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Editor-in-Chief: - Prof. (Dr.) Aryendu Dwivedi

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75 Important Judgments of Supreme Court: Celebrating 75 Years of India's Supreme Court

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Compiled by: Prof. Prakash G & Mr. Vijay Kumar Shukla¹

1. Interpretation of Fundamental rights, basic structure

In *I.C. Golaknath v. State of Punjab* (1967), the court held that fundamental rights could not be abridged or taken away by an amendment under Article 368 of the Constitution. This overruled two judgments in *Sri Sankari Prasad Deo v. UOI & State of Bihar* (1951) and *Sajjan Singh v. State of Rajasthan* (1965) which had held that the power of the Parliament to amend the Constitution is absolute and unfettered and extend to amending Part III.

In *Sankari Prasad*, the Court had also held that 'law' in Article 13(2) did not include the amendments to the Constitution because they were in the exercise of constituent powers and therefore the constitutional amendments could not be held to be violative of Part III. This was reiterated in *Sajjan Singh*. However, in *Golaknath* the Court held that 'law' under Article 13 included amendment under Article 368. Soon after *Golaknath*, the 24th Constitution Amendment added Article 13(4) which stated that nothing in Article 13 shall apply to any amendment made under Article 368.

This was settled in *Keshavananda Bharti v. State of Kerala* (1973) in which the Supreme Court 13-judge bench held by 7-6 that the Constitution can be amended but its basic features, including Part III, must survive. It overruled *Golaknath* in terms of stating that constitutional amendment is not law within Article 13(2).

2. Application of basic structure- judicial review, independence of judiciary, power of amendment

The basic structure doctrine is said to evolve from case-to-case basis. For instance, in *Indira Nehru Gandhi v. Raj Narain* (1975), the Court held that the amendment made to Article 329A through sub-clauses (4) and (5) through the 39th Constitution Amendment which sought to place the election of the President, the Vice President, the Prime Minister and the Speaker of the Lok Sabha beyond judicial review was held to be unconstitutional. It held that judicial review is the basic feature of the Constitution.

¹ The authors are associated with the journal in capacity of the members of Editorial and Advisory Board. The paper has undergone peer review process with independent members of the Board, as such there is no conflict of interest.

Another case where the Court reiterated judicial review as a basic feature of the Constitution was I.R. Coelho v. State of Tamil Nadu & Ors (2007). In this, the Supreme Court held that it is not permissible for the Parliament to immunize legislations from fundamental rights by inserting them into the 9th Schedule and thereof, from the judicial review of the court.

In Minerva Mills & Ors v. UOI (1980), the Constitution validity of the 42nd Amendment, 1976 was challenged for excluding judicial review for constitutional amendments. This was held to be violative of

the basic structure. It was stated that the power of amendment under Article 368 is not unfettered and is limited by basic structure.

In 2015, in *Supreme Court Advocates on Record Association & Ors v. UOI*, the Supreme Court declared the National Judicial Commission (NJAC) unconstitutional for violating the Basic Structure of the Constitution of India. Through this, they declared the 99th Amendment and NJAC Act unconstitutional while Justice Chelameswar upheld it. Through the 99th Constitutional Amendment, Article 124A was added.

The NJAC was introduced to replace the Collegium System through which judges are appointed under Articles 124 (Supreme Court) and 217 (High Courts) respectively.

Article 124A(1) provided for the constitution and the composition of the NJAC. It was composed of the following: (a) the Chief Justice of India, Chairperson, ex officio; (b) two other senior Judges of the Supreme Court, next to the Chief Justice of India – Members, ex officio; (c) the Union Minister in charge of Law and Justice – Member, ex officio; (d) two eminent persons, to be nominated – Members.

The majority judgment led by Justice JS Khehar observed: “I have independently arrived at the conclusion, that clause (c) of Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC. Clause (c) of Article 124A(1), in my view, impinges upon the principles of "independence of the judiciary", as well as, "separation of powers". It has also been concluded by me, that clause (d) of Article 124A(1) which provides for the inclusion of two "eminent persons" as Members of the NJAC is ultra vires the provisions of the Constitution, for a variety of reasons. The same has also been held as violative of the "basic structure" of the Constitution.”

In *S.P. Gupta vs Union Of India & Anr* (1981) (first judges case), the Supreme Court held that the word 'consultation' under Article 217 did not mean 'concurrence'. If it amounted to concurrence, then it would mean that the CJI opinion must prevail over the Chief Justice of the High Court and the Governor of the State meaning that the Central Government would be bound to accept it. It held that the President is the final authority in the appointment.

Although the court upheld the independence of the judiciary, it rejected the argument that because the power of appointment vests with the executive it impairs the independence of the judiciary.

This was overruled in *Supreme Court Advocates-On-Record ... vs Union Of India* (1993) (second-judges case), which is known to have introduced the present collegium system. The Court stated that 'consultation' means 'concurrence' and upheld the primacy of the final opinion of the CJI in the appointment of judges. It was laid down that the opinion of the CJI in the process of consultation for appointment to the superior courts must be formed “in consultation with two of his seniormost colleagues. Apart from that the Chief Justice of India must also consult the seniormost judge who comes from the same state (the State from where the candidate is being considered). This process of consultation shall also be followed while transferring any judge/CJI from one State to another.”

It also held that the basis for selection of appointment should not be on seniority. It should be based on merit alone. Through a Presidential Reference, the third-judge case, *In The Supreme Court of India (In Re: Appointment & Transfer of Judges) (1998)* (third judges case), the second-judges can be unanimously affirmed while holding that the CJI must consult four senior-most judges. The sole opinion of the CJI does not constitute 'consultation'

It added that the opinion must be in writing, the same goes for the CJ of the High Courts, and the opinion of all judges must be transmitted.

3. Reasonable classification, rule of law, the doctrine of arbitrariness to manifestly arbitrary

Classification test

In *The State Of West Bengal vs Anwar All Sarkarhabib Mohamed (1952)*, the West Bengal Special Courts Act, 1950 was challenged as violative of Article 14. The Act provided for speedier trial for certain offences and it laid down the procedure for trial which was different in several respects from that laid down in the Code of Criminal Procedure.

The Court held that Section 5 of the Act contravened Article 14 as it did not lay down any basis for 'classification' which may be directed to be tried by the Special Court. It was left to the uncontrolled discretion of the State Government to direct any cases to be tried by the Special Court.

In this case, the court laid down the test for Article 14 (like should be treated like). The court stated that Article 14 does not take away from the State the power to classify persons for the purpose of legislation, but the classification must be 'rational' and to satisfy the test of rationality: the classification must be found on an intelligible differentia (1) and that differentia must have a rational relation to the object sought to be achieved by the Act (2).

In *E. P. Royappa vs State Of Tamil Nadu & Anr (1973)*, the Court stated that equality is antithetical to arbitrariness and evolved the doctrine of arbitrariness. It said: "In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

4. Rule of law

In *Tehseen S. Poonawalla v. UOI (2018)*, the Supreme Court held that "lynching is an affront to the rule of law and the exalted values of the Constitution. We may say without any fear of contradiction that lynching by unruly mobs and barbaric violence arising out of incitement and instigation cannot be allowed to become the order of the day. Such vigilantism, be it for whatever purpose or borne out of

whatever cause, has the effect of undermining the legal and formal institutions of the State and altering the constitutional order.”

The Court issued guidelines including extensive preventive, remedial, and punitive measures. The Court directed States to prepare a lynching/mob violence victim compensation scheme in light of Section 357A of the CrPC within a month from the judgment.

As per the guidelines, the state government shall designate a senior police officer, not below the rank of Superintendent of Police (SP), as a nodal officer who shall be assisted by one of the deputy superintendent of police (DSP) rank officers in taking measures to prevent incidents of mob violence and lynching. They must also constitute a special task force to procure intelligence reports about people who are likely to commit such crimes or who are involved in spreading hate speeches, provocative statements and fake news.

