CHAPTER- VI

LEGAL PHILOSOPHY IN GLOBALIZATION ERA: A STUDY FROM 1991- 2020

The period after 1978 (Post *Maneka Gandhi* v. *Union of India*) till 1991 (the year when economic liberalization was adopted by India) is significant due to several reasons. There was a clear shift from classical conservatism. The rigidity of Austinian positivism appears to have been relaxed. More emphasis was on the spirit of the law. This era is also remarkable because the focus shifted from the law making institutions to the function of law. Social justice became primary goal for which many of the directive principles to the State were brought within the ambit of the fundamental rights.

In *Tukaram* v. *State of Maharashtra*[1] the judgment given by the Supreme Court, though within the ambit of law, resulted in gross miscarriage of justice. The consequent social uproar led to the Criminal Laws (amendment) Act, 1973 that made an attempt to plug the lacuna in the law.

As has been mentioned in previous chapter post A.D.M. Jabalpur case the Indian legal system focused on evolving the human right jurisprudence in India. Judges like Bhagwati J., Krishna Iyer J., expedited such evolution through liberal interpretation of statutes and constitutional provisions.

Social justice as promised in the Preamble was actualized through judicial activism. Evolution of concept like absolute liability in Oleum gas leak case, application of polluter pays principle to compensate victims of Bhopal gas tragedy case directed towards judiciary's obligation towards strengthening environmental law regime in India. Enactment of the Public Liability Insurance Act, 1991 to compensate victims of Bhopal gas tragedy case was a forward looking step of social justice in India. Shah Bano judgment holding Muslim husband liable to pay maintenance beyond iddat period was undoubtedly a step towards providing social justice to Muslim women. Several cases involving land laws and government's policy setting the upper limit of land holding were also done with a view to ensure social justice in India.

[1] *Tukaram* v. *State of Maharashtra* AIR 1979 SC 185.

The present chapter now focuses on several spheres in which law developed consequent upon the classical liberal approach taken by the Court. During the period under discussion several social conflicting interests were sought to be put at rest, certain areas like environment, gender etc were sought to be laid at rest, but perhaps the most significant development was India embracing economic liberalization. It is significant to note the term 'Socialist' shall exist in the Preamble of the Constitution of India. Perhaps more significant is the fact that no amendment to the Constitution of India was necessary for embracing liberal economic policy. The chapter will discuss significant developments in clusters within which chronological treatment of the case will take place.

- **Cases related to Protection of Reverse Discrimination by the Court**

Owing to India's diverse religion, castes, language it was quite difficult for the Constituent Assembly to provide a Constitution in order to carve out an egalitarian society out of India. The Constituent Assembly were well aware of injustice occurred due to caste differences and inequalities inflicted thereon. Therefore, it became imperative to provide the exploited portion of the society to provide redress through constitutional means. In this backdrop the Draft Committee of the Constituent assembly drafted Article 10 which is now corresponding to Article 16 of the Constitution of India. After much discussion Article 10 of the Draft Constitution was adopted as Article 16 in the Constitution of India. This was a provision to provide reservation, in way of an exception, to underprivileged citizens in order to uplift them to the status of rest of the citizens.

However, this effort of the Constituent Assembly did not put a stop to the ever lasting debate regarding reservation in educational institution and/or in employment. *Akhil Bhartiya Soshit Karmchari Sangh* v. *Union of India*[2], *T. Devdasan* v. *Union of India and another*[3] endeavored to secure social justice in the issue related to reservation.

[2] *Akhil Bhartiya Soshit Karmchari Sangh* v. *Union of India* 1981 SC 298
[3] *T. Devdasan* v. *Union of India and another* AIR 1964 SC 179

Nevertheless *Indra Sawhney* v. *Union of India*[4] case was instituted regarding the reservation issue again in 1991.

In Akhil Bhartiya Soshit Karmchari Sangh and T. Devadasan case it was already settled that reservation for scheduled category in employment should not be more 50% of the total vacancy for any year of recruitment. Issues raised in Indra Sawhney case were-

a. Whether provision for reservation in employment provided under Article 16 (4) of the Constitution of India is an exception to provision of equality of opportunity in employment and appointment guaranteed under Article 16 (1) of the Constitution of India?
b. Whether the term 'class' in Article 16 of the Constitution of India can synonymously used with the term 'caste'?
c. How to determine 'creamy layer' in backward class?

Indra Sawhney case was heard by nine judges Bench consisting of M.H. Kania C.J., M.N. Venkatachaliahj., S.R. Pandian J., Dr. T.K. Thommen J., A.M. Ahmadi J., Kuldip Singh J., P.B. Sawant J., R.M. Sahai J., & B.P. Jeevan Reddy J.

For the first issue B.P. Jeevan Reddy J. (for himself and on behalf of M.H. kania J., M.N. Venkatachaliah and A.M. Ahmadi J.) with S.R. Pandian J., and P.B. Sawant J., concurring observed that Article 16 (1)[5] of the Constitution of India does not permit for reservation for attainment of equality. For assuring equality it is necessary in some situations to treat unequally situated persons unequally. Under Article 16 (4)[6] of the Constitution of India 'backward class' is categorized as a separate class in order to be ensured reservation in employment where it does not have adequate representation. Therefore Article 16 (4) must be read with in harmony with clause 1 of the Article 16. S.R. Pandian J., in his concurrent judgment observed that reservation provided under clause 4 is not an exception to equality of opportunity as guaranteed under clause 1 of

[4] *Indra Sawhney* v. *Union of India* AIR 1993 SC 477

[5] Article 16 of the Constitution of India- Equality of Opportunity in matters of employment.
(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State

[6] Article 16 of the Constitution of India- Equality of Opportunity in matters of employment
(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State

Article 16. Clause 4 provided for reservation opportunity for inadequately represented backward classes in employment. P.B. Sawant J., in his concurrent judgment held that the right to equality is a positive right and the state is under obligation to make it real and effectual. A mere formal declaration of right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to equip disadvantaged and the handicapped to the level of the fortunate advantaged. Thus, the expression 'equality of opportunity' in clause (1) is not used in a formal but in a positive sense and was made in explicit in clause (4). The purpose of clause (4) was to emphasize that there shall be 'reservation in favour of some communities which, so far, did not have a proper look into in administration'.

For the second issue whether class can be interpreted as caste for the purpose of Article 16 majority view was delivered by B.P. Jeevan Reddy J. (for himself and on behalf of M.H. kania J., M.N. Venkatachaliah and A.M. Ahmadi J.) with S.R. Pandian J., and P.B. Sawant J., concurring. The majority view observed that there is no settled method to identify backward class. Therefore, if required to identify such backward class one would begin with caste which represent explicit identifiable social classes. There is nothing unconstitutional with it, more so when caste, occupation, poverty and social backwardness are so closely intertwined in our society. Reservation is not being made under clause (4) of Article 16 in favour of a caste but a backward class. Once a caste satisfies the criteria of backwardness, it becomes backward class for the purpose of Article 16 (4).

The dissenting judgment of Dr. T.K. Thommen j., was that vreservation is meant exclusively for the Harijans, Girijans, Adivasis and Dalits or other depressed classes or races or people who are unfortunately referred as untouchables. It is these classes of people who are segregated in slums and ghettos and afflicted by grinding poverty, disease, ignorance and ill health. Kuldip Singh J. stated that caste can never be considered as class for the purpose of clause (4) of Article 16. 'Not adequately represented in the services under the state' is the only test for the identification of a class under Article 16 (4). Therefore, the backwardness has to be culled out from out of the classes which satisfie inadequacy. Article 16 (4) provides reservation to those classes which, according to the state, are not adequately represented in state services.

R.M. Sahai in his dissenting judgment stated that backward class can not be read as backward caste as clause (4) provides reservation to all the citizens including Muslims, Christians, Sikhs, Buddhists, and Jains. The principle of identification has to be of universal application so as to extend to all the communities. He has observed that caste system is peculiar to Hindu religion therefore, can not be taken as a deciding factor to provide reservation opportunity in employment. Identification of backward classes can be done by factors like dependence of group or collectivity on manual labour, lower age of marriage, poor schooling, living in kachha house etc.

In Indra Sawhney case the Supreme Court faced a significant question which was not decided previously in any other case. The issue was how to determine a backward class. The first commission for backward classes was appointed in 1953 known as Kaka Kalekar Commission. The commission was to investigate into the socially and educationally backwardness of classes within the territory of India. The commission was also to determine and make recommendations regarding backward classes as to how to uplift their conditions. The commission submitted its report in 1955. However, no action was taken basing upon the Kaka Kalekar Commission report. The Second Backward Class Commission was appointed in 1979 known as Mandal Commission. The Mandal Commission was entrusted with task of-

a. Determine the criteria for defining socially and educationally backward class.
b. To recommend steps to be taken for the advancement of socially and educationally backward classes.
c. To examine desirability of making provision of reservation for socially and educationally backward classes for appointment in posts.

Mandal Commission Report in its first chapter mentioned that Kaka Kalekar Commission Report could not be implemented because it did not work out any test and classification to identify socially and educationally backward classes. The Mandal commission Report evolved eleven indicators to identify socially and educationally backward classes[7]. These are-

a. Social-
    i. castes/ classes considered as socially backward by others,

[7] *Indra Sawhney* v. *Union of India* AIR 1993 SC 477 at page 510.

ii. castes/ classes which mainly depend on manual labour for their livelihood,

iii. castes/ classes where atleast 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas,

iv. castes/ classes where participation of females in work is at least 25% above the State average.

b. Educational-
   i. Castes/ classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average,
   ii. Castes/classes where the rate of student drop out in the age group of 5-15 years is at least 25% above the State average,
   iii. Castes/ classes amongst whom the proportion of matriculates is at least 25% below the State average.
c. Economic-
   i. Castes/ classes where the average value of family assets is at least 25% below the State average,
   ii. Castes/ classes where the number of families living in kucha houses is at least 255 above the State average,
   iii. Castes/classes where the source of drinking water is beyond half a kilometer for more than 50% of the households,
   iv. Castes/ classes where the number of households having taken consumption loan is atleast 25% above the State average.

The Office Memorandum of the Government of India for reservation of SEBC (Socially and Educationally Backward Classes) issued on 13th August, 1990 provided that during appointment of candidates of SEBC preference should be given poorer section of SEBC. In occasion of inadequate representation of poorer section of SEBC preference shall be transferred to other members of SEBC

Mentioning of poorer section of SEBC brings forward the issue of exclusion of creamy layer of SEBC from reservation. B.P. Jeevan Reddy J., (for himself and on behalf of M.H. kania C.J., M.N. Venkatachaliah J., A.M. Ahmadi j., with P.B. Sawant j concurring) observed that the very concept of class denotes a group of people having common traits which distinguish them from the rest. However, if a portion from that

group becomes socially (which also includes and means economically and educationally) advanced then the connecting thread between them and the class snaps. They would be misfit in the class.

S.R. Pandian J. observed that the Office Memorandum of the Government issued on 13th August, 1990 does not speak of any test to determine 'creamy layer test'. Kuldip Singh J., observed that the services under the government are less. Therefore, reservation benefit must reach to poorer and the weakest section of backward classes. R.M. Sahai J., observed that the importance of 'is' in Article 16 (4) must not be overlooked. This emphasized that backwardness must exist on the day of reservation. Socially, educationally and economically backward class before 1950 shall not be considered as backward class unless it continues to be so.

Therefore, the majority view was in favour of exclusion of creamy-layer from the benefit of reservation. It was observed that the creamy layer of SEBC would receive the benefit of reservation only when there is no candidate from non-creamy layer. The Court also observed that the list of SEBC prepared by Mandal Comiission was not final and the responsibility lies upon the government to prepare the list after due investigation. The Court declared that-

a. Reservation being the extreme form of protective measures or affirmative action it should be confined to minority of seats. Even though the Constitution remains silent as to the percentage of reservation, but at any point of time the percentage of reservation should not be more than 50% of the total number of vacancy,
b. Reservation in promotion is constitutionally impermissible. Once a candidate from SEBC is advanced to the level of other classes with the benefit of reservation during recruitment then any further benefit of reservation for previously existing inequality would be unconstitutional. It would amount to treating equals unequally.
c. Creamy layer of backward classes must be excluded by fixation of proper income,
d. One of the most important suggestions was to identify non-creamy layer of SEBC.

In *M. Nagaraj and others* v. *Union of India*[8] the validity of 77th Constitution Amendment Act, 81st Constitution Amendment Act and 82nd Constitution Amendment Act was challenged on the ground that these amendments sought to change the Basic Structure of the Constitution of India.[9] This case was presided over the five judges Bench comprising of Y.K. Sabharwal C.J.I., K.G. Balakrishnan J., S.H. Kapadia J., C.K. Thakker J., P.K. Balasubramanyam J. The Bench unanimously rejected the said contention and held that the provisions of the Constitution must not be construed in narrow, pedantic and constricted sense. Constitutional provisions must not be fossilized and must remain flexible enough to meet the newly emerging problems and challenges. Therefore, it was unanimously decided that the aforementioned amendments did not seek to alter the basic Structure of the Constitution of India.

In *Ashok Kumar Thakur* v. *Union of India*[10] the Constitution (93rd Amendment) Act, 2005 and the Central Educational Institution (reservation on Admission) Act 2006 were challenged. The Constitution (93rd Amendment) Act, 2005 allowed the Government to make provision of reservation of SEBC, SC and ST category in unaided educational institution in order to promote educational advancement. Article 15 (5) was also introduced by virtue of the Constitution (93rd Amendment) Act, 2005.[11] By virtue of this constitutional amendment the Parliament enacted the Central Educational Institution (reservation on Admission) Act, 2006. It was also contended that the aforementioned constitutional amendment and the Act violate the Basic Structure of the Constitution of India.

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[8] *M. Nagaraj and others* v. *Union of India* (2006) 8 SCC 212.

[9] The Constitution (77th Amendment) Act, 1995- The government decided to continue the existing reservation policy in promotion for Scheduled Castes and Scheduled Tribes.
The Constitution (81st Amendment) Act, 2000- Article 16 (4B) was inserted and reservation in promotion was allowed which in turn breached the 50% ceiling limit of regular reservation. This Amendment also allowed the State to carry forward unfilled vacancies in reserved category of previous year which came to be known as Carry Forward Rule.
The Constitution (82nd Amendment) Act, 2000- This Amendment allowed the State to relax the qualifying marks for Scheduled Tribes and Scheduled Castes for any competitive examination and/or for the purpose of promotion in service of the Union or the State.. The Amendment also mentioned that this may mean lowering the standard of evaluation.

[10] *Ashok Kumar Thakur* v. *Union of India* (2008) 6 SCC 1.

[11] The Constitution (93rd Amendment) Act, 2005- Allowed the Government to provide reservation to socially and economically backward classes, schedules cases and schedules tribes in unaided educational institutions other that minority institutions.
Article 15 (5) of the Constitution of India-

This case was presided over by five judges Bench comprising of K.G. Balakrishnan C.J.I., Dr. Arijit Pasayat J., C.K. Thakker J., R.V. Raveendran J., and Dalveer Bhandari J. The Bench in 4: 1 majority upheld the Constitutional Amendment and the Act of 2006. The dissenting judgment was given by Justice Dalveer Bhandari who observed that there must be parity between reservation for socially and economically backward class, SC and ST and the social interest. In order to maintain the standards of excellence there must not huge gap in cut off marks for reserved and unreserved category.

- **Cases related to Protection to the Environment**

In *M.C. Mehta* v. *Union of India*[12] the petitioner filed a writ petition seeking an order from the Supreme Court to close down hazardous industrial establishment located in densely populated area of Delhi, and regulation of air population caused by automobiles in Delhi. This case was heard by Rangnath Misra, the then C.J.I., M.H. Kania J., Kuldip Singh J. The Bench ordered for setting up of a committee to enquire about the harmful effects of automobiles and industrial establishments in and around Delhi. A retired judge of the Supreme Court would act as a chairman of the Committee, the chairman of the Central Pollution control Board and person representing association of Automobiles Manufacturers could be members of the Committee. The Bench asked the Committee to work with effect from 18th March, 1991 and also directed the Central government and Delhi Administration to co-operate with the Committee. The Bench allowed the writ petition and asked the Committee to submit its report after every two months to the Supreme Court of India.

In *Tarun Bharat Sangh, Alwar* v. *Union of India*[13] the petitioner, a social action group, brought this PIL for enforcement of certain statutory provisions, notification mentioned under Wildlife laws, Forest laws in areas declared as Reserve Forest in Alwar District, Rajasthan, India. The petitioner mentioned that despite the area being declared as sanctuary under the Wild Life Protection Act, 1972 the government of Rajasthan, illegally and arbitrarily, issued about 400 mining privileges to various persons enabling them to carry on mining operations of lime and dolomite stones. The State government accepted before the court that it came to the knowledge of the

[12] *M.C. Mehta* v. *Union of India* 1991 (2) SCC 353
[13] *Tarun Bharat Sangh, Alwar* v. *Union of India* AIR 1992 SC 514.

government that areas for mining operations come under protected area under Wild Life Protection Act, 1972. This case was heard by M.N. Venkatachaliah J., and K. Jayachandra Reddy J. The Bench made an interlocutory direction that no mining operation shall be carried on within protected area. The Bench appointed a Committee consisting of following members-

a. Mr. Justice M.L. Jain, former Chief Justice of High Court of Delhi,
b. The Chief Conservator of Forest and Wild Life Warden, Government of Rajasthan,
c. Additional Director of Mines, Udaipur,
d. Collector, Alwar District,
e. Dr. Anil Agarwal, Centre for Science and Environment, New Delhi.

