NyayVidhan: the petitioner's name, the incident dates and places, the FIR and police-station details, a Minister's name and a complainant's name in a cited case title are redacted to protect the identity of sexual-offence survivors.

**REPORTABLE**

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL/CIVIL APPELLATE JURISDICTION

**WRIT PETITION (CRIMINAL) NO. 113 OF 2016**

[redacted] … PETITIONER(S)

VERSUS

STATE OF UTTAR PRADESH & ORS. …RESPONDENT(S)

WITH

**SPECIAL LEAVE PETITION @ (DIARY) NO. 34629 OF 2017**

**J U D G M E N T**

**V. RAMASUBRAMANIAN, J.**

**PRELUDE**

தீயினாற் சுட்டபுண் உள்ளாறும் ஆறாதே
நாவினாற் சுட்டவடு

Said the Tamil Poet-Philosopher Tiruvalluvar of the Tamil Sangam age (31, BCE) in his classic "*Tirukkural*". Emphasizing the importance of sweet speech, he said that the scar left behind by a burn injury may heal, but not the one left behind by an offensive

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Anita Malhotra
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speech. The translation of this verse by G.U. Pope in English reads thus:

> ***"In flesh by fire inflamed, nature may thoroughly heal the sore;***
> ***In soul by tongue inflamed, the ulcer healeth never more."***

A Sanskrit Text contains a piece of advice on what to speak and how to speak.

> सत्यं ब्रूयात् प्रियं ब्रूयान्न ब्रूयात् सत्यमप्रियम् ।
> प्रियं च नानृतं ब्रूयादेष धर्मः सनातनः ॥

> *satyam brūyāt priyaṃ brūyān na brūyāt satyam apriyam |*
> *priyaṃ ca nānṛtaṃ brūyād eṣa dharmaḥ sanātanaḥ ||*

The meaning of this verse is: ***"Speak what is true; speak what is pleasing; Do not speak what is unpleasant, even if it is true; And do not say what is pleasing, but untrue; this is the eternal law."***

The "*Book of Proverbs*" (16:24) says:

"***Pleasant words are a honeycomb, sweet to the soul and healing to the bones***"

Though religious texts of all faiths and ancient literature of all languages and geographical locations are full of such moral injunctions emphasising the importance of sweet speech (*more than*

*free speech*), history shows that humanity has consistently defied those diktats. The present reference to the Constitution Bench is the outcome of such behaviour by two honourable men, who occupied the position of Ministers in two different States.

## I. Questions formulated for consideration

**1.** By an order dated 05.10.2017, a Three Member Bench of this Court directed Writ Petition (Criminal) No.113 of 2016 to be placed before the Constitution Bench, after two learned senior counsel, appointed as *amicus curiae,* submitted that the questions arising for consideration in the writ petition were of great importance. Though the Bench recorded, in its order dated 05.10.2017, the questions that were submitted by the learned *amicus curiae*, the Three Member Bench did not frame any particular question, but directed the matter to be placed before the Constitution Bench.

**2.** At this juncture, a Special Leave Petition (Diary) No.34629 of 2017 arising out a judgment of the Kerala High Court came up before the same Three Member Bench. Finding that the questions raised in the said SLP were also similar, this Court passed an order

on 10.11.2017, directing the said SLP also to be tagged with Writ Petition (Criminal) No.113 of 2016.

**3.** Thereafter, the Constitution Bench, by an order dated 24.10.2019, formulated the following five questions to be decided by this Court:-

> "…1) Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?
>
> 2) Can a fundamental right under Article 19 or 21 of the Constitution of India be claimed other than against the 'State' or its instrumentalities?
>
> 3) Whether the State is under a duty to affirmatively protect the rights of a citizen under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?
>
> 4) Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?
>
> 5) Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort"? …"

## II. A brief backdrop

**4.** Without a brief reference to the factual matrix, the questions to be answered by us may look abstract. Therefore, we shall now refer to the background facts in both these cases.

**5.** Writ Petition (Criminal) No.113 of 2016 was filed under Article 32 of the Constitution praying for several reliefs including monitoring the investigation of a criminal complaint in FIR [redacted] under Section 154 Cr.P.C., for the offences under Sections 395, 397 and 376-D read with the relevant provisions of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and for the trial of the case outside the State and also for registering a complaint against the then Minister for Urban Development of the Government of U.P. for making statements outrageous to the modesty of the victims. The case of the petitioner in Writ Petition (Criminal) No.113 of 2016 in brief was that on [redacted] when he and the members of his family were travelling from [redacted] to attend the death ceremony of a relative, they were waylaid by a

gang. According to the writ petitioner, the gang snatched away cash and jewelry in the possession of the petitioner and his family members and they also gang raped the wife and minor daughter of the petitioner. Though an FIR was registered on [redacted] for various offences and newspapers and the television channels reported this ghastly incident, the then Minister for Urban Development of the Government of U.P. called for a press conference and termed the incident as a political conspiracy. Therefore, the petitioner apprehended that there may not be a fair investigation. The petitioner claims that he was also offended by the irresponsible statement made by the Minister and hence he was compelled to file the said writ petition for the reliefs stated supra.

**6.** Insofar as Special Leave Petition (Diary) No.34629 of 2017 is concerned, the same arose out of a judgment of the Division Bench of the Kerala High Court dismissing two writ petitions. The writ petitions were filed in public interest on the ground that the then Minister for Electricity in the State of Kerala issued certain statements in February 2016, 7.4.2017 and 22.4.2017. These statements were highly derogatory of women. Though according to

the petitioners in the public interest litigation, the political party to which the Minister belonged, issued a public censure, no action was taken officially against the Minister. Therefore, the petitioner in one writ petition prayed among other things for a direction to the Chief Minister to frame a Code of Conduct for the Ministers who have subscribed to the oath of office as prescribed by the Constitution with a further direction to the Chief Minister to take suitable action if any of the Ministers failed to live upto the oath. The prayer in the second writ petition was for a direction to the concerned Authorities to take action against the Minister for his utterances.

**7.** Both the writ petitions were dismissed by a Division Bench of the Kerala High Court, on the ground that the prayer of the public interest writ petitioners were in the realm of moral values and that the question whether the Chief Minister should frame a code of conduct for the Ministers of his cabinet or not, is not within the domain of the Court to decide. Therefore, challenging the said common order, the petitioner in one of those public interest writ petitions has come up with Special Leave Petition (Diary) No.34629

of 2017. Since the questions raised by the petitioner in the Special Leave Petition overlapped with the questions raised in the Writ Petition, they have been tagged together.

## III. Contentions

***8.*** We have heard Shri R. Venkataramani, learned Attorney General for India, Ms. Aparajita Singh, learned senior counsel who assisted us as *amicus curiae,* Shri Kaleeswaram Raj, learned counsel for the petitioner in the special leave petition and Shri Ranjith B. Marar, learned counsel appearing for the person who sought to intervene/implead.

### III.A. Preliminary note submitted by learned Attorney General for India

**9.** The learned Attorney General for India submitted a preliminary note containing his submissions question-wise, which can be summed up as follows:-

Question No.1

(i) On question No.1 it is his submission that as a matter of constitutional principle, any addition, alteration or change in the norms or criteria for imposition of restrictions on any fundamental right has to come up through a legislative

process. The restrictions already enumerated in clauses (2) and (6) of Article 19 have to be taken to be exhaustive. Therefore, the Court cannot, under the guise of invoking any other fundamental right such as the one in Article 21, impose restrictions not found in Article 19(2). Under the Constitutional scheme, there can be no conflict between two different fundamental rights or freedoms.

Question No. 2

(ii) The Constitution itself sets out the scheme of claims of fundamental rights against the State or its instrumentalities and it has also enacted in respect of breaches or violations of fundamental rights by persons other than State or its instrumentalities. Any proposition, to add or insert subjects or matters in respect of which claims can be made against persons other than the State, would amount to Constitutional change. The concept of State action propounded and applied in US Constitutional Law and the enactment of 42 US Code § 1983 have to be seen in the context of peculiar state of affairs dealing with governmental and official immunities from legal proceedings. In view of specific provisions in Articles 15(2), 17, 23 and 24 of the Indian Constitution, there may not be a strict need to take recourse to the law obtaining in the USA. Claims against persons other than the State, either through enacted law or otherwise must be confined to constitutionally enacted subjects or matters.

Question No. 3

(iii) There are sufficient Constitutional and legal remedies available for a citizen whose liberty is threatened by any person. Beyond the Constitutional and legal remedy and protection available, there may not be any other additional duty to affirmatively protect the right of a citizen under Article 21. Cases of infringement of fundamental rights are taken care of under Articles 32 and 226.

Question No. 4

(iv) Conduct of public servants like a Minister, if it is traceable to the discharge of public duty or the duties of the office, is subject to scrutiny of the law. Sanction for prosecution can be granted if misconduct is committed under colour of office. Such misconduct including statements that may be made by a Minister cannot be linked to the principles of collective responsibility. The concept of vicarious liability is incapable of being applied to situations and no government can ever be vicariously liable for malfeasance or misconduct of Minister not traceable to statutory duty or statutory violations for the purpose of legal remedies. Ministerial misdemeanors, which have nothing to do with the discharge of public duty and not traceable to the affairs of the State, will have to be treated as acts of individual violation and individual wrong. To extend in the abstract, the liability of the State to such situations or instances without necessary limitations can be problematic.

Post ***M/s. Kasturi Lal Ralia Ram Jain*** vs. ***The State of Uttar Pradesh***[1] and following ***Rudul Sah*** vs. ***State of Bihar***[2], this Court has treated misconduct of public servants or officers and consequent infringement of Constitutional rights as ground for grant of compensation. However, there is need for clarity and certainty as far as the conceptual basis is concerned. This may be better resorted through enacted law.

Question No. 5

(v) While the principle of Constitutional tort has been conceived in ***Nilabati Behera (Smt.) alias Lalita Behera (Through the Supreme Court Legal Aid Committee)*** vs. ***State of Orissa***[3]**,** and subsequently applied to provide in regard to the constitutional remedies, the matter pre-eminently deserves a proper legal framework in order that the principles and procedures are coherently set out without leaving the matter open-ended or vague.

**III.B. Notes of submissions by Amicus**

**10.** Ms. Aparajita Singh, learned senior counsel and *amicus curiae* submitted a written note question-wise, which can be summed up as follows:-

Question No. 1

1 AIR 1965 SC 1039
2 (1983) 4 SCC 141
3 (1993) 2 SCC 746

(i) The right to free speech under Article 19(1)(a) is subject to clearly defined restrictions under Article 19(2). Therefore, any law seeking to limit the right under Article 19(1)(a) has to necessarily fall within the limitations provided under Article 19(2). Whenever two fundamental rights compete, the Court will balance the two to allow the meaningful exercise of both. This conundrum is not new, as the rights under Article 21 and under Article 19(1)(a) have been interpreted and balanced on numerous occasions. Take for instance the Right to Information Act, 2005. The Act balances the citizen's right to know under Article 19(1)(a) with the right to fair investigation and right to privacy under Article 21. This careful balancing was explained by this Court in ***Thalappalam Service Cooperative Bank Ltd.*** vs. ***State of Kerala***[4]**.** The decision of this Court in ***R. Rajagopal alias R.R. Gopal*** vs. ***State of T.N.***[5] is another example of reading down the restrictions (in the form of defamation) on the right to free speech under Article 19(2), in its application to public officials and public figures in larger public interest. Again, in ***People's Union for Civil Liberties (PUCL)*** vs**.** ***Union of India***[6], the right to privacy of the spouse of the candidate contesting the election was declared as subordinate to the citizens' right to know under Article 19(1)(a). In ***Jumuna Prasad Mukhariya*** vs.

4 (2013) 16 SCC 82
5 (1994) 6 SCC 632
6 (2003) 4 SCC 399

***Lachhi Ram***[7], a challenge to Sections 123(5) and 124(5) of the Representation of the People Act, 1951 (*as they prevailed at that time*) was rejected, on the ground that false personal attacks against the contesting candidate was not violative of the right to free speech. But when it comes to private citizens who are not public functionaries, the right to privacy under Article 21 was held to trump the right to know under Article 19(1)(a). This was in the case of ***Ram Jethmalani*** vs. ***Union of India***[8], which concerned the right to privacy of account holders. In ***Sahara India Real Estate Corporation Limited*** vs. ***Securities and Exchange Board of India***[9], this Court struck a balance between the right of the media under Article 19(1)(a) with the right to fair trial under Article 21. The argument that free speech under Article 19(1)(a) was a higher right than the right to reputation under Article 21 was rejected by this Court in ***Subramanian Swamy*** vs. ***Union of India, Ministry of Law***[10]in which Section 499 IPC was under challenge. The right to free speech was balanced with the right to pollution free life in ***Noise Pollution (V.), in Re***[11] and the right to fair trial of the accused was balanced with the right to fair trial of the victim in ***Asha Ranjan*** vs. ***State of Bihar***[12].

7(1955) 1 SCR 608
8(2011) 8 SCC 1
9(2012) 10 SCC 603
10(2016) 7 SCC 221
11(2005) 5 SCC 733
12(2017) 4 SCC 397

Question No. 2

(ii) There are some fundamental rights which are specifically granted against non-State actors. Article 15(2)(a) – access to shops, public restaurants, hotels and places of public entertainment, Article 17 – untouchability, Article 23 – forced labour and Article 24- prohibition of employment of children in factories, mines etc., are rights which are enforceable against private citizens also. Some aspects of Article 21 such as the right to clean environment have been enforced against private parties as well. The State is also under a Constitutional duty to ensure that the rights of its citizens are not violated even by non-State actors and ensure an environment where each right can be exercised without fear of undue encroachment. In ***People's Union for Democratic Rights*** vs. ***Union of India***[13], while rejecting the contention of the State that it was the obligation of the private party i.e., the contractor to follow the mandate of Article 24 of the Constitution and the relevant laws, it was clarified that the primary obligation to protect fundamental rights was that of the State even in the absence of an effective legislation. In ***Bodhisattwa Gautam*** vs. [redacted] ***(Ms.)***[14], interim compensation was awarded holding that fundamental rights under Article 21 can be enforced even against private bodies and individuals. Public law remedy has been repeatedly resorted to even against non-

13(1982) 3 SCC 235
14(1996) 1 SC 490

State actors when their acts have violated the fundamental rights of other citizens. Award of damages against non-State actors for violation of the right to clean environment under Article 21 was laid down in ***M.C. Mehta*** vs. ***Kamal Nath***[15]. Similarly, the majority and concurring opinion in ***Justice K.S. Puttaswamy*** vs. ***Union of India***[16], while elaborating on the duty of the State and non-State actors to protect the rights of citizens, pointed out that recognition and enforcement of claims qua non-State actors may require legislative intervention. However, when it comes to Article 19, a Constitution Bench in ***P.D. Shamdasani*** vs. ***Central Bank of India Ltd.***[17], has held it to be inapplicable against private persons.

Question No. 3

(iii) Fundamental rights of citizens enshrined in the Constitution are not only negative rights against the State but also constitute a positive obligation on the State to protect those rights. The Constitution Bench in ***State of West Bengal*** vs. ***Committee for Protection of Democratic Rights, West Bengal***[18], while upholding the power of the Constitutional Court to transfer an investigation to the CBI without the consent of the concerned State, emphasized the duty of the

15(2000) 6 SCC 213
16(2017) 10 SCC 1
171952 SCR 391
18(2010) 3 SCC 571

State to conduct a fair investigation which is a fundamental right of the victim under Article 21. The majority judgment in ***Justice K.S. Puttaswamy*** (supra), defines the positive obligation of the State to ensure the meaningful exercise of the right of privacy. In ***S. Rangarajan*** vs. ***P. Jagjivan Ram***[19], this Court has categorically laid down that the State cannot plead its inability to protect the fundamental rights of the citizens. In ***Union of India*** vs. ***K.M. Shankarappa***[20], Section 6(1) of the Cinematograph Act, 1952 which granted the Central Government, the power to review the decision of the quasi-judicial Tribunal under the Act, was sought to be defended on the ground of law and order. The contention was rejected holding that it was the duty of the Government to ensure law and order. In ***Indibly Creative Private Limited*** vs. ***Government of West Bengal***[21], the negative restraint and positive obligation under Article 19(1) (a) has been explained. In ***Pt. Parmanand Katara*** vs. ***Union of India***[22], it was held that even the doctors in Government hospitals are duty bound to fulfil the constitutional obligation of the State under Article 21.