A similar interpretation of the rule of law and Article 14 was taken by the Supreme Court cancelling the remission granted to 11 convicts in the Bilkis Bano, sentenced to life imprisonment for multiple murders and gang rapes, including that of Bilkis Bano, during the 2002 communal riots in Gujarat. The court held that the principles of the rule of law encompass the principle of equal protection of law as enshrined in Article 14 of the Constitution. However, 'deprivation of liberty' of 11 convicts was justified as they had erroneously and contrary to law been set at liberty.

In this case, the Gujarat Government granted remission on approval of the Central Government to the 11 convicts on 'good behaviour after they completed 14 years of imprisonment'. The court held that the State of Gujarat was not the "appropriate government" to decide the issue of remission as the trial was held in the State of Maharashtra. Since the Gujarat Government was found to be incompetent, the remission orders were held to be invalid.

5. Manifest arbitrariness

In *Shayara Bano v UOI* (2018), the Supreme Court by 3:2 declared triple talaq as unconstitutional. The main issue before the Court was whether the Muslim Personal Law (Shariat) Application Act, 1937 (pre-constitutional legislation) was a 'personal law' or had transformed into statutory law, and if it was a personal law which was protected by Article 25, could it be tested on the touchstone of fundamental rights.

The inquiry was therefore also whether personal laws are precluded from being the “laws in force”. The majority concluded that it was a law made by the legislature before the Constitution was enforced and therefore, it would fall squarely within the expression of “laws in force” in Article 13(3)(b) and therefore would be hit by Article 13(1) if found inconsistent with Part III.

Further, the court held that the practice of triple talaq was not protected by Article 25(1) which protects 'essential religious practice'.

Justice R.F. Nariman propounded the doctrine of manifest arbitrariness and held that the same could be used for declaring legislation including subordinate legislation unconstitutional. It explained that

although earlier cases struck down legislation on grounds of 'arbitrary' the test cannot be loosely applied. Therefore, it said, legislation is manifestly arbitrary when it is “not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism, or nepotism and not in pursuit of promotion of healthy competition and equitable treatment.”

Therefore, Justice Nariman held: “form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it.”

6. State under Article 12

A clear distinction between the test of classification and the doctrine of arbitrariness emerged from *Ajay Hasia v. Khalid Mujib Sehravardi* (1981), where the Court established a test to find out if an entity could be considered as the instrumentality or agency of the Government for Article 12 and therefore be subject to writ jurisdiction for violation of Part III.

Formal to substantive equality, intersectionality

7. Sex plus one

In *Air India etc v. Nergesh Meerza & Ors* (1981), the Air India Employees Service Regulations and Indian Airline Service Regulations were challenged for being discriminatory. As per the Regulations, the air hostesses had to retire from services on attaining the age of 35 years (unless discretionary retirement is extended to 45 years), based on marital status, or first pregnancy. These criteria did not apply to male counterparts. The court held the discretionary power to extend the service to be discriminatory. The provision on pregnancy was held to be unconstitutional for violating Article 14.

However, based on a comparison of the mode of recruitment, the classification, the promotional avenues and other matters, the Court held that air hostesses form an absolutely different category. In such cases, there cannot be an application of Article 14. It made a distinction between 'hostile discrimination' and 'reasonable classification' and held that only the latter is permitted under Article 14. Meaning hereby, that if equals and unequal are differently treated, there is no discrimination under Article 14. In cases where equals or persons similarly circumstanced are differently treated, the discrimination would attract Article 14 unless there is a 'reasonable basis' for the treatment.

Further, the court noted that Articles 15(1) and 16(2) prohibit discrimination only on 'one' ground. It does not prohibit the State from discriminating on the grounds of sex coupled with other considerations, which was the case here.

In *Githa Hariharan & Anr v. RBI* (1999), the petitioner challenged the validity of Section 6 of the Hindu Minority and Guardianship Act, 1956 as it considered the mother to be the natural guardian of the child 'after' the death of the father. In this, the mother had applied for relief bonds to the Reserve Bank of India to be held in the name of her son along with an intimation that she would act as a natural guardian for investments.

The application was sent back seeking the signature of the father or a certificate of guardianship to be produced in her favour. The court relying on international law jurisprudence on equality and anti-discrimination, the Universal Declaration of Human Rights and the Convention of All Forms of Discrimination Against Women (CEDAW) held that a mother's right to act as the guardian does not stand obliterated during the lifetime of the father and to read the same on the statute otherwise would tantamount to a violent departure from the legislative intent.

8. Sex-based stereotypes in employment

The evolution of the doctrine of substantive equality and anti-stereotyping as a part of Articles 14 and 15(1) began with *Anuj Garg v. Hotel Association of India* (2008), in which the Supreme Court held that the bar on women against serving alcohol was permitted on sex-based stereotypes which are constitutionally impermissible. In this, Section 30 of the Punjab Excise Act, 1914 was under challenge as it prohibited the employment of any man under the age of twenty-five years or any woman in any part of an establishment in which liquor or any other intoxicating drugs were consumed by the public.

The court held that although the law is pre-constitutional, its validity has to be tested in the cornerstone of Articles 14, 19, and 21. The Court stated that the legislation as those with “protective discrimination” aims and therefore strict scrutiny test should be employed while assessing its implications. Such legislation should be assessed not only on its 'proposed aims' but rather on the 'implications' and the 'effects'. It therefore held that the impugned legislation suffered from “incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at it outmoded in content and stifling in means.”

To consider whether Section 30 of the Act which led to legislative interference to the autonomy in employment opportunities is justified, it applied the two-pronged test which is (a) the legislative interference should be justified in principle and (b) the same should be proportionate in measure. This approach was inspired by the European Court of Human Rights.

Sexuality, self-determination and rights of non-heterosexual couples and LGBTQIA+

This interpretation in *Nergesh Meerza* which was termed as 'sex plus' was later found to be a “formalistic” interpretation of Article 15. In *Navej Singh Johar*, Justice Chandrachud stated that discrimination based on sex and another ground (sex plus) would very well fall within the purview of Article 15. Debunking the formalistic interpretation of Article 15, he opined: “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.”

In Navtej Singh Johar, the current Chief Justice of India held that 'sex' under Article 15(1) is inclusive of sexual orientation and therefore, any discrimination based on sexual orientation is prohibited. The court in this case decriminalised non-consensual sex between same-sex adults.

The court also recognised concepts like transformative constitutionalism and constitutional morality which protects the constitutional rights of even the minuscule population against the popular public opinion. This judgment was reaffirmed after 5 years in *Supriyo@Supriya v. UOI* (2023), however, it fell short of recognising non-heterosexual marriages. The court clarified that the question of marriage was not examined in Navtej Singh Johar and that marriage is not an unqualified or fundamental right. The Court clarified that Navtej Singh Johar recognised the right to be in a relationship which does not accrue any socio-economic consequential benefits.

The Supreme Court in *NALSA v. UOI* (2014) recognised transgender persons as third gender. In *NALSA*, the court affirmed the right of self-determination of identity and recognised the historical and multiple discrimination faced by the transgender community in India. It referred to the international jurisprudence especially the Yogyakarta Principles on international human rights standards to be applied to gender identity and sexual orientation and held that the State must progressively realise the rights of the community. It also sought reservations for transgender persons and declared them as socially and educationally backward classes (SEBC) of citizens. The court had issued extensive guidelines also for the socio-economic rehabilitation of transgender persons. Pursuant to this, the Transgender Persons (Protection of Rights) Act, 2019 was enacted.

9. Intersectional nature of gender-based violence

Intersectional gender-based violence discrimination was for the first time expressly recognised in 2021 in *Patan Jamal Vali v. State of Andhra Pradesh*, where a disabled woman belonging to the Scheduled Caste community was raped. The court recognised intersectional identities of a disabled woman from the Scheduled Caste community placed her in a uniquely disadvantageous position and affirmed the compounding effect of the multiple discrimination on sentencing the accused persons to life imprisonment.