The Bench also directed that till the submission of the Committee Report and final execution of the case the State government of Rajasthan was prohibited from granting any mining leases or renewal thereof in respect of the protected area.

T.N. Godavarman v. *Union of India*[14] is also known as forest case. In 1995 T.N. Godavarman Thirumalpad filed a writ petition before the Supreme Court of India regarding illegal timber felling in the hills of Nilgiri. Later on the Apex Court clubbed cases with similar issues with Godavarman case. This case is continuing till date. Due to extensive felling of trees across the country the Apex Court assumed the role of a policy maker, law maker and administrator. Assumption of such vast role by the Supreme Court has no precedence in either India or in any developing nation[15]. The Apex Court re-defined forest under the Forest Conservation Act, 1980 (hereafter called FCA). The FCA was applicable to forests regardless of their legal status. This act makes de-reservation of forests for non-forests purposes. Under non-forest purposes means breaking or cleaning of areas for cultivation of tea, coffee, rubber, oil-bearing plants, medicinal plants. In T.N. Godavarman case the Supreme Court included mining and sawmills work under non-forest purposes thereby banning it so far it would destroy a forest area. The Supreme Court went a step further and excluded all the lower courts from having jurisdiction over any case related to forest issue. The Supreme Court set up a Central Empowered Committee (CEC) under

[14] *T. N. Godavarman* v. *Union of India* W.P. (Civil) No. 202 of 1995.
[15] Armin Rosencranz, Sharachandra Lele, Supreme Court and India's Forest, 43 (5), *Economic & Political Weekly*, 11-14 (2008).

section 3(3) of the Environment (Protection) Act, 1986. The members of the committee were insulated from their roles as central government employee. Members of CEC were delegated wide range of power to dispose of matters according to the orders of the Court. The Supreme Court kept the case open as 'continuing mandamus' and kept on hearing interlocutory petitions relating to this issue.

The role of the Supreme Court is criticized in this case because it has overstepped its limit. Laying down rule for day to day forest management is a job of the executive and not the judiciary. Re-defining 'forest' is definitely an overreach as after the enactment of Forest Dwellers (recognition of Rights) Act, 2006 the definition of forest and non-forest purposes has been changed. After enactment of the Act of 2006 it is required to re-investigate into the lands in order to find out the forest and non-forest land. T.N. Godavarman in comparison to Indra Sawhney case is an example of judicial overreach.

Vellore Citizens Welfare Forum v. *Union of India*[16] was filed under Article 32 of the Constitution of India by the petitioner for the pollution caused by enormous discharge of untreated effluents from tanneries in Tamil Nadu. It was alleged that these tanneries were discharging untreated effluents to road sides, water ways, and agricultural fields. Besides, everyday enormous amount of water was wasted for processing of finished leather which in turn led to discharge of untreated effluents. This case was presided over by Kuldip Singh J., Faizan Uddin J, and K. Venkataswami J. The Bench observed in this case that the traditional concept that development and ecology are opposed to each other is no longer acceptable. Therefore, 'Sustainable Development' is an answer. Some of the salient features of sustainable development as culled out from Brundtland report and other international documents are Inter-Generational Equity, use and conservation of natural resources, environmental protection, the precautionary principle, polluter pays principle, obligation to assist and co-operate, eradicate of poverty, and financial assistance to the developing countries. The environmental measures taken by the state government and other authorities must anticipate, prevent and attack the cause of environmental pollution. The Bench also observed that the onus of proof that the action is environment benign is upon the actor or the developer or the industrialist. Besides

[16] *Vellore Citizens Welfare Forum* v. *Union of India* AIR 1996 SC 2715.

Constitutional mandates there are several legislations like Water (Prevention and Control of Pollution) Act, 1974, The Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, for the protection of environment. Therefore, in view of the abovementioned constitutional provisions and legislations there is no hesitation to hold that the precautionary principle and polluter pays principle are part of the environmental law of the country. Polluter pays principle imposes liability upon the one who pollutes the environment to pay the compensation for the pollution caused and restore the same back to the original state. Precautionary principle means taking preventive action in the face of uncertainty. The Bench reminded the Central Government about its power under the Environment (Protection) Act, 1986 to take measures for environment protection. The Central government was also allowed to constitute authority for the same if necessary. The Central government was asked to react immediately to operation of tanneries in Tamil Nadu as discharge of untreated effluents would lead to agricultural land turn barren, pollution of river/ canals, contamination of underground water, exposure of residents to serious diseases.

The Bench also stated that it already issued direction to the concerned authorities regarding taking measures for the environment protection. It also directed the Madras High Court to monitor the functioning of the authorities. The Chief Justice of the High Court of Madhya Pradesh was requested to constitute a Special Bench i.e. 'Green Bench' to deal with cases related to environmental matters. The Green Bench was empowered to pass appropriate order/ orders keeping in view the direction issued by the Bench of the Supreme Court of India.

Mrs. Indira Gandhi permitted the Indian Oil Corporation to set up petroleum oil refinery in Mathura in 1972. In 1974 a Committee under Dr. S. Varadharajan was constituted to study the effect of emission of Sulphur Dioxide from the refinery. *M.C. Mehta* v. *Union of India*[17], also known as Taz Trapezium, was filed by M.C. Mehta in 1984 seeking an order from the Supreme Court for relocation of 292 industries in five districts of Agra (which is also of a trapezium shape). The petitioner contended that there are several chemical/ hazardous industries in and around Agra and refinery in Mathura which are major sources of pollution in five districts of Agra. Sulphur Dioxide emitted by Mathura refinery and other industries formed sulphuric acid when

[17] *M.C. Mehta* v. *Union of India* 1997 (2) SCC 353.

combined with Oxygen. Sulphuric acid falls to the ground with rain water and has corroding effect on the gleaming white marble of Taj Mahal.

This case was heard by Division Bench of the Supreme Court of India consisting of Kuldip Singh J. and Faizan Uddin J. The judgment was written by Justice Kuldip Singh (for himself and on behalf of Justice Uddin). The Bench considered various reports made by stakeholders regarding impact of industrial emission on white marble of Taj Mahal. The report submitted by Varadarajan Committee was also considered. The National Environment Engineering Research Institute (NEERI) submitted its report in 1990 stating that rapid industrialization in Agra and Mathura is impacting the air quality of the area. The court gave series of orders in this case. In 1993 the Court ordered the U.P. pollution Control Board to make a list of industries in Taj Trapazium Zone (TTZ) and to relocate those industries outside TTZ. The next report of NEERI was submitted in 1993 where NEERI suggested using of substitute of coke or coal. The final judgment was delivered in 1996 where the Division Bench held that relocation of industries outside of TTZ would be resorted only when use of Natural gas is not available and/or accepted to and/or by the industries. The U.P. Pollution Control Board made a list of 500 industries which were confined to 292 industries by the Court. The Court reaffirmed polluter pays principle and precautionary principle in environment protection.

Indian Council for Enviro-Legal Action v. *Union of India*[18] was filed by environmentalist organization by bringing forth the plight of people staying in the vicinity of industrial sectors. In this petition the petitioner showed how these industrial sectors were operating in India despite its utter disregard for legal framework for environmental protection and contempt of the same. These industries took advantage of industrialization and export the profit. Such an industrial establishment was Hindustan Zinc Limited in Rajasthan Bichhri is a village in Udaipur district in Rajasthan situated in the vicinity of this industrial establishment. The production of certain chemicals and especially 'H' acid by Silver Chemicals, the sister concern of Hindustan Zinc Ltd., resulted in discharge of harmful effluents thereby risking the lives of residents of Bichhri village. This case was preside over by Division Bench of the Supreme Court consisting of B.P. Jeevan Reddy J., and B.N.

[18] *Indian Council for Enviro-Legal Action* v. *Union of India* AIR 1996 SC 1446.

Kripal J. The Bench found the industrial establishment absolutely liable for discharge of harmful effluents. The absolute principle of Oleum gas leak case was applied. On the question of liability of private concern the Bench observed that even if the Supreme Court can not award damage against private companies responsible for causing pollution under Article 32 of the Constitution of India, it can always direct the Central government to determine and recover the cost of remedial measures from the private concerns.

In Pradeep Kishan v. *Union of India*[19] government order by the Government of Madhya Pradesh allowing a tribal group to continue their traditional right of collecting tendu leaves within the prohibited area. This case was presided over by A.H. Ahmadi J., B.L. Hansaria J. and S.C. Sen J. The petitioner contended that allowing the specific tribal group to collect tendu leaves from area declared as National parks and Sanctuaries effect the flora and fauna of that area. The presence of human being within the prohibited area does not only effect the flora and fauna but also scares away the wild life. The respondent i.e. the government contended that it could not stop villagers and/or tribal group from carrying on their traditional occupation of collecting tendu leaves because the State government did not issue any notification to that effect. On this contention the Bench observed that if allowing villagers and/or tribal group within prohibited area amounted to disturbance the ecology of the National park and/or sanctuary then the government must issue notification acquiring the rights of villagers and/or tribal group. Besides, the State government must think of a rehabilitation of those villagers and/or tribal group whose rights have been so acquired by the government to protect the flora and fauna and the wild life of Sanctuary and National Park in Bhopal, Madhya Pradesh

M.C. Mehta v. *Kamal Nath*[20] exposed encroachment of environmental and natural resources by individual. This case was presided over by Kuldip Singh J., and S.S. Ahmad. The Bench in this case took notice of the news appeared in 'Indian Express' on 25th February, 1996 under the caption 'Kamal Nath dares the mighty Beas to keep his dreams afloat'. The relevant portion of the news disclosed that Kamal Nath, the then Forest and Environment Minister, had direct link with the owner of the motel named Span resort. This motel, Span resort, was hosting tourists in Kullu-Manali.

[19] *Pradeep Kishan* v. *Union of India* AIR 1996 SC 2040
[20] *M.C. Mehta* v. *Kamal Nath* 1997 (1) SCC 388.

Another ambitious venture floated by Span Club, another venture of Span resort, was fulfilling the dream of having a dream house along the bank of Beas. For this project the course of Beas was stopped and diverted to another direction. All these were in the knowledge of Mr. Kamal Nath as there was proof of his visit to the construction site and leaving the site without taking any action. The Motel Company contended that lease of 99 years had been granted by the State government to the company. The course of Beas was stopped with a view to prevent any flood and damaging the same.

The Bench observed that the place where the span Resort was located came under forest and was ecologically fragile. Therefore, no one and nothing can convert such land into private property. The Bench applied 'Public Trust Doctrine' in this case. Public Trust Doctrine means there are some resources like air, water, sea and forests are important to the people as a whole. Therefore, it is unjustified to subject them to private ownership. Applying this doctrine in this case Justice Kuldip Singh (for himself and S.S. Ahmad) quashed lease-deed between the state government and the Motel Company. The company was directed to stop the construction along the bank of Beas. The Motel Company was also directed to pay compensation by way of cost for the restitution of environment and ecology of the area.

Kudremukh Iron Ore Company Ltd. v. *Commissioner of Customs*[21] against stirred up a question of illegal mining by Kudremukh Iron Ore Co. Ltd. (KIOCL) in protected area, Kudremukh National Park. Wild Life First, a Karnataka based NGO, filed this suit seeking the following reliefs-

a. to direct the Ministry of Environment and Forest, Government of India, withdraw the temporary working permission for carrying on mining activities,
b. to direct KIOCL stop mining operation within the National Park,
c. to take action against KIOCL for illegal encroachment of forest land thereby destructing the ecology of the National Park,
d. to direct KIOCL stop polluting Bhadra river for open cast mining,

The Court set up an Advisory Committee under the Forest (Conservation) Act, 1980. The committee provided five years to KIOCL to wind up mining operation in

[21] *Kudremukh Iron Ore Company Ltd*. v. *Commissioner of Customs* 1997 (93) ELT 468 Tri Del.

Kudremukh National Park. In this case the Bench highlighted that two main principles of environmental law in India are-

a. sustainable development and
b. precautionary principle.

Animal and Environment Legal Defence Fund v. *Union of India*[22] is a public interest litigation challenging the order of Chief Wild Life Warden, Forest Department, Madhya Pradesh Government granting 305 fishing permits to tribals formerly residing within the Pench National Park area for fishing in the Totladoh reservoir situated within Pench National Park Tiger Reserve. This case was presided over by A.M. Ahmadi C.J.I., Mrs. Sujata V. Manohar J. and K. Venkataswami J. The Bench while deciding the case has mentioned Constitutional provision to safeguard forests and wildlife under Article 48 A of the Constitution of India. The petitioner rightly pointed out that fishing permit to tribal families within National Park would effect the ecological balance of the place. Some of the portions of this Pench National park fall within State of Maharashtra. Therefore, the state of Maharashtra also objected to the fishing permit to tribal community.

The State of Madhya Pradesh stated that families given the fishing permit have been doing fishing for their livelihood as traditional occupation. Moreover, they were not been given any agricultural land as a method of resettlement. Therefore, the Bench observed that it is important to take care of the fragile ecology of the forest area. However, it is equally important that tribals, when resettles, are in a position to earn their livelihood. The Bench also mentioned that effort have been made on behalf of the Madhya Pradesh government to contain the damage by imposing fishing permits. However, the Court mentioned that it the duty of the government to see which part of the National park is accessible and which is not. Therefore, permissions must be given on following conditions-

a. identified families will be given photo identity cards,
b. during rainy seasons (July to October) fishing will be totally banned,
c. during rest of the year entry will be permitted from 12 p.m. to 4 p.m. and transport of fish will be allowed before sunset,

[22] *Animal and Environment Legal Defence Fund* v. *Union of India* AIR 1997 SC 1071.

d. the photo identity card holders will not be allowed to enter the National Park or the Island in the reservoir and will also not be allowed to make night halts,
e. transport of fish will be allowed only in Totladoh through a specified road.

The Court referred the judgment of Pradeep Kishen v. Union of India (1996) where it was observed that following the shrinking of total forest cover in India the Court can not allow any activity within the prohibited area which will in turn effect the ecological balance of that area. The government must come up with resettlement plan. However, following the Pradeep Kishen judgment the Court held that there would be proper notification regarding acquisition of rights of fishing of villagers/ tribal people. The Madhya Pradesh government was also directed to issue final notification under the Wild Life (protection) Act, 1972.

In *A.P. Pollution Control Board* v. *M.V. Nayadu*[23] dealt with an issue of construction of industry manufacturing vegetable oil near a water reservoir that provide water in Peddaspur, Andhra Pradesh. List prepared by Ministry of Environment and Forest in 1988 regarding red listed hazardous industry included the type of industry the respondent wanted to set up in the village near the water reservoir. The respondent applied for NOC to the A.P. Pollution Control Board but it was rejected for an anticipation of polluting the water of the reservoir which provided water for almost 5 million people in and around of that area. The application for getting NOC kept on being rejected and the respondent filed an appeal before the appellate authority under the Water (Prevention and Control of Pollution) Act, 1972. The appellate authority granted the respondent the NOC for constructing vegetable oil manufacturing industry. The petitioner, A.P. pollution Control Board, filed an appeal before the Supreme Court against the issuance of NOC. This case was heard by Division Bench of the Supreme Court consisting of S.B. Majumdar J., and M. Jagannadha Rao J. The Bench reversed the order of the appellate authority and observed that even though the respondent could show that modern machineries have been installed in his industry for treating harmful effluents NOC could not be issued since it was near to the water reservoir. The notification issued by MoEF clearly stated that industries dealing with hazardous substances could not be located near residential area or water reservoir.

[23] *A.P. Pollution Control Board* v. *M.V. Nayadu* 1994 (3) SCC 1.

Therefore, the Bench withheld NOC and upheld the order of A.P. Pollution Control Board.

M.C. Mehta v. *Union of India*[24] (also known as vehicle pollution case) was filed by the petitioner regarding increasing vehicle pollution in metro cities especially Delhi. This case was presided over by A.M. Ahmadi J., S.V. Manohar J., K. Venkataswami J. The Bench ordered for use of low-lead or lead free petrol by the automobiles. It was brought into the notice before the Bench that four wheelers sold in the four metros after 1st April, 1995 had catalyst converter. The Bench also directed the government to convert all the vehicles to CNG vehicles. So far as diesel-run vehicles were concerned the Bench ordered for reducing the sulphur content in it.

M.C. Mehta v. *Union of India*[25] is also known as phasing out non-CNG buses in Delhi. This case was presided over by B.N. Kripal J., V.N. Khare J., and Ashok Bhan J. The petitioner filed the case pointing out the reducing state of sir quality of Delhi due to inadequate compliance with the law by both the government and stakeholders. This case was filed in 1985 and the Court came up with several directions in this case from time to time. In 1986 the Bench for the first time directed the State government to take steps to reduce pollution level due to emission of smoke and noise from vehicles plying in Delhi. During the proceeding Bhure lal Committee was established under section 3 of the Environment (Protection) Act, 1986. In 1998 the Court passed an order contending that all the non-CNG vehicles would be converted top CNG vehicles. To start with converting non-CNG vehicles the government must first convert government vehicles, public undertaking vehicles and public transport vehicles with CNG cylinders. The Court also stated that such conversion of non-CNG vehicles to CNG vehicles could be done in phased manner.