Question No. 4

19(1989) 2 SCC 574
20(2001) 1 SCC 582
21(2020) 12 SCC 436
22(1989) 4 SCC 286

(iv) The Minister being a functionary of the State, represents the State when acting in his official capacity. Therefore, any violation of the fundamental rights of the citizens by the Minister in his official capacity, would be attributable to the State. The State also has a positive obligation to protect the rights of citizens under Article 21, whether the violation is by its own functionaries or a private person. It would be preposterous to suggest that while the State is under an obligation to restrict a private citizen from violating the fundamental rights of other citizens, its own Minister can do so with impunity. However, the factum of violation would need to be established on the facts of a given case. It would involve a detailed inquiry into questions such as ***(a)*** whether the statement by the Minister was made in his personal or official capacity; ***(b)*** whether the statement was made on a public or private issue; ***(c)*** whether the statement was made on a public or private platform. In ***Amish Devgan*** vs. ***Union of India***[23], while dealing with hate speech, the impact of the speech of "*a person of influence*" such as a Government functionary, was explained. ***State of Maharashtra*** vs. ***Sarangdharsingh Shivdassingh Chavan***[24], provides a clear instance of direct interference with the investigation by a Chief Minister. The Court held the action of the Chief Minister to be "*wholly unconstitutional*" and contrary to the oath of allegiance to the Constitution and imposed costs on the State. The concurring opinion emphasizes the responsibility that the oath of office casts on the Minister under the Constitution. In ***Secretary, Jaipur Development Authority, Jaipur*** vs. ***Daulat Mal***

23(2021) 1 SCC 1
24(2011) 1 SCC 577

***Jain***[25], while dealing with a case involving the misuse of public office by a Minister, this Court elaborated on the responsibility and liability of the Ministerial office under the Constitution. The importance of the Oath of Office under the Constitution was also emphasized by the Constitution Bench in ***Manoj Narula*** vs. ***Union of India***[26]. However, the Ministerial code of conduct was held to be not enforceable in a court of law in ***R. Sai Bharathi*** vs. ***J. Jayalalitha***[27], as it does not have any statutory force. An argument can be made that the Minister is personally bound by the oath of his office to bear true faith and allegiance to the Constitution of India under Articles 75(4) and 164(3) of the Constitution. The Constitution imposes a solemn obligation on the Minister as a Constitutional functionary to protect the fundamental rights of the citizens. The code of conduct for Ministers (Both for Union and States) specifically lays down that the Code is in addition to the ". . . *observance of the provisions of the Constitution, the Representation of the People Act, 1951*". Therefore, a Constitutional functionary is duty bound to act in a manner which is in consonance with this constitutional obligation of the State.

<u>Question No. 5</u>

(v) The State acts through its functionaries. Therefore, the official act of a Minister which violates the fundamental rights of the citizens, would make the State liable under constitutional tort. The principle of sovereign immunity of the

25(1997) 1 SCC 35
26(2014) 9 SCC 1
27(2004) 2 SCC 9

State for the tortious acts of its servant, has been held to be inapplicable in the case of violation of fundamental rights. The principle of State liability under Constitutional tort was expounded in ***Nilabati Behera*** (supra). In ***Common Cause, A Registered Society*** vs. ***Union of India.***[28], the position in the case of a public functionary was explained.

## III.C. Written submissions of Shri Kaleeswaram Raj, Advocate for the SLP petitioner

**11.** Shri Kaleeswaram Raj, learned counsel appearing for the petitioner in the special leave petition submitted an elaborate note. This note is divided into several chapters dealing with the nature and extent of the freedom of speech, the restrictions on the same, the horizontality of fundamental rights, constitutional rights and constitutional values, statements made by Ministers and collective responsibility, self-regulation as the best mode of regulation, hate speech not being a protected speech and the way forward. The contents of this note are summarized as follows:-

(i) The Constitutional mandate of freedom of expression and free speech is to be preserved without imposing unconstitutional restrictions. It is a right available to everyone including political personalities.

28(1999) 6 SCC 667

(ii) But even while upholding such a right, efforts should be taken to frame a voluntary code of conduct for Ministers etc., to ensure better accountability and transparency;

(iii) There is an imperative need to evolve a device such as Ombudsman to act as a Constitutional check on the misuse of the freedom of expression by public functionaries using the apparatus of the State;

(iv) The right under Article 19(1)(a) is limited by restrictions expressly indicated in Article 19(2), under which the restrictions should be reasonable and must be provided for by law, by the State. Therefore this Court cannot provide for any additional restriction by an interpretative exercise or otherwise;

(v) It is too remote to suggest that the right of a victim under Article 21 stands violated if there is a statement by someone that the case was born out of political conspiracy. Therefore, there is actually no conflict of any other right with Article 21;

(vi) Unlike Article 25 which makes the right thereunder subject to public order, morality and health, Article 19(1)(a) does not contain such restrictions. As held by this Court in ***Sakal Papers (P) Ltd.*** vs. ***The Union of India***[29], freedom of speech can be restricted only in the interest of security of

29(1962) 3 SCR 842

the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot be curtailed, in the interest of the general public, as in the case of freedom to carry on business;

(vii) Restricting speech by public figures, such as politicians, on serious crimes will have great impact on the freedom of speech. Such criticism which calls out true conspiracies and true miscarriage of justice, plays an important role in a democracy;

(viii) In so far as the enforcement of fundamental rights against non-State actors is concerned, the vertical approach is giving way to the concept of horizontal application. The vertical approach connotes a situation where the enforceability is only against the Government and not against private actors. But with Nation States gradually moving from *laissez faire* governance to welfare governance, the role of the State is ever expanding, which justifies the shift.

(ix) While the South African Constitution has adopted a horizontal application by providing in Section 9(4) of the Bill of Rights of Final Constitution of 1996 that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-Section (3) which

sets out the grounds that bind the State, the judiciary itself has adopted a direct horizontal effect, in Ireland as could be seen from the decisions in ***John Meskell*** vs***. Córas Iompair Éireann***[30]and ***Murtagh Properties Limited*** vs. ***Cleary***[31]***.*** In ***John Meskell*** (supra), the Irish Supreme Court granted damages against the employer who dismissed the employee for not joining a particular union after serving a due notice to persuade him. In ***Murtagh Properties Limited*** (supra), the High Court recognized and enforced the right to earn livelihood without any discrimination based on sex against a private employer. Countries like Canada and Germany have developed indirect horizontal application, meaning thereby that the rights regulate the laws and statutes, which in turn regulate the conduct of citizens;

(x) In the Indian context, direct horizontal effect has limited application as can be seen from Articles 15(2), 17 and 24;

(xi) Paradigm cases of horizontality should be distinguished from ordinary cases. For instance, the U.S. Supreme Court held in ***Shelly*** vs. ***Kraemer***[32] a covenant contained in a contract prohibiting the sale of houses in a neighbourhood to African-Americans, as unenforceable, for they have the effect of denying equal protection under the laws. The

30 1973 IR 121
31 1972 IR 330
32 334 U.S. 1 (1948)

Federal Constitutional Court of Germany took a similar view in ***Lüth***[33] case (1958) where a call for boycott of a film directed by a person who had worked on anti-semitic Nazi propaganda was challenged. The German Court held that there was an objective order of values that must affect all spheres of law;

(xii) It has been repeatedly held by this Court that the power under Article 226 is available not only against the Government and its instrumentalities but also against "*any person or authority*". A reference may be made in this regard to two decisions *namely* ***Praga Tools Corporation*** vs. ***Shri C.A. Imanual***[34] and ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotasav Smarak Trust*** vs.***V.R. Rudani***[35];

(xiii) There are several instances where this Court has issued writs under Article 32 against non-State actors. Broadly those cases fall under two categories, *namely,* ***(i)*** private players performing public duties/functions; and ***(ii)*** non-State actors performing statutory activities that impact the rights of citizens. Cases which fall under these two categories have been held by this Court to be amenable to writ jurisdiction as seen from several decisions including

33Luth (1958) BVerfGE 7, 198
34(1969) 1 SCC 585
35(1989) 2 SCC 691

***M.C. Mehta*** vs. ***Union of India***[36]. Absent any of these parameters, the Court has refused to exercise writ jurisdiction as seen from ***Binny Ltd.*** vs. ***V. Sadasivan***.[37];

(xiv) Even in jurisdictions where socio economic rights have been elevated in status to that of constitutional rights, the enforcement of those rights were made available only against the State and not against private actors, as held by this Court in ***Society for Unaided Private Schools of Rajasthan*** vs. ***Union of India***[38]*;*

(xv) On the issue of potential conflict of rights, it is important to bear in mind the distinction between constitutional rights and constitutional values. On a formal level, values are understood teleologically as things to be promoted or maximized. Rights, on the other hand, are not to be promoted but rather to be respected. It would not show proper concern for a right to allow the violation of one right in order to prevent the violation of other rights. This would promote the non-violation of rights, but it would not respect rights[39];

(xvi) Instead of values whose satisfaction is to be maximized, rights act as constraints on the actions of the state. They confer individuals with a sphere of liberty that is inviolable.

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36 AIR 1987 SC 1086
37 (2005) 6 SCC 657
38 (2012) 6 SCC 1
39 Frances Kamm, Morality, Mortality Vol.2, Oxford University Press, 1996

Rights thereby act as restrictions on the government on how to pursue values, including constitutional values. It is, therefore, crucially important that we draw a distinction between the constitutional rights and constitutional values. Not every increase in liberty or every improvement in leading a dignified life is a constitutional right. This position has been accepted by this Court;

(xvii) As held by this Court in ***Justice K.S. Puttaswamy***, the Court will strike a balance, wherever a conflict between two sets of fundamental rights is projected. Strictly speaking, what is actually conceived by some and noted in several decisions including ***Justice K.S. Puttaswamy***, is not the conflict of rights in abstractum, at a doctrinal level, but the conflict in the notion/invocation/practice of rights;

(xviii) On the issue of statements made by Ministers and collective responsibility, a reference has to be made to Articles 75(3) and 164(2). Both these Articles speak of collective responsibility of the Council of Ministers. Though the language employed in these Articles indicate that such a collective responsibility is to the House of the People/ Legislative Assembly, it is actually a responsibility to the people at large. Since every utterance by a Minister will have a direct bearing on the policy of the Government, there is an imperative need for a voluntary code of conduct. As pointed out by this Court in ***Common Cause***

(supra), collective responsibility has two meanings, namely, ***(i)*** that all members of the Council of Ministers are unanimous in support of its policies and exhibit such unanimity in public; and ***(ii)*** that they are personally and morally responsible for its success and failure;

(xix) Individual aberrations on the part of Ministers are serious threats to constitutional governance and as such the head of the Council of Ministers has a duty to ensure that such breaches do not happen;

(xx) A code of conduct to self-regulate the speeches and actions of Ministers is constitutionally justifiable and this Court can definitely examine its requirement. Ideally, a Minister is not supposed to breach his collective responsibility towards the Cabinet and the Legislature and hence, it is advisable to have a cogent code of conduct as occurring in advanced democracies;

(xxi) While it is not possible to impose additional restrictions on the freedom of speech, it is certainly desirable to have a code of conduct for public functionaries, as followed in other jurisdictions. The Court may keep in mind the fact that this Court in ***Sahara India Real Estate Corporation Limited*** (supra) cautioned against framing guidelines across the board to restrict the freedom of Press;

(xxii) Coming to hate speeches, there has been a steep increase in the number of hate speeches since 2014. From May-2014 to date, there have been 124 reported instances of derogatory speeches by 45 politicians. Social media platforms have connived the proliferation of targeted hate speech. Such speeches provide fertile ground for incitement to violence;

(xxiii) On the role of the Court in dealing with the question of hate speech, the decisions in ***Pravasi Bhalai Sangathan*** vs. ***Union of India***[40]; ***Kodungallur Film Society*** vs. ***Union of India***[41]and ***Amish Devgan*** (supra) lay down broad parameters;

(xxiv) At the international level, the definition of hate speech was formulated in the UN Strategy and Plan of Action on Hate Speech, to mean

> *"… any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor."*

The Role and Responsibilities of Political Leaders in Combating Hate Speech and Intolerance (Provisional version) dated 12 March 2019, was submitted by the

40 (2014) 11 SCC 477
41 (2018) 10 SCC 713

Committee on Equality and Non-Discrimination to the Parliamentary Assembly of the Council of Europe. The Assembly passed the resolution adopting the text proposed by rapporteur Ms. Elvira Kovacs, Serbia;

(xxv) Finally, the way forward is, ***(i)*** for the legislature to adopt a voluntary model code of conduct for persons holding public offices, which would reflect Constitutional morality and values of good governance; and ***(ii)*** the creation of an appropriate mechanism such as Ombudsman, in accordance with the Venice principles and Paris principles. Till such an Ombudsman is constituted, the National and State Human Rights Commissions have to take pro-active measures, in terms of the provisions of Protection of Human Rights Act, 1993.

## IV. Discussion and Analysis

### Question No. 1

**12.** Question No.1 referred to us, is as to whether the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law are exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?

**History of evolution of clause (2) of Article 19**

**13.** For finding an answer to this question, it may be necessary and even relevant to take a peep into history. Since Dr. B.R. Ambedkar's original draft in this regard followed Article 40(6) of the Irish Constitution, the original draft of the Advisory Committee included restrictions such as public order, morality, sedition, obscenity, blasphemy and defamation. Sardar Vallabhbhai Patel suggested the inclusion of libel also. These restrictions were sought to be justified by citing the decision in ***Gitlow*** vs. ***New York***[42].

**14.** Since the country had witnessed large scale communal riots at that time, Sir Alladi Krishnaswamy Iyer forcefully argued for the inclusion of security and defence of the State or national security as one of the restrictions. Discussion also took place about restricting speech that is intended to spoil communal harmony and speech which is seditious in nature. With suggestions, counter suggestions and objections so articulated, the initial report of the Sub-Committee on Fundamental Rights underwent a lot of changes. The evolution of clauses (1) and (2) of Article 19 stage by stage, from the

42 286 US 652 (1925)

time when the draft report was submitted in April 1947, upto the time when the Constitution was adopted, can be presented in a tabular form[43] as follows:

| Draft | Provision |
|---|---|
| Draft Report of the Subcommittee on Fundamental Rights, April 1947 (BSR II, 139) | 9. There shall be liberty for the exercise of the following rights subject to public order and morality:<br>(a) The right of every citizen to freedom of speech and expression. The publication or utterance of seditious, obscene, slanderous, libellous or defamatory matter shall be actionable or punishable in accordance with law. |
| Final Report of the Sub-Committee on Fundamental Rights, April 1947 (BSR II, 172) | 10. There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the unit concerned whereby the security of the Union or the unit, as the case may be. |
| Interim Report of the Advisory Committee, April 30, 1947 | There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the Unit concerned whereby the security of the Union or the Unit, as the case may be, is threatened:<br>(a) The right of every citizen to freedom of speech and expression:<br>Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable. |
| Draft Constitution prepared | 15. (1) There shall be liberty for the exercise |

43 Sourced from the article "Arguments from Colonial Continuity- the Constitution (First Amendment) Act, 1951" (2008) of Burra, Arudra, Assistant Professor, Department of Humanities and Social Sciences , IIT (Delhi),

| | |
|---|---|
| by B. N. Rau, October 1947 (BSR III, 8-9) | of the following rights subject to public order and morality, namely:<br><br>(a) the right of every citizen to freedom of speech and expression;<br>…<br>(2) Nothing in this section shall restrict the power of the State to make any law or to take any executive action which under this Constitution it has power to make or to take, during the period when a Proclamation of Emergency issued under sub-section (I) of section 182 is in force, or, in the case of a unit during the period of any grave emergency declared by the Government of the unit whereby the security of the unit is threatened. |
| Draft Constitution prepared by the Drafting Committee and submitted to the President of the Constituent Assembly, February 1948 (BSR III, 522) | 13. (1) Subject to the other provisions of this Article, all citizens shall have the right –<br>(a) to freedom of speech and expression;<br>…<br>(2) Nothing in sub-clause (a) of clause (1) of this Article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or ***any other matter which offends against decency or morality or undermines the authority or foundation of the State.*** |
| Proposal introduced in the Constituent Assembly in October 1948 (BSR IV, 39) | 13. (1) Subject to the other provisions of this Article, all citizens shall have the right –<br>(a) to freedom of speech and expression;<br>…<br>(2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency or morality or ***undermines the security of, or tends to overthrow, the State.*** |

| | |
|---|---|
| Revised Draft Constitution, introduced and adopted in November 1949 (BSR IV, 755) | 19. (1) All citizens shall have the right ---<br>(a) to freedom of speech and expression;<br>...<br>(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. |

**15.** Immediately after the adoption of the Constitution, this Court had an occasion to deal with a challenge to an order passed by the Government of Madras in exercise of the powers conferred by Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949[44], banning the entry and circulation of a weekly journal called '*Cross Roads*' printed and published in Bombay. The ban order was challenged on the ground that it was violative of Article 19(1)(a). The validity of the statutory provision under which the ban order was issued, was also attacked on the basis of Article 13(1) of the Constitution. A Seven Member Constitution Bench of this Court, while upholding the challenge in ***Romesh Thappar*** vs. ***State of Madras***[45] held as follows: -

44 1949 Act
45 AIR 1950 SC 124

> "[12] We are therefore of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Art. 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. ..."

**16.** An argument was advanced in ***Romesh Thappar*** (supra) that Section 9(1-A) of the 1949 Act could not be considered wholly void, as the securing of public safety or maintenance of public order would include the security of the State and that therefore the said provision, as applied to the latter purpose was covered by Article 19(2). However, the said argument was rejected on the ground that where a law purports to authorise the imposition of restrictions on a fundamental right, in language wide enough to cover restrictions, both within or without the limits of Constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the Constitutional limits, as it is not severable.

**17.** On the same date on which the decision in ***Romesh Thappar*** was delivered, the Constitution Bench of this Court also delivered another judgment in ***Brij Bhushan*** vs. ***The State of Delhi***[46]. It also

46 AIR 1950 SC 129

arose out of a writ petition under Article 32 challenging an order passed by the Chief Commissioner of Delhi in exercise of the powers conferred by Section 7(1)(c) of the East Punjab Public Safety Act, 1949, requiring the Printer and the Publisher as well as the Editor of an English weekly by name '*Organizer*', to submit for scrutiny, before publication, all communal matters and news and views about Pakistan including photographs and cartoons, other than those derived from the official sources. Following the decision in ***Romesh Thappar***, the Constitution Bench held that the imposition of pre-censorship on a journal is a restriction on the liberty of the Press, which is an essential part of the right to freedom of speech and expression. The Bench went on to hold that Section 7(1)(c) of the East Punjab Public Safety Act, 1949 does not fall within the reservation of clause (2) of Article 19.

