of amendment to the rules relating to dress-code: the object being the accommodation of those students whose religious beliefs require them to wear, in addition to regular uniform, certain particular items of clothing.

[97] I would have directed that the text of this Judgment, along with the Appellate Court's Judgment of 7 September 2016, be forthwith served upon the Cabinet Secretary in charge of the Education docket, to sustain the formulation and application of appropriate rules, regulations or directions – so designed as to uphold the fundamental rights of the Constitution on matters of belief and of religion, of equality, and of freedom from discrimination, as prescribed in Article 27 and 32, and in respect of all schooling establishments in relevant counties. However, as the majority are of a contrary opinion, the final orders are as set out below.

G. DISPOSITION

[98] Consequently, the Court's Orders are as follows:

(i) That the appeal is hereby allowed;

(ii) That the judgment of the Court of Appeal dated 7th September 2016 is hereby set aside;

(iii) Parties to bear their own respective costs.

DATED and **DELIVERED** at **NAIROBI** this 23rd day of January 2019.

..... **.....**

D. K. MARAGA **M. K. IBRAHIM**

CHIEF JUSTICE/PRESIDENT OF THE THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

..... **.....**

J. B. OJWANG **NJOKI NDUNGU**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 10 OF 2019

JWM (alias P).....PETITIONER

VERSUS

BOARD OF MANAGEMENT O HIGH SCHOOL.....1ST RESPONDENT

MINISTRY OF EDUCATION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. This is the first ever case in this country brought on behalf of a Rastafarian child who has been denied the right to receive education because she wears rastas (dreadlocks) due to religious beliefs. ***JWM*** alias P**,** the Petitioner, is father to ***MNW*** a 15 years Rastafarian girl who was admitted to Form One at O High School, a public secondary school, for her secondary school education in January 2019. She reported to school, paid the required fees and was dully issued with admission Number, allocated a class and even attended lessons. However, it was soon discovered that keeps rastas which lead to her being sent home with a warning not to return to school until she had shaved the rastas.

2. The Petitioner felt this was discrimination and a violation of ***MNW's*** right to education based on her religious beliefs. He filed this petition on behalf of the minor against the Board of Management of O High School, the ministry of Education and the Attorney General, the 1st, 2nd and 3rd respondents respectively, challenging the School's action.

3. The Petitioner averred that his family is Rastafarian by faith and keeps rastas as a mark of their religious beliefs; that after ***MNW's*** Kenya Certificate of Primary Education Examination (KCPE) results, she applied for form 1 admission at the 1st respondent's school and indicated in the form that she was Rastafarian by religion; that she was admitted and reported to school on 10th January, 2019; paid the required school fees; issued with admission number and attended classes. He further averred that ***MNW*** was later summoned by the school authorities, admonished for keeping rastas and sent home not to return until she shaves the hair.

4. The Petitioner stated that he approached Head Teacher the following day, 11th January, 2019, with a view to sorting out the issue in order to have ***MNW*** back in school but was turned away without being given a hearing. His attempt to have the Education Officer intervene bore no fruit. It is the Petitioner's case that the Respondents' action was not only discriminatory on grounds of religion but also a violation of MNW's right to religion, education and fair administrative action, contrary to Articles 27, 32, 43 and 47(1) of the constitution. The Petitioner therefore sought the following reliefs;

a) A declaration due hereby issue that the 1st respondent's decision and/or action of constructively suspending the minor herein

namely M N W on the basis of her Rasta religious inclination and culture characterized by her sporting of dreadlocks is a violation of her right to be treated with dignity, freedom from discrimination, freedom of conscience, religion, belief and opinion, freedom of expression, right to Culture and her right to fair administrative action that is lawful and reasonable under Articles 27,28,32,33,44 and 47 of the Constitution.

b) An order do hereby issue permanently restraining the Respondents by themselves, their servants and/or agents from in anyway interfering with M N W's secondary school education on the basis of her cultural beliefs and practices as a Rastafarian.

c) That consequently, an order do issue directing the respondent's Headmaster and the Deputy Headmistress herein to jointly or severely compensate the Petitioner and/or Ms. M N W for the inconvenience, embarrassment, waste of time and the violation of MNW's fundamental human rights and freedoms under Articles 27,28,32,33,44 and 47 of the Constitution.

d) The costs of this Petition be provided for.

e) Any other order that this Honourable Court may deem just and fit in the circumstances.