In 2001 the Central government set up Mashelkar Committee having Mr. R.A. Mashelkar as its head. The Mashelkar Committee Report showed no serious concern for public health. It was only stated that the government must come up with a plan to reduce the pollution level and the choice of fuel must be left with the users of the vehicles. This report is criticized because of absence of any medical professional and

[24] *M.C. Mehta* v. *Union of India* WP 13029/1985.
[25] *M.C. Mehta* v. *Union of India* 2002 (2) SCR 963.

expert in the Committee. The Bench applied Precautionary principle and Polluter Pays Principle and held the government liable to prevent and attack the cause of pollution.

It was directed by the Bench that-

a. The Central government shall provide CNG for vehicles first in Delhi and then for any industry. This is for the inadequate amount of CNG. Therefore, vehicles must be prefer over industries,
b. Application by the Union of India for extension to ply diesel run buses in Delhi was rejected. Therefore, plying the same would amount to nullifying the court order,
c. Owners of diesel buses would face fine if diesel buses are being plied after 31st January, 2002,
d. NCT Delhi would phase out 800 diesel buses per month starting from 1st may, 2002,
e. Due to inadequacy of CNG the Union of India is free to allocate LPG as an alternative to CNG.

In *Narmada Bachao Andolan* v. *Union of India*[26] the petitioner challenged that construction of Sardan Sarovar Dam on Narmada River. Counsel Shanti Bhushan of the petitioner contended that the construction of such dam would result in displacement of tribal people. The State of Madhya Pradesh also joined the petitioner as pleaded for reduction of the height of the dam in order to reduce the extent of submergence and its consequent displacement. Such displacement without providing them with any further rehabilitation amounted to violation of Article 21 of the Constitution of India along with Article 12 of Indigenous and Tribal Population Convention, 1957[27]. The Counsel for the petitioner sought closure of the Sardar Sarovar Dam Project for following reasons-

[26] *Narmada Bachao Andolan* v. *Union of India* 2000 (10) SCC 664.

[27] Article 12 Indigenous and Tribal population Convention, 1957,

- 1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.
- 2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of

a. execution of such large project without having any Environmental Impact Assessment amounted to violation of fundamental rights guaranteed to people under Article 21 of the Constitution of India,
b. whether diverse environmental effect of Sardar Sarovar Dam Project was properly studied?
c. Whether any independent authority examined the environmental impact of the project and its mitigated measures to be taken by the authority?
d. Whether any environmental condition imposed by the Ministry of Environment and Forest was violated by the construction of the Dam?

This case was presided over by three judges Bench of the Supreme Court consisting of B.N. Kripal J., Dr. A. Anand J. and Bharucha J. the petioner challenged the award given by Narmada Water Dispute Tribunal (hereinafter mentioned as NWDT). The dispute was between the State of Gujarat and State of Madhya Pradesh. However, the NWDT gave award in favour of the State of Gujarat allowing it to go ahead with the construction of the dam. Justice B.N. Kripal (for himself and Dr. Anand J. with Justice Bharucha dissenting) observed that when such project is undertaken crores of public money is spent. Therefore, it is not feasible to challenge such project under the garb of Public interest Litigation. Institution of PILs would hinder the developmental projects undertaken by the government and is against the national interest.

The petitioner argued for application of 'precautionary principle' here in this which was rejected by the majority. The majority observed that precautionary principle would be applicable in case of any industrial establishment emitting poisonous gas or discharging harmful effluents but this is a dam. Construction of dam would change the environment to some an extent but can not be thought of altering the ecological balance. On the contrary there is an ecological up gradation with the construction of dam.

Justice Bharucha dissented on the ground that developmental activities are no longer examined on following grounds, i.e.-

a. economic returns of it, &
b. technical feasibility of the work.

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alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

- 3. Persons thus removed shall be fully compensated for any resulting loss or injury.

The majority decision embraces State's initiative to carry on with the infrastructure of the dam which in turn displaced many people. This decision created a dent in the well established principle of environmental protection created by the Indian judiciary from mid 1980s, especially Oleum Gas leak case.

Murli S Deora v. *Union of India*[28] stirred up an issue of non-smokers getting affected for smokers. This case was heard by two judges Bench consisting of M.B. Shah J. and R.P. Sethi J. the Bench prohibited smoking in public place considering the adverse effect of smoking on people. The Bench prohibited smoking in public places like auditorium, hospital building, health institution, educational institutions, libraries, court buildings, public office, public conveyances including railways.

M.C. Mehta v. *Union of India*[29] highlighted illegal encroachment of public property in Taj Trapezium area. The petitioner filed the suit highlighting sorry state of management of public property in Taj Trapezium area by the U.P. Government. U.P. tenancy Act abolished the Zamindari system and it also prohibited conversion of public property into private ownership. However, the petitioner mentioned the failure of Archeological Survey of India to protect historical monuments and cultural heritage sites within Taj Trapezium like Astha Sakhi Kund, Balram Kund and Bhanokar from encroachment, illegal constructions and defilement of waters of kunds.

This case was presided over by M. Shah J., B. Singh J., and H. Sema. The Bench directed the Commissioner of Agra Division, District Collector of Mathura, Superintendent of Police, Mathura to take appropriate action for removal of illegal encroachment of mentioned area. The state Government was further directed not to convert Shamshabad- Fatehbad Marg marked as Zonal Park into light industrial area.

Animal Welfare Board of India v. *A. Nagaraj and Ors*[30] stirred up controversy regarding *jallikattu*, a famous traditional event usually aims at taming bull. Investigators of Animal Welfare board of India (AWBI) observed gross violation of provisions of Prevention of Cruelty to Animal Act, 1960 (hereinafter mentioned as PCA Act). The Ministry of Environment and Forest amended section 22 of the PCA

[28] *Murli S Deora* v. *Union of India* (2001) 8 SCC 765.
[29] *M.C. Mehta* v. *Union of India* AIR 2002 SC 3696.
[30] *Animal Welfare Board of India* v. *A. Nagaraj and Ors* (2014) 7 SCC 547.

Act, 1960 to ban training and exhibition of bears, monkeys, tigers, panthers, and dogs. It further amended the section in 2011 to ban bull fight. However, the MoEF provided exemption to bulls taking part in *jallikattu* which is highlighted in this case by the petitioner, AWBI.

Jallikattu, traditional event often resulted in mutilation of ears of bulls, dislocation and amputation of tails for deliberate pulling and twisting, forcing the bull to stand and wait in accumulated waste. Sometimes the animal is forced to drink alcoholic fluids. The AWBI contended that *Jallikattu* must not be excluded from the PCA since it resulted in pain and suffering of the animal. This case was heard by K.S. Radhakrishnan J., and Pinaki Chandra Ghosh of the Supreme Court of India. The Bench declared *Jallikattu* amounted to violation of provisions of PCA act, 1960.

- **Cases related to Balance of Power between the Judiciary and the Executive**

S.C. Advocates-on-Record Association v. *Union of India*[31] is a second case regarding appointment of judges in High Courts and Supreme Court. This case is significant as it involved the issue of 'independence of judiciary'. In S.P. Gupta v. Union of India (1982) it was delivered that under Article 124 the executive is to appoint judges in High Court and Supreme Court in consultation with Chief Justice of High Court and Supreme Court. However, this consultation does not mean concurrence with judges. This judgment is overruled in S.C. Advocates-on-Record Association v. Union of India case. In this case it was contended by the petitioners that the executive while appointing judges in higher judiciary does not give primacy to the opinion of Hon'ble Chief Justice of India. The respondents contended that since S.P. Gupta judgment i.e. 1982 from amongst 547 appointments in higher judiciary there are only 7 cases of appointment where opinions of Chief Justice of India have been overlooked.

S.C. Advocates-on-Record Association case was heard by nine judges Bench consisting of S.R. Pandian j., A.M. Ahmadi J., Kuldip Singh J., J.S. Verma J., M.M. Punchhi J., Yogeshwar Dayal J., G.N. Ray J., Dr. A.S. Anand J., and S.P. Bharucha J. The Bench with 7:2 (A.M. Ahmadi J., & M.M. Punchhi dissenting) overruled S.P. Gupta judgment and observed that the opinion of the Chief Justice of India in the

[31] *S.C. Advocates-on-Record Association* v. *Union of India* AIR 1994 SC 268.

process of constitutional consultation in the matter of selection and appointment of judges to the Supreme Court and High court as well as transfer of judges from one High Court to another is entitled to have primacy. The majority view on the contention by the Union of India regarding difference of opinion in 7 cases was that the number of cases of disagreement regarding appointment may be as negligible as 7 amongst 547. However, appointment of judges even after disapproval from the Chief Justice of Indian shows executive's denial of primacy concept. On the contrary it shows that the executive acts with restraint and due difference with the Chief Justice of India. There are innumerable impelling factors which motivate, mobilize and impart momentum to opinion of CJI given in that process of 'consultation' is entitled to have primacy. Amongst various high ranking constitutional offices Article 124 (2)[32] of the Constitution of India required consultation with the Chief Justice of India. Therefore, there is no way to deny the primacy concept of CJI in appointment and transfer of judges. The majority view in this case was to set up a collegium to appoint judges.

According to A.M. Ahmadi J., the Constitution of India has provided for pre-consultation with the Chief Justice of India in matter of appointment of judges in higher judiciary and transfer of judges from one High Court to another High Court. Weight to be attached to the opinion of the CJI would depend on whether it is at the pre-appointment stage or post-appointment stage. Punchhi J., on the question of primacy of opinion of CJI observed that the role of CJI in matter of appointments of judges in the Supreme Court is unique, singular and prima, but participatory vis-à-vis the executive on a level of togetherness and mutuality. The judgment in this is significant as it upheld the independence of judiciary.

Overruling S.P. Gupta's judgment and pronouncing this judgment the Apex Court expressed that the executive has limited role in appointment and transfer of judges.

[32] 124. Establishment and constitution of Supreme Court
(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted:
(a) a Judge may, by writing under his hand addressed to the President, resign his office;
(b) a Judge may be removed from his office in the manner provided in clause (4)

S.R. Bommai v. *Union of India*[33] is a landmark case which dealt with justiciability of discretionary power of the President and is also criticized by a few for adopting concept of 'judicial hands off' owing to separation of power theory[34]. Significant issues of this case were-

a. Scope of judicial review of presidential proclamation under Article 356 of the Constitution of India,
b. Whether the norms and yardstick applied for adjudging the validity of administrative and executive action will be applicable for adjudging constitutionality of Presidential Proclamation?
c. Whether the power of dissolving the assembly can be exercised only after presidential proclamation?
d. Whether floor test is necessary to determine whether the Ministry enjoys confidence of the House or has lost it.[35]

This case was heard by nine judges Bench consisting of Kuldip Singh J., P.B. Sawant J., K Ramaswamy J., S.C. Agarwal J., Yogeshwar Dayal J., B.P. Jeevan Reddy J., A.M. Ahmadi J., S.R. Pandian J. J.S. Verma J.

The question was regarding scope of the phrase 'the state Govt. can not be carried in accordance with the provisions of the Constitution'. Sawant J., (for himself and on behalf of Kuldip Singh J.) observed that this phrase in Article 356 means the Governor shall ask the president for proclamation of emergency only when the situation can not be remedied. The phrase 'can not' in Article 356 (1) connotes a situation of impasse. Resort to Article 356 (1) should be as a last measure. Before bringing this Article into operation the President would take proper precautions unless urgent action is absolutely necessary. The president should use all other measures to restore constitutional machinery in the state. Issuance of warning to the State is the

[33] *S.R. Bommai* v. *Union of India (*1994) 3 SCC 1.

[34] Appeals from the judgments of the Gauhati, Karnataka and Madhya Pradesh High Courts and the writ petitions filed in Rajasthan and Himachal Pradesh High Courts, which were transferred to the Supreme Court, were heard by a nine- judge Bench. The arguments in the case commenced in the first week of October 1993 and were concluded in the last week of December 1993. The hearing was interrupted thrice because of intervening Dussehra and Diwali holidays and a brief absence of Justice Pandian from the Bench. The judgment was pronounced on March 11, 1994.

[35] S.R. Bommai case dealt with other issues as well. However, for the purpose of this chapter only relevant issues are mentioned here.

first measure which the President should resort before rushing to exercise its power under Article 356.

K. Ramaswamy J., observed that the phrase 'can not' used in Article 356 (1) does not mean that it is impossible to carry on the Government of the state. It only means that a situation has arisen when the State Government can not carry on its administration in accordance with the provisions of the Constitution. Power vested with the President under Article 356 is extraordinary power. However, the President does not need to use it sparingly.

Regarding justiciability of Presidential proclamation the Bench unanimously held that presidential proclamation under Article 356 is not beyond the scope of judicial review. Nevertheless, disagreement arises regarding extent of judicial review and justiciability of Presidential proclamation. The most expansive scope of judicial review has been given by Sawant J. (for himself and on behalf of Kuldip Singh J.). The Bench was of the view that Presidential proclamation must be based on objective material obtained from Government's report and/or otherwise. Proclamation is judicially reviewable to the extent of examining the material provided to the President. On this point the respondent contended that materials provided to the President for his satisfaction constitutes official documents therefore, can not be disclosed. In this backdrop the Bench observed that all the materials can not be regarded as confidential document[36].

K. Ramaswamy J. & Ahmadi J. in their separate minority judgment held in favour of non-justiciability of Presidential proclamation and observed that proclamation under Article 356 can not be subject to judicial review. However, Advocate Soli Sorabjee[37] criticized this minority judgment and contended that satisfaction of the President mentioned under Article 356 before proclaiming emergency is of subjective nature. In such situation the president is required to reach satisfactory opinion only after aid and advice from the Council of Ministers. He mentioned that in Maru Ram v. Union of India (1980) the Supreme Court has stated that President, wherever it is mentioned in

[36] Soli J. Sorabjee, Decision of the Supreme Court in S.R. Bommai v. Union of India: A critique, The Practical Lawyer.

[37] Soli Jehangir Sorabjee, AM is an Indian jurist and former Attorney-General of India. He has been honored with Padma Vibhushan for his defence of the freedom of expression and the protection of human rights. Sorabjee has held several offices in organizations of national and international repute

the Constitution, is a shorthand for the Central government. Satisfaction mentioned here is of Council of Ministers which became the subject matter of judicial review when challenged. Therefore, repeated reference of exclusion of Presidential proclamation from judicial review by virtue of President's being the head of the state is devoid of legal and constitutional significance and totally irrelevant in determining the scope of judicial review of the same[38].

However, the Bench also acknowledged that proclamation by the President under Article 356 is an executive action and loaded with political overtones. Therefore, it would not be justified in laying a set of rules determining the validity of Presidential proclamation at any point of time. Validity of Emergency proclamation under Article 356 has to be examined on the basis of circumstances, objective materials and subjective satisfaction of that particular incident. In this case the Apex Court has aptly defined the area of judiciary and executive by not expanding the scope of judicial review. Following the separation of power theory the judiciary observed that

Judicial review must be distinguished from the justiciability by the Court. The two concepts are not synonymous. The power of judicial review is a constituent power and can not be abdicated by judicial process of interpretation. However, justiciability of the decision taken by the President is exercise of the power by the Court is hedged by self-imposed judicial restraint. It is cardinal principle of our Constitution that no one howsoever lofty, can claim to be the sole Judge of the power given under the Constitution. Its actions are within the confines of the powers given by the Constitution.[39]

Post 1991 judicial independence was undermined by the executive. In *S.C. Advocates-on-Record Association* v. *Union of India*[40] the nine judges Bench unanimously declared that the opinion of the Chief Justice of India is unique and primacy has to be given to his opinion in appointment of judges in higher judiciary and transfer of judges from one High Court to another High Court. This judgment has declared that in collegiums system the executive is bound to give primacy to the opinion of Chief Justice of India in abovementioned matters. To do away with this judgment the

[38] Soli J. Sorabjee, Decision of the Supreme Court in S.R. Bommai v. Union of India: A critique, The Practical Lawyer, available at https://www.supremecourtcases.com/ (visited on 07.05.2020)
[39] *S.R. Bommai* v. *Union of India* AIR 1994 SC 1918 at 2047.
[40] *S.C. Advocates-on-Record Association* v. *Union of India* AIR 1994 SC 268.

Parliament enacted the Constitution (Ninety Ninth Amendment) Act, 2014 introducing the National Judicial Appointment Commission (NJAC) for the matters related to appointment of judges in higher judiciary and transfer of judges from one High Court to another. The interference of the executive in judge's appointment and transfer is definitely against the basic structure of the Constitution of India and amounted to interference with the judicial independence. In *Supreme Court Advocates-on-Record Association* v. *Union of India* (NJAC Judgment)[41] five judges Bench comprising of J.S. Khehar J., Chelamaswar J., Madan B. Lokur J., Kurian Joseph J., Adarsh Kumar Goel J. held (with Chelameswar J. dissenting) the ninety ninth amendment to the Constitution of India and related legislations setting up NJAC unconstitutional. J.S. Khehar J. in his judgment observed that in the proposed NJAC three members will be from judiciary, therefore leaving a very thin scope of determinative role of the judges in judge's appointment and transfer matters. The Chief Justice of the Supreme Court and Chief Justices of High Court must be given primacy in matters related to judicial appointments in higher judiciary. Chelameswar J. in his dissenting judgment upheld the NJAC Act. However, he opined to strike down section 6(6) of the Act as this section gives veto power to the members from executive in NJAC to reject candidate for judicial appointment proposed by the judicial members in NJAC. However, it was Hon'ble Justice Chelameswar who in 2018 addressed the then Chief Justice of India complaining executive interference with the judicial independence.[42] Chelameswa J. also held an unprecedented press conference with other three judges of the Supreme Court of India questioning allocation of cases by the then CJI.