**18.** After aforesaid two decisions, the Parliament sought to amend the Constitution through the Constitution (First Amendment) Bill, 1951. In the Statement of Objects and Reasons to the First Amendment, it was indicated that the citizen's right to freedom of speech and expression guaranteed by Article 19(1)(a) has been held

by some Courts to be so comprehensive as not to render a person culpable, even if he advocates murder and other crimes of violence. Incidentally, the First Amendment also dealt with other issues, about which we are not concerned in this discussion. Clause (2) of Article 19 was substituted by a new clause under the Constitution (First Amendment) Act, 1951. For easy appreciation of the metamorphosis that clause (2) of Article 19 underwent after the first amendment, we present in a tabular column, Article 19(2) pre-first amendment and post-first amendment as under: -

| **Pre-First Amendment – Article 19(2)** | **Post-First Amendment – Article 19(2)** |
|---|---|
| (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. | (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. |

**19.** It is significant to note that Section 3(1)(a) of the Constitution (First Amendment) Act, 1951, declared that the ***newly substituted***

***clause (2) of Article 19 shall be deemed always to have been enacted in the amended form, meaning thereby that the amended clause (2) was given retrospective effect.***

**20.** Another important feature to be noted in the amended clause (2) of Article 19 is the inclusion of the words '*reasonable restrictions*'. Thus, the test of reasonableness was introduced by the first amendment and the same fell for jural exploration within no time, in ***State of Madras*** vs. ***V.G. Row***[47]. The said case arose out of a judgment of the Madras High Court quashing a Government Order declaring a society known as '*People's Education Society*' as an unlawful association and also declaring as unconstitutional, Section 15(2)(b) of the Indian Criminal Law Amendment Act, 1908, as amended by the Indian Criminal Law Amendment (Madras) Act, 1950. While upholding the judgment of the Madras High Court, this Court indicated as to how the test of reasonableness has to be expounded. The relevant portion of the judgment reads as follows: -

> "23. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of

47(1952) 1 SCC 410

> reasonableness can be laid down as applicable to all cases. **The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable**."

**21.** After the First Amendment to the Constitution, the country witnessed cries for secession, with parochial tendencies showing their ugly head, especially from a southern State. Therefore, a National Integration Conference was convened in September-October, 1961 to find ways and means to combat the evils of communalism, casteism, regionalism, linguism and narrow mindedness. This Conference decided to set up the National Integration Council. Accordingly, it was constituted in 1962. The constitution of the Council assumed significance in the wake of the

Sino-India war in 1962. This National Integration Council had a Committee on national integration and regionalism. This Committee recommended two amendments to the Constitution, *namely*, ***(i)*** the amendment of clause (2) of Article 19 so as to include the words "*the sovereignty and integrity of India*" as one of the restrictions; and ***(ii)*** the amendment of 8 Forms of oath or affirmation contained in the Third Schedule. Until 1963, no one taking a constitutional oath was required to swear that they would "*uphold the sovereignty and integrity of India*". But, the Constitution (Sixteenth Amendment) Act, 1963 expanded the forms of oath to ensure that "*every candidate for the membership of a State Legislature or Parliament, and every aspirant to, and incumbent of, public office*" – to quote its Statement of Objects and Reasons – "*pledges himself . . . to preserve the integrity and sovereignty of the Union of India*." Thus, by the Constitution (Sixteenth Amendment) Act, 1963, "*the sovereignty and integrity of India*", was included as an additional ground of restriction on the right guaranteed under Article 19(1)(a).

**22.** Having seen the history of evolution of clause (2) of Article 19, let us now turn to the first question.

**Two parts of Question No.1**

**23.** Question No.1 is actually in two parts. The first part raises a poser as to whether reasonable restrictions on the right to free speech enumerated in Article 19(2) could be said to be exhaustive. The second part of the Question raises a debate as to whether additional restrictions on the right to free speech can be imposed on grounds not found in Article 19(2), by invoking other fundamental rights.

**First part of Question No.1**

**24.** The judicial history of the evolution of clause (2) of Article 19 which we have captured above shows that lot of deliberations went into the articulation of the restrictions now enumerated. The draft Report of the Sub-Committee on Fundamental Rights itself underwent several changes until the Constitution was adopted in November, 1949. In the form in which the Constitution was adopted in 1949, the restrictions related to ***(i)*** libel; ***(ii)*** slander; ***(iii)*** defamation; ***(iv)*** contempt of court; ***(v)*** any matter which offends

against decency or morality; and ***(vi)*** any matter which undermines the security of the State or tends to overthrow the State.

**25.** After the 1st and 16th Amendments, the emphasis is on reasonable restrictions relating to, ***(i)*** interests of sovereignty and integrity of India; ***(ii)*** the security of the State; ***(iii)*** friendly relations with foreign states; ***(iv)*** public order; ***(v)*** decency or morality; ***(vi)*** contempt of court; ***(vii)*** defamation; and ***(viii)*** incitement to an offence.

**26.** ***A careful look at these eight heads of restrictions would show that they save the existing laws and enable the State to make laws, restricting free speech with a view to afford protection to (i) individuals (ii) groups of persons (iii) sections of society (iv) classes of citizens (v) the Court (vi) the State and (vii) the country***. This can be demonstrated by providing in a table, the provisions of the Indian Penal Code that make some speech or expression a punishable offence, thereby impeding the right to free speech, the heads of restriction under which they fall and the

category/class of person/persons sought to be protected by the restriction:

**Table of Provisions under IPC restricting freedom of speech and expression**

| **Laws restricting free speech** | **Heads of Restriction traceable to Article 19(2)** | **Person/Class of Person sought to be protected and the nature of protection.** |
|---|---|---|
| Section 117 of the IPC -Abetting commission of offence by the public or by more than ten persons. There is an illustration under the section which forms part of the statute. This illustration seeks to restrict freedom of expression<br>Illustration:<br>*A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.* | 1. Public Order<br>2. Incitement to an Offence | Individual Persons - Protection from incitement to commit offence. |
| Section 124A of the IPC - Sedition[48] | 1. Public Order<br>2. Decency and Morality | State – Protection against disaffection |
| Section 153A(1)(a) of the IPC - Promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony | 1.Public Order<br>2. Decency and Morality | Groups of Persons - Protection from disrupting harmony among different sections of society. |

48 Subject matter of challenge pending before this Court.

| | | |
|---|---|---|
| Section 153B of the IPC - Imputations, assertions prejudicial to the national-integration | 1. Sovereignty and Integrity of the State<br>2. Public Order<br>3. Decency and Morality | 1. Nation<br>2. Group of persons belonging to different religions, races, languages, etc,. |
| Section 171C of the IPC -Undue Influence at Elections | 1. Public Order | Candidates contesting the Election and Voters – To ensure free and fair election and to keep the purity of the democratic process |
| Section 228 of the IPC - Intentional insult or interruption to public servant sitting in judicial proceedings | Contempt of Court | Court –To prevent people from undermining the authority of the court. |
| Section 228A of the IPC- Disclosure of identity of the victim of certain offences etc. | 1. Public Order<br>2. Decency and Morality | Individual persons (Victims of offences u/s 376)- Protection of identity of women and minors. |
| Section 295A of the IPC - Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs. | 1. Public order,<br>2. Decency and morality | Sections of society professing and practicing different religious beliefs/sentiments. |
| Section 298 of the IPC- Uttering words, etc., with deliberate intent to wound religious feelings. | 1. Public order,<br>2. Decency and morality | Sections of society professing and practicing different religious beliefs/sentiments. |
| Section 351 of the IPC – Assault. The definition of assault includes some utterances, as seen from the Explanation under the Section.<br><br><u>Explanation:</u><br>*Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning* | 1. Public Order<br>2. Decency and morality | Individual Persons – Protection from Criminal Force. |

| | | |
|---|---|---|
| *as may make those gestures or preparations amount to an assault.* | | |
| Section 354 of the IPC- Assault to woman with intent to outrage her modesty<br><br><u>Note:</u><br>*The Definition of Assault includes the use of words.* | 1. Public Order<br>2. Decency and morality<br>3. Defamation | Individual Persons – Protection of Modesty of a Woman. |
| Section 354A of the IPC – Sexual Harassment (It includes sexually colored remarks). | 1. Public Order<br>2. Decency and morality<br>3. Defamation | Individuals – Protection of Modesty of a Woman. |
| Section 354C of the IPC – Voyeurism | 1. Public Order<br>2. Decency and morality<br>3. Defamation | Individuals – Protection of Modesty of a Woman. |
| Section 354D of the IPC – Stalking | 1. Decency and Morality<br>2. Defamation | Individuals – Protection of Modesty of a Woman. |
| Section 354E of the IPC – Sextortion | 1. Public Order<br>2. Decency and morality<br>3. Defamation | Individual Persons – Protection of Modesty of a Woman. |
| Section 355 of the IPC - Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.<br><br><u>Note:</u><br>*The Definition of Assault includes use of words.* | 1. Public Order<br>2. Decency and morality<br>3. Defamation | Individual Persons – Protection of reputation. |
| Section 383 of the IPC – Extortion (The illustration under the Section includes threat to publish defamatory libel).<br><br><u>Illustration:</u><br>*A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give* | 1. Public Order<br>2. Decency and Morality | Individuals – Protection from fear of injury/ Protection of Property. |

| | | |
|---|---|---|
| *him money. A has committed extortion.* | | |
| Section 390 of the IPC – Robbery<br><br><u>Note:</u><br>*In all robbery there is either theft or extortion.* | 1. Public Order<br>2. Decency and Morality | Individuals – Protection from fear of injury/ Protection of Property. |
| Section 499 of the IPC – Defamation | Defamation | Individual Persons and Group of People – Reputation sought to be protected. |
| Section 504 of the IPC – Intentional insult with intent to provoke breach of peace. | 1. Incitement to an offense<br>2. Public Order<br>3. Decency and morality | The public – Protection of Peace. |
| Section 505(1)(b) of the IPC – Statement likely to cause fear or alarm to the public whereby any person may be induced to commit an offence against the State or against the public tranquility. | 1. Sovereignty and Integrity of the State<br>2. Incitement to an offense<br>3. Public Order | State – Protection from the commission of offences against the State and protection of public tranquility. |
| Section 505(1)(c) of the IPC- Statement intended to incite any class or community of persons to commit any offence against any other class or community. | Public Order | Class/community of people.<br>Protection from incitement to commit violence against class or community. |
| Section 509 of the IPC – Word, Gesture or Act intended to insult the modesty of a woman. | 1. Defamation<br>2. Decency or Morality | Individual persons – Protection of Modesty of a Woman. |

**27.** We have taken note of, in the above Table, only the provisions of the Indian Penal Code that curtail free speech. There are also other special enactments such as The Scheduled Castes and The

Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Prevention of Insults to National Honour Act, 1971 etc., which also impose certain restrictions on free speech. From these it will be clear that the eight heads of restrictions contained in clause (2) of Article 19 are so exhaustive that the laws made for the purpose of protection of the individual, sections of society, classes of citizens, court, the country and the State have been saved.

**28.** The restrictions under clause (2) of Article 19 are comprehensive enough to cover all possible attacks on the individual, groups/classes of people, the society, the court, the country and the State. This is why this Court repeatedly held that any restriction which does not fall within the four corners of Article 19(2) will be unconstitutional. For instance, it was held by the Constitution Bench in ***Express Newspapers (Private) Ltd.*** vs. ***The Union of India***[49], that a law enacted by the legislature, which does not come squarely within Article 19(2) would be struck down as unconstitutional. Again, in ***Sakal Papers*** (supra), this Court held that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom.

49 1959 SCR 12

**29.** That the Executive cannot transgress its limits by imposing an additional restriction in the form of Executive or Departmental instruction was emphasised by this Court in ***Bijoe Emmanuel*** vs. ***State of Kerala***[50]. The Court made it clear that the reasonable restrictions sought to be imposed must be through "***a law***" having statutory force and not a mere Executive or Departmental instruction. ***The restraint upon the Executive not to have a back-door intrusion applies equally to Courts.*** While Courts may be entitled to interpret the law in such a manner that the rights existing in blue print have expansive connotations, the Court cannot impose additional restrictions by using tools of interpretation. What this Court can do and how far it can afford to go, was articulated by B. Sudharshan Reddy, J., in ***Ram Jethmalani*** (supra) as follows:

> *"**85**. An argument can be made that this Court can make exceptions under the peculiar circumstances of this case, wherein the State has acknowledged that it has not acted with the requisite speed and vigour in the case of large volumes of suspected unaccounted for monies of certain individuals. There is an inherent danger in making exceptions to fundamental principles and rights on the fly. Those exceptions, bit by bit, would then eviscerate the content of the main right itself.*

50(1986) 3 SCC 615

*Undesirable lapses in upholding of fundamental rights by the legislature, or the executive, can be rectified by assertion of constitutional principles by this Court. However, a decision by this Court that an exception could be carved out remains permanently as a part of judicial canon, and becomes a part of the constitutional interpretation itself. It can be used in the future in a manner and form that may far exceed what this Court intended or what the constitutional text and values can bear. We are not proposing that Constitutions cannot be interpreted in a manner that allows the nation-State to tackle the problems it faces. The principle is that exceptions cannot be carved out willy-nilly, and without forethought as to the damage they may cause.*

***86.****One of the chief dangers of making exceptions to principles that have become a part of constitutional law, through aeons of human experience, is that the logic, and ease of seeing exceptions, would become entrenched as a part of the constitutional order. Such logic would then lead to seeking exceptions, from protective walls of all fundamental rights, on grounds of expediency and claims that there are no solutions to problems that the society is confronting without the evisceration of fundamental rights. That same logic could then be used by the State in demanding exceptions to a slew of other fundamental rights, leading to violation of human rights of citizens on a massive scale."*

**30.** Again, in ***Secretary, Ministry of Information & Broadcasting, Govt. of India*** vs. ***Cricket Association of Bengal***[51], this Court cautioned that the restrictions on free speech can be imposed only on the basis of Article 19(2). In ***Ramlila Maidan Incident, in re.***[52], this Court developed a three-pronged

51(1995) 2 SCC 161
52 (2012) 5 SCC 1

test namely, ***(i)*** that the restriction can be imposed only by or under the authority of law and not by exercise of the executive power; ***(ii)*** that such restriction must be reasonable; and ***(iii)*** that the restriction must be related to the purposes mentioned in clause (2) of Article 19.

**31.** That the eight heads of restrictions contained in clause (2) of Article 19 are exhaustive can be established from another perspective also. The nature of the restrictions on free speech imposed by law/judicial pronouncements even in countries where a higher threshold is maintained, are almost similar. To drive home this point, we are presenting in the following table, a comparative note relating to different jurisdictions:

| **Jurisdiction** | **The Document from which the Right to Freedom of Speech and Expression flows** | **The Document from which the restrictions on the right to freedom of Speech and Expression flow** | **Nature of Restrictions** |
|---|---|---|---|
| India | Article 19(1)(a) - Constitution of India | Article 19(2) - Constitution of India | 1. Sovereignty and integrity of the State,<br>2. Security of the State,<br>3. Friendly relations |

| | | | |
|---|---|---|---|
| | | | with foreign countries,<br>4. Public order,<br>5. Decency and morality,<br>6. Contempt of court,<br>7. Defamation,<br>8. Incitement to an offense. |
| UK | Article 10(1) of the Human Rights Act, 1998 | Article 10(2) of the Human Rights Act, 1998 | 1. National security,<br>2. Territorial integrity or public safety,<br>3. For the prevention of disorder or crime, for the protection of health or morals,<br>4. For the protection of the reputation or rights of others,<br>5. For preventing the disclosure of information received in confidence, or<br>6. For maintaining the authority and impartiality of the judiciary. |
| USA | First Amendment to the US Constitution | No restriction is specifically provided in the Constitution. But Judicial Review by the Supreme Court has admitted certain restrictions | Recognised forms of Unprotected Speech:<br>1. **Obscenity** as held in Roth v. United States, 354 U.S. 476, 483 (1957).<br>2.**Child Pornography** as held in Ashcroft v. Free Speech Coalition, 435 U.S. 234 (2002).<br>**3. Fighting Words** |

| | | | |
|---|---|---|---|
| | | | **and True Threat** as held in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) and Virginia v. Black, 538 U.S. 343, 363 (2003), respectively. |
| Australia | Australian Constitution does not expressly speak about freedom of expression. However, the High Court has held that an implied freedom of political communication exists as an indispensible part of the system of representative and responsible government created by the Constitution. It operates as a freedom from government restraint, rather than a right conferred directly on individuals. Australia is a party to seven core international human rights treaties. The right to freedom of opinion and expression is contained in Articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR)and Articles 4 and 5 of | 1. Article 19(3), 20 of the ICCPR contains mandatory limitations on freedom of expression, and requires countries, subject to reservation/declaration, to outlaw vilification of persons on national, racial or religious grounds. Australia has made a declaration in relation to Article 20 to the effect that existing Commonwealth and state legislation is regarded as adequate, and that the right is reserved not to introduce any further legislation imposing further restrictions on these matters.<br><br>**2. Criminal Code Act 1995**<br><br>**3. Racial Discrimination Act 1975** | **Under International Treaties:**<br><br>1. Rights of Reputation of Others,<br>2. National Security,<br>3. Public Order,<br>4. Public Health, or<br>5. Public Morality<br><br>**Under the Criminal Code Act, 1995**<br><br>1.Offences relating to urging by force or violence the overthrow of the Constitution or the lawful authority of the Government; and<br><br>2. Offences relating to the use of a telecommunications carriage service in a way which is intentionally menacing, harassing or offensive, and using a carriage service to communicate content which is menacing, harassing or offensive.<br><br>**Speech or Expression amounting to Racial** |

| | | | |
|---|---|---|---|
| | the Convention on the Elimination of All Forms of Racial Discrimination (CERD) , Articles 12 and 13 of the Convention on the Rights of the Child (CRC) and Article 21 of the Convention on the Rights of Persons with Disabilities (CRPD). | | **Discrimination under the Racial Discrimination Act, 1975** |
| European Union | Article 10(1), European Convention on Human Rights, 1950 | Article 10(2), European Convention on Human Rights, 1950 | 1. In the interests of national security, territorial integrity or public safety,<br>2. For the prevention of disorder or crime,<br>3. For the protection of health or morals,<br>4. For the protection of the reputation or rights of others,<br>5. For preventing the disclosure of information received in confidence, or<br>6. For maintaining the authority and impartiality of the judiciary. |
| Republic of South Africa | Bill of Rights, Article 16(1) of the Constitution of the Republic of South Africa, 1996 | Bill of Rights, Article 16(2) of the Constitution of the Republic of South Africa, 1996 | 1. Propaganda for war,<br>2. Incitement of imminent violence,<br>3. Advocacy of hatred that is based on race, ethnicity, gender, religion, and that |

| | | | |
|---|---|---|---|
| | | | constitutes incitement to cause harm. |

**32.** Since the eight heads of restrictions contained in clause (2) of Article 19 seek to protect:

***(i)*** the individual – against the infringement of his dignity, reputation, bodily autonomy and property;

***(ii)*** different sections of society professing and practicing, different religious beliefs/sentiments - against offending their beliefs and sentiments;

***(iii)*** classes/groups of citizens belonging to different races, linguistic identities etc.- against an attack on their identities;

***(iv)*** women and children – against the violation of their special rights;

***(v)*** the State - against the breach of its security;

***(vi)*** the country - against an attack on its sovereignty and integrity;

***(vii)*** the Court – against an attempt to undermine its authority,

we think that the restrictions contained in clause (2) of Article 19 are exhaustive and no further restriction need to be incorporated.