Respondents' response

5. The Respondents filed grounds of opposition dated 25th January 2019 and a replying affidavit by ***Michael Kahora Waichinga***, the Head Teacher and Secretary of the 1st Respondent, sworn on the same day in response to the petition. In the grounds of opposition, the Respondents contended that it is the 1st Respondent's mandate to make rules for the management the school; that the Petitioner has not challenged the legality or constitutionality of the school rules; that ***MNW*** accepted to be bound by the school rules; that the Petitioner has misconstrued and misapplied the import of enjoyment of rights and fundamental freedoms and the limitation thereof; that the school dress code is part and parcel of school management and that the Petitioner has not shown how the right to religion is related to the right to education.

6. In the replying affidavit, ***Mr. Waichinga*** deposed that as a public secondary school, the school is managed by a Board of Management; that the school admits students from all walks of life and from various religious backgrounds; that ***MNW's*** mother approached the school seeking a chance for her daughter and that after the school was satisfied with her KCPE performance, she was admitted but strictly in accordance with the school rules and regulations.

7. ***Mr. Waichinga*** further deposed that a calling letter was issued to ***MNW*** with an admission form which she filled and thereafter reported for admission on 10th January, 2019. According to the deponent, ***MNW*** was given admission No. 4016 after the she signed to be bound by school rules and regulations. He stated that although ***NMW*** had indicated her religion as Rastafarian, she wore a hijab and she had informed teachers that she was Muslim which explained why she had a hijab.

8. He further stated that it was when she was being issued with school uniform that the hijab fell off revealing the rastas. He contended that it was at that point that ***MNW*** was reminded about the school rules but was allowed to attend classes for the day and advised to comply with school rules the following day.

9. According to the deponent, the following day, 11th January 2019, the Petitioner went to school accompanied by ***MNW*** but they were told that she had to comply with school rules and that she would not be treated in a special way. He deposed that at that point the Petitioner and ***MNW*** stormed out of the office and left. ***Mr. Waichinga*** further deposed that he informed the Sub county Director of Education of the incident who ordered that a report be prepared; that a report was prepared and showed that ***MNW*** had violated rule 7 of the school rules and regulations which prohibits students from keeping dreadlocks. He contended that the Rastafarian Society has nothing to do with the right to Education and denied that they violated any of ***MNW's*** rights.

Oral testimony

10. The Petitioner offered to give oral testimony in support of the petition during the hearing. He testified that his family is Rastafarian by faith which they have espoused since birth; that they follow biblical teachings found in various books, including Numbers 6: 1-6, Leviticus 21: 5 – 6 among others which he said prohibit eating certain foods and cutting of the hair, as a sign of their dedication to God's teachings and that they, therefore, keep the hair as a manifestation of their faith. He stated that the

command to keep the hair is biblical and that keeping the hair is a manifestation of their faith and as such his family never shaves their hair in keeping with their faith.

11. The petitioner further testified that ***MNW,*** now 15 years old, has never shaved her hair since birth due to their religious beliefs; that she attended public nursery and primary schools wearing rastas and attached photographs to show that ***MNW*** has always had Rastas. He added that ***MNW*** was admitted to the 1st Respondent's school having clearly indicated in her admission form that her religion was Rastafarian; that she paid school fees, issued with uniforms, but was later sent away due to her hair style which she keeps by reason of her faith and nothing else. He told the court that his attempt to have the issue resolved amicably was not successful because the school leadership insisted that ***MNW*** had to shave her rastas which is against her faith.

12. In cross examination, the Petitioner stated that they follow the Ten Commandments and keep the Sabbath as their day of worship. Regarding school rules, the Petitioner argued that the rule that requires ***MNW*** to shave her hair violates her right to religion. He insisted that Rastafarians keep "Rastas" and not "dreadlock"; that rastas is a sign of faith as opposed to "dreadlocks" which is a matter of one's choice or style.

Petitioner's submissions

13. Mr. Ochiel, appearing with Mr. Wambui for the Petitioner, submitted that the Petitioner's case presents an element of discrimination on the basis of religion in that ***MNW*** has been compelled to choose between keeping her faith and education. According to counsel, section 23 (2) (ii) of the Children Act requires parents to give children parental responsibility which includes religious and moral values. He argued that ***MNW*** is a member of the Rastafarian religion, a fact she fully disclosed in her admission form; that one of ***MNW***'s genuinely held beliefs according to biblical teachings is that of keeping the hair. For those reasons, counsel contended, there is a genuine threat to ***MNW's*** right to freedom of religion and education.

14. Relying on Article 32 of the Constitution, Mr. Ochiel submitted that the Constitution guarantees freedom of religion which includes the right to manifest religious beliefs through worship practices, teachings and observance, whether in public or private. He argued that ***MNW*** keeps her hair as a mark of expression and observance of her faith and relied on ***Seventh Day Adventist Church v Ministry for Education*** [2017] e KLR for the submissions that freedom of religion includes both the right to have religious belief and the right to express such belief in practice.