Therefore, in post 1991 period the judicial independence has been sometimes interfered by the executive and sometimes the Indian judiciary has projected its fractured face because of its internal disturbances amongst judges. This was definitely not found in earlier two phases i.e. from 1950 to 1978 and from 1978 to 1991.

[41] *Supreme Court Advocates-on-Record Association* v. *Union of India* (2016) 4 SCC 1.

[42] Justice Chelameswar red flags Government interference, asks CJI to convene full court, PTI, New Delhi, March 29, 2018, available at: https://www.deccanherald.com/content/667354/justice-chelameswar-red-flags-govt.html,

- **Cases related to Vicarious Liability of the Government**

Smt. Nilabati Behra Alias Lalit v. *State of Orissa & Ors*[43] is regarding guarantee of fundamental rights to under trials and person in custody. The petitioner informed the Supreme Court through a letter that her son was found dead after being taken away by police. Her letter was considered as Writ Petition under Article 32 of the Constitution of India. This case was heard by three judges Bench consisting of J.S. Verma J., A.S. Anand J., N. Venkatachala J. Respondent contended (on behalf of police) that the deceased ran away from custody and later found dead on railway track by the police. Verma J. (for himself and N. Venkatachala J.,) observed that the fact that police reached the place of death much later even after being informed about the death. Thus, the contention that police was in search of the deceased does not hold any truth. Contention of respondent that the deceased managed to escape from police custody by chewing off ropes was negative when the Regional Forensic Laboratory found ends of two ropes, one is provided by the police and another was tied in deceased hands, did not match. A.S. Anand J., in his concurring judgment stated that arrest is a kind of intervention by the state with someone's enjoyment of his/her rights. However, arrest itself does not take away indefeasible rights of under trial or a detenue. Right to life guaranteed under Article 21 can not be violated even when a person is in custody except through a procedure established by the Law. The Bench found the death caused due to injuries inflicted upon the deceased during custody which made it a custodial death. Now the question arises whether the sovereign or its employee will be liable for tort committed during the time of duty. In *Kasturilal Ralia Rain Jain* v. *The State of Uttar Pradesh*[44] the Apex Court has already recognized State's liability to compensate for tort committed by its employee against an individual during the course of his employment. The respondent-state of Orissa is directed to pay a sum of Rs. 150000/- by way of compensation and Rs. 10000/- to the Supreme Court Legal Aid Committee.

COLLECTIVE RIGHTS IN INDIA

Post Maneka Gandhi period (1978) expanded the rights of vulnerable groups and provided several protections. However, from 1978 to 1991 issues related to rights of

[43] *Smt. Nilabati Behra Alias Lalit* v. *State of Orissa & Ors* AIR 1993 SC 1960.
[44] *Kasturilal Ralia Rain Jain* v. *The State of Uttar Pradesh* AIR 1965 SC 1039.

women and LGBTQ communities were not adequately represented through litigations. Therefore, the collective rights of these two groups were still immature. Post 1991 witnessed increase in litigations related to rights of these aforementioned communities because of increased awareness of exploitation of these vulnerable groups. Under this head cases have been divided under following categories-

a. Cases related to protection of rights of women, and
b. Cases related to rights of LGBTQ community in India.

- **Cases related to Protection Rights of Women**

Vishaka v. *State of Rajasthan*[45] is a significant case in the area of protection of women at workplace. This case led to formation of Code of Conduct for work place by the Supreme Court of India. This case was heard by three judges Bench consisting of J.S. Verma C.J. I., Mrs. Sujata V. Manohar J., B.N. Kripal J. This case was filed by the petitioner alleging a brutal rape incident of a woman while she was working in field. The petitioner pointed out that in India there was, at the time of institution of this case, no law governing sexual offences committed against women at work place. The Bench observed that 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 implicit in Article 14, 15, 19 1 (g) and 21 of the Constitution of India. International Conventions in harmony with fundamental rights must be read into these provisions to enlarge the scope, meaning and content of fundamental rights guaranteed under the Constitution of India. The Supreme Court also prescribed guidelines for the employer for his/her workplace.

Judgment in Vishaka case is quite expected post Tukaram case judgment and Criminal law Amendment in 1983. Vishaka case proved that India requires a long way to go in providing protective environment to its female citizens. However, judgment in this case also shows Supreme Court's dedication towards ensuring protection to the vulnerable group.

[45] *Vishaka* v. *State of Rajasthan* AIR 1997 SC 3011.

Fundamental rights and DPSP in Constitution of India comprise of human rights of an individual. Post 1978 Indian judiciary interpreted that for the full realization of fundamental rights directive principles of state policy must go hand in hand. Interpretation of rights guaranteed to individual has been interpreted in different way in pre and post 1978. In Kesavananda Bharti case Y.V. Chandrachud J. (as he then was) observed while explaining the relationship between fundamental right and DPSP[46]

As I look at the provisions of part III and IV, I feel no doubt, that the basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in part IV….. May I say that the directive principles of state policy should not be permitted to become 'a mere rope of sand'. If the state fails to create conditions in which the fundamental freedoms can be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish.

Apparel Export Promotion Council v. *A.K. Chopra*[47] again incited the issue of sexual harassment of women at workplace. In this case the respondent was removed from his office when the relevant disciplinary authority found him guilty of sexual harassment of a female employee. The respondent filed a petition before the High Court of Delhi challenging the decision of the Disciplinary Committee. The Single Bench of the High Court of Delhi observed that the dismissal of the respondent was unjustified as the respondent only tried to molest and there was no physical contact. This judgment of the Single Bench was upheld by the Division Bench of the High Court of Delhi. The appellant then files an appeal before the Supreme Court of India challenging the decision of the Division Bench of the Delhi High Court. The case was heard by two judges Bench comprising of Dr. A.S. Anand C.J.I. and V.N. Khare J. The Bench observed that in matter of human rights violation the Court must always remain alive to the International Instruments and Conventions concerning the same unless any inconsistency is found. The Bench also observed that each incident of sexual harassment is violation of fundamental rights guaranteed under the Constitution of India. Sexual harassment of female employee at workplace is a form of gender discrimination. The Bench referred the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Beijing Convention to

[46] *Unni Krishnan* v. *State of Andhra Pradesh* AIR 1993 SC 2178 at 2229.
[47] *Apparel Export Promotion Council* v. *A.K. Chopra* AIR 1999 SC 62

substantiate that discrimination against female employee at work place is prohibited. The significance of taking steps to honour the dignity of female employees at work place was also made loud and clear through the international instruments.

In *Chairman Railway Board and Ors*. v. *Chandrima Das*[48] Mrs. Chandrima Das, a practicing lawyer, filed a petition under Article 226 before the High Court of Calcutta against the Chairman, Railway Board; General manager, Eastern railway; Divisional railway manager, Howrah Division claiming compensation for victim Smt. Hanuffa Khatoon. The victim was a Bangladeshi national who came to Howrah station to catch train to Ajmer. However, being new to the place she was misled by one of the employees of the Railway and was taken to a room in Yatri Niwas. She was raped there multiples times. The High Court Calcutta ordered the Union of India to pay compensation of Rs. 10 Lakhs to the victim. The Chairman of the Railway Board challenged this judgment before the Supreme Court of India. In the Supreme Court the case was heard by two judges Bench comprising of R.P. Sethi J and S. Saghir Ahmad J. The Bench unanimously upheld the decision of the High Court of Calcutta and expanded the horizon of the Article 14 in order to bring executive action of the Government under the scrutiny of the Writ jurisdiction. The Court further held that where public functionaries are involved in matters of invasion of fundamental rights or enforcement of public duties, the remedy of compensation through WRIT is available.

Mukesh & Anr v. *State for NCT of Delhi & Ors*.[49] is case of brutal gang rape on 16th December 2012 in Delhi. The brutality of the incident shocked the whole nation. The Court convicted six people for the offence of rape and murder of twenty three year old student. Amongst six convicts there was a juvenile delinquent who was found to be guilty of rape and murder and was tried under the Juvenile Justice Act, 2000. One of the convicts died in prison during trial. Other four convicts were tried by the Delhi High Courts and the High Court imposed death penalty. An appeal was filed before the Supreme Court of India against the judgment of death penalty imposed by the High Court of Delhi. *Mukesh & Anr* v. *State for NCT of Delhi & Ors* was presided over by three judges Bench of the Supreme Court of India comprising of Dtpak Misra C.J.I, Ashok Bhushan J., and R. Banumathi J. The Bench unanimously upheld the

[48] *Chairman Railway Board and Ors*. v. *Chandrima Das* (2000) 2 SCC 465.
[49] *Mukesh & Anr* v. *State for NCT of Delhi & Ors.*

decision of the death penalty declared by the High Court of Delhi. Justice Dipak Misra (for himself and on behalf of Justice Ashok Bhushan) observed that they upheld death sentence of four convicts on the basis of 'rarest of the rare' doctrine. They observed that the brutality of the violence and the exhibition of mental perversion by appellants left no scope for mercy. Justice R. Banumathi observed that in a civilized society every individual possesses inviolable fundamental rights. As the law and order is supreme in a society any instance of grave violation of human dignity attracts reaction from all parts of the society and the organs of the Government have to act immediately. Justice Banumathi, pointed out that to ensure women's safety in society children have to be taught basic lesson regarding respecting human being. Every individual irrespective of gender must assume responsibility to fight for gender justice. Mercy petition was also filed by death row convicts of this case, however, those mercy petitions were also rejected.

Indian Young Lawyers Association & Ors. v. *State of Kerala*[50] is a landmark case on exclusionary practices of women under Hindu religion and women's right to worship. This case was presided over by five judges Bench consisting of Dipak Misra C.J.I., A.M. Khanwilkar J., R.F. Nariman J., D.Y. Chandrachud J., & Indu Malhotra J. In Lord Ayappam temple in Kerala women of a specific age group (i.e. from 10 to 50) were not allowed owing to the historical background of the temple[51]. The Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 has given this exclusionary practice legal validity. The question before the Bench was whether such exclusionary practice is violative of right to profess, practice and propagate religion as guaranteed under Article 25 of the Constitution. Whether a religious denomination can exclude a group of citizens from entering into temple under the pretext of right guaranteed to religious denominations to manage religious affairs under Article 26 of the Constitution of India.[52]

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[50] *Indian Young Lawyers Association & Ors*. v. *State of Kerala* AIR 2018 SC 1690.

[51] Women of menstruating age are barred from entering the temple as Lord Ayappam is believed to practice celibacy.

[52] Article 25 of the Constitution of India- Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion

Justice Indu Malhotra dissented in a matter of rights of religious denomination under Article 26. Dipak Misra C.J. (for himself and on behalf of A.M. Khanwilkar J.), R.F. Nariman J., and D.Y. Chandrachud J. observed that irrespective of rights guaranteed under Article 26 to religious denominations freedom to manage religious affairs a religious denomination can not continue a practice which is violative and exclusionary. However, Justice Indu Malhotra dissented to this opinion and observed that equality principle under Article 14 does not override right freedom of religion guaranteed under Article 25-28 of the Constitution of India.

On the issue of exclusion of certain age group of women amounting to untouchability under Article 17 of the Constitution of India the five judges four judges (Indu Malhotra J. dissenting) observed that exclusion does amount to untouchability. Justice Malhotra observed that restriction upon a certain age group is not imposed through out India. The restriction owes its existence to historical background of the temple and the lord. Therefore, this exclusion is not a rule rather an exception owing to special circumstances.

Discriminatory religious practices against women have been in existence since time immemorial. Sabarimala is an incident of exclusionary religious practice in Hindu religion, while Triple Talaaq is a discriminatory practice of divorcing a Muslim wife unilaterally. *Shayara Bano & Ors*. v. *Union of India*[53] is a first case where the issue

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(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

Article 26 of the Constitution of India- Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law

[53] *Shayara Bano & Ors*. v. *Union of India* AIR 2017 SC 4609.

was constitutionality of triple talaaq[54]. The petitioner challenged the constitutional validity of triple talaaq contending that this type of pronouncing talaaq upon Muslim wife gives Muslim men the right to divorce their wives arbitrarily and unilaterally. This case was heard by five judges Bench comprising of J.S. Khehar C.J.I., R.F. Nariman J., Kurian Joseph J., U.U. lalit J., and S.A. Nazeer J. The majority judgment holding triple talaaq unconstitutional was declared by R.F. Nariman J. (for himself and on behalf of U.U. Lalit J.) and Kurian Joseph J. in his concurring judgment. J.S. Khehar J. (for himself and S.A. Nazeer J.) in dissenting judgment opined that fundamental rights enshrined under Article 14, 15 and 21 are against the State action. Challenges under these provisions can be invoked only against state. It is necessary to remind that Article 14 forbids the State from acting arbitrary while the contention in the petition is Muslim husbands are pronouncing talaaq arbitrarily. The dissenting opinion was in favour of a legislation on the issue of declaring triple talaaq illegal and till then the Court would be satisfied injuncting Muslim husbands from pronouncing talaaq-e-biddat or triple talaaq as means of severing their matrimonial relationship. Muslim Personal Law (shariat) Act, 1937 ceases to be tested on the touchstone of state action once it is legislated and transformed into statutory law in the branch of personal laws in India. However, the majority judgment set aside triple talaaq as unconstitutional.

- **Cases related to Rights of LGBTQ Community in India**

In *Naz Foundation* v. *Govt of NCT Delhi*[55] the contention was that section 377 of IPC penalizes sexual activity when done with non consenting adult, & Penile non-vaginal sex with minor. However, section 377 of IPC, 1860 has been misunderstood and misinterpreted over the period of time to relate it to the homosexual activity between two consenting adults. The petitioner challenged this interpretation of section 377 contending that criminalization of homosexual activity between two consenting adults amounts to violation of Article 14 and 21 of the Constitution of India. In this celebrated case the Division Bench of Delhi High Court consisting of Ajit Prakash Shah, Chief Justice of Delhi High Court & S. Muralidhar J., observed that

[54] Bai Tahira case (1979), Fuzlnubi case (1980) and Shah Bano case (1985) were regarding maintenance of Muslim wife. In these cases triple talaaq was discussed but never to the extent as was done in Shayara Bano case in 2016.

[55] *Naz Foundation* v. *Govt of NCT Delhi* WP(C) No.7455/2001

discrimination is anti thesis to the right to equality guaranteed under Article 14 of the Constitution. Moreover, denying the right to an individual to choose sexual partner amounts to infringement of right to privacy under right to life and personal liberty under Article 21 of the Constitution of India. Therefore, ensuring right to equality to the LGBT community will promote harmony and foster dignity of individual.

The judgment in Naz Foundation case was challenged in *Suresh Kumar Kaushal* v. *Naz Foundation (India) Trust & Ors*[56] by way of an appeal in. In this case the Division Bench of the Supreme Court of India consisting of G.S. Singhvi J., & S.J. Mukhopadhaya J., overruled judgment delivered in Naz Foundation and upheld criminalization of homosexual activity under section 377 of Indian Penal Code, 1860.

National Legal Services Authority v. *Union of India & others*[57] is another significant case in acknowledging the right of identity of transgender and trans-sexual community. This case was heard by a Division Bench of the Supreme Court consisting of Radhakrishnan J., and A.K. Sikri J.

Hon'ble Justice Radhakrishnan in this case observed that one of the fundamental aspects of human life is to ascertain gender identity of an individual. 'Sex' is assigned at birth while 'gender' identity is developed by an individual during adulthood.He observed

'Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.'

While adverting discrimination on the basis of gender Radhakrishnan J., observed

'*The discrimination on the ground of ―sex‖ under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression ―sex used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female'*

[56] *Suresh Kumar Kaushal* v. *Naz Foundation (India) Trust & Ors* Civil Appeal 10972 of 2013

[57] National Legal Services Authory v. Union of India (2014) 5 SCC 438.

Dealing with legality of identity of transgender Radhakrishnan J., stated that hijra or eunuch can be regarded as third gender and is not required to be identified as either male or female because gender identity refers to an individual's internal sense of being male/ female or transgender.

Hon'ble Justice A.K. Sikri observed that there is a need to recognise transgender and/ or trans-sexual as third gender as gender identity is required for enjoying catena of civil rights. Emphasising on the human rights of transgender he observed - *'....there seems to be no reason why a transgender must be denied of basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination. The Constitution has fulfilled its duty of providing rights to transgender. Now it is time for us to recognise this and to extend and interpret the Constitution in such a manner to ensure a dignified life for transgender people. All this can be achieved if the beginning is made with the recognition of TG as third gender'*

Thus, in post 2014 i.e. post NALSA judgment there was a dichotomy regarding the rights of LGBT community in India. In December, 2013 two judges Bench of the Supreme Court recognising criminalisation of homosexual activity by upholding section 377 of Indian Penal Code, 1860. While, in April, 2014 two judges Bench of the Supreme Court in NALSA case recognised LGBT community as third gender by upholding their human rights.