**33.** In any event, the law imposing any restriction in terms of clause (2) of Article 19 can only be made by the State and not by

the Court. ***The role envisaged in the Constitutional scheme for the Court, is to be a gate-keeper (and a conscience keeper) to check strictly the entry of restrictions, into the temple of fundamental rights. The role of the Court is to protect fundamental rights limited by lawful restrictions and not to protect restrictions and make the rights residual privileges***. Clause (2) of Article 19 saves ***(i)*** the operation of any existing law; and ***(ii)*** the making of any law by the State. Therefore, it is not for us to add one or more restrictions than what is already found.

***Second part of Question No.1***

**34.** The second part of Question No.1 is as to whether additional restrictions on the right to free speech can be imposed on grounds not found in Article 19(2) by invoking other fundamental rights.

**35.** This part of Question No.1 already stands partly answered while dealing with the first part of Question No.1. The decisions of this Court in ***Express Newspapers (Private) Ltd.*** (supra), the ***Cricket Association of Bengal*** (supra) and ***Ramlila Maidan***

***Incident, in re.*** (supra), provide a complete answer to the question whether additional restrictions on the right to free speech can be imposed on grounds not found in Article 19(2).

**36.** The question whether additional restrictions can peep into Article 19(2), by invoking other fundamental rights, also stands answered by this Court in ***Sakal Papers***. In ***Sakal Papers***, the Central Government issued an order called Daily Newspaper (Price and Page) Order, 1960 in exercise of the power conferred under the Newspaper (Price and Page) Act, 1956, fixing the maximum number of pages that might be published by a newspaper according to the price charged. Therefore, the publisher of a Marathi Newspaper challenged the constitutionality of both the Act and the Order. One of the arguments raised on behalf of the State in the said case was that there are two aspects of the activities of newspapers namely, ***(i)*** the dissemination of news and views; and ***(ii)*** the commercial aspect. While the former would fall under Article 19(1)(a), the latter would fall under Article 19(1)(g).

**37.** Since these two rights are independent and since the restrictions on the right under Article 19(1)(g) can be placed in the

interest of the general public under Article 19(6), it was contended by the State in ***Sakal Papers*** that the Act and the Order are saved by clause (6) of Article 19. But the said argument of the State was rejected by the Constitution Bench in ***Sakal Papers***, in the following words:

> "It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgement on the same grounds as are set out in cl. (6) of Art. 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. ***If a law directly affecting it is challenged it is no answer that the restrictions enacted by it are justifiable under cls. (3) to (6). For, the scheme of Art. 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and cl. (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore, for holding that***

> ***the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom.***"

**38.** We are conscious of the fact that ***Sakal Papers*** was a case where the petitioner before the Court had two different fundamental rights and the law made by the State fell within the permitted restrictions upon the exercise of one of those two fundamental rights. However, the restriction traceable to clause (6) of Article 19 was not available in clause (2) of Article 19. It is in such circumstances that this Court held that the restriction validly imposed upon the exercise of one fundamental right cannot automatically become valid while dealing with another fundamental right of the same person, the restriction of which stands Constitutionally on different parameters.

**39.** In ***Sakal Papers*** the conflict was neither between one individual's fundamental right *qua* another individual's fundamental right nor one fundamental right *qua* another fundamental right of the same individual. It was a case where a restriction validly made upon a fundamental right was held invalid *qua* another fundamental right of the same individual. In the cases

on hand, what is sought to be projected is a possible conflict arising out of the exercise of a fundamental right by one individual, in a manner infringing upon the free exercise of the fundamental right of another person. But this conflict is age old.

**40.** The exercise of all fundamental rights by all citizens is possible only when each individual respects the other person's rights. As acknowledged by the learned Attorney General and Ms. Aparjita Singh, learned *Amicus*, this Court has always struck a balance whenever it was found that the exercise of fundamental rights by an individual, caused inroads into the space available for the exercise of fundamental rights by another individual. The emphasis even in the Preamble on "***fraternity***" is an indication that the survival of all fundamental rights and the survival of democracy itself depends upon mutual respect, accommodation and willingness to co-exist in peace and tranquility on the part of the citizens. Let us now see a few examples. The Fundamental Duty enjoined upon every citizen of the country under Article 51-A (e) to *"promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities*

*and to renounce practices derogatory to the dignity of women*", is also an indicator that no one can exercise his fundamental right in a manner that infringes upon the fundamental right of another.

**41.** As articulated by Jeevan Reddy, J. in ***Cricket Association of Bengal,*** no one can exercise his right of speech in such a manner as to violate another man's right. In paragraph 152 of the decision in ***Cricket Association of Bengal***, Jeevan Reddy, J. said : ***"Indeed it may be the duty of the State to ensure that this right is available to all in equal measure and that it is not hijacked by a few to the detriment of the rest. This obligation flows from the Preamble to our Constitution, which seeks to secure all its citizens liberty of thought, expression, belief and worship.....Under our Constitutional scheme, the State is not merely under an obligation to respect the fundamental rights guaranteed by Part-III but under an equal obligation to ensure conditions in which those rights can be meaningfully and effectively enjoyed by one and all."***

**42.** The above passage from the opinion of Jeevan Reddy, J., in ***Cricket Association of Bengal***, was quoted with approval by the Constitution Bench in ***Sahara India Real Estate Corporation Limited*** case.

**43.** There are several instances where this Court either struck a balance or placed on a slightly higher pedestal, the fundamental right of one over that of the other. Interestingly, the competing claims arose in many of those cases, in the context of Article 19(1)(a) right of one person *qua* Article 21 right of another. Let us now take a look at some of them.

(i) In ***R. Rajagopal*** (supra), the rights pitted against one another were the freedom of expression under Article 19(1)(a) and the right to privacy of the Officers of the Government under Article 21. This Court propounded:

> "**26**. We may now summarise the broad principles flowing from the above discussion:
>
> (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be

violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above — indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false *and* actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament

> and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.
>
> (4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.
>
> (5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.
>
> (6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media."

(ii) In ***People's Union for Civil Liberties (PUCL)*** (supra), the rights that were perceived as competing with each other were the right to privacy of the spouse of a candidate contesting election *qua* the voter's right to information. In his separate but near concurring opinion, P. Venkatarama Reddi, J. articulated the position thus:

> ***"121. ...***
>
> ***...When there is a competition between the right to privacy of an individual and the right to information of the citizen, the former right has to be subordinated to the latter right as it serves the larger public interest. ..."***

(iii) In ***Noise Pollution (V.), in Re*** (supra), the rights that competed with one another, were the rights enshrined in Article 19(1)(a) and Article 21. The clash was between

individuals and the persons in the neighborhood. This Court held:

> "**11.** Those who make noise often take shelter behind Article 19(1)(a) pleading freedom of speech and right to expression. Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge into aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels, then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19(1)(a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21. ..."

(iv) In ***Ram Jethmalani*** the right to know, inhering in Article 19(1)(a) and the right to privacy under Article 21, were seen to be in conflict. Right to privacy was asserted by individuals holding bank accounts in other countries. The court had to balance the same with the citizens' right to know. This Court propounded as follows:

> "**84.** The rights of citizens, to effectively seek the protection of fundamental rights, under clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to

> dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, interalia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others."

(v) In ***Sahara India Real Estate Corporation Limited*** freedom of press and the right to fair trial were the competing rights. In this case, the Constitution Bench was dealing with a question whether an order for postponement of publication of the proceedings pending before a Court, would constitute a restriction under Article 19(1)(a) and as to whether such restriction is saved under Article 19(2). This question was answered by the Constitution Bench in para 42 as follows:

> "**42.** At the outset, we must understand the nature of such orders of postponement. Publicity postponement orders should be seen in the context of Article 19(1)(a) not being an absolute right. The US *clash model* based on collision between freedom of expression (including free press) and the right to a fair trial will not apply to the Indian Constitution. In certain cases, even the accused seeks publicity (not in the pejorative sense) as openness and transparency is the basis of a fair trial in which all the stakeholders who are a party to a

litigation including the Judges are under scrutiny and at the same time people get to know what is going on inside the courtrooms. These aspects come within the scope of Article 19(1) and Article 21. When rights of equal weight clash, the Courts have to evolve balancing techniques or measures based on recalibration under which both the rights are given equal space in the constitutional scheme and this is what the "postponement order" does, subject to the parameters mentioned hereinafter. But, what happens when the courts are required to balance important public interests placed side by side. For example, in cases where presumption of open justice has to be balanced with presumption of innocence, which as stated above, is now recognised as a human right. These presumptions existed at the time when the Constitution was framed [existing law under Article 19(2)] and they continue till date not only as part of rule of law under Article 14 but also as an Article 21 right. The constitutional protection in Article 21 which protects the rights of the person for a fair trial is, in law, a valid restriction operating on the right to free speech under Article 19(1)(a), by virtue of force of it being a constitutional provision. Given that the *postponement orders* curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is *real and substantial risk* of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is "the end and purpose of all laws". However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders *outweigh* the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. ..."

(vi) In ***Thalapplam Service Cooperative Bank Ltd.*** (supra), the right to know held as part of Article 19(1)(a) and the right to privacy being part of Article 21 were perceived as competing with each other, in a matter between holders of accounts in cooperative banks and members of the public who wanted details. This Court in paragraph 64 held:

> "**64.** Recognising the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights under Section 8(j), as already indicated. If the information sought for is personal and has no relationship with any public activity or interest or it will not subserve larger public interest, the public authority or the officer concerned is not legally obliged to provide those information. Reference may be made to a recent judgment of this Court in Girish Ramchandra Deshpande v. Central Information Commr., (2013) 1 SCC 212, wherein this Court held that since there is no bona fide public interest in seeking information, the disclosure of said information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the Act. Further, if the authority finds that information sought for can be made available in the larger public interest, then the officer should record his reasons in writing before providing the information, because the person from whom information is sought for, has also a right to privacy guaranteed under Article 21 of the Constitution."

(vii) In ***Subramanian Swamy*** (supra), the right to freedom of speech of an individual guaranteed under Article 19(1)(a) *qua* the right to dignity and reputation of another individual guaranteed under Article 21 were the competing rights. In this case, the Court held as follows:

> "**98.** Freedom of speech and expression in a spirited democracy is a highly treasured value. Authors, philosophers and thinkers have considered it as a prized asset to the individuality and overall progression of a thinking society, as it permits argument, allows dissent to have a respectable place, and honours contrary stances. There are proponents who have set it on a higher pedestal than life and not hesitated to barter death for it. Some have condemned compelled silence to ruthless treatment. William Dougles has denounced regulation of free speech like regulating diseased cattle and impure butter. The Court has in many an authority having realised its precious nature and seemly glorified sanctity has put it in a meticulously structured pyramid. Freedom of speech is treated as the thought of the freest who has not mortgaged his ideas, may be wild, to the artificially cultivated social norms; and transgression thereof is not perceived as a folly. Needless to emphasise, freedom of speech has to be allowed specious castle, but the question is: should it be so specious or regarded as so righteous that it would make reputation of another individual or a group or a collection of persons absolutely ephemeral, so as to hold that criminal prosecution on account of defamation negates and violates right to free speech and expression of opinion…"

(viii) In ***Asha Ranjan*** (supra), the right to free trial, of an accused *vis-à-vis* the victim, came up for consideration. The Court propounded in paragraph 61:

> "**61.** Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right. To elaborate, as in this case, the accused has a fundamental right to have a fair trial under Article 21 of the Constitution. Similarly, the

victims who are directly affected and also form a part of the constituent of the collective, have a fundamental right for a fair trial. Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances. Thus, permissible limitations are imposed by the State. The said limitations are to be within the bounds of law. However, when there is intra-conflict of the right conferred under the same article, like fair trial in this case, the test that is required to be applied, we are disposed to think, it would be "paramount collective interest" or "sustenance of public confidence in the justice dispensation system". An example can be cited. A group of persons in the name of "class honour", as has been stated in *Vikas Yadav v. State of U.P.,* (2016) 9 SCC 541: (2016) 3 SCC (Cri) 621], cannot curtail or throttle the choice of a woman. It is because choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognised in the Constitution under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking". It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion. Therefore, if the collective interest or the public interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes "Rule of Law". …"

(ix) In ***Railway Board representing the Union of India*** vs. ***Niranjan Singh***[53], a trade union worker was charged of the misconduct of addressing meetings within the railway premises, in contravention of the directions issued by the employer. When he sought protection under clauses (a), (b) and (c) of Article 19(1), this Court rejected the same by holding "***that the exercise of those freedoms will come to an end as soon as the right of someone else to hold his property intervenes.***" This Court went on to state that "***the validity of that limitation is not to be judged by the test prescribed in sub-Articles (2) and (3) of Article 19***".

(x) In ***Life Insurance Corporation of India*** vs. ***Prof. Manubhai D. Shah***[54], two fundamental rights were not competing or in conflict with each other. But the right to free speech and the right to propagate one's ideas, in the context of censorship under the Cinematograph Act, 1952 and in the context of a State institution refusing to publish an Article in an in-house magazine were in question. In Paragraph 23 of the Report, this Court said: "*every right has a corresponding duty or obligation and so is the fundamental right of speech and expression. The freedom conferred by Article 19(1((a) is therefore not absolute as perhaps in the case of the US First Amendment: it carries with it certain responsibilities towards fellow citizens and society at*

53(1969) 1 SCC 502
54 (1992) 3 SCC 637

*large.* ***A citizen who exercises this right must remain conscious that his fellow citizen too has a similar right. Therefore, the right must be so exercised as not to come in direct conflict with the right of another citizen***."

**44.** The series of decisions discussed above shows that whenever two or more fundamental rights appeared either to be on a collision course or to be seeking preference over one another, this Court has dealt with the same by applying well-established legal tools. Therefore, we are of the view that under the guise of invoking other fundamental rights, additional restrictions, over and above those prescribed in Article 19(2), cannot be imposed upon the exercise of one's fundamental rights.

**45.** In fine, we answer Question No.1 in the following manner:

> *"The grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other fundamental rights or under the guise of two fundamental rights staking a competing claim against each other, additional restrictions not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual."*

**Question No.2**

**46.** The second question referred to us is as to whether a fundamental right under Article 19 or 21 can be claimed against anyone other than the State or its instrumentalities. Actually, the question is not about "*claim*" but about "*enforceability*".

**47.** To use the phraseology adopted by the philosophers of Law, ***the question on hand is as to whether Part III of the Constitution has a "vertical" or "horizontal" effect.*** Wherever Constitutional rights regulate and impact only the conduct of the Government and Governmental actors, in their dealings with private individuals, they are said to have "*a vertical effect*". But wherever Constitutional rights impact even the relations between private individuals, they are said to have "*a horizontal effect*".

**48.** In his scholarly article, "The '*Horizontal Effect*' of Constitutional Rights", published in Michigan Law Review (Volume 2. Issue 3, 2003) Stephen Gardbaum, states that the horizontal position has been adopted to varying degrees in Ireland, Canada, Germany, South Africa and European Union. According to the

learned author, this issue has also been the topic of sustained debate in the United Kingdom following the enactment of the Human Rights Act of 1998[55].

**49.** No jurisdiction in the world appears to be adopting, at least as on date, a purely vertical approach or a wholly horizontal approach. A vertical approach provides weightage to individual autonomy, choice and privacy, while the horizontal approach seeks to imbibe Constitutional values in all individuals. These approaches which appear to be bipolar opposites, raise the age-old question of '*individual vs. society*'.