15. In counsel's view, ***MNW*** was excluded from school for reason of keeping hair in accordance to her faith, an action that has limited her right to education on grounds of her religious beliefs. He contended that school rules and regulations cannot stand in the way of the Constitution. He submitted, referring to the ***Seventh Day Adventist case*** that the Court of Appeal had observed that Article 27 of the Constitution enjoins both the state and individuals not to discriminate either directly or indirectly on, among other grounds, religion. In this regard, counsel argued that the application of school rules and regulations on ***MNW*** in the manner the school has done amounts to direct discrimination without considering reasonable accommodation of her religious beliefs and, therefore, violates the Constitution.

Respondents' submissions

16. Mr. Ogosso, learned counsel for the Respondents submitted in opposition to the petition, that there cannot be a selective application of school rules in favour of a Rastafarian student. He contended that section 59(1) of the Basic Education Act mandates the Boards of School Management to formulate rules and regulations for the management of schools. With regard to the present petition, he argued that school rules were formulated and each student is required to abide by them; that ***MNW*** understood the school rules and signed the admission letter to that effect and, therefore, she cannot claim that they violate her rights. Counsel relied on ***Republic v Head Teacher Kenya High School & Another exparte SMY*** [2017] e KLR and ***Ndanu Mutambuki & 119 Others v Minister for Education & 2 Others*** [2007] e KLR**.**

17. He submitted that once the 1st Respondent formulated the rules and regulations, it was the duty of the students to abide by those rules and there is a legitimate expectation that students admitted to the school will obey and adhere to the school rules.

18. Mr. Ogosso contended that the school is applying the rules as formulated and, therefore, it has not violated ***MNW's*** rights; that the right to express her faith under Articles 32(2) is not absolute; that there is no evidence that she has been denied the right to

worship or receive teachings of her faith or that she has been treated differently on account of her religious beliefs. In counsel's view, the right to manifest religious beliefs can be limited by requiring her to abide by school rules which is a justifiable limitation. He relied on ***J.K. Suing on behalf of Club Board of Directors v. School & another*** [2014] eKLR for the proposition that although the right to education is important, the court should not ordinarily interfere with school affairs except in exceptional cases.

Analysis and determination

19. I have considered the petition, the response, submissions and the authorities relied on. The facts of this petition are straight forward. ***MNW*** is a member of the Rastafarian whose religious beliefs do not allow her to shave the hair. She was admitted to the school and she clearly indicated in her admission form that her religion was Rastafari. She reported to school, paid the required fees and was given admission number and a class, form 1A. Later the school authorities noticed her rastas, ("dreadlocks") and sent her home until she shaves the rastas.

20. The Petitioner, MNW's father, tried to have the issue sorted out to no avail, with the school administration insisting that ***MNW*** has to shave the hair before rejoining the school. The petitioner argued that shaving hair is against their religious beliefs and that what ***MNW*** keeps are "rastas" which manifest their faith and not "dreadlocks" which are a matter of choice or style. The Respondents on their part maintained that school rules and regulations prohibit dreadlocks and apply to all students and for that reason, ***MNW*** will not be accorded preferential treatment and will only be allowed back to school once she shaves the dreadlocks.

21. The single question that arises for determination in this petition is whether the decision to exclude ***MNW*** from school has violated her right to education on religious grounds. However, before I venture to answer this question, I find it necessary to address a preliminary issue, namely; whether Rastafari is a religion to warrant invocation of protection under Article 32 of the Constitution. But, first, what is religion"

22. The Constitution does not define the word "religion." We must therefore turn elsewhere to find the meaning of this word. Concise Oxford English Dictionary, Twelfth Edition defines "religion" as;

"(1) the belief in and worship of a superhuman controlling power, especially a personal God or gods, a particular system of faith and worship;

(2) a pursuit of or interest followed with great devotion."

23. Black's Law Dictionary, Ninth Edition defines "religion" as;

"A system of faith and worship usually involving belief in in a supreme being and usually containing a moral or ethical code; especially such a system recognized and practiced by a particular church, sect, or denomination."

24. On the other hand, Greil, A.L. & D.G. Bromley; Defining Religion: Investigating the Boundaries between the Sacred and Secular, 2003. Amsterdam: JAI, define religion as;

"a unified system of beliefs and practices relative to sacred things set apart and forbidden, beliefs and practices which unite into a single moral community called a church and all those who adhere to them"

25. It follows from the above definitions that religion encompasses aspects such as beliefs, faith and worship of a superior being which determine a person's moral or spiritual conduct. And from what the Petitioner averred in his pleadings, deposed in his affidavits and testified on oath in court, that they believe in the biblical teachings which forbid shaving of hair; that they keep the Ten Commandments given by a superior being and that they observe the Sabbath as their day of worship, it is my holding that Rastafari is a religion whose sincere adherents should be accorded full protection under Article 32 of the Constitution just like those of other religions.