10. Untouchability extends to gender-based exclusion

In *Indian Young Lawyers Association v. The State of Kerala* (2018) struck down Rule 3(b) of the Kerala Hindu Places of Public Worship Rules, 1965 allowed the exclusion of entry of women between the ages of 10-50 years in the Sabarimala Temple. While the court held that it violated Articles 14, 19, 21 and 25(1) (also held that a ban on entry was not an essential religious practice and did not fulfil the test of separate religious denomination), CJI stated that the practise constituted untouchability. He stated that gender-based exclusion which stigmatised women violated Article 17.

A reference was made to the Constituent Assembly Debates to show that Article 17 does not specify the meaning of untouchability and therefore, the same would be interpreted widely. However, Justice Indu

Malhotra, who gave a lone dissenting opinion, opposed the arguments of CJI and stated that Article 17 was limited to caste-based exclusion. Reference against this judgment is pending before 9-judge bench.

11. Women's rights and affirmative action

Women in command posts in Army

In 2020 in *The Secretary, Ministry of Defence v. Babita Puniya & Ors*, the Supreme Court paved the way for the women officers on the Short Service Commission to be considered for Permanent Commission in the Army regardless of their service. It held: “An absolute bar on women seeking criteria or common appointments would not comport with the guarantees of equality under Article 14. Implicit in the guarantee of equality is that where the action of the State does differentiate between two classes of persons, it does not differentiate them in an unreasonable or irrational manner.”

After this judgment, the Supreme Court in *Lt Col Nitisha & Ors v. UOI* (2021) noted that the evaluation deployed by the Army to implement its Babita Puniya judgment constituted 'systematic discrimination' against the women officers which is anathema to substantive equality.

In this, petitioners contended that the Army denied them Permanent Commission despite the court's ruling by applying an arbitrary threshold for medical fitness and by not considering their credentials beyond the 5th or 10th year of service. It held: “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”.

12. Right to reasonable accommodation in disability rights

In *Vikas Kumar v. Union Public Service Commission* (2021), the Supreme Court recognised the right to reasonable accommodation as a positive obligation of the State and private parties to provide additional support to persons with disabilities to facilitate their full and effective participation in society through the constitutional guarantees of equality and non-discrimination. It termed it as a substantive equality facilitator. The court, in this case, held that the judgment rendered that stipulating a limit of 50 percent disability in hearing impairment or visual impairment as a condition to be eligible for the post of a judicial officer is no longer a binding precedent after the Rights of Persons with Disabilities Act, 2016 was enforced.

13. Rape with 'child' wife amounts to rape

In a significant ruling in *Independent Thought v. UOI* (2017), the Supreme Court read down Exception 2 to Section 375 (rape) of the Indian Penal Code, which stated that sexual intercourse by a man with his own wife is not rape. The court added that sexual intercourse with a wife below 18 years will be rape and any distinction between 'child wife' and child is against the intent of social justice.

14. Abortion rights extend to marital rape

In *X v. Principal Secretary, Health and Family Welfare Department, Gov of NCT Delhi* (2020), the Supreme Court held that all women are entitled to the fundamental right to safe and legal abortion. It also stated that a wife who conceives out of forced sex by their husband will be protected within the ambit of 'survivors of sexual assault or rape or incest' under Rule 3B(a) (mentions the categories of women who can seek termination of pregnancy in terms of 20-24 weeks) of the Medical Termination of Pregnancy Rules. This essentially mentioned that the definition of 'rape' under the 1971 Act and Rules would include marital rape.

15. Reservation

In *State of Madras v. Champakam Dorairajan* (1951), the Supreme Court held that reservation of seats based on caste, religion, and race in State-aided or state-funded education institutions violated Article 29. This was overturned by inserting Article 15(4) through the Constitution (First Amendment) Act, 1951.

B Venkataramana v. The State of Tamil Nadu (1951) held that Article 16(4) permitted Harijans and the backward Hindus to be considered as 'backward classes' and any other representation would be discriminatory based on the ground of caste. Both these two judgments are known to have viewed reservation as an exception to the principle of equal opportunity in Articles 15(1) and 16(1).

In *Indra Sawhney v. UOI & Ors* (1993), the Supreme Court upheld 27 percent for Other Backward Classes in central government services. It recognised caste as an indicator of backwardness and that further sub-classification of backward classes is permissible. This judgment became the foundation for the Court holding that sub-classification within Scheduled Caste is permissible in *The State of Punjab & Ors v.*

Davinder Singh & Ors (2024) [21]. In *Indra Sawhney*, the Court proposed a 50 percent ceiling for reservation. But excluded 'creamy lawyer' (forward section of the backward class) from the reservation.

16. Reservation in promotion

Subsequent judgments deal with the issue of whether reservation in promotion was detrimental to efficiency. In *General Management, Southern Railway v. Rangachari* (1962), the majority held that although reservations in promotions are detrimental to efficiency, a substantive reading of Article 16(4) would allow that. It interpreted the phrase "matters relating to employment" under Article 16(1) to also

include promotion. This was overruled in *Indra Sawhney*. Subsequently, the Constitution (Seventy-seventh Amendment) Act, 1995 included clause 4A into Article 16, permitting reservation for the Scheduled Castes and the Scheduled Tribes in promotion.

17. Consequential seniority

In *UOI v. Virpal Singh Chauhan* (1995), the court was faced with the issue of whether a general candidate, who was promoted after the Scheduled Caste or Scheduled Tribe candidate, would regain his seniority over general candidates (catch-up rule). The court held that though the catch-up rule is not implicit in Article 16, it is a constitutionally valid practice to maintain efficiency. Through the Constitution (Eighty-fifth Amendment) Act, 2001, Article 16(4A) was amended to enable the State to provide reservation in promotion with consequential seniority.

18. Relaxation of qualifying marks

In *Indra Sawhney*, the court held that relaxation of qualifying marks in promotion would result in inefficiency of administration. This was specifically reiterated in *S Vinod Kumar v. UOI* (1996). However, a proviso to Article 335 by the Constitution (Eighty-second) Amendment Act, 2000 was introduced to overcome the judgments. It was held that lowering the standards of evaluation would not be inconsistent with the maintenance of efficiency.

19. Permissible percentage of reservation

While in *Indra Sawhney*, the court held that reservation cannot exceed 50 percent, the States were faced with the issue of whether unfilled seats of the reserved category could be carried forward to next year and whether it could be counted while calculating the total percentage of reservation seats in a given year (known as carry forward rule).

In *T. Devadasan v. UOI* (1964), the majority held that the carry forward rule would abrogate the equal opportunity principle and impair efficiency. However, Justice Subba Rao dissented. He argued that a harmonious reading of Articles 16, 46, and 335 is required. He held that “any provision” in Article 16(4) is wide enough to include the carry forward rule.

In *NM Thomas v. State of Kerala* (1976), the court finally took an expansive reading and stated that Article 16(4) cannot be treated as an exception to equality. Instead, it was “illustration of constitutionally sanctified classification”. In this case, Rule 13AA of the Kerala State and Subordinate Services Rules, 1958, which relaxed the qualifying criteria for candidates belonging to Scheduled Castes and Scheduled Tribes, was challenged.

By the Constitution (Eighty-first) Amendment Act, 2000, Article 16(4B) was introduced, which implemented the carry forward rule.

In 2022, the Supreme Court 3:2 majority upheld the validity of the 103rd Constitutional Amendment which introduced a 10% reservation for Economically Weaker Sections (EWS) in education and public employment by inserting clause (6) in both Articles 15 and 16. In *Janhit Abhiyan vs Union Of India*, it

held that reservation structured singularly on economic criteria does not violate the basic structure of the Constitution. The petitioners had relied on Indira Sawhney, stating that reservation cannot be given based on economic criteria.

However, the Court held that breach of 50% ceiling limit by EWS reservation does not violate basic structure.

25 judgments discussed in this part.