**50.** Even in countries where the individual reigns supreme, as in the United States, the Thirteenth Amendment making slavery and involuntary servitude a punishable offence, has actually made inroads into individual autonomy. Therefore, some scholars think that the Thirteenth Amendment provided a shift from the 'purely vertical' approach in a direct way. Subsequently, an indirect effect of the horizontality was found in certain decisions of the U.S. Supreme Court, two of which are of interest.

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55 Interestingly The Protection of Human Rights Act, 1993 was enacted in India five years before a similar Act came in United Kingdom.

**51.** After the American Civil War (1861-1865), the Reconstruction Era began in the United States. During this period, the Fourteenth Amendment came (1866-1868) followed by the Civil Rights Act, 1875 (also called Enforcement Act or Force Act). This Civil Rights Act, 1875 entitled everyone, to access accommodation, public transport and theaters regardless of race or color. Finding that despite the Act, they were excluded from "*whites only*" facilities in hotels, theaters etc., the victims of discrimination (African-Americans) filed cases. All those five cases were tagged together and the U.S. Supreme Court held in (year 1883) what came to be known as ***"Civil Rights Cases***"[56] that the Thirteenth and Fourteenth Amendments did not empower Congress to outlaw racial discrimination by private individuals. But after nearly 85 years, this decision was overturned in ***Jones*** vs. ***Alfred H. Mayer Co***[57] wherein it was held that Congress could regulate sale of private property to prevent racial discrimination. This was done in terms of ***42 U.S. Code*** § **1982** which entitled all citizens of the United States to have the same right, in every State and Territory, as is enjoyed by

56 109 US 3 (1883)
57 392 US 409 (1968)

white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

**52.** But a good 20 years before the decision in ***Jones*** (supra) was delivered, the U.S. Supreme Court had an occasion to consider a clash between contractual rights and Constitutional rights. It was in ***Shelly*** (supra) where an African-American family (*Shellys*) who purchased a property in a neighbourhood in St. Louis, Missouri was sought to be restrained from taking possession, because of a racially restrictive covenant contained in an Agreement of the year 1911 to which a majority of property owners in the neighbourhood were parties. The covenant restricted the sale of any property or part thereof for a term of 50 years to African-Americans and Asian-Americans. The Missouri Supreme Court upheld the racially restricted covenant. But the U.S. Supreme Court reversed it holding that the enforcement of such covenants violated the Equal Protection Clause of the Fourteenth Amendment. In other words the contractual rights were trumped by the Constitutional obligations.

**53.** Then came the decision in ***New York Times*** vs. ***Sullivan***[58]. It was a case where the City Commissioner in Montgomery, Alabama filed an action for libel against the New York Times for publishing an allegedly defamatory statement in a paid advertisement. The jury awarded damages and the judgment was affirmed by the Supreme Court of Alabama. However, the U.S. Supreme Court reversed the decision and held that the First Amendment which prohibited a public official from recovering damages for a defamatory falsehood relating to the public official's official conduct except in the case of actual malice, bound the plaintiff from exercising his private right.

**54.** The above decisions of the U.S. Supreme Court were seen by scholars as indicating a shift from a 'purely vertical approach' to a 'horizontal approach'.

**55.** While the U.S. Constitution represented (to begin with) a purely vertical approach, the Irish Constitution was found to be on the opposite side of the spectrum, with the rights provided therein having horizontal effect. Article 40 of the Irish Constitution deals with Personal Rights under the Chapter "*Fundamental Rights*". Sub-

58376 U.S. 254 (1964)

Article (3) of Article 40 states that "*The State guarantees in its laws to respect, and, as far as practicable,* ***by its laws to defend and vindicate the personal rights of the citizen****".* In other words, two rights are guaranteed namely ***(i)*** respect for the personal rights of the citizen; and ***(ii)*** to defend and vindicate the personal rights of its citizen.

**56.** The second clause of sub-Article (3) of Article 40 of the Irish Constitution states that "*The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen*".

**57.** The above provisions have been interpreted by the Irish Supreme Court as imposing a positive obligation on all State actors, including the Courts to protect and enforce the rights of individuals. It appears that full horizontal effect was given by the Irish Supreme Court to Constitutional rights such as freedom of association, freedom from sex discrimination and the right to earn a livelihood. For instance, the Irish Supreme Court had an occasion to consider

in ***John Meskell***, the Constitutional rights of citizens to form associations and unions guaranteed by Article 40.6.1. This case arose out of an agreement reached between certain trade unions and the employer to terminate the services of all workers and to reemploy them on condition that they agree to be members of the specified trade unions at all times. One employee whose services were terminated was not reemployed, as he refused to accept the special condition. Therefore, he sued the company for damages and claimed a declaration that his dismissal was a violation of the Constitutional rights. Holding that ***the Constitutional right of citizens to form associations and unions necessarily recognized a correlative right to abstain from joining associations and unions***, the Irish Supreme Court awarded damages on the ground that the non-State actors actually violated the Constitutional right of the plaintiff. In other words, the Constitutional rights were considered to have horizontal effect.

**58.** The Constitution of the Republic of South Africa, 1996 also provides horizontal effect to certain rights. Section 8.2 of the said Constitution states: "***A provision of the Bill of Rights binds a***

***natural or a juristic person*** *if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."*

**59.** The manner in which Section 8.2 has to be applied is spelt out in Section 8.3. The same reads thus:

> "8. Application
>
> .....
>
> 3. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court
>
> > a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
> >
> > b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

**60.** Section 9 of the Constitution of the Republic of South Africa guarantees equality before law and equal protection and the benefit of the law to everyone. ***Section 9.3 mandates the State not to unfairly discriminate directly or indirectly against anyone, on one or more grounds including race, gender, sex, pregnancy,***

***marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.*** If Section 9.3 is a mandate against the State, what follows in Section 9.4 is a mandate against every person. Section 9.4 reads as follows:

> "9. Equality
>
> .....
>
> 4. ***No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-section (3). National legislation must be enacted to prevent or prohibit unfair discrimination."***

**61.** Again, Section 10 recognises the right to human dignity. ***While doing so, it employs a language, which applies to non-State actors also***. Section 10 states that "*Everyone has inherent dignity and the right to have their dignity respected and protected*".

**62.** During the period from April 1994 to February 1997, when the Republic of South Africa had an Interim Constitution, the Constitutional Court of South Africa had an occasion to deal with a defamation action in ***Du Plessis and Others*** vs***. De Klerk and***

***Another***[59]. The defamation action was instituted by an Airline company, against a newspaper for publishing an article implicating the Airline in the unlawful supply of arms to UNITA (National Union for the Total Independence of Angola). After the Interim Constitution came into force, the defendant-newspaper raised a defence that they were insulated against the defamation action, under Section 15 of the Constitution which protected the freedom of the press. The Transvaal Provincial Division of the Supreme Court referred two issues to the Constitutional Court. ***One of the issues was whether Chapter 3 (fundamental rights) of the Constitution was applicable to legal relationships between private parties.*** The majority (11:2) of the Court held that Chapter 3 could not be applied directly to the common law in actions between private parties. But they left open the question whether there were particular provisions of the Chapter that could be so applied. However, the Court held that in terms of Section 35(3) of the Interim Constitution, Courts were obliged in the application and development of common law, to have due regard to the spirit, purport and objects of Chapter 3. The majority held that it was the

59 1996 ZACC 10

task of the Supreme Court to apply and develop the common law as required by Section 35(3).

**63.** Interestingly, the dissenting opinion given by Kriegler, J. became the subject matter of lot of academic debate. To begin with, Kriegler, J. rejected the idea that the debate was one of "*verticality versus horizontality*". He said that Chapter 3 rights do not operate only as against the State but also horizontally as between individuals where Statutes are involved. Calling "*direct horizontality*" as a bogeyman, Kriegler, J. said as follows:

> *"The Chapter has nothing to do with the ordinary relationships between private persons or associations. What it does govern, however, is all law, including that applicable to private relationships. Unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned.* ***As far as the Chapter is concerned a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may black-ball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuse to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry. One cannot claim rescission of a contract or specific performance thereof if such claim, albeit well-founded at common law,***

> ***infringes a Chapter 3 right****. One cannot raise a defence to a claim in law if such defence is in conflict with a protected right or freedom. The whole gamut of private relationships is left undisturbed. But the state, as the maker of the laws, the administrator of laws and the interpreter and applier of the law, is bound to stay within the four corners of Chapter 3.* ***Thus, if a man claims to have the right to beat his wife, sell his daughter into bondage or abuse his son, he will not be allowed to raise as a defence to a civil claim or a criminal charge that he is entitled to do so at common law, under customary law or in terms of any statute or contract. That is a far cry from the spectre of the state placing its hand on private relationships.*** *On the contrary, if it were to try to do so by legislation or administrative action, sections 4, 7(1) and the whole of Chapter 3 would stand as a bastion of personal rights."*

**64.** After the Final Constitution was adopted and it came into force on February 4, 1997, the first case to come up on this issue was ***Khumalo*** vs. ***Holomisa***[60]. In this case, Bantu Holomisa, the leader of the South African opposition political party sued a newspaper for publishing an article alleging as though he was under a police investigation for his involvement with a gang of bank robbers. Heavy reliance was placed in this case on the majority decision of the Constitutional Court of South Africa in ***Du Plessis*** (supra). But as pointed out earlier, ***Du Plessis*** was a case which was decided at a time when South Africa had only an Interim Constitution.

60 (2002) ZACC 12

Therefore, while dealing with ***Khumalo*** (supra), the Constitutional Court of South Africa applied the Final Constitution, as it had come into force by then. What is relevant for our purpose is the opinion of the Constitutional Court in paragraph 33 which dealt with the enforcement of the rights against non-State actors. Paragraph 33 reads thus:

> *"[33] In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression.* ***Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution****. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by section 8(3) of the Constitution."*

**65.** The horizontal effect was taken to another extreme by the Constitutional Court of South Africa in ***Governing Body of the Juma Musjid Primary School & Others*** vs. ***Essay N.O. and Others***[61] wherein it was held that an eviction order obtained by the

61(CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC)

owner of a private land on which a public school was located, could not be enforced as it would impact the students' right to basic education and the best interests of the child under the South African Constitution (Sections 28 and 29). The Court held that a private landowner and non-State actor has a Constitutional obligation not to impair the right to basic education under Section 29 of the Constitution. The relevant portion reads thus:

> "[57] In order to determine whether the right to a basic education in terms of section 29(1)(a) binds the Trust, section 8(2) requires that the nature of the right of the learners to a basic education and the duty imposed by that right be taken into account. From the discussion in the previous paragraphs of the general nature of the right and the MEC's obligation in relation to it, the form of the duty that the right to a basic education imposed on the Trustees emerges. It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC. There was also no obligation on the Trust to make its property available to the MEC for use as a public school. A private landowner may do so, however, in accordance with section 14(1) of the Act which provides that a public school may be provided on private property only in terms of an agreement between the MEC and the owner of the property.
>
> **[58] This Court, in Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to**

> **prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State.**"

**66.** Coming to the United Kingdom, they ratified the European Convention on Human Rights in 1951. But the rights conferred by the Convention had to be enforced by British citizens only in the European Court of Human Rights, for a long time. Finding that it took an average of five years to get an action in the European Court of Human Rights after all domestic remedies are exhausted and also finding that on an average, the same costed £30,000, a white paper was submitted in 1997 under the title "*Rights Brought Home*". This led to the enactment of the Human Rights Act, 1998 by the Parliament of the United Kingdom. It came into force on 2.10.2000 (coincidentally *Gandhi Jayanti* Day). This Act sought to incorporate into the domestic law, the rights conferred by the European

Convention, so that the citizens need not go to the European Court of Human Rights in Strasbourg. After the enactment of the Human Rights Act, the horizontal effect of Convention Rights became the subject matter of debate in several cases.

**67.** For instance, ***Douglas*** vs. ***Hello! Ltd.***[62] was a case where the right to privacy of an individual was pitted against the right of free speech and expression. In that case, a magazine called OK! was given the exclusive right to publish the photographs of the wedding reception of a celebrity couple that took place at New York. On the day of the wedding, certain paparazzo had infiltrated the venue and took few unauthorized photographs which were shared with potential competitor viz. Hello! Ltd. (another magazine). Hello! published the photographs in the next issue of their magazine even before Ok! could publish it. The question before the Court of Appeal (Civil Division) was whether there was violation of right to privacy, *among others* and whether it could be enforced against a private person. The Court said:

> "49. **It follows that the ECtHR has recognised an obligation on member states to protect one**

62[2001] QB 967

> **individual from an unjustified invasion of private life by another individual** and an obligation on the courts of a member state to interpret legislation in a way which will achieve that result.
>
> 50. Some, such as the late Professor Sir William Wade, in Wade & Forsyth Administrative Law (8th Ed.) p 983, and Jonathan Morgan, in Privacy, Confidence and Horizontal Effect:" Hello" Trouble (2003) CLJ 443, contend **that the Human Rights Act should be given 'full, direct, horizontal effect'. The courts have not been prepared to go this far.**....
>
> ...
> 102. **To summarise our conclusion at this stage: disregarding the effect of the OK! contract, we are satisfied that the Douglases' claim for invasion of their privacy falls to be determined according to the English law of confidence. That law, as extended to cover private and personal information, protected information about the Douglases' wedding."**

**68.** In ***X vs. Y***[63], the Court of Appeals dealt with the case of an employee X, who was cautioned by the Police for committing a sex offence with another man in a public bathroom. The offence occurred when X was off duty. On finding about the incident, the employer Y suspended X and dismissed him after a disciplinary hearing. The dismissal was challenged as violative of Convention Rights. An argument was raised that these rights are not enforceable against private parties. Though on facts, the claim of

63[2004] EWCA Civ 662

the dismissed employee was dismissed, the legal issue was articulated by the Court thus:

> "55. The applicant invoked articles 8 and 14 of the Convention in relation to his cause of action in private law.
> (1) As appears from the authorities cited in section C above, article 8 is not confined in its effect to relations between individuals and the state and public authorities**. It has been interpreted by the Strasbourg court as imposing a positive obligation on the state to secure the observance and enjoyment of the right between private individuals.**
> (2) If the facts of the case fall within the ambit of article 8, the state is also under a positive obligation under article 14 to secure to private individuals the enjoyment of the right without discrimination, including discrimination on the ground of sexual orientation.
> (3) A person's sexual orientation and private sex life fall within the scope of the Convention right to respect for private life (see ADT v. UK [2000] 2 FLR 697) and the right to non-discrimination in respect that right. Interference with the right within article 8.1 has to be justified under article 8.2."

**69.** In ***Plattform "Ärzte Für Das Leben"*** vs. ***Austria***[64], a question arose as to the enforceability of the right to freedom of assembly against non-State actors, who obstructed the assembly. The case arose out of these facts. On 28 December 1980, the anti-abortion NGO "Ärzte für das Leben" (*Physicians for Life*) organised a religious service and a march to the clinic of a doctor who carried

64[1988] ECHR 15

out abortions in Stadl-Paura. A number of counter-demonstrators disrupted the march to the hillside by mingling with the marchers and shouting down their recitation. At the end of the ceremony, special riot-control units – which had until then been standing by – formed a cordon between the opposing groups. One person caught in the act of throwing eggs was fined. The association lodged a disciplinary complaint against police for failing to protect the demonstration, which was refused. When the matter was taken to the Constitutional Court, it held that it had no jurisdiction over the case. Therefore, the association applied to the European Commission on 13 September 1982, alleging violation of Articles 9 (conscience and religion), 10 (expression), 11 (association) and 13 (effective remedy) of the European Convention on Human Rights. The European Court on Human Rights held:

> "32. A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.

> **Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11). Like Article 8 (art. 8), Article 11 (art. 11) sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be** (see, mutatis mutandis, the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, § 23)"

**70.** In ***X and Y*** vs. ***The Netherlands***[65], a privately-run home for children with mental disabilities was sued on the ground that a 16-year-old inmate was subjected to sexual assault. When the case was dismissed by the domestic court on a technical plea, the father of the victim approached the European Court of Human Rights. ECHR outlined the extent of State obligation on the protection of the right to life even against private persons as follows:

> "23. The Court recalls that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the Airey judgment of 9 October 1979, Series A no. 32, p. 17, para. 32). **These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.**"

65[1985] ECHR 4

**71.** Having taken an overview of the theoretical aspect of "*verticality vs horizontality*" and the approach of Constitutional Courts in other jurisdictions, let us now come back to the Indian context.