In *Navtez Singh Johar* v. *Union of India*[58] the constitutionality of section 377 of Indian Penal Code, 1860 was challenged and it was heard by five judges Bench consisting of Hon'ble Chief Justice Dipak Mishra, A. M. Khanwilkar J., R.F. Nariman J., D.Y. Chandrachud J., and Indu Malhotra J. In this case the Bench overruled the judgment delivered in Suresh Kumar Kaushal case. In Suresh Kumar Kaushal case the petitioner argued the matter from the point of view of morality and contended that homosexuality is not moral. The Supreme Court accepted the contention made in Suresh Kumar Kaushal case regarding morality. However, in Navtej Singh Johar case Indu Malhotra J., in her concurring judgment has put a distinction between Societal

[58] *Navtez Singh Johar* v. *Union of India* AIR 2018 SC 4321.

morality and Constitutional morality[59]. Justice Indu Malhotra further stated that societal morality is counter to the constitutional morality and can not form the basis of state interest. It is societal morality that discriminates against LGBT community and subjects them to sanction.

Chief Justice Dipak Mishra, A.M. Khanwilkar J., and D.Y. Chandrachud j., were of the opinion that Constitution is a social document and society is ever changing. Therefore, to cope up with this change the Constitution must transform according to the needs of the society. Thus, the Indian society must acknowledge the injustice which it has perpetuated and must correct it to mark an evolution of it.

D.Y. Chandrachud J., observed, while explaining the reason for decriminalisation of homosexuality, that consensual sexual activity can not be criminalised if Bentham's theory of Utility is applied[60]. Bentham tested 'sodomy' laws on three main principles, these are-

a. whether they produce any primary mischief (i.e. direct harm to anybody)

b. whether they produce any secondary mischief (i.e. danger to the stability and security to the society)

c. whether they pose any threat to the state.

Therefore, Bentham observed that homosexuality gives pleasure to some and produces pain to no body.

Hon'ble Justice Indu Malhotra also observed that sexual orientation of an individual is an innate part of his/her identity. Therefore, it is an essential part of the right to privacy of that individual. In post K. S. Puttaswamy judgment[61] there is no scope left for doubt that Right to Privacy is an essential right guaranteed under Article 21 of the Constitution of India.

The five judges Bench unanimously overruled the judgment of Suresh Kr. Kaushal case by stating that the part of Section 377 of IPC, 1860 which penalised homosexual

[59]*Navtez Singh Johar* v. *Union of India* AIR 2018 SC 4321 Concurrent Judgment by Hon'ble Justice Indu Malhotra at page 34

[60]*Navtez Singh Johar* v. *Union of India* AIR 2018 SC 4321 Concurrent Judgment by Hon'ble Justice D.Y. Chandrachud at page 151

[61] *Justice K.S. Puttaswamy* v. *Union of India* WP (Civil) 494 of 2012.

activity stands ultra vires. However, the part of section 377 of IPC, 1860 which deals with unnatural sexual offences was upheld and subjected to a sanction. This judgment successfully distinguished between homosexual activity and unnatural sexual offences which were being used synonymously.

- **Cases related to Guarantee of Fundamental Rights in the wake of Liberalization**

The interpretation of right to education in *Unni Krishnan* v. *State of Andhra Pradesh*[62] is different from the interpretation of right to education in Mohini Jain case. In *Mohini Jain* v. *state of Karnataka*[63] the Supreme Court of India observed that right to education is a fundamental right of a citizen. Article 21 is so wide that it includes the right to education as right to life and dignity under this Article can not be assured except a guaranteed right of education. In this backdrop it is significant to mention that the central government formulated its National Education Policy (NEP) in 1986. This NEP in paragraph 6.20 laid down that private and voluntary effort in the sector of technical and professional education will be devised as an alternative, but in conformity with the accepted norms and goals. Paragraph 10.1 of the NEP, 1986 laid down about decentralization and creation of a spirit of autonomy for educational institutions in India. This National Education Policy is definitely an indicator towards privatization in educational sector in India. India went through this transformation when Mr. Rajiv Gandhi from Congress was the Prime Minister. However, it was during his mother's, Mrs. Indira Gandhi, tenure as Prime Minister the decision of centralization of banking sector was taken. Jawaharlal Nehru from Congress, father of Mrs. Indira Gandhi and grand-father of Mr. Rajiv Gandhi, expressed his opinion on making India a socialist country.

In Unni Krishnan the issue was whether right to education is a part of Article 21 of the Constitution of India. Unni Krishnan's case was heard by five judges Bench consisting of L.M. Sharma C.J.I., S.R.Pandian J., S. Mohan J., B.P. Jeevan Reddy J., S.P. Bharucha J.[64] In Mohini Jain's case the Bench did not interpret right to education in the light of DPSP. However, in Unni Krishnan case the Bench considered Article

[62] *Unni Krishnan* v. *State of Andhra Pradesh* AIR 1993 SC 2178.
[63] *Mohini Jain* v. *State of Karnataka* (1992) 3 SCC 666.
[64] Mohini Jain's case was heard by two judges Bench while the Bench presiding over Unni Krishnan v. State of A.P. was a Constitutional Bench.

41, 45 and 46 of the Constitution[65] while interpreting the right to education. Article 41 has laid down that the state (education is in concurrent list, therefore, both the union and state govt. can legislate on this matter) has an obligation to enable everyone to have right to education within the limit of its economic capacity and development. Article 45 of the Constitution of India lays down stat's obligation to provide free and compulsory education till the age of 14 of a child. B.P. Jeevan Reddy (Mohan J. concurring) observed right to education flowing from Article 21 is not absolute right. Its content and parameter has to be determined in the light of Article 45 and 41. Therefore, every citizen has a right to education till he/she attains the age of 14. Thereafter, his right to education is subject to stat's economic capacity and developmental status.

The NEP of 1986 decentralized education by allowing private educational institutions. In Unni Krishnan recognition or affiliation of these private educational institutions by the State or Universities was also an issue. B.P. Jeevan Reddy (Mohan J. concurring) observed that allowing private educational institution in India does not mean compulsory recognition or affiliation by the state or University. Recognition or affiliation may be subject to fulfillment of conditions set by the affiliating State or the affiliating University. Sharma C.J., (for himself and on behalf of S.P. Bharucha) wrote a concurrent judgment in agreement with judgment delivered by B.P. Jeevan Reddy J., and Mohan J. Unni Krishan judgment on right to education overruled Mohini Jain judgment.

Post 1991 is a period of transformation for educational policy in India. Owing to NEP 1986 the Government admission to all the educational institution irrespective of their minority status, govt. aided, private institution was ordered to be made according to

[65] Article 41- Right to work, to education and to public assistance in certain cases The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 45- Provision for free and compulsory education for children The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years

Article 46- Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

the Government order. The petitioner T.M.A. Pai Foundation filed the suit against such order contending that there are various minority educational institutions (MEI) which have the right to form their own policies regarding education under Article 29 and 30 of the Constitution of India. Issuing of such order by the Government violates the rights of MEIs in India. *T.M.A. Pai Foundation* v. *State of Karnataka*[66] was filed seeking interim order from the Supreme Court of India allowing admission in MEIs for the academic session commencing from 1994. This case was heard by seven judges Bench consisting of Kuldip Singh J., S.C. Agarwal J., S. Mohan J., B.P. Jeevan Reddy J., Dr. A.S. Anand J., S.P. Bharucha J., and Faizan Uddin J. For admission in the last academic session 1993-1994 an interim order was made by a Bench consisting of M.N. Venkachaliah and B.P. Jeevan Reddy. On 14th May the two judges Bench in the interim order declared that

i. Fifty percent of the total intake has to be made by the agency of the state government. The candidates so selected and admitted shall pay scales of fee applicable to this class of students as determined by the State Government.
ii. Rest of fifty percent intake shall be made by the petitioners to admit candidate belonging to a particular religious or linguistic minority. However, the selection must be made on the basis of merit. Such merit shall be determined on the basis of academic performance at the qualifying examination, or the objective test that the institution might apply to determine such relative and competing merit or on the basis of performance in the selection test conducted by the state government. It is optional for the petitioner to adopt any method for admitting candidates in college.[67]

In interim order dated on 18th August, 1993 the Bench categorized institutions filing writ petitions into five categories. These categories are-

i. Unaided minority educational institutions,
ii. Minority educational institutions which are in receipt of State funds by way of and,

[66] *T.M.A. Pai Foundation* v. *State of Karnataka* AIR 1994 SC 2372.
[67] *T.M.A. Pai Foundation* v. *State of Karnataka* AIR 1994 SC 2372 at 2374.

iii. Minority educational institutions in respect of which it is not clear from the averments in the writ petitions whether they are aided or unaided institutions,

iv. Writ petitions challenging the correctness and applicability of Unni Krishnan filed by the educational institutions which do not claim to be minority educational institutions,

v. Educational institutions which do not fall in any of the above categories.

In this interim order it was mentioned that interim order on 14th May, 1993 would not be applicable to educational institutions mentioned in no. iv and v. in interim order dated 18th August, 1993 the Bench held that educational institutions mentioned in no. i, ii and iii could admit 50% of seats equally distributed between free seats and paid seats according to the rule made by the management of the institution. The Management can secure 5% seats for NRI candidates as well. The State government is entitled to carry out admission program for the other half i.e. 50% and other half i.e. admission for the rest of the 50% seats shall be carried out by the Management. In the seats admitted by the agency of the state government there shall be paid seats and free seats. This judgment was undoubtedly in line with the globalization policy adopted by the government.

There was not only a transition in the policy of the government but also a transformation of legal philosophy followed by the Indian Judiciary. Eleven judges Bench of Supreme Court of India in R.C. Cooper case ruled in favour of bank nationalization seconding government's socialist policy in 1970. With the introduction of National Education Policy in 1986 the government welcomes globalization and privatization in India. This policy led to transformation of legal philosophy followed by the Supreme Court of India and eventually exhibited in cases like *Unni Krishnan* v. *State of A.P*. and *T.M.A. Pai Foundation* v. *State of Karnataka*.

T.M.A. Pai Foundation case in 2002[68] is a landmark case laying down contours of governmental rule in private educational institutions. This case was presided over by eleven judges Bench. In this case the majority view of six judges, delivered by B.N.

[68] *T.M.A. Pai Foundation* v. *State of Karnataka* AIR 2003 SC 355.

Kripal C.J.I. (for himself and on behalf of G.B. Patnaik J., S. Rajendra Babu J., K.G. Balakrishnan J., P.V. Reddi J., and Arijit Pasayat J.), was that the State can determine the religious and/or linguistic minorities and would have to be considered state-wise. The minorities have right under Article 29 and 30 to establish and administer educational institution. However, this right is not absolute and can not override national interest. Therefore, rights conferred under these Articles to minorities can not prohibit the government from formulating rules governing all the educational institutions within the state and these rules will apply to all the educational institutions irrespective of their minority status. The state government can make rules for minority educational institutions-

i. As regulatory measures governing quality of education imparted by the institution, & ii. Rules governing students' welfare and teachers for proper academic atmosphere.

- **Cases related to offences to the Institution of Marriage and the role of the Judiciary**

Sarla Mudgal v. *Union of India*[69] is significant as the issue of implementing Uniform Civil Code in India arose eventually in this case. The present suit was mainly various petitions claiming conversion of religion for the purpose of solemnization of another marriage. It was alleged that there are incidents of Hindu male converting to Islam to solemnize second marriage. This case was presided over by two judges Bench consisting of Kuldip Singh J., and R.M. Sahai J. The Bench observed that religious conversion solely for solemnizing a marriage while having a spouse alive itself is a proof of guilty mind. The person, irrespective of his conversion to another religion, whose spouse is living during solemnization of another marriage, is guilty of bigamy under section 494 of the Indian Penal Code. The Bench eventually discussed the implementation of Uniform Civil Code in India under Article 44 of the Constitution of India. Kuldip Singh J., observed that the system introduced by the British that personal laws would govern inheritance, marriage etc. must be supplemented/ superseded by the Uniform Civil Code. He was also of the opinion that the successive government has been wholly remiss in their duty of implementing Uniform Civil

[69] *Sarla Mudgal* v. *Union of India* AIR 1995 SC 1531.

Code. R.M. Sahai J., also declared his judgment in favour of implementation of Unform Civil Code but after consulting the Law Commission of India.

In the background of Sarla Mudgal case where bigamy was held as a crime it is important to mention that regarding adultery under section 497 of Indian Penal Code, 1860 the Supreme Court has delivered a landmark judgment in 2018 in *Joseph Shine* v. *Union of India*[70]. This case was presided over by five judges Bench consisting of Dipak Misra C.J.I., A.M. Khanwilkar J., D.Y. Chandrachud J., Indu MAlhotra J., and R.F. Nariman J. The suit was filed seeking the Constitutional Bench to declare section 497 of the Indian Penal Code, 1860 unconstitutional. Section 497 is reproduced below-

Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

This section does not only violate the equality principle enunciated under Article 14 of the Constitution, but also exhibits woman as a property of her husband. Equality principle is violate because for the act of adultery a man is only punished where the woman is treated as an abettor or victim and does not have any liability. However, the perpetrator shall not be liable of offence of adultery if the husband of the woman consents to it. This section definitely bore the patriarchal mindset and India had to set itself free from everything which hinders the proposal of egalitarian society. Hence, this case is significant. Dipak Mishra J. (for himself and A.M. Khanwilkar J.) observed that transformative constitutionalism does not conform to this inequality. Moreover, for the same offence committed by both man and woman, a woman can not be perceived as a victim while the other is perceived as committing a crime.

R.F. Nariman J. declared section 497 of I.P.C. 1860 invalid because assumption in favour of a woman, in an instance of adultery, as victim is not protected under Article 15 (3) of the Constitution of India as argued. Article 15(3) of the Constitution of India empowers the state to legislate in favour of women but this is only to provide them

[70] *Joseph Shine* v. *Union of India* AIR 2018 SC 4898.

with benefit and not to absolve their liability from any offence. D.Y. Chandrachud declared section 497 because of the following reasons

Firstly, this section confers right upon the husband to prosecute the adulterer while the wife whose husband has committed adultery does not have any right to prosecute the woman in adulterous relationship with her husband,

Secondly, it does not confer the right upon the wife to prosecute her husband who has committed adultery,

Thirdly, there is no punishment if a married man commits adultery with an unmarried woman.

On issue of marital fidelity vis-à-vis fundamental right of self determination, D.Y. Chandrachud J., observed that, right to self determination includes right to sexual self-determination of an individual. The Constitutional Bench of South Korea observed that no public consensus exist recognizing adultery as a crime. Marital infidelity is immoral and unethical. He also observed that it is nowhere implicit in the Constitution that a woman upon entering into marriage consents to advance sexual relation with her husband or refrain from sexual relation outside the marriage. A provision of law must not be understood in isolation from social, political, historical and cultural context.

Five judges Bench unanimously declared section 497 unconstitutional and struck down the same. Section 198 (2) of the Cr.P.C.[71] 1973 was struck down because it provides for procedure to file complaint for offence committed under section 497 of I.P.C. 1860.

Post 1978 Indian legal system has undergone several changes and witnessed liberal interpretation of constitutional provisions. Since 1978 India has undergone various social changes as well. Law which was moral in post independent period becomes redundant with the change in Indian society. There was always transformative element in the Constitution of India. However, it is only because of the judiciary which brings out that element by giving it a liberal interpretation. As opposed to Kelson's Pure Theory of Law it was realized that Law can not be perceived without

[71] Section 198. Prosecution for offences against marriage-

(2) For the purposes of sub- section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was com- mitted may, with the leave of the Court, make a complaint on his behalf.

its social, political, economic and cultural context. Therefore, a law which becomes socially irrelevant has to be got away with. The right of LGBT community is not raised before the Indian Judiciary until Naaz Foundation case in 2009. Section 377 of I.P.C. 1860[72] penalizes any sexual act against the nature with any man, woman or animal.

- **Cases related to Euthanasia i.e. the Right to Die**

The expansion of human rights jurisprudence in India stirred up the question whether right to life under Article 21 of the Constitution of India includes right to die with dignity. In *Maruti Shripati Dubal* v. *State of Maharashtra*[73] Division Bench of Bombay High Court, consisting of B.K. Patil J., & P. Sawant J., declared that right to life guaranteed under Article 21 includes right to die with dignity. However, the same question arose again in 1996 in *Smt. Gian Kaur* v. *State of Punjab*[74]. This case was heard by a Constitutional Bench consisting of five judges namely, J.S. Verma J., G.N. Ray J., N.P. Singh J., Faizan Uddin J., & G.T. Nanavati J. In this case the issue was whether suicide is a right flowing from right to life guaranteed under Article 21 of the Constitution. The Bench unanimously decided that right to die is not included in right to life under Article 21. For the same reason 'right to live with human dignity' can not be construed to include within its ambit the right to terminate natural life, at least before commencement of the natural process of certain death. We do not see how Article 21 can be pressed into service to support the challenge based on Article 14. It can not therefore, be accepted that that section 309 of I.P.C.[75] is violative of either Article 14 or Article 21 of the Constitution. The five judges Bench declared that section 309 and 306[76] of Indian Penal Code, 1860 are not unconstitutional.[77] Issue

[72] Section 377 of Indian Penal Code 1860
Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

[73] *Maruti Shripati Dubal* v. *State of Maharashtra* 1987 (1) Bom. CR 499.