1. Keshavananda Bharti v. State of Kerala (1973)
2. Indira Nehru Gandhi v. Raj Narain (1975)
3. I.R. Coelho v. State of Tamil Nadu & Ors (2007)
4. Minerva Mills & Ors v. UOI (1980) [4]
5. Supreme Court Advocates on Record Association & Ors v. UOI
6. In The Supreme Court of India (In Re: Appointment & Transfer of Judges) (1998)
7. The State Of West Bengal vs Anwar All Sarkarhabib Mohamed (1952)
8. E. P. Royappa vs State Of Tamil Nadu & Anr (1973)
9. Tehseen S. Poonawalla v. UOI (2018)
10. Shayara Bano v UOI (2018)
11. Ajay Hasia v.Khalid Mujib Sehravardi (1981)
12. Air India etc v. Nergesh Meerza & Ors (1981)
13. Githa Hariharan & Anr v. RBI (1999)
14. Anuj Garg v. Hotel Association of India (2008)
15. Navtej Singh Johar v. UOI (2018)
16. Supriyo@Supriya v. UOI (2023)
17. NALSA v. UOI (2014)
18. Patan Jamal Vali v. State of Andhra Pradesh (2021)
19. Lt Col Nitisha & Ors v. UOI (2021)
20. Vikas Kumar v. Union Public Service Commission (2021)

21. Independent Thought v. UOI(2017)
22. X v. Principal Secretary, Health and Family Welfare Department, Gov of NCT Delhi (2020)
23. Indian Young Lawyers Association v. The State of Kerala (2018)
24. Indra Sawhney v. UOI & Ors (1993)
25. The State of Punjab & Ors v. Davinder Singh & Ors (2024)

Due process and interrelatedness of rights

Due process guarantees not included in Article 21

In 1950, in *A.K. Gopalan v The State of Madras*, the Supreme Court upheld the constitutional validity of the Prevention Detention Act, 1950, except for Section 14 which prescribed restrictions as to the disclosure of grounds of detention before the court. The judgment became a cause celebre for holding that Article 21's 'procedure established by law' does not include 'due process' guarantees and that Article 19 had no application in the case of prevention detention.

The court had held that 'law' in the expression procedure established by law meant the State-made law and did not embody the principles of natural justice in an abstract sense.

Fundamental rights as complete code theory

In this case, an argument was put forth by the then Attorney General of India that for the matters of prevention detention, Article 22 was a complete code. Therefore, it should not fall within the purview of Article 21. Although the court rejected the 'complete code' theory and held that Article 22 is supplemented by Article 21, in *R.C. Cooper v. UOI* (1970), the court erroneously assumed otherwise. It therefore went on to hold that the fundamental right guarantees delimit the protection of those rights in their allotted fields: they do not -attempt to enunciate distinct rights.

It held: “In our judgment, the assumption in *A. K. Gopalan's* case(1) that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals, in general, will be Ignored cannot be accepted as correct.”

Right to move the court for enforcement of fundamental rights during emergency

During this, the emergency was proclaimed in 1975 and through a Presidential Order, the right to move the court to challenge the enforcement of fundamental rights was suspended. In *A.D.M. Jabalpur v. Shivkant Shukla* (1976), some petitioners moved a writ of habeas corpus challenging detention orders under the Maintenance of Internal Security Act, 1971. However, through the majority, the Supreme Court held that Article 21 was the 'sole repository' of the right to life and personal liberty and any writ of habeas corpus for enforcement of Article 21 was barred by the Presidential Order.

However, the lone dissenter, Justice H.R. Khanna held that Article 21 was not the 'sole repository' of the right to life and personal liberty. It held: "Article 21 incorporates an essential aspect of that principle and makes it part of the fundamental rights guaranteed in Part III of the Constitution. It does not, however, follow from the above that if Article 21 had not been drafted and inserted in Part III, in that event it would have been permissible for the State to deprive a person of his life or liberty without the authority of law."

This minority opinion went on to become the majority opinion of Justice K.S. Puttaswamy v. UOI (2017) recognising the right to privacy as a fundamental right. In the 44th Amendment, 1978 it was stated that Articles 20 and 21 cannot be suspended during Emergency.

Procedure established by law under Article 21 cannot be arbitrary, Golden triangle

In *Maneka Gandhi, v., Union, of India* (1978), the judgment of A.K. Gopalan was revisited in terms of the due process requirement under Article 21. While deciding the issue of whether the right to go abroad was a part of the expression "personal liberty", the court answering in the affirmative also held that the 'procedure' under Article 21 has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. It held that Article 21 is of the widest amplitude.

This judgment is also significant for the interrelation between Articles 14, 19 and 21, which weave a "pattern of guarantees on the basic structure of human rights" and impose negative obligations on the State not to encroach on individual liberty in its various dimensions. The Court observed: "The law must, therefore, now be taken to be well settled that article 21 does not exclude article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by article 21, such law, in so far as it abridges or takes away any fundamental right under article 19 would have to meet the challenge of that article."

Through this, the interrelation between Articles 14, 19 and 21 was referred to as the 'Golden Triangle'.

Right to privacy

In *M.P. Sharma and Others v. Satish Chandra & Ors* (1954), and *Kharak Singh v. State of Uttar Pradesh* (1964) were some of the earlier judgments where the right to privacy as a part of Article 21 was either asserted or referred to. In all judgments, the court held that the right to privacy is not recognised as a

fundamental right. However, in *Govind v. State of Madhya Pradesh* (1975), the court explicitly recognised the right to privacy for the first time.

In *Kharak Singh's* judgment, particularly the minority judgment by Justice Subba Rao held that the word 'liberty' under Article 21 was comprehensive enough to include privacy. This minority opinion also became the majority opinion in *Puttaswamy's* judgment.

Interestingly, while the court in *Puttaswamy* judgment explored many contours of privacy such as dignity, autonomy, informational and data privacy, the right to be left alone etc, and how privacy as right shields many aspects of personal life including marriage, sexuality, procreation etc from the State's arbitrary interference, the Supreme Court in *R. Rajagopal v. State of Tamil Nadu* (1994) had held: “The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent— whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.”

R. Rajagopal was an interesting case because it also dealt with how the right to freedom of speech protected under Article 19(1)(a) is to be balanced with the right to privacy. In this case, the petitioners wanted to publish the autobiography of a prisoner convicted of committing murders. The publication was prevented by the State officials as it would reveal their connections with the prisoner. The court held that the publishers had the freedom to publish his autobiography even without his consent to the extent that the content was a part of the public domain. If the publishers go beyond that, they would be violating his right to privacy.

The *Puttaswamy* judgment also held that the right to privacy is not absolute. Any restriction on the right must meet three-fold requirements (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

Dignity, choice, livelihood and autonomy protected under Article 21

In *Bandhua Mukti Morcha v. UOI* (1983), the Supreme Court through Justice P.N Bhagwati admitted a letter by an organisation dedicated to the cause of bonded labourers. The letter raised concerns that a large number of labourers from different parts of the country were working in some stone quarries in Faridabad under “inhumane and intolerable conditions” and that the provisions of social welfare laws including the Minimum Wages Act, were not implemented properly for their benefit.

The court appointed a commission to inquire into allegations and found that most stone quarries engaged in forced labour and there was no facility for even providing pure water. The court extensively

interpreting the right to dignity said: “This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State government has the right to take any action which will deprive a person of the enjoyment of these essentials”.

The court also interpreted the jurisdiction under Article 32 and said that the constitutional drafters deliberately did not specify any particular form of proceedings for the enforcement of fundamental rights under Article 32 except that the provision uses 'appropriate' proceedings. This is because any rigid formula of proceedings for the enforcement of a fundamental right would be self-defeating as it would place enforcement of fundamental rights beyond the reach of the common man.

Therefore, the court said that any member of a public acting bona fide can move the court for enforcement of rights on behalf of a person, or class of persons who on account of poverty, disability or socially or economically disadvantaged position cannot approach the court for relief. Such members of the public can even approach the court by writing a letter.

In *Shakti Vahini v. UOI* (2018), the court the concept of choice and individual dignity is within the framework of liberty. The court was hearing a petition filed by NGO Shakti Vahini seeking directions for the Government to take preventive steps to combat honour killings. The court while laying down preventive measures reiterated that the right to choice of an individual is an inextricable part of dignity and when two adults marry out of their violation, they choose their path and consummate their relationship, which is constitutionally protected.