**72.** Part-III of the Indian Constitution begins with Article 12 which defines the expression "*the State*" to include the Government and the Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

**73.** After defining the expression "*the State*" in Article 12 and after declaring all laws inconsistent with or in derogation of the fundamental rights to be void under Article 13, Part-III of the Constitution proceeds to deal with rights. ***There are some Articles in Part-III where the mandate is directly to the State and there are other Articles where without injuncting the State, certain rights are recognized to be inherent, either in the citizens of the country or in persons***. In fact, there are two sets of dichotomies that are apparent in the Articles contained in Part

III. One set of dichotomy is between ***(i)*** what is directed against the State; and ***(ii)*** what is spelt out as inhering in every individual without reference to the State. The other dichotomy is between ***(i)*** citizens; and ***(ii)*** persons. This can be illustrated easily in the form of a table as follows:

| **Sl. Nos.** | **Provisions containing a mandate to the State** | **Provisions declaring the rights of the individuals without reference to "the State"** | **on whom the right is conferred** |
|---|---|---|---|
| 1. | Article 14 mandates the State not to deny to any person equality before law or the equal protection of the laws within the territory of India. | - | Any person |
| 2. | Article 15(1) mandates the State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. | - | Any citizen |
| 3. | - | Article 15(2) mandates that no citizen shall be subject to any disability, liability, restriction or condition, with regard to— (i) access to shops, public restaurants, hotels and places of public entertainment; or (ii) the use of wells, tanks, bathing ghats, roads and places of | Citizen |

| | | | |
|---|---|---|---|
| | | public resort maintained wholly or partly out of State funds or dedicated to the use of general public,<br><br>only on grounds of religion, race, caste, sex, place of birth or any of them. | |
| 4. | Article 16(1) declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. | - | Only citizens |
| 5. | Article 16(2) states that no citizen shall on grounds of only religion, race, caste, sex, descent, place of birth, resident or any of them be ineligible for or discriminated against in respect of any employment or office under the State. | - | Citizen |
| 6. | - | Article 17 abolishes untouchability and forbids the practice of the same in any form and declares it to be a punishable offence. | Neither the word "*citizen*" nor the word "*person*" is mentioned in Article 17. It means that what is abolished is the practice and any violation of this injunction is punishable. |
| 7. | - | Six types of rights are listed in Article 19(1), as available to all | Citizens |

| | | | |
|---|---|---|---|
| | | citizens. | |
| 8. | Article 20 confers three different rights namely (i) not to be convicted except by the application of a law in force at the time of the commission of offence; (ii) not to be prosecuted and punished for the same offence more than once; and (iii) right against self-incrimination. | - | Persons |
| 9. | - | Article 21 protects life and liberty of all persons. | Persons |
| 10. | Article 21A mandates the State to provide free and compulsory education to all children of the age of six to fourteen years. | - | Children |
| 11. | Article 22 provides protection against arrest and detention generally and saves preventive detention with certain limitations. | - | All persons except an enemy alien (Article 22(3)(a) makes the provision inapplicable to an enemy alien). |
| 12. | - | Article 23(1) prohibits traffic in human beings and begar and other similar forms of forced labour. Any contravention is made a punishable offence. | Any person |
| 13. | - | Article 24 prohibits the employment of children below the age of fourteen years in any factory or mine. | Children |
| 14. | - | Article 25(1) declares the right of all persons to freedom of | Persons |

| | | | |
|---|---|---|---|
| | | conscience and the right freely to profess, practice and propagate religion. | |
| 15. | - | Article 26 confers four different types of rights upon every religious denomination or any section thereof. | Religious denomination |
| 16. | Article 27 confers right not to be compelled to pay any taxes, for the promotion of any particular religion. | - | Person |
| 17. | - | Article 28(1) forbids religious instructions being provided in any educational institution wholly maintained out of State funds, with the exception of those established under any endowment or trust. | Person |
| 18. | - | A right not to take part in any religious instruction imparted in an educational institution recognised by the State or receiving aid out of State funds, is conferred by Article 28(3). | Person |
| 19. | - | A right to conserve the language, script or culture distinct to any part of the territory of India is conferred by Article 29(1). | Citizens |
| 20. | A right not to be denied admission into any | This applies to institutions | Citizen |

| | | | |
|---|---|---|---|
| | educational institution maintained by the State or receiving aid out of State funds, on grounds only of religion, race, caste, language or any of them is conferred by Article 29(2). | maintained by the State or even to institutions receiving aid out of State funds. | |
| 21. | (i) A right to establish and administer educational institutions of their choice is conferred by Article 30(1) upon the religious as well as linguistic minorities.<br><br>(ii) The State is mandated under Article 30(2) not to discriminate against any educational institution while granting aid. | - | Religious and linguistic minorities |
| 22. | - | The right to move the Supreme Court for the enforcement of the rights conferred by Part III is guaranteed under Article 32. | The words "*State*", "*citizen*" or "*person*" are not mentioned in Article 32, indicating thereby that the right is available to one and all, depending upon which right is sought to be enforced. |

**74.** The above table would show that some of the Articles of Part-III are in the form of a directive to the State, while others are not. This is an indication that some of the rights conferred by Part-III are to be honored by and also enforceable against, non-State actors.

**75.** For instance, the rights conferred by Articles 15(2)(a) and (b), 17, 20(2), 21, 23, 24, 29(2) etc., are obviously enforceable against non-State actors also. The owner of a shop, public restaurant, hotel or place of entertainment, though a non-State actor cannot deny access to a citizen of India on grounds only of religion, race etc., in view of Article 15(2)(a). So is the case with wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public, in view of Article 15(2)(b). The right not to be enforced with any disability arising out of untouchability is available against non-State actors under Article 17. The right against double jeopardy, and the right against self-incrimination available under sub-Articles (2) and (3) of Article 20 may also be available even against non-State actors in the case of prosecution on private complaints. We need not elaborate more, as the table given above places all rights in perspective.

**76.** That takes us to the question as to how the Courts in India have dealt with cases where there were complaints of infringement by non-State actors, of fundamental rights, other than those

covered in column 2 of the Table in para 73 above. To begin with, this Court was weary of extending the enforcement of fundamental rights against private individuals. But this reluctance changed over a period of time. Let us now see how the law evolved:

(i) In ***P.D. Shamdasani*** (supra), a Five Member Bench of this Court was dealing with a writ petition under Article 32, filed by a person who lost a series of proceedings both civil and otherwise, against the Central Bank of India Limited, which was at that time a company incorporated under Companies Act. The grievance of the petitioner in that case was that the shares held by him in the company were sold by the bank in exercise of its right of lien for recovery of a debt. Therefore, the petitioner pitched his claim under Article 19(1)(f) and Article 31(1)(*which was available at that time*). But while making a comparison between Article 31(1) (*as it stood at that time*) and Article 21, both of which contained a declaration in the same negative form, this Court observed in ***P.D. Shamdasani*** as follows: "***There is no express reference to the State in Article 21. But could it be suggested on that account that that Article was intended to afford protection to life and personal liberty against violation by private individuals? The words "except by procedure established by law" plainly exclude such a suggestion***".

(ii) The aforesaid principle in ***P.D. Shamdasani*** was reiterated by another Five Member Bench of this Court in ***Smt. Vidya Varma*** vs. ***Dr. Shiv Narain Varma***[66]holding that the language of Article 31(1) and Article 21 are similar and that they do not apply to invasions of a right by a private individual and that consequently no writ will lie in such cases.

(iii) In ***Sukhdev Singh*** vs. ***Bhagatram Sardar Singh Raghuvanshi***[67] two questions arose before a Constitution Bench of this Court. One of the questions was whether an employee of a statutory corporation is entitled to protection of Articles 14 and 16 against the corporation on the premise that these statutory corporations are authorities within the meaning of Article 12. In his separate but concurring opinion, Mathew, J. pointed out that the concept of State has undergone drastic changes in recent years and that today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. The learned Judge quoted the decision of the US Supreme Court in ***Marsh*** vs. ***Alabama***[68], where a person who was a Jehovah's witness was arrested for trespassing and distributing pamphlets, in a company town owned by a corporation. Though the property in question was private, the Court said that the operation of a town was a public function and that therefore, the private

66AIR 1956 SC 108
67(1975) 1 SCC 421
68326 US 501 (1946)

rights of the corporation must be exercised within constitutional limitations. After quoting the decision in ***Marsh,*** K.K. Mathew, J. went on to hold as follows:

> "**95.** But how far can this expansion go? Except in very few cases, our Constitution does not, through its own force, set any limitation upon private action. Article 13(2) provides that no State shall make any law which takes away or abridges the rights guaranteed by Part III. It is the State action of a particular character that is prohibited. Individual invasion of individual right is not, generally speaking, covered by Article 13(2). In other words, it is against State action that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceeding are not prohibited. Articles 17, 23 and 24 postulate that fundamental rights can be violated by private individuals and that the remedy under Article 32 may be available against them. But, by and large, unless an act is sanctioned in some way by the State, the action would not be State action. In other words, until some law is passed or some action is taken through officers or agents of the State, there is no action by the State…"

(iv) In ***People's Union for Democratic Rights*** (supra) this Court pointed out that the fundamental right guaranteed under Article 24 is enforceable against everyone, including the contractors. The Court went a step further by holding that the Union of India, the Delhi Administration and the Delhi Development Authority have a duty to ensure that this Constitutional obligation is obeyed by the contractors. Going further, this Court held that certain fundamental rights such as those found in Articles 17, 23 and 24 are enforceable against the whole world.

(v) ***S. Rangarajan*** (supra) was a case where a division Bench of the Madras High Court revoked the 'U' certificate issued to a Tamil feature film, on the ground that it offended the reservation policy. The Government of Tamil Nadu supported the decision of the High Court on the ground that several organizations in Tamil Nadu were agitating that the film should be banned as it hurt the sentiments of people belonging to the reserved categories. ***After pointing out that this Court was amused and troubled by the stand taken by the State Government, this Court indicated that it is the duty of the State to protect the freedom of expression since it is a liberty granted against the State and that the State cannot plead its inability to handle the hostile audience problem.*** Holding that the State cannot negate the rule of law and surrender to blackmail and intimidation, this Court said that it the obligatory duty of the Court to prevent it and protect the freedom.

(vi) In ***Smt. Nilabati***, this Court made ***a distinction between, (i) the decision in Kasturi Lal upholding the State's plea of sovereign immunity for tortious acts of its servants, which was confined to the sphere of liability in tort; and (ii) the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme***. In paragraph

34, which contains the separate but concurring opinion of Dr. A.S. Anand, J., the law was summarised as follows:-

> "**34.** The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

(vii) In ***Lucknow Development Authority*** vs. ***M.K. Gupta***[69] this Court pointed out that the administrative law of accountability

69(1994) 1 SCC 243

of public authorities for their arbitrary and even *ultra vires* actions has taken many strides and that it is now accepted by both by this Court and English Courts that the State is liable to compensate for the loss or injury suffered by a citizen due to arbitrary actions of its employees.

(viii) The decision in ***Bodhisattwa Gautam*** (supra), arose under special circumstances. A girl student of a college lodged a complaint against a Lecturer for alleged offences under Sections 312, 420, 493, 496 and 498-A IPC. The Lecturer moved the High Court under Section 482 Cr.P.C. for quashing the complaint. The High Court dismissed the quash petition. When the Lecturer filed a special leave petition, this Court not only dismissed the SLP but also issued notice *suo motu* on the question as to why he should not be asked to pay reasonable monthly maintenance during the pendency of the prosecution. Finally, this Court ordered payment of a monthly interim compensation after ***holding that what was violated was the fundamental right of the women under Article 21 and that therefore a remedy can be provided by this Court under Article 32 even against the non-state actor*** (*namely the accused*). This decision was cited with approval in ***Chairman, Railway Board & Ors.*** vs. ***Chandrima Das (Mrs.) &Ors.***[70].

70(2000) 2 SCC 465

(ix) As rightly highlighted by the learned *amicus*, this Court has awarded damages against non-State actors under the environmental law regime, whenever they were found to have violated the right under Article 21. For instance this Court was concerned with a case in ***M.C. Mehta*** vs. ***Kamal Nath*** [71] where a company built a club on the banks of River Beas, partly taken on lease from the Government and partly by encroaching into forest land and virtually turning the course of the River. Invoking the "*polluter pays principle*" and "*precautionary principle*" landscaped in ***Vellore Citizens' Welfare Forum*** vs. ***Union of India***[72]and also applied in ***Indian Council for Enviro-Legal Action*** vs. ***Union of India***[73], this Court held the owner of the private motel to be liable to pay compensation towards the cost of restoration of the ecology of the area. Thereafter, a show cause notice was issued to the motel as to why they should not be asked to pay compensation to reverse the degraded environment and as to why a pollution fine should not be imposed. In response, the motel contended before this Court that though in proceedings under Article 32 it was open to this Court to grant compensation to the victims whose fundamental rights were violated or who are victims of arbitrary Executive action or victims of atrocious behavior of public authorities, the Court cannot impose any fine on those who are guilty of that action.

71(1997) 1 SCC 388
72(1996) 5 SCC 647
73(1996) 3 SCC 212

The motel also contended that fine is a component of criminal jurisprudence and hence the imposition of fine would be violative of Articles 20 and 21. This Court, even while accepting the said argument in so far as the component of fine is concerned, directed the issue of fresh notice to the motel to show cause why exemplary damages be not awarded, in addition to the damages already awarded. Thereafter, this Court held in ***M.C. Mehta*** vs. ***Kamal Nath*** (supra at footnote no.15) as follows:-

> "**10.** In the matter of enforcement of fundamental rights under Article 21, under public law domain, the Court, in exercise of its powers under Article 32 of the Constitution, has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment. The Court while awarding damages also enforces the "POLLUTER-PAYS PRINCIPLE" which is widely accepted as a means of paying for the cost of pollution and control. To put in other words, the wrongdoer, the polluter, is under an obligation to make good the damage caused to the environment."

(x) In ***Consumer Education & Research Centre & Ors.*** vs. ***Union of India &Ors.***[74], this Court held that in appropriate cases the Court could give appropriate directions to the employer, be it the State or its undertaking or **private employer**, to make the right to life meaningful, to prevent pollution of work place, protection of environment, protection of the health of the workmen and to preserve free and

74(1995) 3 SCC 42

unpolluted water for the safety and health of the people. The Court was dealing in that case with the occupational health hazards and diseases afflicting the workmen employed in asbestos industries. In paragraph 29 of the Report, this Court said, "…*It is therefore settled law that in public law claim for compensation is a remedy available under Article 32 or Article 226 for the enforcement and protection of fundamental and human rights. … It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities*, ***a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the Constitution or the law***."

(xi) In ***Vishaka*** vs. ***State of Rajasthan.***[75], this Court laid down guidelines, in the absence of a legislation, for the enforcement of the right to gender equality of working women, in a class action petition that was filed to enforce fundamental rights of working women and to prevent sexual harassment of women in workplace. The guidelines imposed an obligation upon both public and private employers not to violate the fundamental rights guaranteed to working women under Article 14, 15, 19(1)(g) and 21. In ***Medha Kotwal Lele & Ors.*** vs. ***Union of***

75(1997) 6 SCC 241

***India***[76],this Court noted that even after 15 years of the judgment in ***Vishaka*** (supra), many States had not made the necessary amendments or failed to effectively implement the guidelines. This Court issued a direction in Paragraph 44.4 :

> "**44.4 The State functionaries and private and public sector undertakings/organisations/bodies/ institutions, etc. shall put in place sufficient mechanism to ensure full** implementation of *Vishaka* [Vishaka v. State of Rajasthan, (1997) 6 SCC 241 : 1997 SCC (Cri) 932] guidelines and further provide that if the alleged harasser is found guilty, the complainant victim is not forced to work with/under such harasser and where appropriate and possible the alleged harasser should be transferred. Further provision should be made that harassment and intimidation of witnesses and the complainants shall be met with severe disciplinary action."

(xii) In ***Githa Hariharan (Ms.) & Anr.*** vs. ***Reserve Bank of India & Anr.***[77], this Court was dealing with a challenge to Section 6(a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890 which declared the father to be the natural guardian of the person and property of a minor son and unmarried daughter. The mother was recognised as the natural guardian under these provisions "*after the father*". These provisions resulted in hardship to spouses separated from each other while dealing with the wards. Reading the obligations of the State under certain International Conventions like CEDAW into the right to

76(2013) 1 SCC 297
77(1999) 2 SCC 228

dignity of women and gender equality, traceable to Article 21 and 14, this Court read down the word "*after*" to mean "*in the absence of*". By such interpretation, this Court invoked fundamental rights to interpret a word in the sphere of family law.

(xiii) In ***Indian Medical Association*** vs. ***Union of India.***[78], the policy of an Army College of Medical Sciences to admit only those who are wards of army personnel, based on scores obtained in an entrance test, was under challenge. The question that came up for consideration was whether this discriminatory practice by a private entity would be in violation of Article 15 of the Constitution. This Court in Paragraph 187 stated:

> "**187.** Inasmuch as education, pursuant to T.M.A. Pai [(2002) 8 SCC 481], is an occupation under sub-clause (g) of clause (1) of Article 19, and it is a service that is offered for a fee that takes care of all the expenses of the educational institution in rendering that service, plus a reasonable surplus, and is offered to all those amongst the general public, who are otherwise qualified, then such educational institutions would also be subject to the discipline of clause (2) of Article 15. In this regard, **the purport of the above exposition of clause (2) of Article 15, when read in the context of egalitarian jurisprudence inherent in Articles 14, 15, 16 and Article 38, and read with our national aspirations of establishing a society in which equality of status and opportunity, and justice, social, economic and political, would imply that the private sector which offers such facilities ought not to be conducting their affairs in a manner which promote existing discriminations and disadvantages."**

78 (2011) 7 SCC 179

(xiv) In ***Society for Unaided Private Schools of Rajasthan*** (supra), the constitutionality of Section 12 of the Right of Children to Free and Compulsory Education Act, 2009 was challenged on the ground that it violated Articles 19(1)(g) and 30 of those who had established schools in the private sector. While upholding the Constitutionality of the provision, which required all schools, private and State-funded, to reserve 25% of its intake for students from disadvantaged background, this Court held:

> "**222.** The provisions referred to above and other provisions of international conventions indicate that the rights have been guaranteed to the children and those rights carry corresponding State obligations to respect, protect and fulfil the realisation of children's rights. ***The obligation to protect implies the horizontal right which casts an obligation on the State to see that it is not violated by non-State actors. For non-State actors to respect children's rights casts a negative duty of non-violation to protect children's rights and a positive duty on them to prevent the violation of children's rights by others, and also to fulfil children's rights and take measures for progressive improvement. In other words, in the spheres of non-State activity there shall be no violation of children's rights."***

(xv) In ***Jeeja Ghosh*** vs. ***Union of India***[79], the petitioner, a disabled person suffering from cerebral palsy, was unceremoniously ordered off a SpiceJet aircraft by the flight crew on account of the disability. The petition was filed for putting in place a system to ensure such a violation of human

79(2016) 7 SCC 761

dignity and inequality is not meted out to similarly placed persons. This Court observed as follows:

> "**10.** It is submitted by the petitioner that the Union of India (Respondent 1) has an obligation to ensure that its citizens are not subject to such arbitrary and humiliating discrimination. It is a violation of their fundamental rights, including the right to life, right to equality, right to move freely throughout the territory of India, and right to practise their profession. ***The State has an obligation to ensure that these rights are protected*** — particularly for those who are disabled. ..."