[74] *Smt. Gian Kaur* v. *State of Punjab* AIR 1996 SC 946.

[75] Section 309 Indian Penal Code- Attempt to commit suicide.—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year 1[or with fine, or with both.

[76] Section 306 Indian Penal Code- Abetment of suicide. —If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

regarding euthanasia arose in *Aruna Ramchandra Shanbaug* v. *Union of India*[78]. In this case feasibility of punishing an individual for attempt to commit suicide was sought to be reconsidered. Constitutionality of Mercy Killing or Euthanasia was discussed. This was presided over vy two judges Bench consisting of Markendey Katju J., & Mrs. Gyan Sudha Mishra J.

The Bench categorized Euthanasia in Active and Passive and voluntary and non-voluntary. In active euthanasia something is done to end the patient's life. While in passive euthanasia something is not done which would preserve the patient's life. In voluntary euthanasia consent is taken from the patient while in non-voluntary euthanasia consent of the patient is not obtained. The Bench observed that there is no law in India as to the legal procedure for withdrawing life support to a person in permanent vegetative state (PVS) or who is incompetent to take a decision in this connection. The Bench observed that passive euthanasia is permitted where the patient is terminally ill or in permanent vegetative state. However, it is subject to prior approval by the High Court under Article 226 (1) of the Constitution of India.

The Bench observed that notwithstanding anything contained in Article 32 of the Constitution of India it is the High Court which must be vested with the power under Article 226 of the Constitution to grant withdrawal of life support. The Court also laid down procedure to be adopted by the High Court when such an application is filed. The case must be heard by a Bench of at least two judges which would take suggestions from a Committee consisted of at least three doctors regarding the medical condition of the patient. From amongst three doctors, preferably, one should be neurologist, one should be a psychiatrist, and the third should be a physician.

In *Common Cause (Regd. Society)* v. *Union of India*[79] the issue was whether an individual has the right to give 'advance directives' i.e. directives on medical treatment if they become incompetent or unable to communicate in future (it is known as living will). The constitutionality of passive euthanasia under prescribed circumstances was already upheld in Aruna R. Shanbaug. Common Cause (Regd. Society) case was presided over by five judges Bench consisting of Dipak Misra

[77] The Bench found judgment in Maruti Shripati Dubal v. State of Maharashtra and P. Rathinam v. Union of India holding punishment for attempt to suicide unconstitutional is not correct.
[78] *Aruna Ramchandra Shanbaug* v. *Union of India* AIR 2011 SC 1290.
[79] *Common Cause (Regd. Society)* v. *Union of India* (2018) 5 SCC 1.

C.J.I., A.M. Khanwilkar J., A.K. Sikri J., D.Y. Chandrachud J., Ashok Bhushan J. The Bench unanimously decided (Dipak Misra C.J.I. for himself and A.M. Khanwilkar J., with A.K. Sikri J., concurring, D.Y. Chandrachud J., concurring, & Ashok Bhushan J., concurring) that a person with mental capacity and attaining the age of majority has the right to lay down advance directives regarding medical treatment. This decision was taken owing to right to self-determination of every individual. A.K. Sikri J., Ashok Bhushan J., also observed that 'best interest principle' can be followed for those patients who can not take informed decision and be taken by a specified competent medical expert.[80] D.Y. Chandrachud J., laid down that while recognizing advance directives sustenance has been drawn from the constitutional values of liberty, dignity, autonomy and privacy.

Procedure for recording or preservation of living will has been provided by Dipak Misra j. (for himself and on behalf of A.M. Khanwilkar J.,). The executor must sign the document in the presence of two attesting witnesses, preferably independent, and countersigned by the jurisdictional Judicial Magistrate of First Class (JMFC) so designated by the concerned District Judge. On presenting that document at time of necessity before the Medical Board, the Board shall examine the authenticity of the document. If the document is refused by the Medical Board then the executor or his representative has the right to approach the High Court under Article 226 of the Constitution of India. An individual may withdraw or alter the Advance Directive at any time when he/she has the capacity to do so and by following the same procedure as provided for recording of Advance Directive. Withdrawal or revocation of an Advance Directive must be in writing.

In case of withdrawal of life support treatment opinion of the treating physician shall be taken. The family members shall be apprised of pros and cons of withdrawal of life support by the medical Board constituted for this purpose. The JMFC shall visit once the medical Board informs about this situation to the jurisdictional collector. There may be situation when the medical Board is not concurring on withdrawal of life support. in such a case application can be filed before the High Court. The Chief

[80] D.Y. chandrachud in his concurrent judgment observed that Gian Kaur case upheld constitutionality of section 306 and 309 of IPC, 1860. However, it remained silent as to passive euthanasia. Therefore, according to him in Aruna Shanbaug case the Bench had an incorrect view of Gian Kaur case. Aruna Shanbaug is the first case allowing passive euthanasia under special circumstances.

Justice of the said High Court shall constitute a Division Bench which shall decide to grant approval or not. The High Court may constitute an independent Committee to depute three doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years after consulting the competent medical practitioners. It shall also afford an opportunity to the State counsel. The High Court in such cases shall render its decision at the earliest since such matters cannot brook any delay. Needless to say, the High Court shall ascribe reasons specifically keeping in mind the principle of "best interests of the patient".

Dipak Misra C.J. I. also mentioned that this procedure would be followed until the Parliament comes up with any legislation on this issue. D.Y. Chandrachud J., agreed with the opinion of Dipak Misra C.J.I. regarding procedure for withdrawal of life support eventually leading to passive euthanasia.

- **Cases related to Right To Privacy in India**

People's Union for Civil Liberties v. *Union of India*[81] indirectly deals with privacy right of India citizens. In 1990 Chandra Sekhar (who was soon to be the Prime Minister) publicly leveled an allegation against V-P Singh led government that it was illegally tapping telephones of 27 politicians including his own. This case was heard by two judges Bench consisting of K Singh J., and S.S. Ahmad J. The Court held privacy right to be a part of fundamental right[82]. However, the focus was whether the procedure of tapping telephone was according to the established procedure by the Law. The Bench observed that even though the Constitution remains silent as to privacy right, telephone tapping is a serious intrusion to someone's privacy. Telephone tapping equals to eves-dropping in advanced technological era. Therefore, any such order of telephone tapping is subject to judicial scrutiny. The Court held that telephone tapping can be done by the Government subject to following of proper procedure. The procedure includes maintaining of the following documents by the authority which issued the order:

(a) the intercepted communications,

[81] *People's Union for Civil Liberties* v. *Union of India* AIR 1997 SC 568.

[82] There was yet no judgment as to privacy right is intrinsic in the right to life and liberty under Article 21 of the Constitution of India.

(b) the extent to which the material is disclosed,
(c) the number of persons and their identity to whom any of the material is disclosed.
(d) the extent to which the material is copied and
(e) the number of copies made of any of the material.

The issue of privacy has been raised before the Supreme Court of India time and again. With the institution of *K.S. Puttaswamy* v. *Union of India*[83] the privacy issue in India re-emerged. The Apex Court first dealt with privacy issue in M.P. Sharma case in 1954. In M.P. Sharma case (1954) eight judges Bench and in Kharak Singh case (1963) four judges in majority of six judges Bench declared that the Constitution does not guarantee right to privacy under right to life and liberty of Article 21. In these two cases privacy meant privacy to the physical appearance and was confined to demographic and or territorial limits. India has undergone vast technological development since 1963 and with that the concept of privacy has been changed to a great extent. Privacy relating to physical or spatial privacy developed to privacy as to an individual's personal choices. The manifestation of privacy as to individual's persona choice and ability to make decision for self was seen in Naz Foundation case (2009), NALSA case (2014), Navtaj Singh Johar case (2018), Passive Euthanasia case (2018). K.S. Puttaswamy case involves a different aspect of privacy i.e. informational privacy. Informational privacy involves protection to personal information from public scrutiny which may likely to be flown due to advanced technological development bearing personal databases.

K.S. Puttaswamy case was instituted in 2012 in the backdrop of the government mandate was issued regarding ADHAR link with Bank account and PAN card. AADHAAR card has all the personal information including individual's biometric information. Linking of bank account and PAN card brings personal information of an individual to public forum. Each individual was assigned a unique number knowing as UIDAI number. This scheme received a lot of criticism from a section of society as it was supposed to have a serious privacy concern. This scheme was supposed to be introduced to bring citizens under surveillance by the State. In this backdrop Justice K.S. puttaswamy filed a case before three judges Bench of the Supreme Court in 2012. The case was transferred to five judges Bench considering its involving

[83] *K.S. Puttaswamy* v. *Union of India* (2017) 10 SCC 1.

constitutional provision. At last the case was transferred to nine judges Bench consisting of J.S. Khehar C.J.I., D.Y. Chandrachud J., J. Chelameswar J., S.A. Bobde J., R.F. Nariman J., A.M. Sapre J., R.K. agarwal J., Sanjay Kishan Kaul J., A.Abdul Nazeer J. The nine judges Bench declared the judgment unanimously with D.Y. Chandrachud writing for himself and Khehar C.J.I., R.K. Agarwal J., & A. Abdul Nazeer J., while Chelameswar J., S.A. Bobde J., R.F. Nariman J., S. K. Kaul J., & A.M. Sapre J., concurred in five separate judgments.

D.Y. Chandrachud in Navtej Singh Johar case (decriminalization of homosexual activity between two consenting adult), Joseph Shine case (deciminalisation of adultery), Common Cause (Regd. Society) case (legalizing passive euthanasia and livilng will), Sabarimala case (unconstitutionality of exclusionary religious practices against women) time and again emphasized upon the importance of privacy in individual's life. According to him privacy constitutes a significant right of an individual, therefore, the right to privacy must obtain protection under the Constitution in order to ensure dignity, liberty to individual.

The nine judges Bench in six separate judgments declared privacy, contrary to what observed in M.P. Sharma and Kharak Singh case, as an intrinsic part of rights guaranteed under Article 21 of the Constitution of India. A.D.M. Jabalpur judgment where it was observed that fundamental rights can be infringed during emergency is overruled by D.Y. Chandrachud (judgment for himself and three other justices) and concurring judgment of S.K. Kaul J.

The case was instituted in the backdrop of Aadhaar link, but at the end the judgment dealt with right to privacy as fundamental right, overruling of M.P.Sharma and Kharak Singh judgment to the extent of its repugnancy to the observation made in Puttaswamy case, and complete overruling of A.D.M. Jabalpur case. However, the judgment does not give any clear mandate whether to continue with Aadhaar linking scheme. It is only the jusgment delivered by D.Y. Chandrachud (for himself and three other justices) recommending the Union Government the need to examine and put into a robust data protection regime. Such data protection regime must balance between individual privacy and legitimate concern of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. Nevertheless, linking of

AADHAAR with bank account and PAN card continues even after the judgment of K.S. Puttaswamy case.

- **Cases related to Agrarian Reform in India vis-à-vis Right to Property**

Post 1981 i.e. post Waman Rao case the issue of providing immunity to a legislation by inserting it to Ninth Schedule of the Constitution of India arose again in *I.R. Coelho* v. *State of Tamilnadu*[84]. After Kesavananda Bharti case the Judiciary's stand with Basic Structure was quite clear. Minerva Mills case and Waman Rao case subsequently made it clear that insertion of any enactment into the Ninth Schedule can be questioned if it does not deal with agrarian reform[85]. The Gudalur Janmann Estates (Abolition and Conversion into Ryotwari) Act, 1969 was struck down by the Apex Court in Balmadies Plantation Ltd. & Ors. v. State of TamilNadu in 1972. It was found that the impugned Act does not have any purpose of agrarian reform as the land to be converted by the Act was a vested forest land. Section 2 (c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court for the same reason. However, the Gudalur Janmann Estate Act was inserted in Ninth Schedule by the Constitution (Thirty Fourth Amendment) Act, 1974 and the West Bengal Land Holding Revenue Act, 1979 was inserted in the Ninth Schedule by the Constitution (Sixty-Sixth Amendment) Act, 1990. These insertions were challenged before five judges Bench in *I.R. Coelho* v. *State of Tamil Nadu* in 1999. However, the case was then referred after more than seven years in 2007 to nine judges Bench consisting of Y.K. Sabharwal C.J.I., Ashok Bhan J., Arijit Pasayat J., B.P. Singh J., S.H. Kapadia J., C.K. Thakker J., P.K. Balasubramanyan J., Altamas Kabir J., D.K. Jain J. The Bench referred judgments delivered in Kesavananda Bharti, Minerva Mills, Waman Rao and came to a conclusion that the Basic Structure doctrine does not allow destruction of basic feature of the Constitution. Therefore, any insertion to the Ninth schedule by virtue of Article 31-B of the Constitution to

[84] *I.R. Coelho* v *State of Tamilnadu* (1999) 7 SCC 580.

[85] In Waman Rao the very objective of insertion of Article 31B which immunizes legislation by inserting them in Ninth Schedule was tried to be found out. It was found that the legislative intention was to introduce agrarian reform. Therefore, enactments dealing only agrarian reform can be placed in Ninth Schedule by way of insertion.

obliterate rights guaranteed to an individual under Part III of the Constitution amounts to destruction of Basic Structure[86].

Insertion of two impugned Act in the ninth schedule was declared unconstitutional as such Acts were not dealing with agrarian reform.

An extensive study of different periods shows that Indian legal philosophy travelled from analytical positivism to positivism as propounded by H.L.A. Hart. Positivism propounded by Hart acknowledged sources other than legislation to ascertain, introduce or change the rule. Since 1980's the judiciary, along with the legislature, has been source of some of the significant rules in Indian legal system, for example, absolute liability principle, rule laid down for employers in Vishaka case, rules laid down favouring rights of LGBT community, rules restricting Tripple Talaaq. The focus of the legal system has been shifted from the source of the law to the purpose of the law. Law devoid of morality has been discarded by people and post 1978 the Judiciary has taken a note of it. The fear of sanction would ensure obedience to law no longer holds any significance with the increase in denial of Indian laws devoid of morality[87] and subsequent challenge of the same before the Indian judiciary. Therefore, Fuller's 'inner morality' becomes essential for a law to perpetuate in society. As Fuller laid it down that legality for a rule can be achieved through eight ways, these are-

i. Express rules,
ii. Promulgation,
iii. Constancy,
iv. Prospective effect unless required retrospective effect,
v. Clear and concise,

[86] Part III of the Constitution guarantees fundamental rights.
Ninth Schedule provides immunity to enactments from judicial review.
Article 31-B of the Constitution of India-
Validation of certain Acts and Regulations Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force

[87] Laws decriminalizing homosexual activity, laws legalizing triple talaaq, laws legalizing exclusionary religious practices were challenged.

vi. Coherence,

vii. Possibility of performance of the law,

viii. Congruence between official action and declared rule.

Aforementioned factors indicate towards procedural natural law which was for the first time recognized by the Indian Judiciary in Maneka Gandhi v. Union of India.

Hart has not directly accepted the relation between morality and law. However, Hart's primary rule i.e. duty imposing rule approves of existence of morality in Law. The secondary rule or rule of recognition has put a stress upon the legal validity of these moral values. Therefore, according to Hart the moral values are not binding unless posited. These moral values were posited by the Indian judiciary in several significant cases. Therefore, post 1978 Indian Judiciary started having authority to posit the law. Nevertheless, the study of Indian legal system discloses that the system, despite acknowledging various sources of law, still relies on the legislature to come up with an authoritative law. To put it in other words a law enacted by the legislature will always prevail over the precedent set by the judiciary, ordinance declared by the executive and/or custom followed from time immemorial. In K.S. Puttaswamy case D.Y. Chandrachud J. observed that even though the judiciary provides guidelines for data protection, parliament must come up with legislation in this matter. In Shayara Bano case J.S. Khehar C.J. I. in dissenting opinion held that the Apex Court does not have jurisdiction under Article 142 of the Constitution[88] to declare triple talaaq as unconstitutional. It is the parliament to come up with legislation putting a ban on triple talaaq. Besides these, political reaction to judicial pronouncement is apparent in India.

[88] Article 142 of the Constitution of India-
Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself

With the passage of the time Indian legal system has started to consider external factors while enacting laws. Non-execution of Sabarimala verdict is an example that law devoid of social, political and economic factor will not be able to generate general obedience. Today general obedience towards law is not generated by the fear of sanction and various significant cases have proved the same.

Post 1978 to 1991 period in Indian legal system focuses on resolving disputes like constitutionality of enactments restricting upper limit of land holding, reservation in employment, constitutionality of death penalty. So this period confined itself in transforming legal philosophy from strict positivism to a form of positivism which approves of procedural natural law. With the National education Policy in 1986 liberalization, privatization and globalization entered India. With this shift in state's controlled economy to liberalized economy a change was found in Indian legal system as well. The concept of global morality entered Indian legal system which led to judgments related to-

c. Decriminalization of homosexual activity in India,
d. Declaring exclusionary religious practice against women unconstitutional,
e. Declaring triple talaaq unconstitutional,
f. Upholding right to privacy as an intrinsic part of right to life and liberty guaranteed under Article 21.