During this time, the court in *Shafin Jahan v. Asokan K.M. and Others* held that the right to marry a person of choice is protected under Articles 19 and 21. In this case, the Kerala High Court had entertained a habeas corpus petition to bring back 24 years Shafin to the custody of the after. She had married Ashokan. The Supreme Court overruled the high court's order and held that it committed an error.

In 2018, the Supreme Court announced another judgment decriminalising adultery. In *Joseph Shine v. UOI*, the Supreme Court held that Section 497 of the Indian Penal Code violated women's right to dignity of which autonomy is an intrinsic part. It punished a man having intercourse with another's wife. However, exempted from punishment if it was performed with the consent or connivance of the husband of the other woman.

The court held: “Any provision of law affecting individual dignity and equality of women invites the wrath of the Constitution. It's time to say that the husband is not the master of wife. Legal sovereignty of one sex over other sex is wrong”.

In the same year, the Supreme Court in *Shayara Bano v UOI*, held 'talaq-e-biddat' (triple talaq) as unconstitutional. One of the grounds considered by the court was that the practice of triple talaq was derogatory to the dignity of women apart from the fact that it denied equal rights to Muslim women.

Right to primary education

In *Unni Krishnan, J.P. And Ors. Etc. Etc vs State Of Andhra Pradesh And Ors* (1993), the Supreme Court interpreted Article 21 to include the right to free education up to the age of 14 years as a fundamental right. The Court reasoned that Article 21 is inclusive of human dignity and everything that goes along with it including the right to receive primary education. The 86th Constitutional Amendment Act, 2002 added Article 21(A), which states that the state must provide free and compulsory education to children between the ages of six and fourteen.

Doctrine of estoppel in fundamental rights enforcement

In *Olga Tellis & Ors vs Bombay Municipal Corporation & Ors* (1985), the Supreme Court recognised the right to life including the right to livelihood. The Court was hearing a petition filed under Article 32, whereby slum dwellers challenged the eviction and demolition of pavement dwellings and slum hutments by the State Authority. It was argued that the decision to demolish and evict them would amount to depriving them of their right to livelihood, which is comprehended in the right guaranteed by Article 21.

The Bombay Municipal Corporation contended that pavement dwellers had conceded in the High Court that they did not claim any fundamental right to put up huts on pavements or public roads and since they had given an undertaking to the High Court that they would not obstruct the demolition of the huts, they are estopped from contending in this Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, which is comprehended within the fundamental right to life guaranteed by Article 21 of the Constitution.

Rejecting any claim of estoppel against fundamental rights, the Court said that the principle can have no application to representations made regarding the assertion or enforcement of fundamental rights.

Right to die, passive euthanasia, and death penalty

Right to die

Another significant judgment was passed by the Supreme Court in 2018 in *Common Cause v UOI*, wherein the court allowed passive euthanasia for terminally ill patients and thereby recognised the right to die with dignity as a fundamental right. By recognising the right to die as a part of Article 21, the court overruled its own in *Gian Kaur v. The State of Punjab* (1996). The Court issued guidelines for the Living Will/Advance Medical Directive, which were later modified in 2023.

Constitutionality of death penalty

In *Jagmohan Singh v. The State of UP* (1973), the Supreme Court upheld the constitutionality of the death penalty by stating that it is not deprived of the procedure established by law just because the judge has the discretion to decide on the punishment. In 1979, in *Rajendra Prasad v. State of Uttar Pradesh*, the Supreme Court held that the requirement of 'special reasons' under CrPC to impose the death penalty must show what exceptional circumstance led to awarding death penalty. It also held that the discretionary powers to impose the death penalty must that it is a reasonable restriction under Article 19. However, in *Bachan Singh v. State of Punjab* (1980), the court rejected that Article 19 freedoms were violated due to the imposition of death penalty.

It held that the right to life is not a part of Article 19 and therefore, cannot be invoked to determine the constitutionality of the death penalty. As for Article 21, it held that the State had the right to deprive a person of his right to life through the procedure established by law which is laid down in law.

In *Mithu v. State of Punjab* (1983), the Constitution Bench of this Court struck down Section 303 of the Indian Penal Code, by which a mandatory sentence of death was imposed on life convicts who commit murder in jail.

Custodial torture, rights of prisoners, detenues and undertrials

In *Sunil Batra v. Delhi Administration* (1979), the Supreme Court delivered a landmark judgment against custodial torture and wrote down guidelines that must be followed in such cases. It stated that the fundamental rights of prisoners do not feel when a person enters prison, it may suffer shrinkage necessitated incarceration. It held that the rights of the prisoners are protected through the writ jurisdiction of the courts under Articles 226 and 32 and the right to life includes a right to live with human dignity which is not just mere sustenance.

In *Hussainara Khatoon & Ors v. Home Secretary, State of Bihar* (1980), the court hearing the plea of undertrial prisoners held that the procedure to deprive life or liberty under Article must be reasonable, fair and just' and an 'inalienable' element of this is the free legal aid to poor and needy. It held that every accused person has a constitutional right to engage a lawyer and secure legal services and the state is under a mandate to provide him legal aid under Article 39A.

Thereafter, in *Francis Coralie Mullin v. The Administrator* (1981), the court made a distinction between prevention detention and punitive detention. The court held that prevention detention is a drastic power but the Indian Constitution recognises it to the extent that the safeguards should be followed not only as laid down in Article 22 but also in Article 21, which as per *Menaka Gandhi's* judgment should be 'reasonable, fair and just'. It also held that any form of torture or cruel, inhuman, or degrading treatment would be offensive to human dignity and constitute inroad into the right to life.

In *Nilabati Bahera Alias Lalit Behera v. State of Orissa* (1993), the court reiterated that prisoners, undertrials and detenus have an indefeasible right under Article 21 and restrictions imposed by law can be permitted. In this case, a mother addressed a letter to the court allegedly custodial death of his son whose body was found on a railway track after police took him in connection with an investigation

related to the offence of theft. The court ordered an inquiry and it was established that the son died due to custodial torture.

Treating the letter as a writ petition, the court held that under Article 32 or 226, it would mould a relief by granting compensation in such proceedings because under the public law, penalising the wrongdoer and fixing liability for the public wrongdoer the state which failed to protect fundamental rights is duly recognised remedy.

Based on these judgments, in the Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. UOI (1994), the court held that undertrial prisoners including foreigners cannot be indefinitely detained pending trial and shall be entitled to bail because Article 21 includes the right to speedy trial. It issued directives in connection with undertrials under the Narcotic Drugs and Psychotropic Substances Act, 1985 such as those in jail for an offence with 5 years of imprisonment, they shall be released on bail if they have spent half of the sentence.

Prolonged incarceration, bail and right to speedy trial

Years later, the Supreme Court Legal Aid Committee Representing Undertrial Prisoners became for the Supreme Court in Union of India v. K.A. Najeeb (2021) to hold that the stringent Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 does not oust the ability of constitutional courts to grant bail on account of prolonged incarceration and violation of fundamental rights to speedy trial. Post Kartar Singh, TADA was repealed and replaced by the Prevention of Terrorism Act, which was also repealed. Only UAPA survived.

In Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari v. State of Uttar Pradesh (2024), the Court held that it is wrong to say that bail in special laws such as UAPA cannot be granted and reiterated that 'bail is the rule, jail an exception' in special laws which have stringent twin-bail conditions.

Extrajudicial killings, illegal arrests and safeguards under Article 22

Further, the court widened the scope of Article 21 to also include cases of extrajudicial killings, i.e. encounter killings. In Joginder Kumar v. State of U.P (1994), a petition was detained for five days by the police and his whereabouts were unknown. His brother filed a habeas corpus petition apprehending that the brother was shot dead in a fake encounter.

The court issued brief guidelines on arrest such as a person arrested and held in custody must be able to inform his friend, relative or anyone of his arrest and the police officer is obligated to inform the arrested person of his right. An entry shall be made in the police diary as to who was informed of the arrest. And the magistrate, before whom the arrested person is produced, to satisfy that these requirements are complied with. These protections follow from Articles 21 and 22(1).