26. This view finds support in an Article by Midas H. Chawane, ***The Rastafarian movement in South Africa: A religion or way of life***" (Journal for the Study of Religion vol.27 n.2 Pretoria 2014) in which he opines that whether Rastafarians see their movement

as religious or not will depend on their definition of religion. He argues that when other aspects of the definitions are applied such as "***a unified system of beliefs and practices, Rastafarianism qualifies as a religion".***

27. Within Judicial circles, the issue of whether or not Rastafari is a religion was considered in ***Reed v Faulkner*** 842 F 2d 960 (7th Cir 1988), where the US Circuit Court held that Rastafarianism was a form of religion. The court observed that the Rastafarians are a religious sect that originated among black people in Jamaica though it has adherents among black American and that its tenets are derived by interpretation of passages in the Bible and, therefore, Rastafarian faith was a bona fide religion for purposes of the First Amendment.

28. And in ***re chikweche*** 1995 (4) SA 284 (ZC), The Supreme Court of Zimbabwe held that the status of Rastafarianism as a religion, in the wide and non-technical sense, has to be accepted and wearing dreadlocks was a manifestation of this religion and fell within the protection afforded by s 19(1) of the Constitution of Zimbabwe.

29. It follows that it is no longer contestable that Rastafarian is a religion for purposes of constitutional protection. That done, I now turn to consider the core issue in this petition regarding ***MNW's*** rights.

Whether MNW's rights have been violate

30. Article 32 (1) of the Constitution guarantees every person the right to freedom of conscience, religion, thought, belief and opinion. Sub Article (2) provides that;

"Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship."

31. Sub Article (3) further provides that, a person may not be denied access to ***any institution***, employment or facility or enjoyment of any right because of the person's ***belief or religion***. While Sub Article (4) states that ***a person should not be compelled to act or engage in any act that is contrary to the person's belief or religion.*** Article 32, therefore, guarantees the right to manifest, observe and practice religious beliefs and prohibits actions that compel one to act in a manner that goes against his or her religious beliefs.

32. Similarly, Article 43 (1) (f) guarantees every person the right to education. While Article 53 (1) (b) guarantees every child the right to compulsory basic education. Sub Article (3) makes it clear that a child's interests are of paramount importance in every matter concerning the child. A child's right to compulsory education is replicated in section 28(1) of the Basic Education Act which requires the Cabinet Secretary to implement the right of every child to free and compulsory basic education. In that regard, a child has a constitutional right to have basic education as a matter of compulsion.

33. Parents have a legal responsibility to take their children to school. To that extent, section 30 of the Basic Education Act provides th us;

1 "Every parent whose child is-;

(a) Kenyan, or

(b) resides in Kenya;

Shall ensure that the child attends regularly as a pupil at a school or such other institution as may be authorized and prescribed by the Cabinet Secretary for purposes of principal, mental, intellectual or social development of the child.

34. Subsection (2) makes it an offence where a parent fails to take his or her child to school providing that a parent who fails to take his or her child to school as required under subsection (1) commits an offence and on conviction, is liable to a fine of Kshs. 100,000/= or one year imprisonment or both, signifying the importance the state attaches to education for the children. In this respect, the Petitioner discharged his statutory obligation when he took the minor to school

34. The fact that the Petitioner and his family belong to the Rastafarian religion is not in doubt and that is why they do not shave their hair as a manifestation of their religious beliefs. ***MNW*** indicated in her admission form that she is Rastafarian by religion. The Petitioner was also emphatic that ***MNW*** has never shaved her hair since birth and that doing so is against their faith and religious beliefs. He maintained that ***MNW*** went through public nursery and primary schools without encountering the prospect of being forced to shave her hair against her religious beliefs and that the scenario she faces now has traumatized her.

35. The stance taken by the Respondents that ***MNW*** must shave her hair before she is allowed back to school is clearly contrary to Article 32 which guarantees every person's right to religion and to manifest that religion through practice. Keeping rastas is the minor's outward manifestation of her religious beliefs and forcing her to cut the hair is contrary to those beliefs. Article 32(3) is also clear that a person may not be denied access to an "institution" because of his or her religion while Sub Article (4) states that, no person should be compelled to act or engage in an act that is contrary to the his or her beliefs or religion.