Indian judiciary while dealing with human rights issues no longer confines itself to regional approach and the introduction of global morality in human rights was exhibited through judgments.[89]

With this shift in economic structure India slowly moved towards capitalism. However, Indian economy is still introduced as a socialist economy in the Constitution of India.

- **Case related to Religion and Politics**

Ayodhya dispute is a land dispute between two religious groups in India. The dispute dates back to 1949 when the idol of a Hindu deity, Ram Lalla, was placed under a central dome of disputed land. Soon this land dispute took a turn to political one because of following reasons-

[89] Andrew Calpham, *Globalisation and Rule of Law*.

a. Indian Muslims claimed that the disputed land belonged to them because Mir Baqi, commander of Mughal emperor Babur, built Babri Masjid in the land,
b. Hindus claimed Ayodhya as Ram Janmabhoomi and the structure of the Mosque was built by demolishing the temple of Ram Lalla, Hindu deity.

In 1885 Mahant Raghubir Das filed a petition before the Faizabad Court seeking the court to permit to build a canopy outside the disputed land which was rejected by the court. In 1949 the idol of Ram Lalla was found to be placed under the central dome of the Mosque. In 1950 again suits were filed for continuation to worship Hindu deity, Ram Lalla, in the disputed land. In 1959 Nirmohi Akhara and in 1981 the U.P. Sunni Central Waqf Board respectively filed suit for possession of the site.

In 1986 the local court ordered the government to open the disputed land for Hindu worship. The Allahabad High Court ordered for maintaining status quo in the disputed land. On 6th December, 1992 the Babri Masjid structure was demolished and the Parliament on 3rd April 1993 enacted Acquisition of Certain area at Ayodhya Act, 1993 for acquiring lands at Ayodhya.

Following this several petitions were filed before the Allahabad High Court. One of such petitions filed by Dr. M. Ismail Faruqui was transferred to the Supreme Court of India and was heard by five judges Bench consisting of M.N. Venkatachaliah C.J.I., A.M. Ahmadi J., J.S. Verma J., G.N. Ray J., and S.P. Bharucha J.[90] The majority judgment was delivered by M.N. Venkatachaliah C.J.I, J.S. Verma J., G.N. Ray J. and the minority judgment was delivered by Ahmadi and Bharucha JJ. The majority judgment observed that Mosque was not integral part of Islam and therefore asked the government to maintain the status quo. However, the majority judgment struck down some of the provision of Acquisition of Certain area at Ayodhya Act, 1993 for being unconstitutional.

In 2010 the Allahabad High Court in a suit filed between following parties-

a. *Gopal Singh Visharad since deceased and survived by Rajendra Singh* v. *Zahoor Ahmad and others*
b. *Nirmohi Akhara and others* v. *Baboo Priya Datt Ram and others*
c. *The Sunni Central Board of Waqfs, U.P. and others* v. *Gopal Singh Visharad (since deceased) and others*

[90] *M. Ismail Faruqui* v. *Union of India* AIR 1993 SC 605.

d. *Bhagwan Sri Ram Lala Virajman and others* v. *Rajendra Singh and others* divided the disputed land between the Sunni Waqf Board, Nirmohi Akhara and Ram Lalla. This case was heard by three judges Bench consisting of S.U. Khan J., Sudhir Agarwal J. and D.V. Sharma J. The judgment was delivered in 2:1 majority with Justice Verma dissenting who dissented to one third formula of dividing the land.
Appeal was filed before the Supreme Court in 2011 and was heard by three judges Bench consisting of Dipak Mishra C.J.I. A. Bhushan J., and S.A. Nazeer J. The majority judgment in *M. Siddiqui* v. *Mahant Suresh Das* was delivered in 2019 by 2:1 majority with Justice Nazeer dissenting. The majority judgment observed that the matter did not need to be heard by Constitutional Bench and the judgment of *Faruqui* v. *Union of India* need not be revisited. However, Justice S.A. Nazeer in minority decision observed that Faruqui decision had to be revisited for solving the Ayodhya land dispute.

In 2018 several petitions were filed before the Supreme Court of India for revisiting the 2017 judgment. Rajeev Dhavan, a senior advocate and a human rights activist, filed a petition before the Supreme Court requesting hearing of the Ayodhya dispute by a larger Bench (precisely by Constitutional Bench). The Supreme Court notified five judges Bench consisting of the then Chief Justice of India Ranjan Gogoi, S.A. Bobde J., N.V. Ramana J., U.U. Lalit J., and D.Y. Chandrachud J. to hear the Ayodhya dispute. However, Justice Lalit recused himself from hearing the petition and Justice Bobde left on Medical ground. Therefore, these two judges were replaced by Ashok Bhushan J. and S.A. Nazeer J.[91]

The five judges Bench sent the dispute for resolution before the mediation panel consisting of Justice FMI Kallifulla, retired Supreme Court Judge, Spiritual leader Sri Ravi Shankar and senior Advocate Sriram Panchu. However, the dispute could not be solved through mediation and finally the judgment was delivered by the Constitutional Bench on 9th November, 2019. It was delivered by the Bench that the disputed land belonged to Hindu deity Ram Lalla. An alternative land was provided to for building Mosque. The Bench condemned demolition of the structure of Babri Mosque. The Central Government was asked to set up a Trust to manage the property of the temple to be constructed on the disputed land.

[91] *M. Siddiq* v. *Mahant Suresh Das* AIR 2019 SC 1251.

Rights of prisoners were already recognized in the second phase of paradigm shift in the Indian legal system through *M.H. Hoskot* v. *State of Maharashtra* and *Charles Sobraj* v. *Superintendent, Central Jail, Tihar*[92] in 1978. Thereafter, a series of cases have been instituted to ensure guarantee of rights of under-trial and convicted prisoners in India. *D.K. Basu* v. *State of West Bengal*[93] was an added on to the existing jurisprudence regarding prisoner's rights in India. The Executive Chairman of Legal Aid Services, West Bengal addressed a letter to the Chief Justice of India drawing his attention on news custodial deaths as reported in national level newspapers like The Telegraph, Statesman, India Express on several dates in 1986. Therefore, through the letter a request was made to develop the custodial jurisprudence by ensuring protection to individual in police custody. Considering custodial violence in police lock up an urgent and frequent incident in India the letter was treated as Writ petition. This case was presided over by Dr. A.S. Anand J., and Kuldip Singh j.

It was debated whether an individual could claim compensation for custodial violence. Demand was also made regarding requirement of protection of any individual arrested for economic offences or any other offence and kept in police custody. However, this custodial violence had nothing to do with the punishment for a particular offence.

In this case the Division Bench of the Supreme Court came up with some guidelines which are known as D.K. Basu guidelines which laid down law of arrest. The guidelines are mentioned hereinafter-

a. Police personnel carrying out the arrest and investigation must bear accurate name tag and designation and these information must be visible at all times,
b. Police officer carrying out the arrest must prepare memo of arrest which must be attested by one of the witnesses who can be anyone including the family member of the person to be arrested,
c. Family members, relatives of an arrested person have the right to be informed about the arrest. The arrestee must also be made aware of his rights of legal representation before the Court,

[92] *M.H. Hoskot* v. *State of Maharashtra* AIR 1978
Charles Sobraj v. *Superintendent, Central Jail, Tihar* AIR 1978 SC 1514.
[93] *D.K. Basu* v. *State of West Bengal* (1997) 1 SCC 416.

d. Where the arrest has been made outside the place of residence of the arrestee the police officer carrying out the arrest must inform about the date, time and venue of arrest to the police officer of the place of residence of the arrestee,
e. An entry of the arrest must be made by the police officer,
f. If the arrestee sustains any minor or major injury then the arrestee must be examined by the medical practitioner,
g. Documents regarding arrest must be sent to the Magistrate for his record.

Besides the abovementioned guidelines the Bench also observed that a balanced approach was required to meet the ends of justice. During this phase the role of the Supreme Court of India became significant in protecting rights of citizens.

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
1.	*M.C. Mehta* v. *U.O.I. (Pollution Due To Automobile Industries In Delhi) (1991)*	RANGNATH MISHRA M.H. KANIA KULDIP SINGH			
2.	*Mohini Jain* v. *State Of Karnataka (1992)*	KULDIP SINGH R.M. SAHAI			
3.	*Tarun Bharat Sangh Alwar* v. *U.O.I. (1992)*	M.N. VENKATACHALIAH K.J. REDDY			
4.	*Unni Krishnan* v. *State Of Andhra Pradesh (1993)*	L.M. SHARMA S. MOHAN B.P. JEEVAN REDDY S.P. BHARUCHA S.R. PANDIAN (PARTIAL)		L.M. SHARMA S. MOHAN B.P. JEEVAN REDDY S.P. BHARUCHA S.R. PANDIAN (PARTIAL)	
5.	*Indra Sawhney* v. *Union Of India (1993)*	B.P. JEEVAN REDDY M.H. KANIA M.N.			

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
		VENKATACHALIAH A.M. AHMADI S.R. PANDIAN P.B. SAWANT T.K. THOMMEN KULDIP SINGH R.M. SAHAI			
6.	*Smt. Nilabati Behra* v. *State of Orissa (1993)*	J.S. VERMA Dr. A.S. ANAND N.G. VENKATACHALA			
7.	*T.M.A. Pai Foundation* v. *State of Karnataka (1994)*	KULDIP SINGH S.C. AGARWAL S.MOHAN B.P. JEEVAN REDDY Dr. A.S. ANAND S.P. BHARUCHA FAIZAN UDDIN	KULDIP SINGH S.C. AGARWAL S.MOHAN B.P. JEEVAN REDDY Dr. A.S. ANAND S.P. BHARUCHA FAIZAN UDDIN		
8.	*S.C. Advocates-On-Record Association* v. *Union of India*	S.R. PANDIAN KULDIP SINGH J.S. VERMA		A.M. AHMADI M.M. PUNCHHI	

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
	(1994)	YOGESHWAR DAYAL G.N. RAY Dr. A.S. ANAND S.P. BHARUCHA			
9.	*S.R. Bommai* v. *Union Of India (1994)*	KULDIP SINGH P.B. SAWANT S.C. AGARWAL YOGESHWAR DAYAL B.P. JEEVAN REDDY S.R. PANDIAN J.S. VERMA		K. RAMASWAMY A.M. AHMADI	
10	*A.P. Pollution Control Board* v. *M.V. Nayadu (1994)*	S.B. MAJUMDAR M. JAGANNADHA RAO			
11	*M. Ismail Faruqui* v. *Union of India (1995)*	A.M. AHMADI S.P. BHARUCHA		M.N. VENKATACHALIAH J.S. VERMA G.N. RAY	

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
12	*M.C. Mehta* v. *U.O.I (1995) (Vehicular Pollution Case)*	A.M. AHMADI Mrs. SUJATA MANOHAR K. VENKATASWAMI			
13	*Sarla Mudgal* v. *Union Of India (1995)*	KULDIP SINGH R.M. SAHAI (PARTIAL)		KULDIP SINGH R.M. SAHAI (PARTIAL)	
14	*Gian Kaur* v. *State Of Punjab (1996)*	J.S. VERMA G.N. RAY N.P. SINGH FAIZAN UDDIN G.T. NANAVATI (PARTIAL)		J.S. VERMA G.N. RAY N.P. SINGH FAIZAN UDDIN G.T. NANAVATI (PARTIAL)	
15	*D.K. Basu* v. *State of West Bengal (1996)*	Dr. A.S. ANAND KULDIP SINGH			
16	*Indian Council For Enviro-Legal Action* v. *U.O.I. (1996)*	B.P. JEEVAN REDDY B.N. KRIPAL			

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
17	*Vellore Citizens Welfare Forum* v. *U.O.I. (1996)*	KULDIP SINGH FAIZAN UDDIN K. VENKATASWAMI			
18	*Pradeep Kishan* v. *U.O.I. (1996)*	A.M. AHMADI B.L. HANSARIA S.C. SEN (PARTIAL)		A.M. AHMADI B.L. HANSARIA S.C. SEN (PARTIAL)	A.M. AHMADI B.L. HANSARIA S.C. SEN
19	*People's Union For Civil Liberties* v. *Union of India (1997)*	K.S. SINGH S.S. AHMAD (PARTIAL)		K.S. SINGH S.S. AHMAD (PARTIAL)	
20	*M.C. Mehta* v. *U.O.I. (1997) (Taj Trapezium Case)*	KULDIP SINGH FAIZAN UDDIN			
21	*Vishaka* v. *State of Rajasthan (1997)*	J.S. VERMA Mrs. SUJATA V. MANOHAR B.N. KRIPAL			
22	*M.C. Mehta* v. *Kamal Nath (1997)*	KULDIP SINGH S.S. AHMAD			

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
23	*Animal & Environment Legal Defence Fund* v. *U.O.I. (1997)*	A.M. AHMADI Mrs. SUJATA V. MANOHAR K. VENKATASWAMI (PARTIAL)		A.M. AHMADI Mrs. SUJATA V. MANOHAR K. VENKATASWAMI (PARTIAL)	
24	*Apparel Export Promotion Council* v. *A.K. Chopra (1999)*	Dr. A.S. ANAND V.N. KHARE			
25	*Chairman Railway Board & Ors.* v. *U.O.I. (2000)*	R.P. SETHI S.SAGHIR AHMAD			
26	*Narmada Bachao Andolan* v. *U.O.I. (2000)*			B.N. KRIPAL Dr. A. S. ANAND S.P. BHARUCHA	
27	*Murli S. Deora* v. *U.O.I. (2001)*	M.B. SHAH R.P. SETHI			

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
28	*T.M.A. Pai Foundation* v. *State of Karnataka (2002)*	B.N. KRIPAL G.B. PATNAIK S. RAJENDRA BABU K.G. BALAKRISHNAN P.V. REDDI ARIJIT PASAYAT (PARTIAL) V.N. KHARE S.S.M. QUADRI Mrs. RUMA PAL S.N. VAIRAVA ASHOK BHAN	V.N. KHARE S.S.M. QUADRI Mrs. RUMA PAL S.N. VAIRAVA ASHOK BHAN	B.N. KRIPAL G.B. PATNAIK S. RAJENDRA BABU K.G. BALAKRISHNAN P.V. REDDI ARIJIT PASAYAT (PARTIAL)	
29	*M.C. Mehta* v. *U.O.I. (Abolishing Zamindari System In And Around Taj Trapezium Area) (2002)*	M. SHAH B. SINGH H. SEMA			

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
30	*M.C. Mehta* v. *U.O.I. (Phasing Out Of Non-Cng Buses) (2002)*	B.N. KRIPAL V.N. KHARE ASHOK BHAN			
31	*M. Nagaraj* v. *U.O.I. (2006)*	Y.K. SABHARWAL K.G. BALAKRISHNAN S.H. KAPADIA C.K. THAKKER P.K. BALASUBRAMANYAM			
32	*Ashok Kumar Thakur* v. *U.O.I. (2008)*	K.G. BALAKRISHNAN ARIJIT PASAYAT C.K. THAKKER R.V. RAVEENDRAN		DALVEER BHANDARI	
33	*I.R. Coelho* v. *State Of Tamilnadu (2009)*	Y.K. SABRAWAL ASHOK BHAN ARIJIT PASAYAT B.P. SINGH S.H. KAPADIA C.K. THAKKAR	Y.K. SABRAWAL ASHOK BHAN ARIJIT PASAYAT B.P. SINGH S.H. KAPADIA C.K. THAKKAR		

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
		P.K. BALASUBRAMANYAM ALTAMAS KABIR D.K. JAIN	P.K. BALASUBRAMANYAM ALTAMAS KABIR D.K. JAIN		
34	*Aruna Ramachandra Shanbaug* v. *Union of India (2011)*	MARKENDEY KATJU Mrs. GYAN SUDHA MISHRA			
35	*Suresh Kumar Kaushal* v. *Naz Foundation (India) Trust & Ors. (2013)*			G.S. SINGHVI S.J. MUKHOPADAHYA	
36	*National Legal Services Authority* v. *Union Of India & Ors. (2014)*	RADHAKRISHNAN A.K. SIKRI			
37	*Animal Welfare Board of India* v. *A. Nagaraj & Ors. (2014)*	K.S. RADHAKRISHNAN PINAKI CHANDRA GHOSH			

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
38	*S.C. Advocates-On-Record Association* v. *Union of India (2019) (Njac)*	J.S. KHEHAR MADAN B. LOKUR KURIAN JOSEPH ADARSH KUMAR GOEL		J. CHELAMESWAR	
39	*K.S. Puttaswamy* v. *Union of India (2017)*	J.S. KHEHAR D.Y. CHANDRACHUD J. CHELAMESWAR S.A. BOBDE R.F. NARIMAN A.M. SAPRE R.K. AGARWAL S.K. KAUL S.A. NAZEER			
40	*Shayara Bano* v. *Union Of India (2017)*	R.F. NARIMAN U.U. LALIT KURIAN JOSEPH		J.S. KHEHAR S.A. NAZEER	
41	*M. Siddiqi* v. *Mahant Suresh Das (2017)*	S.A. NAZEER		DIPAK MISRA ASHOK BHUSHAN	