The guidelines on arrest and detention were further expanded D.K. Basu v. State of West Bengal (1996). This pertained to the extrajudicial torture in police lock-ups and custody. In this case, the executive

chairman of Legal Aid Services, West Bengal, addressed a letter to the then Chief Justice of India highlighting various news items regarding deaths due to extrajudicial torture. The letter stressed the issue needs to be examined and the court needs to formulate guidelines for awarding compensation to the victim or the families.

The letter along with the news items was treated as a writ petition under 'public interest litigation' the genesis of which goes to another significant judgment of the Supreme Court in *Mumbai Kamgar Sabha, Bombay v. M/S Abdulbhai Faizullabhai & Ors* (1976). In *Mumbai Kamgar Sabha*, the court through Justice Krishna Iyer laid down the foundation for PILs under Article 226 or 32 of the Constitution while dealing with a case where customary bonuses were denied to the workmen on grounds that it did not fall within the four corners of Payment of Bonus Act, 1965.

The locus standi of the petition was challenged on the grounds that it was an industrial dispute. Rejecting this, the court said: “Even Art. 226, viewed in wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, backed by precedents, has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law.”

In *D.K. Basu*, the Supreme Court held that custodial torture is a naked violation of human dignity. It is a calculated assault on human dignity. The expression right to life and personal liberty has been held to include the right to live with human dignity and includes within itself a guarantee against torture and assault by the State and its functionaries.

The court's guidelines included that the arrestee may be permitted to meet his lawyer during interrogation. He should be subjected to a medical examination by a trained doctor every 48 days during detention. The time, place of arrest and venue of custody of the arrestee must be notified by the police to the next friend or relative etc.

Based on this jurisprudence, in 2014, the Supreme Court in *Arnesh Kumar v. State of Bihar* further elaborated the guidelines to prevent unnecessary arrest and casual and mechanical detention. These guidelines were issued in the context of Section 498A of the IPC.

While all these guidelines were issued in a respective context, the Supreme Court's decision in *Lalita Kumari v. Government of UP* (2013) lays down general guidelines on mandatory registration of First Information Report if the commission of offence discloses cognisable offence. In such a case, no preliminary inquiry is to be conducted.

Further, the Court has recently elaborated the mandate of Articles 21 and 22 by stating that the grounds of arrest must be furnished in writing to the accused person. In *Pankaj Bansal v. UOI* (2023), the Court had held that merely reading out the grounds of arrest will not fulfil the mandate of Article 22(1) of the Constitution and Section 19(1) of the Prevention of Money Laundering Act which talks about the power

to arrest. This reasoning was extended to UAPA cases through the judgment in *Prabir Purkayastha v. State* (2024) where the arrest and remand of NewsClick founder and Editor-in-Chief Prabir Purkayastha was declared illegal.

List of judgments mentioned in this part :

26. Justice K.S. Puttaswamy v. UOI (2017)
27. Maneka Gandhi, v., Union, of India (1978)
28. Bandhua Mukti Morcha v. UOI (1983)
29. Shakti Vahini v. UOI (2018)
30. Shafin Jahan v. Asokan K.M. and Others (2018)
31. Joseph Shine v. UOI (2018)
32. Unni Krishnan, J.P. And Ors. Etc. Etc vs State Of Andhra Pradesh And Ors (1993)
33. Olga Tellis & Ors vs Bombay Municipal Corporation & Ors (1985)
34. Common Cause v UOI
35. Bachan Singh v. State of Punjab (1980)
36. Mithu v. State of Punjab (1983)
37. Sunil Batra v. Delhi Administration (1979)
38. Hussainara Khatoon & Ors v. Home Secretary, State of Bihar (1980)
39. Francis Coralie Mullin v. The Administrator (1981)
40. Nilabati Bahera Alias Lalit Behera v. State of Orissa (1993)
41. Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. UOI (1994)
42. Union of India v. K.A. Najeeb (2021)
43. Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari v. State of Uttar Pradesh (2024)
44. Joginder Kumar v. State of U.P (1994)
45. D.K. Basu v. State of West Bengal (1996)
46. Mumbai Kamgar Sabha, Bombay v. M/S Abdulbhai Faizullabhai & Ors (1976).
47. Arnesh Kumar v. State of Bihar

48. Lalita Kumari v. Government of UP(2013)

49. Pankaj Bansal v. UOI (2023)

50. Prabir Purkayastha v. State (2024)

Freedom of propagation of ideas and freedom of circulation and narrow interpretation of restrictions on free speech

Romesh Thappar v. The State of Madras (1950) was one of the first judgments of the Supreme Court holding that Article 19(1)(a) includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. In this case, Romesh Thappar filed a petition challenging the validity of Section 9(1A) of the Madras Maintenance of Public Order Act, 1949 under which entry and circulation of his weekly journal in English, Cross Road was banned on grounds of “securing the public safety and the maintenance of public order” as being void under Article 13(1) for being inconsistent with his fundamental rights. The court stated that the order would be unconstitutional unless it is saved by restrictions under Article 19(2) which included a law that would 'undermine the security of, or tends to overthrow, the State'.

In 1950, Article 19(2) read: “(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.”

The court accepting the arguments of Thappar observed that 'very narrow and stringent limits' have been set to permissible legislative abridgment of the right to free speech and expression because the 'freedom of speech and the press lay at the foundation of all democratic organisation'. It held that 9(1A) may have intended to impose restrictions conceived for the wider pursuit of security public safety or maintenance of public order but it does not fall within the narrow restrictions of Article 19(2) and therefore, is unconstitutional. On the same day, another landmark judgment on free speech was pronounced in Brij Bhushan & Anr v. The State of Delhi (1950). In this, Section 7(1)(c) of the East Punjab Public Safety Act, 1949 allowed pre-censorship of newspapers to prevent activities prejudicial to public safety and preventing public disorder. However, the court held that these were not grounds relating to 'matters which undermined the security or tended to overthrow the State and therefore, unconstitutional.

'Reasonable' restrictions on free speech

Following the judgments in Romesh Thapar and Brij Bhushan, which narrowly interpreted restrictions on free speech, were diluted by bringing the First Amendment, 1951 broadening the scope of Article 19(2), which now reads as: “(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of

court, defamation or incitement to an offence” with retrospective effect. While grounds like 'public order', against which these judgments spoke had a wide connotation, the word 'reasonable' was also added to Article 19(2) as a safeguard. However, the term 'reasonable restriction' existed for Article 19(1)(g) (right to practise any profession, or to carry on any occupation, trade or business) in Article 19(6)."

In *Chintaman Rao v. The State of Madhya Pradesh* (1950), the court was hearing a writ of mandamus against the statute prohibiting all persons residing in the notified villages from engaging in the manufacture of bidis during the agricultural season. The court held that the total prohibition was outside the purview of Article 19(6) because it does not stand the test of 'reasonableness'. It stated that the phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be 'arbitrary' or of an 'excessive nature', beyond what is required in the interests of the public.

In *State of Madras v. V. G. Row* (1952) the question of the reasonableness of restrictions which could be posed upon a fundamental right was considered. This Court has pointed out that the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and scope of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing conditions at that time should all be taken into consideration.

The court had held this in the context of the fundamental right to form associations or unions guaranteed by art. 19 (1) (c) of the Constitution "has such a wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic field this, that the vesting of the authority in the executive Government to impose restrictions on such right, without allowing the grounds of such imposition, both in their factual and legal aspects to be duly tested in a judicial inquiry, is a strong element which should be taken into account in judging the reasonableness of restrictions imposed on the fundamental right under art. 19(1)(c)."

Proximate v. Tendency test to disrupt public order

To this date, expressions like 'public order' have not been able to find a concrete meaning. Some judgments tried to either restrict the meaning of public order or establish tests of what speech could be reasonably restricted. However, it was not very successful in light of the broad drafting of Article 19(2).

For instance, in *Ramji Lal Modi vs The State Of U.P* (1957) the court upheld the conviction of one Ramji Lal Modi for publishing an article in his magazine 'Guarakshak' and it found that the speech was an aggravated form of insult on the religion or religious belief of a class of citizens which was perpetrated with the deliberate and malicious intention of outraging the religious feelings. The petitioner had argued that his speech could only be interfered with if it likely caused public disorder and, with the connection to the disorder being 'proximate'.