36. It is therefore plain to me that the Respondents' demand that the minor must cut her hair is constitutionally prohibited. Article 32 contains constitutional guarantees that should not be undermined in a way that violates one's religious beliefs. In that regard, Article 32 underscores the breath and width of the right to religion and, therefore, guarantees ***MNW's*** right to declare, express, practice and manifest her religious beliefs to the fullest extent.

37. As was observed by the Supreme Court of Canada in ***R v Big M Drug Mart Ltd*** (1985) 1 SCR 295; [1986] LRC (Const) 322);

"The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal…[E]very individual [i]s free to hold whatever religious beliefs his or her conscience dictates, provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."

38. Article 19 of our Constitution unashamedly proclaims that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals, communities and to promote social justice and the realisation of the potential of all human beings. The Article is also categorical that the rights and fundamental freedoms in the Bill of Rights belong to each individual; are not granted by the State and are subject only to the limitations contemplated in the Constitution.

39. In the same vain, Article 20(1) states that every person is to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The Article requires courts when interpreting the Bill of Rights, to ***adopt an interpretation that most favours the enforcement of a right or fundamental freedom.***

40. Regard must also be had to Article 21(1) which makes it a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. All State organs and public officers have a duty to address the needs of vulnerable groups within society, including "***children"*** and members of particular ethnic, "***religious"*** or cultural communities.

41. As already stated, Articles 43(1) (f) of the Constitution guarantees the right to education while Article 53 (1) (b) guarantees every child, including ***MNW,*** the right to compulsory basic education. This right cannot be compromised on the basis of one's religious beliefs or the way one manifests those beliefs. These constitutional guarantees notwithstanding, the minor finds herself torn into choosing between the right to keep her rastas as a way of manifesting her religious beliefs and education. If she opts to keep her rastas, she must then forgo her right to education because of school rules. The opposite is that she shaves her rastas, thus surrenders her right to manifest her religious beliefs, and resumes school, despite this being a right guaranteed by the Constitution. School rules and regulations stand in the way of her right to religion and education because they do not allow one to wear "dreadlocks."

42. To the extent that the school rules and regulations have been applied in a manner that denies ***MNW*** the right to access the 1st Respondent's school to receive education unless she cuts her rastas, violates the essence of Articles 32 and 43 on the right to religion and education respectively. This is because although these rights are guaranteed by the Constitution, the Respondents have applied school rules in a manner that negates the fundamental essence of these rights.

43. The Constitution demands that the Bill of Rights be interpreted in a manner that favours enforcement and enjoyment of rights

and fundamental freedoms. In this regard, I find it appropriate refer to the Court of Appeal decision in ***Attorney General v Kituo Cha Sheria & 7 others*** [2017] e K LR, where it stated thus;

"Quite beyond argument then, the Bill of Rights in Kenya's constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country's democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities. The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey."

44. The Court then stated with regard to the application and interpretation of the Bill of Rights;

"…Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal. It is the ubiquitous theme unspoken that inspires, colours and weighs all law and action for validity. It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation…. [C]ourts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach and highest claims… [T]hey are enjoined in their interpretative role to adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms. They must aim at promoting through their interpretations of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is human dignity, equality, equity and freedom. It is the duty of every judge, magistrate, member of a tribunal or other body invested with judicial functions to deliberately and unrelentingly pursue, encourage, entrench, protect, jealously guard, educate and propagate Project Freedom and aim to advance openness, democracy, and ensure that liberty rings loud and true in every place and sphere of Kenyan's socio-political life. The Constitution demands that everything the Bill of Rights stands for in its text, its purport, its spirit, philosophy and intendment as a charter of liberty must be given full effect in a bold and unflinching manner. Judges must speak the language of rights and fundamental freedoms and do so with neither apology nor embarrassment. To fail to do so or to do otherwise would be to violate the express precepts of the Constitution."(Emphasis)

45. The principle of maximization in interpreting constitutional provisions containing rights and fundamental freedoms was also advocated for in ***Tinyefuze v Attorney General*** [1997]UGCC3, thus;

"A Constitutional provision containing a fundamental right is a permanent provision n intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexable, keeping in view ideals of the people, socio-economic and politico - cultural values so as to extend the benefit of the same to the maximum possible."

46. Applying the principles in the above decisions, it follows that the Respondents are bound to uphold the minor's rights guaranteed under Articles 32, 43(1) (f) and 53(1)(b) as well as section 28(1) of the Basic Education Act. This is because these fundamental rights and freedom are enshrined in and protected by the Constitution. I therefore find and hold that the Respondents' decision to exclude ***MNW*** from school for reason of keeping rastas on religious grounds is not only discriminatory but also violates her right to religion and education. She does not keep the rastas out of choice but due to her strongly held religious beliefs. Her right to education cannot, therefore, depend on violating her right to manifest those religious beliefs. The Respondents are also acting in violation of the Constitution by not only excluding her from school but also forcing her to act in a manner that is contrary to her religion, beliefs and practices.