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
42	*Mukesh & Anr* v. *State for NCT of Delhi & Ors (2017)*	DIPAK MISRA ASHOK BHUSHAN R. BANUMATHI			
43	*Navtez Singh Johar* v. *Union of India (2018)*	DIPAK MISRA A.M. KHANWILKAR R.F. NARIMAN D.Y. CHANDRACHUD INDU MALHOTRA			
44	*Joseph Shine* v. *Union of India (2018)*	DIPAK MISRA A.M. KHANWILKAR D.Y. CHANDRACHUD INDU MALHOTRA R.F. NARIMAN			
45	*Common Cause (Regd. Society)* v. *Union Of India (2018)*	DIPAK MISRA A.M. KHANWILKAR A.K. SIKRI D.Y. CHANDRACHUD ASHOK BHUSHAN			

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN CHAPTER VI

SL NO	NAME OF CASES	APPROVES CIVIL LIBERTY	APPROVES ECONOMIC LIBERTY	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY
46	*Indian Young Lawyers Association & Ors.* v. *State Of Kerala (2018)*	DIPAK MISRA A.M. KHANWILKAR R.F. NARIMAN D.Y. CHANDRACHUD INDU MALHOTRA		INDU MALHOTRA (PARTIAL)	
47	*Ayodhya Verdict (2019)*	RANJAN GOGOI N.V. RAMANA D.Y. CHANDRACHUD ASHOK BHUSHAN S.A. NAZEER (PARTIAL)	RANJAN GOGOI N.V. RAMANA D.Y. CHANDRACHUD ASHOK BHUSHAN S.A. NAZEER (PARTIAL)		

JUDGES CLASSIFIED ACCORDING TO GADBOI Jr CLASSIFICATION CHAPTER VI

CLASSICAL CONSERVATIVE	AMBIVALENT	CLASSICAL LIBERAL	MODERN LIBERAL	MODERN CONSER-VATIVE
M.M. PUNCHHI	A.M. AHMADI	KULDIP SINGH	NOT FOUND ANY	NOT FOUND ANY
K. RAMASWAMY	L.M. SHARMA	R.M. SAHAI		
G.S. SINGHVI	M.N. VENKATACHALIAH	S.P. BHARUCHA		
S.J. MUKHOPADHYAY		S.R. PANDIAN		
J. CHELAMESHWAR		J.S. VERMA		
		G.N. RAY		
		S. MOHAN		
		B.P. JEEVAN REDDY		
		M.H. KANIA		
		P.B. SAWANT		
		T.K. THOMMEN		
		Dr. A.S. ANAND		
		N.G. VENKATACHALA		
		S.C. AGARWAL		
		FAIZAN UDDIN		
		YOGESHWAR DAYAL		

JUDGES CLASSIFIED ACCORDING TO GADBOI Jr CLASSIFICATION CHAPTER VI

CLASSICAL CONSERVATIVE	AMBIVALENT	CLASSICAL LIBERAL	MODERN LIBERAL	MODERN CONSER-VATIVE
		A.M. KHANWILKAR	NOT FOUND ANY	NOT FOUND ANY
		INDU MALHOTRA		
		RANJAN GOGOI		
		N.V. RAMANA		
		Mrs. SUJATA V. MANOHAR		
		B.N. KRIPAL		
		G.B. PATNAIK		
		S. RAJENDRA BABU		
		K.G. BALAKRISHNAN		
		P.V. REDDI		
		ARIJIT PASAYAT		
		V.N. KHARE		
		S.S.M. QUADRI		
		Mrs. RUMA PAL		
		S.N. VAIRAVA		
		ASHOK BHAN		
		B.P. SINGH		

JUDGES CLASSIFIED ACCORDING TO GADBOI Jr CLASSIFICATION CHAPTER VI

CLASSICAL CONSERVATIVE	AMBIVALENT	CLASSICAL LIBERAL	MODERN LIBERAL	MODERN CONSER-VATIVE
		ADARSH K. GOEL	NOT FOUND ANY	NOT FOUND ANY
		D.Y. CHANDRACHUD		
		S.A. BOBDE		
		MARKENDEY KATJU		
		Mrs. GYAN SUDHA MISHRA		
		RADHAKRISHNAN		
		A.K. SIKRI		
		J.S. KHEHAR		
		MADAN B. LOKUR		
		KURIAN JOSEPH		
		R.F. NARIMAN		
		A.M. SAPRE		
		R.K. AGARWAL		
		S.K. KAUL		
		RANGANATH MISHRA		
		K.J. REDDY		
		S.B. MAJUMDAR		

JUDGES CLASSIFIED ACCORDING TO GADBOI Jr CLASSIFICATION CHAPTER VI

CLASSICAL CONSERVATIVE	AMBIVALENT	CLASSICAL LIBERAL	MODERN LIBERAL	MODERN CONSER-VATIVE
		M. SHAH	NOT FOUND ANY	NOT FOUND ANY
		B. SINGH		
		H. SEMA		
		K.S. RADHAKRISHNAN		
		P.C. GHOSH		
		Y.K. SABHARWAL		
		R. BANUMATHI		
		R.V. RAVEENDRAN		
		K.S. SINGH		
		S.S. AHMAD		
		S.A. NAZEER		
		U.U. LALIT		
		DIPAK MISRA		
		ASHOK BHUSHAN		
		S.H. KAPADIA		
		C.K. THAKKAR		
		P.K. BALASUBRAMANYAM		

JUDGES CLASSIFIED ACCORDING TO GADBOI Jr CLASSIFICATION CHAPTER VI

CLASSICAL CONSERVATIVE	AMBIVALENT	CLASSICAL LIBERAL	MODERN LIBERAL	MODERN CONSER-VATIVE
		ALTAMAS KABIR	NOT FOUND ANY	NOT FOUND ANY
		D.K. JAIN		
		M. JAGANNADHA RAO		
		K. VENKATASWAMI		
		B.L. HANSARIA		
		S.C. SEN		
		SAGHIR AHMAD		

This chapter deals with a period from 1991-2020. In this chapter behavioural pattern of eighty two judges have been studied and analyzed in forty seven Supreme Court cases. Though this chapter deals with T.N. Godavarman case in detail, the voting behaviour of judges in this case has not been analyzed. T.N. Godavarman filed Writ petition in 1995 seeking attention of the Indian judiciary towards arbitrary felling of trees leading to shrinkage of total forest cover in India. The case was finally closed in 2014. During these two decades various Benches of the Supreme Court heard the matter and gave direction to the government regarding protection of forests in India. However, Supreme Court directions in this case were criticized for assumption of vast role by the Supreme Court thereby overstepping its boundary. George H. Gadboi categorized judges of the Supreme Court of India under several categories according to their voting behaviour from 1950-1967. However, in this chapter the researcher studied and analyzed Supreme Court cases instituted and delivered from 1991-2020. The researcher has considered four categories suggested by George H. Gadboi in 'Indian Judicial Behaviour'[94] and created another another category called 'Ambivalent' group. Judges whose voting behaviour do not manifest a specific pattern or behaviour have been positioned under Ambivalent group. The other four categories are-

Modern Liberal- Who approves civil liberty but disapproves economic liberty.
Modern Conservative- one who condones restriction of civil liberty i.e. approves restriction upon civil liberties but approves economic liberty.
Classical Conservative- One whose voting behaviour suggests restriction upon both the civil liberty and economic liberty.
Classical Liberal- One whose voting behaviour corresponds to the belief in freedom of individual's both personal and property rights.

For the purpose of analyzing the voting pattern of judges it is necessary to mention that there are some judges in the list whose voting patterns have been manifested only once in this chapter. Therefore, the researcher does not negate the chance of judge's voting pattern in a particular case, studied and analyzed in this chapter, differing from the overall voting pattern of the judge.

[94] George H. Gadboi Jr., Indian Judicial Behaviour, 5 (3/5) *Economic and Political weekly* 149-166 (1970)

It is also to be mentioned that the phase studied in this chapter i.e. post 1991 is a phase of liberalization, privatization and globalization. The Supreme Court of India adopted restricted approach while reviewing government's economic policies. Therefore, judges manifesting their voting behaviour do not indicate their approval or disapproval towards government's economic policy. Economic liberty for the purpose of analyzing judge's voting pattern means economic freedom of person both natural and legal persons.

Judges categorized under Classical Conservative group are M.M. Punchhi, K. Ramaswamy, G.S. Singhvi, S.J. Mukhopadhyay, Chelameshwar JJ. Justice M.M. Punchhi's voting pattern was manifested once in this chapter in SC Advocates-On-Record Association v. Union of India (1994) where he voted in favour of limited independence to judiciary. Therefore, an assumption has been made that Justice Punchhi may deliver judgment disapproving economic liberty. Justice Ramaswamy in S.R. Bommai case undermined the significance of civil liberty by observing that President's proclamation of emergency under article 356 of the Constitution of India is non-justiciable. Justice Chelameshwar in SC Advocates-On-Record Association v. Union of India (2019) delivered judgment disapproving judicial independence.

Judges categorized under Ambivalent group are A.M. Ahmadi, L.M. Sharma and M.N. Venkatachaliah JJ. Justice Ahmadi disapproved civil liberty in SC Advocates-On-Record Association v. Union of India (1994) and S.R. Bommai case. However, he approved civil liberty in M Ismail Faruqui (case regarding Ayodhya dispute) and Indra Sawhney (case relating to reservation and determination of creamy layer of backward classes). Justice M.N. Venkatachaliah disapproved civil liberty in Ismail Faruqui case and approved civil liberty in Indra Sawhney case thereby led his way to Ambivalent group.

Judges categorized under Classical Liberal group are-

Kuldip Singh, R.M. Sahai, , S.P. Bharucha, S.R. Pandian, J.S. Verma, G.N. Ray, S. Mohan, B.P. Jeevan Reddy, M.H. Kania, P.B. Sawant, T.K. Thommen, Dr. A.S. Anand, N.G. Venkatachala, S.C. Agarwal, Faizan Uddin, Yogeshwar Dayal, K.S. Singh, S.S. Ahmad, S.A. Nazeer, U.U. Lalit, Dipak Misra, Ashok Bhushan, A.M. Khanwilkar, Indu Malhotra, Ranjan Gogoi , N.V. Ramana, Mrs. Sujata V. Manohar, B.N. Kripal, G.B. Patnaik, S. Rajendra Babu, K.G. Balakrishnan, P.V. Reddi, Arijit

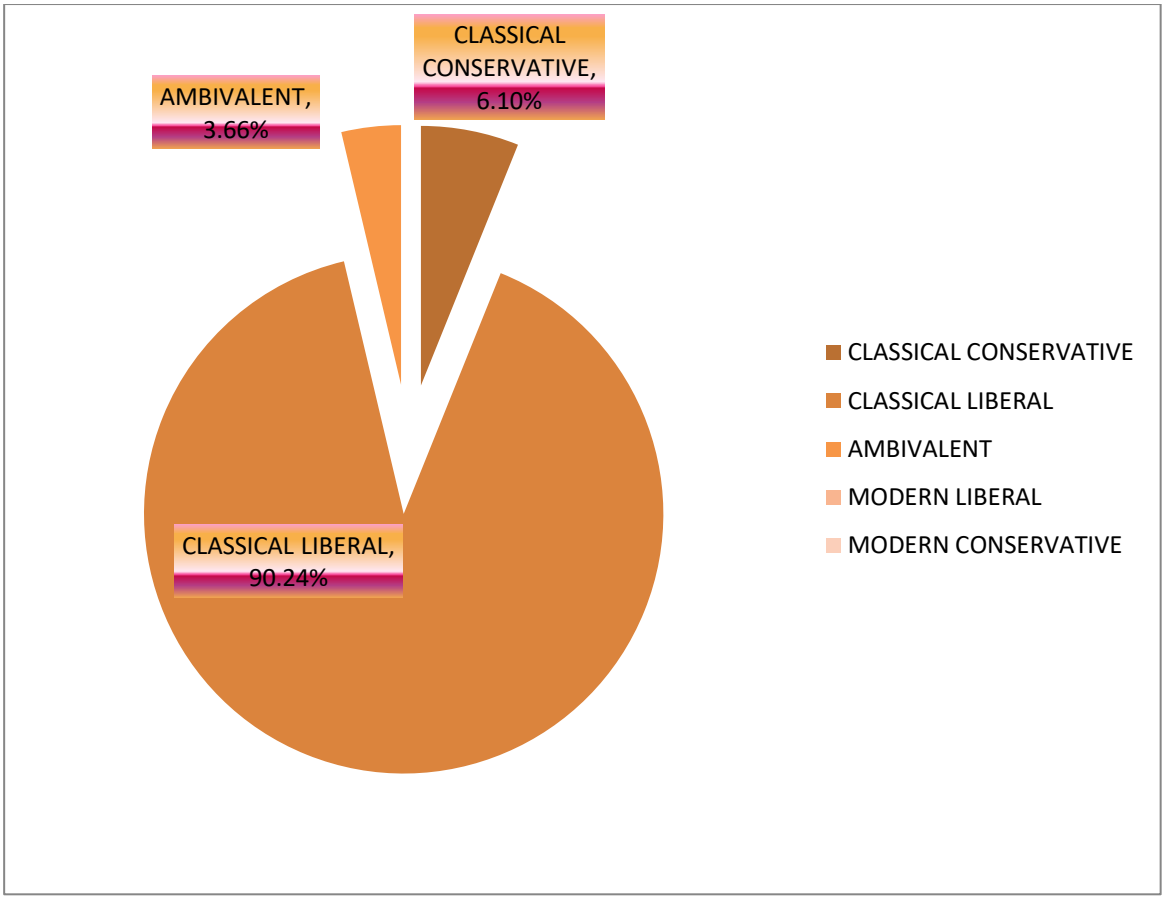
Pasayat, V.N. Khare, S.S.M. Quadri, Mrs. Ruma Pal, S.N. Vairava, Ashok Bhan, B.P. Singh, S.H. Kapadia, C.K. Thakkar, P.K. Balasubramanyam, Altamas Kabir, D.K. Jain, Adarsh K. Goel, D.Y. Chandrachud, S.A. Bobde, Markendey Katju, Mrs. Gyan Sudha Mishra, Radhakrishnan, A.K. Sikri, J.S. Khehar, Madan B. Lokur, Kurian Joseph, R.F. Nariman , A.M. Sapre, R.K. Agarwal, S.K. Kaul, Ranganath Misra, K.J. Reddy, S.B. Majumdar, M. Jagannadha Rao, K. Venkataswami, B.L. Hansaria, S.C. Sen, Saghir Ahmad, M. Shah, B. Singh, H. Sema, K.S. Radhakrishnan, P.C. Ghosh, Y.K. Sabharwal, R.V. Raveendran, R. Banumathi JJ. Post 1991 seventy four judges were found to belong to classical liberal category.

Ranjan Gogoi, N.V. Ramana, D.Y. Chandrachud, Ashok Bhushan and S.A. Nazeer JJ. in Ayodhya verdict observed demolition of mosque was unconstitutional. However, ordered that disputed land belonged to Hindu deity Ram Lalla and the claim of U.P. waqf Board over the disputed land was rejected.

B.N. Kripal, G.B. Patnaik, S. Rajendra Babu, K.G. Balakrishnan and P.V. Reddi JJ. approved civil liberty of education of citizens however, imposed restriction upon the private educational institution that affiliation by the government would not be granted unless the institution abide the standards set by the government to maintain the quality of education.

In Unni Krishnan case L.M. Sharma, S. Mohan, B.P. Jeevan Reddy, S.P. Bharucha and S.R. Pandian JJ. interpreted the right to education under article 21 in the light of DPSP. Therefore, the Bench observed that it is State's obligation to provide with the education but the parameter and content of this right has to be understood in the light of economic capacity and the developmental status of the State.

No judges were found under the category of Modern Liberal and Modern Conservative group.



VOTING PATTERN OF JUDGES FROM 1991-2020

In this chart voting behaviour of eighty one judges of the Supreme Court of India in forty six cases 2020 have been analyzed for the period 1991-2020. The researcher made five categories to study the voting behaviour of judges. These categories are Classical Conservative, Modern Conservative, Classical Liberal, Modern Liberal and Ambivalent group. No judge is found under Modern Conservative group during 1991-2020 as against 5.56% during 1978-1991. No judge is found under Modern Liberal group during period 1991-2020 as against 11.11% during 1978-1991. As against no judge in Ambivalent group during 1978-1991, 3.66% judge is found in this group during 1991-2020. 19.44% judges were found in Classical Conservative group during 1978-1991 which decreased to 6.10% during 1991-2020. A sharp increase is found in the category of Classical Liberal. As against 63.89% judges in Classical Liberal group during 1978-1991, 90.24% judges were found to belong to Classical Liberal group during 1991-2020.

During this phase voting pattern of five female judges of the Supreme Court have been studied and analyzed. These judges are Mrs. Sujata V. Manohar, Mrs. Ruma Pal, Mrs. Gyan Sudha Misra and Indu Malhotra, R. Banumathi JJ. All these four judges have manifested voting pattern of Classical Liberal group.

Voting pattern of eighty two judges have been found during the period 1991-2020. From amongst these eighty two judges only five judges are female judges and exhibits a disparity between the ratio of male and female judges in the Supreme Court of India.