Rejecting this standard, the court said that the 'calculated tendency' of the aggravated form of insult can disrupt public order and therefore well within the protection of Article 19(2). Moreover, it noted that Article 19(2) uses the expression 'in the interests of' which had the effect of making the protection afforded by that clause very wide and a law not directly designed to maintain public order would well be within its protection if such activities as it penalised had a tendency to cause public disorder.

Intersection between free speech and public order and chilling effect on free speech

The expression of 'public order' has widely intersected with the fundamental rights to protest and dissent, the right to the internet etc in modern times and continues to do so. For instance, Section 66A of the Information Technology, 2000, criminalised speech on the internet which is 'grossly offensive' or has a 'menacing character' or causes 'annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will' etc on the grounds of disturbing public order.

In *Shreya Singhal v. UOI* (2015) the court applied the American case of 'clear and present danger' or the test of 'calculated tendency' to disrupt public order and held that Section 66A has no element of any tendency to create public disorder. It further applied 'proximate connection' test and held that it has nothing to do with "incitement to an offence". In this, the court categorised speech under Article 19(1)(a) into three concepts: discussion, advocacy and incitement. It held that "mere discussion or even advocacy of a particular cause, however, unpopular, is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in."

The court held: "As Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters under Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved under Article 19(2), is declared as unconstitutional."

The court held that Section 66A was cast so widely that virtually any opinion on any subject could come within its purview and thereby its overreach sent chilling effects on free speech.

The Supreme Court in *Dr. Ram Manohar Lohia v. State of Bihar & Ors* (1965) tried to explain the difference between 'law and order', 'public order' and 'security of state'. The court said: "One has to imagine three concentric circles, the largest representing "law and order", the next representing "public order" and the smallest representing "security of state". An act may affect "law and order" but not "public order," and just as an act may affect "public order" but not "security of the State"."

Right to freedom of press

In *Express Newspapers (Private) Ltd., v. The Union of India* (1958), the Supreme Court observed that while there is no immunity to the press from the operation of the general laws it would not be legitimate to subject the press to laws which take away or abridge the freedom of speech and expression. Or adopt measures calculated and intended to curtail circulation and thereby narrow the scope of dissemination of information, or fetter its freedom to choose its means of exercising the right or would undermine its independence by driving it to seek Government aid.

The right to freedom of the press was first stated in *Sakal Papers (P) Ltd. versus Union of India* (1961) where the constitutionality of the Newspaper (Price and Page) Act, 1956 was challenged for violating freedom of press and circulation by restricting the pages and sizes of newspaper and regulating the allocation of space for advertising matter. Under the 1956 Act, the Central Government made the Daily Newspapers (Price and Page) Order, 1960, thereby fixing the maximum number of pages that might be Published by a newspaper according to the price charged and prescribing the number of supplements that could be issued.

The court held that it violated Art. 19(1) (a) of the Constitution and was not saved by Art. 19(2). It held that the right to propagate one's ideas is inherent in the conception of freedom of speech and expression. For propagating ideas, a citizen has the right to publish them, to disseminate them and to circulate them, either by word of mouth or by writing. The right extended not merely to the matter which he was entitled to circulate but also to the volume of circulation.

The court laid down the test that when a law is intended against the circulation of a newspaper, it would have a direct interference with the right of freedom of speech and expression guaranteed under Art. 19(1)(a). It said: "Since the very object of the impugned law is to affect the circulation of certain newspapers which, are said to be practising unfair competition it is difficult to appreciate how it could be sustained. The right to freedom of speech and expression is an individual right guaranteed to every citizen by Art. 19(1)(a) of the Constitution. There is nothing in el. (2) of Art. 19 which permits the State, to abridge this right on the ground of conferring benefits upon the public in general or upon a section of the public. It is not open to the State to curtail or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law competent under el. (2) of Art. 19."

These judgments were further reiterated in *Bennett Coleman & Co. v. Union of India* (1976) to also include free of press under Article 19(1)(a).

Interestingly, in *Bennett Coleman's* case, the court adopted the 'effect test' of *R.C. Cooper* on violation of fundamental rights. It stated that the effect of the law and the action upon the right is which attraction the jurisdiction of the court on violation of fundamental rights. In this case, a newsprint policy was in question which restricted page limits, and prohibited new newspapers and new editions.

The court held that the "effect and the consequence of the impugned policy upon the newspaper is directly controlling the growth and circulation of the newspaper. The direct effect is the restriction upon the circulation of the newspaper. The direction effect is upon the growth of newspapers through pages. The direct effect is that newspapers are deprived of their area of advertisement. The direct effect is that

they are exposed to financial loss. The direct effect is that freedom of speech and expression is infringed.”

Public decency and morality

In this case, a bookseller sold a copy of the unexpurgated edition of "Lady Chatterley's Lover". He was convicted under s. 292, Indian Penal Code for obscenity. He contended that the Section was void because it violated the freedom of speech and expression guaranteed by Art. 19(1)(a) of the Constitution of India. Alternatively, he argued even if the section was valid, the book was not obscene and it must be shown by the prosecution that he sold the book with the intention to corrupt the purchaser, that is to say, that he knew that the book was obscene.

The court held that section 292 embodies a reasonable restriction upon the freedom of speech and expression guaranteed by Art. 19 and does not fall outside the limits of restriction permitted by cl. (2) of the Article. The section seeks no more than the promotion of public decency and morality which are the words of that clause.

In *Ranjit D. Udeshi vs State Of Maharashtra* (1964), it said: "The word "obscene" in the section is not limited to writings, pictures etc. intended to arouse sexual desire. At the same time, the mere treating with sex and nudity in art and literature is not per se evidence of obscenity. The test given by Cockburn C.J., in *Queen v. Hicklin*, (1868) to the effect that the tendency of the matter charged as obscene must be to deprave and corrupt those, whose minds are open to such immoral influences and into whose hands a publication of the sort may fall, so far followed in India, is the right test. The test does not offend Art. 19(1) (a) of the Constitution."

In *Aveek Sarkar & Anr vs State Of West Bengal And Anr* (2014), the court applied the 'community standard' test on a publication of article with a picture of Boris Becker, a world-renowned Tennis player, posing nude with his dark-skinned fiancée by name Barbara Feltus, a film actress, which was photographed by none other than her father.

The court stated that for the semi-nude picture to be obscene under Section 292, it shall be deemed to be obscene (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. It held: "A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of “exciting lustful thoughts” can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."

Sedition

It is the lack of any confined meaning to the expression 'public order' that the Supreme Court in *Kedar Nath Singh v. State of Bihar* (1962) was able to uphold the constitutionality of Section 124A (sedition) and Section 505 of the Indian Penal Code. The court stated that while sedition imposed restrictions on fundamental freedom of speech and expression, the restrictions were in the interest of 'public order' and therefore, within the ambit of permissible legislative interference with the fundamental rights. The 154-year-old sedition law's constitutionality continued to be challenged and only in 2022 was it kept in abeyance in *S.G. Vombatkere v. UOI* (2022). A challenge to its constitutionality is pending before a seven-judge bench of the Supreme Court.

Free speech and religion

In *Bijoe Emmanuel & Ors vs State Of Kerala & Ors* (1986), three children belonging to the sect called Jehovah's Witnesses were expelled from school because they refused to sing the National Anthem. The children however would stand up in respectful silence daily during the morning assembly when the Anthem was sung. The court found that the expulsion violated their right to freedom of conscience and freely to profess, practice and propagate religion.

Further, the court held that any law which may be made under clauses 2 to 6 of Article 19 as a reasonable restriction to rights under Article 19(1)(a) to (e) and (g) must be statutory and not merely an executive or departmental instructions. Since the circulars issued by the School had no statutory basis, they could not form the foundation for denying Article 19(1)(a).

Right to protest

In *Re Ramlila Maidan Incident vs Home Secretary, Union of India & Others* (2012), the Supreme Court recognised that citizens have a fundamental right to assembly and peaceful protest under Article 19(1)(b) which cannot be taken away by an arbitrary executive or legislative action.