47. This holding is buttressed by persuasive foreign but important decisions on the issue. in ***re chikweche*** (supra), Chikweche, a

citizen of Zimbabwe and a devout follower of the Rastafari movement, applied for registration as a legal practitioner in terms of the Legal Practitioners Act, 15 of 1981 of Zimbabwe, but despite possessing the necessary qualifications required by the appropriate regulations and satisfying the additional requirements laid down in the Act, the Judge declined to hear his application when he appeared wearing dreadlocks. The Judge considered him 'unkempt' and improperly 'dressed' and did not allow him to take the oath of loyalty and of office in terms of s 63 of the Act, as a preliminary to registration. Chikweche filed a reference in the Supreme Court under s 24(2) of the Constitution of Zimbabwe, arguing that wearing of dreadlocks was a symbolic expression of his religious outlook inspired by Rastafarianism.

48. The Supreme Court allowed the reference and held, ***inter alia,*** that the reference in s 19(1) of the Constitution to freedom of conscience was intended to encompass and protect systems of belief which were not centred on a deity or were not religiously motivated, but were founded on personal morality. Gubbay CJ, stated;

'It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.'… It is obvious to me that the refusal by the learned Judge to entertain the application placed the applicant in a dilemma. Its effect was to force him to choose between adhering to the precepts of his religion and thereby foregoing the right to practise his profession and appear before the courts of this country, or sacrifice an important edict of his religion in order to achieve that end."

49. In ***DZvova v Minister of education, Sports and Culture and Others*** (2007) A4RLR 189(SWSC 2007), a minor of Rastafarian faith was excluded from school for keeping dreadlocks. The matter was first filed at the High Court but was referred to the Supreme Court of Zimbabwe for determination of constitutional issues. The Supreme Court held that Rastafarian was not only a religion, but also that expulsion of the minor from school on the basis of her expression of his religious belief through his dreadlocks was a contravention of sections 19 and 23 of the Constitution of Zimbabwe. The Court observed that the attempt by the school to bar the child from school contravened not only the Constitution, but also the provision of the Education Act.

50. And in ***Department of Correctional Services and Another v Police and Prison Civil Rights Union (POPC2V) and others*** [2013] ZASCA 40, the Supreme Court of Appeal upheld the decision of the Employment and Labour Relation Court that dismissal from employment of officers who wore dreadlocks based on their religious or cultural beliefs was discriminatory and unconstitutional. The Supreme Court of Appeal stated;

"[22] Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound. That impact here was devastating because the respondents' refusal to yield to an instruction at odds with their sincerely held beliefs cost them their employment."

51. Applying the jurisprudence emerging from the above persuasive decisions to the present case, it is plain that where the Constitution guarantees the right to religion, the constitutional guarantee includes the right to manifest that religion. It is, therefore, an invasion of that right when one is forced to act contrary to his beliefs.

52. The fact that ***MNW*** keeps rastas as a manifestation of her religious beliefs should not have been the basis for excluding her from school. The school's decision to force her to shave the hair effectively punished the practice of her religion, degraded and devalued her and the other followers of that religion in the eyes of other members of society. The ultimate result was to force her to choose between adhering to her religious edicts thereby foregoing education, or sacrifice an important aspect of her religion in order to pursue education. This is a clear violation of the constitution and the law both of which guarantee her right to compulsory basic education as none of the rights can give way.

53. In that regard, school rules and regulations, (including rule7), though necessary for proper governing the conduct and discipline of students, must not be applied in a manner that infringes on rights guaranteed by the Constitution. School rules and regulations are intended to 'regulate and guide students' conduct and discipline for their well-being and proper management of the school but not to punish them. They should not therefore undermine substantive constitutional rights and being subordinate to the Constitution, they should not be applied so as to overrides constitutional provisions. Rather, they should augment those provisions. The fact that rule 7 does not allow keeping of dreadlocks, is not to say ***MNW*** must give up her religious beliefs and do away with rastas given

that shaving hair is against her religious beliefs.

54. The Respondents argued that rights under Article 32 are not absolute and that the right to manifest religious beliefs can be limited by school rules. I do not agree that rights under Article 32 may be limited given the way the Article is couched. Even if they were to be limited, the limitation must be one contemplated by the Constitution. That is why Article 19 is clear that rights and fundamental freedoms in the Bill of Rights belong to each individual, are not granted by the State and are subject only to the limitations contemplated in the Constitution.