This Court awarded compensation to the petitioner against the private Airline on the ground that the airline, though a private enterprise, ought not to have violated her fundamental right.

(xvi) In ***Zee Telefilms Ltd.*** vs. ***Union of India***[80], this Court held that though BCCI does not fall within the purview of the term "*State*", it discharges public duties and that therefore even if a remedy under Article 32 is not available, the aggrieved party can always seek a remedy before the ordinary courts of law or by way of a writ petition under Article 226. This Court pointed out that the violator of a constitutional right could not go scot-free merely because it is not a State. The said logic was extended by this Court to a "Deemed to be University" in ***Janet Jeyapaul*** vs. ***SRM***

80(2005) 4 SCC 649

***University***[81], on the ground that though it is a private university, it was discharging "public functions", by imparting education.

**77.** All the above decisions show that on a case-to-case basis, this Court applied horizontal effect, considering the nature of the right violated and the extent of obligation on the part of the violator. But to enable the courts to have certain basic guidelines in place, for dealing with such cases, this Court developed a tool in ***Justice K.S. Puttaswamy.*** While affirming the right to privacy as a fundamental right, this Court laid down the landscape as follows:

> "**397.** Once we have arrived at this understanding of the nature of fundamental rights, we can dismantle a core assumption of the Union's argument: **that a right must either be a common law right or a fundamental right**. The only material distinctions between the two classes of right—of which the nature and content may be the same—lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. ***Common law rights are horizontal in their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the "State", as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the State. It is perfectly possible for an***

81(2015) 16 SCC 530

> ***interest to simultaneously be recognised as a common law right and a fundamental right. Where the interference with a recognised interest is by the State or any other like entity recognised by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-State actor, an action at common law would lie in an ordinary court***.
>
> **398.** Privacy has the nature of being both a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form."

**78.** Thus, the answer to Question No. 2 is partly found in the 9-Judge Bench decision in ***Justice K.S. Puttaswamy*** itself. We have seen from the line of judicial pronouncements listed above that after ***A.K. Gopalan*** vs. ***State of Madras***[82] lost its hold, this Court has expanded the width of Article 21 in several areas such as health, environment, transportation, Education and Prisoner's life etc. As Vivian Bose, J., put it in a poetic language in ***S. Krishnan vs State of Madras***[83]"***Brush aside for a moment the pettifogging of the law and forget for the nonce all the learned disputations about this and that, and "and" or "or ", or "may" and "must ". Look past the mere verbiage of the***

82AIR 1950 SC 27
83 AIR 1951 SC 301

***words and penetrate deep into the heart and spirit of the Constitution.".*** The original thinking of this Court that these rights can be enforced only against the State, changed over a period of time. The transformation was from "State" to "Authorities" to "instrumentalities of State" to "agency of the Government" to "impregnation with Governmental character" to "enjoyment of monopoly status conferred by State" to "deep and pervasive control"[84] to the "nature of the duties/functions performed"[85]. Therefore, we would answer Question No. 2 as follows:

> *"A fundamental right under Article 19/21 can be enforced even against persons other than the State or its instrumentalities"*

**Question No. 3**

**79.** "Whether the State is under a duty to affirmatively protect the rights of a citizen under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?" is the third question referred to us.

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84 R.D. Shetty vs International Airport Authority (1979) 3 SCC 489
85 Andi Mukta vs V.R. Rudani (1989) 2 SCC 691

**80.** Before we proceed further, it is necessary to make a small correction. Article 21 right is available not only to citizens but to all persons. Therefore, the word '*citizen*' mentioned in Question No.3 has to be read as '*person*'.

**81.** As we have pointed out in the Table under paragraph 73 above, the expression "*the State*" is not used in Article 21. This Article 21 guarantees every person that he shall not be deprived of his life and liberty except according to the procedure established by law. Going by the scheme of Part-III which we have outlined both in the preceding paragraphs and in the Table in paragraph 73, it is clear that the State has two obligations, ***(i)*** not to deprive a person of his life and liberty except according to procedure established by law; and ***(ii)*** to ensure that the life and liberty of a person is not deprived even otherwise. ***Article 21 does not say "the State shall not deprive a person of his life and liberty", but says that "no person shall be deprived of his life or personal liberty"***.

**82.** When the Constitution was adopted, our understanding of the words "*life*" and "*personal liberty*" was not as it has evolved over the

past seven decades. Similarly, it was not imagined or conceived at that time that anyone other than the State is capable of depriving the life and personal liberty of a person, except by committing a punishable offence. But with the expanding horizons of our philosophical understanding of law, life and liberty and the advancement of science and technology, we have come to realize that "*life is not an empty dream*" and "*our hearts are not muffled drums beating funeral marches to the grave*"[86], nor is "*life a tale told by an idiot, full of sound and fury signifying nothing*"[87].

**83.** Over a period of time, this Court has interpreted '*the right to life*' to include, ***(i)*** livelihood; ***(ii)*** all those aspects of life which go to make a man's life meaningful, complete and worth living; ***(iii)*** something more than mere survival or animal existence; ***(iv)*** right to live (and die) with human dignity; ***(v)*** right to food, water, decent environment, medical care and shelter etc.; ***(vi)*** all that gives meaning to a man's life, such as his tradition, culture, heritage and protection of that heritage in its full measure; and ***(vii)*** the right to Privacy. There are certain jurisdictions which have taken this right

86 From H.W. Longfellow in "A Psalm of life"
87 From Shakespeare in Macbeth

to include "the r*ight to be forgotten*" or the "r*ight not to be remembered*".

**84.** When the word "*life*" was understood to mean only physical existence, the deprivation of the same was generally conceived to be possible only by the State, except in cases where someone committed an offence punishable under the Penal Code. But the moment the right to life under Article 21 was developed into a bouquet of rights and science and technology intruded into all spheres to life, the deprivation of the right by non-State actors also became possible. Another development that has taken place in the past 3 to 4 decades is that several of the functions of the Government have either been out-sourced to non-State actors or been entrusted to public-private partnerships. This is why, the High Courts and this Court modulated the tests to be applied for finding out the maintainability of an action under Article 226 or Article 32. Once upon a time, the maintainability of a petition under Article 32/226 depended upon "*who the respondent was*". Later, the focus shifted to "*the nature of the duties/functions performed*" by the

respondent, for finding out his amenability to the jurisdiction under Article 226.

**85.** Life and personal liberty are two different things, even while being an integral part of a whole and they have different connotations. Question No. 3 is so worded that the focus is not on 'deprivation of life' but on ***(i)*** '*deprivation of personal liberty*' and that too by the acts or omissions of another person or private agency; and ***(ii)*** the duty of the State to affirmatively protect it. Therefore, we shall, in our discussion, focus more on two aspects, namely, ***(i)*** deprivation of personal liberty by non-State actors; and ***(ii)*** the duty of the State. An elaborate exposition of the expression "***personal liberty***" and its origin in Greek civilization may be found in the judgment of this Court in ***Siddharam Satlingappa Mhetre*** vs. ***State of Maharashtra***[88]. Suffice it to say for our purpose that in this judgment, this Court identified in paragraph 53 of the Report that Article 21 guarantees two rights, namely, ***(i)*** right to life; and ***(ii)*** right to personal liberty. Therefore, because of the manner in which Question No. 3 is framed, we shall try to confine our

88 (2011) 1 SCC 694

discussion to personal liberty, though at times both may overlap or get interchanged.

**86.** The expression "*personal liberty*" appearing in Article 21 was held by this Court in ***A.K. Gopalan*** (supra) to mean freedom from physical restraint of a person by incarceration or otherwise. However, the understanding of the expression "*personal liberty*" got enlarged in ***Kharak Singh*** vs. ***State of U.P.***[89] It was a case where a person who was originally charged for the offence of dacoity and later released for lack of evidence, was put under surveillance by the Police, and his name included in the history-sheet under the U.P. Police Regulations. As a result, he was required to make frequent visits to the Police Station. Sometimes the Police made domiciliary visits at night to his house. They would knock at the door, disturb his sleep and ask to report to the Police, whenever he went out of the village. Though by a majority, the Constitution Bench held in ***Kharak Singh*** (supra) that the regulation permitting domiciliary visits is unconstitutional, the majority upheld the Police surveillance on the ground that (at that time) right to privacy had

89AIR 1963 SC 1295

not become part of the fundamental rights. But K. Subba Rao, J. speaking for himself and J.C. Shah, J. held that the concept of personal liberty in Article 21 is comprehensive enough to include privacy. The thinking reflected in ***A.K. Gopalan*** that physical restraint was necessary to constitute infringement of personal liberty, was completely changed by K. Subba Rao, J. in his minority opinion in ***Kharak Singh***. Giving a completely new dimension to personal liberty, K. Subba Rao, J. said:

> "(31) ...The expression is wide enough to take in a right to be free from restrictions placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. ***In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected grooves. So also creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life***. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. ***Every democratic country sanctifies***

> ***domestic life; it is expected to give him rest, physical happiness, peace of mind and security***. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in (1948) 338 US 25, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. ***We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures***. It so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Art. 21 of the Constitution."

As pointed out by Rohinton Nariman, J., in ***Mohd. Arif alias Ashfaq*** vs. ***Registrar, Supreme Court of India & Ors.***[90] "*The minority judgment of Subba Rao and Shah, JJ. eventually became law in* ***Rustom Cavasjee Cooper*** *vs.* ***Union of India***[91]*(Bank Nationalisation case), where the 11-Judge Bench finally discarded the view expressed in* ***A.K. Gopalan*** *and held that various*

90(2014) 9 SCC 737
91(1970) 1 SCC 248

*fundamental rights contained in different articles are not mutually exclusive …*".

**87.** If U.P. Police Regulations were challenged in ***Kharak Singh***, identical Regulations issued by the State of Madhya Pradesh were challenged in ***Gobind*** vs. ***State of Madhya Pradesh***[92]. Though this Court upheld the impugned Regulations, K.K. Mathew, J. pointed out:

> "**25.** Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality, and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against Government" a phrase coined by Professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.
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> *** *** ***
>
> **27.** There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectible by the State. ***The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than***

92(1975) 2 SCC 148

***the realities of their natures***.[See 26 Stanford Law Rev. 1161, 1187]"

**88.** Thus, the understanding of this Court in ***A.K. Gopalan***, that deprivation of personal liberty required a physical restraint, underwent a change in ***Kharak Singh*** and ***Gobind*** (supra). From there, the law marched to the next stage in ***Satwant Singh Sawhney*** vs. ***D. Ramarathnam, Assistant Passport Officer, New Delhi***[93] where a Constitution Bench of this Court held by a majority, that ***the right to personal liberty included the right of locomotion and right to travel abroad***. It was held in the said decision that "***liberty" in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U.S. Constitution and the expression "personal liberty" in Article 21 only excludes the ingredients of "liberty" enshrined in Article 19 of the Constitution***. The Court went on to hold that "***the expression "personal liberty" in Art. 21 takes in the right of loco-motion and to travel abroad, but the right to move throughout the***

93 AIR 1967 SC 1836

***territories of India is not covered by it inasmuch as it is specially provided in Art. 19."***

**89.** ***Satwant Singh*** (supra) was the case of a businessman, who was directed to surrender his passport, with a view to prevent him from travelling out of India, on account of an investigation pending against him under the Export and Import Control Act. It must be noted that this case was before the enactment of The Passports Act, 1967.

**90.** After The Passports Act came into force, the decision of the 7-Judge Bench in ***Maneka Gandhi*** vs. ***Union of India***[94] came. It was held therein that the right to travel abroad is part of the right to personal liberty and that the same cannot be deprived except according to the procedure established by law.

**91.** Next came the decision in ***Bandhua Mukti Morcha*** vs. ***Union of India & Ors.***[95]. It was a case where a letter addressed by an NGO to the Court exposing the plight of persons working in stone quarries under inhuman conditions, was treated as a public

94 (1978) 1 SCC 248
95(1984) 3 SCC 161

interest litigation. Some of those workers were actually bonded labourers. After this Court issued notice to the State Governments and the lessees of the quarries, a preliminary objection was raised as to the maintainability of the writ petition. While rejecting the preliminary objection, this Court broadly indicated how the fundamental rights of those bonded labourers were violated and what were the duties of the State and the Court in cases of that nature. The relevant portion of the decision reads thus:

> "**9.** ... We should have thought that if any citizen brings before the Court a complaint that a large number of peasants or workers are bonded serfs or are being subjected to exploitation by a few mine lessees or contractors or employers or are being denied the benefits of social welfare laws, the State Government, which is, under our constitutional scheme, charged with the mission of bringing about a new socio-economic order where there will be social and economic justice for everyone and equality of status and opportunity for all, would welcome an enquiry by the Court, so that if it is found that there are in fact bonded labourers or even if the workers are not bonded in the strict sense of the term as defined in the Bonded Labour System (Abolition) Act, 1976 but they are made to provide forced labour or are consigned to a life of utter deprivation and degradation, such a situation can be set right by the State Government. Even if the State Government is on its own enquiry satisfied that the workmen are not bonded and are not compelled to provide forced labour and are living and working in decent conditions with all the basic necessities of life provided to them, the State Government should not baulk an enquiry by the Court when a complaint is brought by a citizen, but it should be anxious to satisfy the Court and through the Court,

> the people of the country, that it is discharging its constitutional obligation fairly and adequately and the workmen are being ensured social and economic justice. ..."

**92.** Therefore, three major breakthroughs happened, the first in ***Kharak Singh,*** the second in ***Satwant Singh*** and ***Maneka Gandhi*** (supra) and the third in ***Bandhua Mukti Morcha*** (supra). The first breakthrough was the opinion, though of a minority, that physical restraint was not a necessary *sine qua non* for the deprivation of personal liberty and that even a psychological restraint may amount to deprivation of personal liberty. The second breakthrough was the opinion in ***Satwant Singh*** and ***Maneka Gandhi*** that the right of locomotion and to travel abroad are part of the right to personal liberty. The third breakthrough was the opinion in ***Bandhua Mukti Morcha*** that the State owed an obligation to take corrective measures when there was an infraction of Article 21.

**93.** In ***National Human Rights Commission*** vs. ***State of Arunachal Pradesh & Anr.***[96], this Court was confronted with a situation where private citizens, namely, the All Arunachal Pradesh

96(1996) 1 SCC 742

Students' Union held out threats to forcibly drive *chakmas,* out of the State. The National Human Rights Commission itself filed a writ petition under Article 32. While allowing the writ petition and issuing directions, this Court indicated the role of the State in the following words:

> "**20.** ...***Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise,*** and it cannot permit any body or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty-bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics. ..."

**94.** In ***Mr. 'X'*** vs. ***Hospital 'Z'***[97], the appellant had accompanied a patient to the hospital for treatment and offered to donate blood, for the purpose of surgery. Before allowing him to donate blood, samples were taken from "X". It was detected that he was HIV positive. The fact that Mr. "X" tested positive was disclosed by the

97(1998) 8 SCC 296

hospital to the fiancée of Mr. "X". Therefore, the proposal for marriage was called off and Mr. "X" was ostracised by the community. Mr. "X" sued the hospital for damages, pitching his claim on the right to privacy and the duty of confidentiality that the hospital had in their relationship with him. Though this Court partly agreed with Mr. "X" the court found that the disclosure made by the hospital actually saved the life of a lady. But while dealing with a right under Article 21 *vis-à-vis* the hospital (a private hospital), this Court held as follows :-

> "**27.** ***Right of privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political.*** As already discussed above, doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed.
>
> **28.** Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and

> may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others."

**95.** In ***Pt. Parmanand Katara*** (supra), a human rights activist filed a writ petition under Article 32 seeking a direction to the Union of India that every injured person brought for treatment to a hospital should instantaneously be given medical aid to preserve life and that the procedural Criminal Law should be allowed to operate thereafter. The basis of the said writ petition was a report about a scooterist who got injured in a road traffic accident, being turned away by the nearby hospital on the ground that they were not authorized to handle medico-legal cases. Before the victim could be taken to an authorized hospital located 20 kilometers away, he died, which prompted the writ petition. While issuing directions, this Court expressed an opinion about the affirmative duty of court in paragraph 8 as follows:-

> "**8.** ***Article 21 of the Constitution casts the obligation on the State to preserve life***. The provision as explained by this Court in scores of decisions has emphasized and reiterated with gradually increasing emphasis that position. A doctor at the government hospital positioned to meet this State obligation is, therefore, duty bound to extend medical assistance for preserving life. ***Every doctor***

> ***whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life***. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. ***The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way***...."

That the State has an obligation to help preserve life, guaranteed under Article 21 was spelt out clearly in ***Pt. Parmanand Katara***. What applies to life applies equally to personal liberty. This is because there may be cases involving both the right to life as well as liberty.