Hate speech

Another form of speech that requires criminalisation for disrupting public order is 'hate speech'. The menace of hate speech can blur the distinction between constitutionally protected speech and speech that needs to be criminalised. In 2020, the Supreme Court in *Amish Devgan v. UOI* made a distinction between free speech and hate speech. It stated that the former includes the right to comment, favour or criticise government policies, whereas, hate speech intends to create or spread hatred against a targeted community or group.

Subsequently, *Shaheen Abdullah versus Union of India* (2021), directed police and authorities to immediately and suo moto register cases against hate speech in Delhi, Uttar Pradesh and Uttarakhand even if a complaint is not filed.

The Order highlighted that Sections 153A (promoting enmity between different groups on the ground of religion), 153B (imputations, assertions prejudicial to national integration), 505 (statement inducing to public mischief), 295A (deliberate and malicious acts intended to outrage religious feelings) of the Indian Penal Code (IPC) can be invoked to book hate mongers. Any violation of these directions will attract contempt, the court's Order stated.

Right to information

In 2003, the Supreme Court recognised in *People's Union of Civil Liberties v UOI* (2003) that Article 19(1)(a) included the right to seek information as a fundamental right including of electoral candidates. In this case, PUCL challenged the validity of Section 33B of the Representation of People Act, 1951 which stated that political candidates were not bound to disclose any information. Years later, this became the basis for the Supreme Court to hold the Electoral Bonds Scheme unconstitutional in *Association for Democratic Reforms & Anr v. UOI* (2024), in which the court held that non-disclosure of information on voluntary contributions to political parties violated the right to information.

Right to trade, occupation or profession

Right to internet

In *Anuradha Bhasin v UOI* (2019), where petitions were filed challenging the internet ban in Jammu & Kashmir, the court held that the right to freedom of speech and expression and the right to carry out any trade or business under Article 19(1)(g) using the internet as a medium is constitutionally protected.

The question in this case was also whether there could be a complete prohibition of the internet as a reasonable restriction. Answering in affirmative, the court “(1) restriction on free speech and expression may include cases of prohibition; (2) There should not be excessive burden on free speech even if a complete prohibition is imposed, and the Government has to justify imposition of such prohibition and explain as to why lesser alternatives would be inadequate; (3) whether a restriction amounts to a complete prohibition is a question of fact, which is required to be determined by the Court with regard to the facts and circumstances of each case.”

On the point of lesser alternatives, the court referred to the principle of proportionality.

Right to carry on any occupation, trade or profession depends on the availability of a safe working environment

In *Vishakh v. State of Rajasthan* (1997), the Supreme Court issued guidelines on the prohibition of sexual harassment in the workplace. In this case, an alleged brutal gangrape of a social worker took place in a village in Rajasthan. The court found that the incident violated Articles 14, 15, 19, 21 and specifically Article 19(1)(g) which protected the fundamental right to carry out trade or profession. It stated that the fundamental right to carry out any occupation, trade or profession was dependent on “safe” working environment the lack of which violated the fundamental right to human dignity under Article 21. The guidelines issued by the court were law until the Parliament enacted The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

National Anthem in Cinemas

Acting on a public interest litigation filed by one Shyam Narayan Chouski hailing from Bhopal complaining of misuse of the anthem in TV shows or movies, the Supreme Court in 2016 made it mandatory for all cinema theatres to play the national anthem before a movie begins during which the national flag is to be shown on the screen. In *Shyam Narayan Chouksey v Union of India*, an interim order also ruled that the national anthem should not be commercially exploited or dramatized. In a major U-turn on the National anthem, the Government in 2018 filed an affidavit asking the Supreme Court to modify its November 30, 2016 order.

In a significant development in 2018, the interim order was modified to the extent that playing the national anthem before a movie screening is optional and not mandatory. The court referred to *Bijoe Emmanuel and Others vs. State of Kerala and Others* and stated that although one cannot be compelled to sing the national anthem, due respect must be shown when the national anthem is played. The court said: "A person who stands respectfully when the National Anthem is sung, is showing proper respect. Thus, the stress is on respect when the National Anthem is sung or played."

Live Streaming of court proceedings

In *Swapnil Tripathi v. Supreme Court of India* (2018), the Supreme Court held that Court proceedings shall be live-streamed in the larger public interest. In this, reliance was put on Article 19(1)(a) and 19(1)(g) of the Constitution which recognises the know and receive information and the right to carry out trade, occupation or profession respectively. This is clubbed with the right of access to justice flowing from Article 21 of the Constitution or be it the concept of justice at the doorstep. The Court said that it would be meaningful only if the public gets access to the proceedings as it would unfold before the Courts and in particular, the opportunity to witness live proceedings in respect of matters having an impact on the public at large or on a section of people. This would educate them about the issues which come up for consideration before the Court on real-time basis.

Restriction of Public Official's free speech and horizontal application of fundamental rights

In 2023, a constitution bench of the Supreme Court in *Kaushal Kishor v. The State of Uttar Pradesh* held that additional restrictions, not found in Article 19(2), cannot be imposed on the exercise of the right to free speech under Article 19(1)(a) of Ministers, MPs and MLAs. It held that the grounds mentioned in Article 19(2) for restricting free speech are exhaustive.

The Court by a 4:1 majority added that statements made by the Minister, even if traceable to any affairs of the state or protecting the govt, cannot be attributed vicariously to the govt even applying the principle of collective responsibility. In her dissenting opinion, Justice B.V. Nagarathna agreed that greater restriction cannot be imposed on free speech, in addition to grounds under Article 19(2).

However, she observed that in case a Minister makes disparaging statements in his "official capacity", then such statements can be vicariously attributed to the govt. However, if the statements of the Ministers are stray remarks not consistent with the stand of govt then they would be treated as personal remarks.

The case emanates from the Bulandshahar rape incident wherein the then Minister of the State of Uttar Pradesh and Samajwadi Party leader, Azam Khan had trivialised the act by dismissing the incident as a 'political conspiracy and nothing else'.

By majority, the Court had also held that fundamental rights enshrined in Articles 19 and 21 are enforceable even against persons other than the state or its instrumentalities. However, Justice Nagarathna stated that recognising a horizontal approach of fundamental rights between citizens inter se would render redundant, all the tests and doctrines forged by this Court to identify 'State' to entertain claims of fundamental rights violations.

51. *Romesh Thappar v. The State of Madras* (1950)

52. *Brij Bhushan & Anr v. The State of Delhi* (1950)

53. *Bennett Coleman & Co. v. Union of India* (1976)

54. *Chintaman Rao v. The State of Madhya Pradesh* (1950)

55. *State of Madras v. V. G. Row* (1952)

56. *Express Newspapers (Private) Ltd., v. The Union of India* (1958)

57. *Ramji Lal Modi vs The State Of U.P* (1957)

58. *Shreya Singhal v. UOI* (2015)

59. *Kedar Nath Singh v. State of Bihar* (1962)

60. *S.G. Vombatkere v. UOI* (2022)

61. *Sakal Papers (P) Ltd. versus Union of India* (1961)

62. Dr. Ram Manohar Lohia v. State of Bihar & Ors (1965)
63. Bijoe Emmanuel & Ors vs State Of Kerala & Ors (1986)
64. Anuradha Bhasin v UOI (2019)
65. Amish Devgan v. UOI
66. Shaheen Abdullah versus Union of India (2021)
67. Shyam Narayan Chouksey v Union of India (2018)
68. People's Union of Civil Liberties v UOI (2003)
69. Association for Democratic Reforms & Anr v. UOI (2024)
70. Vishakh v. State of Rajasthan (1997)
71. Kaushal Kishor v. The State of Uttar Pradesh (2023)
72. Re Ramlila Maidan Incident vs Home Secretary, Union of India & Others (2012)
73. Swapnil Tripathi v. Supreme Court of India (2018)
74. Ranjit D. Udeshi vs State Of Maharashtra (1964)
75. Aveek Sarkar & Anr vs State Of West Bengal And Anr (2014)