55. In that respect, I do not think the Constitution contemplates that school rules should force ***MNW*** to act contrary to her religious beliefs. There must be a balance between school rules and rights and fundamental freedoms. Where genuinely held religious beliefs clash with school rules, both sides must strike a balance between religion and education for the good of the learner and the institution. School rules must appreciate genuinely held religious beliefs and should not be applied as though they are superior to the text of the Constitution. They should not be a bar to full realization and enjoyment of rights and fundamental freedoms guaranteed by the Constitution.

56. As the Court of Appeal observed in ***Seventh Day Adventist church v Minister for Education*** (Supra);

"[F]reedom of religion is a complex issue and requires delicate balance since it protects the rights to freedom of conscience both of believers and non-believers and those whose religious beliefs differ from the beliefs which are being observed in schools or by the majority. In other words a fair balance must be struck…, between the rights of the individual and the rights of others, between the right to believe and manifest a religion and the right to education…"

57. The court then stated;

"The right to freedom of conscience, religion, thought, beliefs and opinion…in its various facets is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others, privately or in public. The manifestation through observance includes observance of a day of worship, and a believer will not be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

58. For ***MNW,*** keeping rastas is not a matter of choice. It is about her religion and manifestation of what she genuinely believes to be aspects of that religion which she must not be forced to compromise. The limitation that Article 24(1) contemplates is to the extent only that it is reasonable and justifiable in an open and democratic society. The limitation should however take into the account the nature of the right so that enjoyment of one's right is not prejudicial to the rights of others. Most importantly, limitation is acceptable if there is no less restrictive means of achieving the intended limitation.

59. Looking at the totality of ***MNW's*** case, I am not persuaded that the rule demanding that she cuts her hair which manifests her religious beliefs is a reasonable limitation. It is intrusive and invasive of her right to religion and to manifest that religion. It is therefore not justifiable in an open and democratic society based on human dignity, equality and freedom. The Respondents have not shown that there is no less restrictive means to achieve the intended limitation other that coercing her to cut her hair. The Respondent's argument cannot therefore pass the test in Article 24. It is not tenable in our constitutional scheme and its expanded Bill of Rights. It plainly violates the right to religion and to manifest that religion and the right to education guaranteed under Articles 32, 43(1)(f) and 53(1)(b) of the Constitution respectively as well as section 28(1) of the Basic Education Act.

60. In the end, therefore, having considered the petition, submissions, the Constitution and the law, as well as both local and foreign decisions, I am satisfied that the Petitioner has made out a case that the Respondents' decision to exclude the minor from school for keeping rastas which symbolize her religious beliefs and the attempt to force her to act contrary to her religious beliefs, is a violation of her constitutional rights to religion and education guaranteed by the Constitution and is therefore null and void.

61. Consequently, the petition amended on 29th January 2019 is allowed and I make the following orders.

a. A declaration is hereby issued that the decision by the School administration of O High School to exclude MNW from school on the basis of her keeping Rastas which manifests her religious beliefs is a violation of her rights guaranteed under Articles 32,

43 and 53 of the constitution and is therefore unconstitutional null and void.

b. ***An order is hereby issued directing the School administration of O High School to immediately recall MNW to resume and continue with her education unhindered.***

c. A permanent injunction is hereby issued restraining the School administration of O High School from negatively interfering with MNW's education based on her religious beliefs, particularly for keeping rastas.

d. The Respondents do pay costs of this Petition.

Dated, Signed and Delivered at Nairobi this 13th Day of September 2019.

E C MWITA

JUDGE

INTRODUCTION

On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly. It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. By the tenth anniversary of the Convention in 1989, almost one hundred nations have agreed to be bound by its provisions.

The Convention was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and to promote women's rights. The Commission's work has been instrumental in bringing to light all the areas in which women are denied equality with men. These efforts for the advancement of women have resulted in several declarations and conventions, of which the Convention on the Elimination of All Forms of Discrimination against Women is the central and most comprehensive document.

Among the international human rights treaties, the Convention takes an important place in bringing the female half of humanity into the focus of human rights concerns. The spirit of the Convention is rooted in the goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity,v and worth of the human person, in the equal rights of men and women. The present document spells out the meaning of equality and how it can be achieved. In so doing, the Convention establishes not only an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights.

In its preamble, the Convention explicitly acknowledges that "extensive discrimination against women continues to exist", and emphasizes that such discrimination "violates the principles of equality of rights and respect for human dignity". As defined in article 1, discrimination is understood as "any distinction, exclusion or restriction made o.1 the basis of sex...in the political, economic, social, cultural, civil or any other field". The Convention gives positive affirmation to the principle of equality by requiring States parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men"(article 3).

The agenda for equality is specified in fourteen subsequent articles. In its approach, the Convention covers three dimensions of the situation of women. Civil rights and the legal status of women are dealt with in great detail. In addition, and unlike other human rights treaties, the Convention is also concerned with the dimension of human reproduction as well as with the impact of cultural factors on gender relations.

The legal status of women receives the broadest attention. Concern over the basic rights of political participation has not diminished since the adoption of the Convention on the Political Rights of Women in 1952. Its provisions, therefore, are restated in article 7 of the present document, whereby women are guaranteed the rights to vote, to hold public office and to exercise public functions. This includes equal rights for women to represent their countries at the international level (article 8). The Convention on the Nationality of Married Women - adopted in 1957 - is integrated under article 9 providing for the statehood of women, irrespective of their marital status. The Convention, thereby, draws attention to the fact that often women's legal status has been linked to marriage, making them dependent on their husband's nationality rather than individuals in their own right. Articles 10, 11 and 13, respectively, affirm women's rights to non-discrimination in education, employment and economic and social activities. These demands are given special emphasis with regard to the situation of rural women, whose particular struggles and vital economic contributions, as noted in article 14, warrant more attention in policy planning. Article 15 asserts the full equality of women in civil and business matters, demanding that all instruments directed at restricting women's legal capacity "shall be deemed null and void". Finally, in article 16, the Convention returns to the issue of marriage and family relations, asserting the equal rights and obligations of women and men with regard to choice of spouse, parenthood, personal rights and command over property.

Aside from civil rights issues, the Convention also devotes major attention to a most vital concern of women, namely their reproductive rights. The preamble sets the tone by stating that "the role of women in procreation should not be a basis for discrimination". The link between discrimination and women's reproductive role is a matter of recurrent concern in the Convention. For example, it advocates, in article 5, "a proper understanding of maternity as a social function", demanding fully shared responsibility for child-rearing by both sexes. Accordingly, provisions for maternity protection and child-care are proclaimed as essential rights and are incorporated into all areas of the Convention, whether dealing with employment, family law, health core or education. Society's obligation extends to offering social services, especially child-care facilities, that allow individuals to combine family responsibilities with work and participation in public life. Special measures for maternity protection are recommended and "shall not be considered discriminatory". (article 4). "The Convention also affirms women's right to reproductive choice. Notably, it is the only human rights treaty to mention family planning. States parties are obliged to include advice on family planning in the education process (article l O.h) and to develop family codes that guarantee women's rights "to decide freely and responsibly on the number and spacing of their children and to hove access to the information, education and means to enable them to exercise these rights" (article 16.e).

The third general thrust of the Convention aims at enlarging our understanding of the concept of human rights, as it gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental rights. These forces take shape in stereotypes, customs and norms which give rise to the multitude of legal, political and economic constraints on the advancement of women. Noting this interrelationship, the preamble of the Convention stresses "that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women". States parties are therefore obliged to work towards the modification of social and cultural patterns of individual conduct in order to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" (article 5). And Article 1O.c. mandates the revision of textbooks, school programmes and teaching methods with a view to eliminating stereotyped concepts in the field of education. Finally, cultural patterns which define the public realm as a man's world and the domestic sphere as women's domain are strongly targeted in all of the Convention's provisions that affirm the equal responsibilities of both sexes in family life and their equal rights with regard to education and employment. Altogether, the Convention provides a comprehensive framework for challenging the various forces that have created and sustained discrimination based upon sex.

The implementation of the Convention is monitored by the Committee on the Elimination of Discrimination against Women (CEDAW). The Committee's mandate and the administration of the treaty are defined in the Articles 17 to 30 of the Convention. The Committee is composed of 23 experts nominated by their Governments and elected by the States parties as individuals "of high moral standing and competence in the field covered by the Convention".

At least every four years, the States parties are expected to submit a national report to the Committee, indicating the measures they have adopted to give effect to the provisions of the Convention. During its annual session, the Committee members discuss these reports with the Government representatives and explore with them areas for further action by the specific country. The Committee also makes general recommendations to the States parties on matters concerning the elimination of discrimination against women.

The full text of the Convention is set out herein

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The States Parties to the present Convention,

> Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article I

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure the full development and advancement of women , for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particulary those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same Opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women

play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons

elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned;

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 19

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

Article 20

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. (amendment, status of ratification)

Article 21

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of

the Committee together with comments, if any, from States Parties.

2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Article 25

1. The present Convention shall be open for signature by all States.

2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.

3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28