**96.** For instance, in ***Suchita Srivastava & Anr.*** vs. ***Chandigarh Administration***[98],this Court had an occasion to consider the reproductive rights of a mentally-challenged woman. This right was read as part of the right to life and liberty under Article 21. In ***Devika Biswas*** vs. ***Union of India***.[99], this Court considered certain issues concerning the entire range of conduct and management, under the auspices of State Governments, of

98(2009) 9 SCC 1
99(2016) 10 SCC 726

sterilization procedures, either in camps or in accredited centres and held that the right to health and reproductive rights of a person are part of the right under Article 21. While doing so, this Court quoted with approval the decision in ***Bandhua Mukti Morcha*** where the obligation of the State to ensure that the fundamental rights of weaker sections of society are not exploited, was underlined.

**97.** Tapping of telephones in exercise of the power conferred by Section 5(2) of the Indian Telegraph Act, 1885 became the subject matter of challenge in ***People's Union for Civil Liberties (PUCL)*** vs. ***Union of India***[100]. This Court held that conversation on telephone is an important facet of a man's private life and that tapping of telephone would infringe Article 21. Technological eavesdropping except in accordance with the procedure established by law was frowned upon by the Court. This was at a time when mobile phones had not become the order of the day and the State monopoly was yet to be replaced by private players such as intermediaries/service providers. Today, the infringement of the

100(1997) 1 SCC 301

right to privacy is mostly by private players and if fundamental rights cannot be enforced against non-State actors, this right will go for a toss.

**98.** In ***District Registrar and Collector, Hyderabad & Anr.*** vs. ***Canara Bank & Ors.***[101], what was under challenge was an amendment made to The Indian Stamp Act, 1899 by the State of Andhra Pradesh, empowering a public officer to inspect the registers, books, papers and documents kept in any premises, including a private place where such registers, books etc., are kept. Taking cue from the decision in ***R. Rajagopal*** and ***Maneka Gandhi***, this Court held in paragraphs 55 and 56 of the decision as follows:-

> "**55.** The A.P. Amendment permits inspection being carried out by the Collector by having access to the documents which are in *private custody* i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents "tending" to or leading to the various facts stated in Section 73 are in existence and Section 73 being one without any safeguards as to probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. We have already referred to *R. Rajagopal case* [(1994) 6 SCC 632]

101(2005) 1 SCC 496

> wherein the learned Judges have held that the right to personal liberty also means life free from encroachments unsustainable in law, and such right flowing from Article 21 of the Constitution.
>
> **56.** In *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248] a seven-Judge Bench decision, P.N. Bhagwati, J. (as His Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given *additional protection* under Article 19 (emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple test: (*i*) it must prescribe a procedure; (*ii*) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (*iii*) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21."

**99.** In ***Indian Woman says Gang-raped on orders of village Court published in Business and Financial News dated 23-1-2014, in Re***[102], this Court was dealing with a *suo motu* writ petition relating to the gang-rape of a women under orders of a community *panchayat* as punishment for having a relationship with a man belonging to a different community. After taking note of two

102(2014) 4 SCC 786

earlier decisions, one in ***Lata Singh*** vs. ***State of U.P.***[103] which dealt with honour killings of youngsters involved in inter-caste, inter-religious marriages and the other in ***Arumugam Servai*** vs. ***State of Tamil Nadu***[104], which dealt with *khap panchayats*, this Court opined in paragraph 16 as follows:-

> "**16.** Ultimately, the question which ought to consider and assess by this Court is whether the State police machinery could have possibly prevented the said occurrence. ***The response is certainly a "yes". The State is duty-bound to protect the fundamental rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage***. Such offences are resultant of the State's incapacity or inability to protect the fundamental rights of its citizens."

In fact, this Court observed in the aforesaid decision that the obligation of the State does not get extinguished upon payment of compensation and that the rehabilitation of the victims of such nature was a must.

**100.** In ***Shakti Vahini*** vs. ***Union of India & Ors.***[105], while dealing with a writ petition seeking a direction to the State Governments and Central Government to take preventive measures

103(2006) 5 SCC 475
104(2011) 6 SCC 405
105(2018) 7 SCC 192

to combat honour crimes and to submit a National/State plan of action, this Court issued a slew of directions directing the State Governments to take both punitive and remedial measures, on the ground that the State has a positive obligation to protect the life and liberty of persons. In paragraph 49 this Court said, "*We are disposed to think so, as it is the obligation of the State to have an atmosphere where the citizens are in a position to enjoy their fundamental rights.*" After quoting the previous decision in ***S. Rangarajan*** (supra), which arose out of the infringement of the freedom of expression in respect of a cinematograph film, this Court said in ***Shakti Vahini*** (supra) as follows:-

> "**49. ...**
>
> ***We are absolutely conscious that the aforesaid passage has been stated in respect of a different fundamental right, but the said principle applies with more vigour when the life and liberty of individuals is involved. We say so reminding the States of their constitutional obligations to comfort, nurture the sustenance of fundamental rights of the citizens and not to allow any hostile group to create any kind of trench in them***."

**101.** At last, while dealing with the right to privacy, in ***Justice K.S. Puttaswamy***, this Court made it clear that, "***it is a right***

***which protects the inner sphere of the individuals from interference by both the State and non-State actors***".

**102.** Before we conclude this chapter, we must point out that some academics feel that the same level of justification for infringement by the State, for all rights recognized by the Court, end up being problematic[106] and that the idea of a hierarchy of rights, as articulated by Das, J. in ***A.K. Gopalan*** may have to be examined. In fact, ***Rohinton Nariman***, ***J.*** articulated this idea in ***Mohd. Arif*** (supra) where the question was as to whether a petition for review in the Supreme Court should be heard in open Court at least in death penalty cases. The learned Judge said:

> "**36.** ***If a pyramidical structure is to be imagined, with life on top, personal liberty (and all the rights it encompasses under the new doctrine) immediately below it and other fundamental rights below personal liberty it is obvious that this judgment will apply only to death sentence cases.*** *In most other cases, the factors mentioned by Krishna Iyer, J. in particular the Supreme Court's overcrowded docket, and the fact that a full oral hearing has preceded judgment of a criminal appeal on merits, may tilt the balance the other way."*

106Anup Surendranath in his Article "*Life and Personal Liberty*" in The Oxford Handbook of the Indian Constitution (South Asia Edition), 2016

Therefore, the importance of the right to personal liberty over and above all the other rights guaranteed under Articles 19 and 14 need hardly to be over-emphasized.

**103.** ***Therefore, our answer to Question No.3 would be that the State is under a duty to affirmatively protect the rights of a person under Article 21, whenever there is a threat to personal liberty, even by a non-State actor***.

**Question No.4**

**104.** Question No.4 referred to us is this: "Can a statement made by a Minister, traceable to any affairs of the State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?"

**105.** The above question revolves around the role and responsibility of a Minister and the vicarious liability/responsibility of a Government to any statement made by him. For answering the said question, we may need to understand the role of a Minister under our Constitutional scheme.

**106.** Part V of the Constitution providing for matters connected with "*The Union*" contains five chapters, dealing respectively with, ***(i)*** the Executive; ***(ii)*** Parliament; ***(iii)*** Legislative powers of the President; ***(iv)*** the Union Judiciary; and ***(v)*** Comptroller and Auditor General of India. Part VI of the Constitution dealing with "*The States*" contains six chapters, dealing respectively with, ***(i)*** general provision containing the definitions; ***(ii)*** the Executive; ***(iii)*** the State Legislature; ***(iv)*** Legislative power of the Governor; ***(v)*** the High Courts in the States; and ***(vi)*** Subordinate Courts.

**107.** While Articles 74 and 75 provide for, ***(i)*** 'Council of Ministers to aid and advise the President'; and ***(ii)*** 'Other provisions as to Ministers', insofar as the Union is concerned, Articles 163 and 164 provide for, ***(i)*** 'Council of Ministers to aid and advise the Governor'; and ***(ii)*** 'Other provisions as to Ministers', insofar as the States are concerned. Similarly, Article 77 provides for the conduct of business of the Government of India and Article 166 provides for the conduct of business of the Government of a State. The duties of the Prime

Minister are dealt with in Article 78 and the duties of Chief Ministers are dealt with in Article 167.

**108.** Article 75(3) states that "***the Council of Ministers shall be collectively responsible to the House of the People***." Similarly, Article 164(2) states "*the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State*".

**109.** Generally, all executive action of the Government of India shall be expressed to be taken in the name of the President under Article 77(1). However, for more convenient transaction of the business of the Government of India, the President shall make Rules. These Rules shall also provide for the allocation of the business among Ministers. This is under Article 77(3). Similar provisions are found in sub-Articles (1) and (3) of Article 166.

**110.** There are special duties assigned to the Prime Minister and the Chief Ministers, under Articles 78 and 167 respectively.

**111.** While dealing with the scheme of Article 166(3), the Constitution Bench of this Court pointed out in ***A. Sanjeevi Naidu***

vs. ***State of Madras***[107], that under our Constitution, the Governor is essentially a constitutional head and the administration of the State is run by the Council of Ministers. Since it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government, the Governor is authorized under Article 166(3) to make Rules for the more convenient transaction of the business of the Government of the State and for allocation amongst its Ministers the business of the Government. ***In paragraph 10 of the said decision, the Constitution Bench spoke about "joint responsibility" and not about collective responsibility***. The relevant portion of paragraph 10 reads as follows:

> "**10. The cabinet is responsible to the Legislature for every action taken in any of the Ministries. That is the essence of joint responsibility**. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Council of Ministers to discharge all or any of the Governmental functions. Similarly an individual Minister is responsible to the Legislature for every action taken or omitted to be taken in his ministry. This again is a political

107 (1970) 1 SCC 443

responsibility and not personal responsibility. ..."

**112.** The expression "*collective responsibility*" can be traced to some extent, to Article 75(3) insofar as the Union is concerned and to Article 164(2) insofar as the States are concerned. But in both the Articles, it is the Council of Ministers who are stated to be collectively responsible to the House of the People/Legislative Assembly of the State. ***Generally collective responsibility of the Council of Ministers either to the House of the People or to the Assembly should be understood to correlate to the decisions and actions of the Council of Ministers and not to every statement made by every individual Minister.***

**113.** In ***State of Karnataka*** vs. ***Union of India.***[108], a Seven Member Constitution Bench of this Court, while dealing with a challenge made by the State of Karnataka in the form of a civil suit under Article 131, to the appointment by the Central Government, of a commission of enquiry against the Chief Minister of Karnataka, had an occasion to consider the exposition of the words "c*ollective*

108 (1977) 4 SCC 608

*responsibility*" appearing in Article 164(2). After indicating that ***collective responsibility is basically political in origin and mode of operation***, Beg, C.J. opined in the said case as follows:

> "**46.** ***The object of collective responsibility is to make the whole body of persons holding Ministerial office collectively, or, if one may so put it, "vicariously" responsible for such acts of the others as are referable to their collective volition so that, even if an individual may not be personally responsible for it, yet, he will be deemed to share the responsibility with those who may have actually committed some wrong. ...***
>
> **47.** Each Minister can be and is separately responsible for his own decisions and acts and omissions also. But, inasmuch as the Council of Ministers is able to stay in office only so long as it commands the support and confidence of a majority of members of the Legislature of the State, the whole Council of Ministers must be held to be politically responsible for the decisions and policies of each of the Ministers and of his department which could be presumed to have the support of the whole Ministry. Hence, the whole Ministry will, at least on issues involving matters of policy, have to be treated as one entity so far as its answerability to the Legislative Assembly representing the electors is concerned. This is the meaning of the principle underlying Article 164(2) of the Constitution. The purpose of this provision is not to find out facts or to establish the actual responsibility of a Chief Minister or any other Minister or Ministers for particular decisions or Governmental acts. That can be more suitably done, when wrongful acts or decisions are complained of, by means of inquiries under the Act. As already indicated above, the procedure of Parliamentary Committees to inquire into every legally or ethically wrong act was found to be unsatisfactory and unsound. The principle of individual as well as

> collective ministerial responsibility can work most efficiently only when cases requiring proper sifting and evaluation of evidence and discussion of questions involved have taken place, where this is required, in proceedings before a Commission appointed under Section 3 of the Act.
>
> **48.** Text-book writers on Constitutional Law have indicated how collective ministerial responsibility to Parliament, which has essentially a political purpose and effects, developed later than individual responsibility of Ministers to Parliament which was also political in origin and operation. It is true that an individual Minister could, in England, where the principle of individual and collective responsibility of Ministers was evolved, be responsible either for wrongful acts done by him without the authority of the whole cabinet or of the monarch to support them, or under orders of the King who could, in the eye of law, do no wrong. But, apart from an impeachment, which has become obsolete, or punishment for contempts of a House, which constitute only a limited kind of offences, the Parliament does not punish the offender. For establishing his legal liability recourse to ordinary courts of law is indispensable."

**114.** Quoting from Wade and Phillips on Constitutional Law, this Court pointed out in the ***State of Karnataka*** (supra) that "***responsibility to Parliament only means that the Minster may be compelled by convention to resign.***"

**115.** The extent to which the enforcement of collective responsibility can be taken was also indicated in the above decision as follows:

> "**50.** ***The whole question of responsibility is related to the continuance of a Minister or a***

> ***Government in office. A Minister's own acts or omissions or those of others in the department in his charge, for which he may feel morally responsible, or, for which others may hold him morally responsible, may compel him to resign.*** By an extension of this logic, applied to individual Ministers at first, emerged the principle of "collective responsibility" which we find enacted in Articles 75(2) and 164(2) of our Constitution. The only sanction for its enforcement is the pressure of public opinion expressed particularly in terms of withdrawal of political support by members of Parliament or the State Legislature as the case may be."

**116.** In other words, this Court indicated that while a Minister may be compelled to resign for his individual acts of omission or commission, the ***only sanction for the enforcement of collective responsibility is the*** "***pressure of public opinion***".

**117.** In ***R.K. Jain*** vs. ***Union of India***[109], this Court was concerned with a public interest litigation relating to the functioning of the Customs, Excise and Gold Control Appellate Tribunal. At that time the office of the President of the Tribunal was lying vacant for over six months. But after *rule nisi* was issued in the first writ petition, the Government appointed someone as the President of the Tribunal. Immediately, a second writ petition was filed challenging the appointment and also some of the recruitment rules relating to

109(1993) 4 SCC 119

the appointment.The file relating to the appointment was produced in a sealed cover and the Government claimed privilege in terms of Section 123 of the Indian Evidence Act, 1872 and Article 74(2) of the Constitution. While dealing with the executive power of the President and the role of the Council of Ministers, K.Ramasamy, J., said "***The principle of ministerial responsibility has a variety of meanings precise and imprecise, authentic and vague***". Paragraphs 29 and 30 of the report in ***R.K. Jain*** (supra) may be usefully extracted as follows:

> "**29.** It would thus be held that the Cabinet known as Council of Ministers headed by Prime Minister under Article 75(3) is the driving and steering body responsible for the governance of the country. They enjoy the confidence of the Parliament and remain in office so long as they maintain the confidence of the majority. They are answerable to the Parliament and accountable to the people. They bear collective responsibility and shall be bound to maintain secrecy. Their executive function comprises of both the determination of the policy as well as carrying it into execution, the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, direction of foreign policy. In short the carrying on or supervision of the general administration of the affairs of Union of India which includes political activity and carrying on all trading activities, the acquisition, holding and disposal of property and the making of contracts for any purpose. In short the primary function of the Cabinet is to formulate the policies of the Government in conformity with the directive principles of the Constitution for the governance of the nation; place the same before the Parliament for

> acceptance and to carry on the executive function of the State as per the provisions of the Constitution and the laws.
>
> **30. Collective responsibility under Article 75(3) of the Constitution inheres maintenance of confidentiality as enjoined in oaths of office and of secrecy set forth in Schedule III of the Constitution** that the Minister will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under his/her consideration or shall become known to him/her as Minister except as may be required for the "due discharge of his/her duty as Minister". The base and basic postulate of its significance is unexceptionable. But the need for and effect of confidentiality has to be nurtured not merely from political imperatives of collective responsibility envisaged by Article 75(3) but also from its pragmatism."

**118.** In paragraph 33 of the report in ***R.K. Jain***, this Court indicated that the Cabinet as a whole is collectively responsible for the advice tendered to the President and for the conduct of business of each of his/her department. The question as to what happens when an individual Minister is in total disagreement with the collective decision of the Cabinet was also spelt out in ***R.K. Jain*** in the following words:

> "**33.** ...Each member of the Cabinet has personal responsibility to his conscience and also responsibility to the Government. **Discussion and persuasion may diminish disagreement, reach unanimity, or leave it unaltered. Despite persistence of disagreement,**

> **it is a decision, though some members like it less than others. Both practical politics and good government require that those who like it less must still publicly support it. If such support is too great a strain on a Minister's conscience or incompatible to his/her perceptions of commitment and he/she finds it difficult to support the decision, it would be open to him/her to resign**. So the price of the acceptance of Cabinet office is the assumption of the responsibility to support Cabinet decisions. The burden of that responsibility is shared by all."

**119.** In ***Secretary, Jaipur Development Authority, Jaipur*** (supra), the abuse of official position by the Minister of Urban Development and Housing Department and the officers working in the Jaipur Development Authority in the matter of allotment of plots became the subject matter. While dealing with the question of individual and collective accountability and responsibility of Ministers, this Court said in paragraph 10 as follows:

> "**10.** ...The Governor runs the Executive Government of a State with the aid and advice of the Chief Minister and the Council of Ministers which exercise the powers and performs its duties by the individual Ministers as public officers with the assistance of the bureaucracy working in various departments and corporate sectors etc. Though they are expressed in the name of the Governor, each Minister is personally and collectively responsible for the actions, acts and policies. They are accountable and answerable to the people. Their powers and duties are regulated by the law and the rules. The legal and moral responsibility

> or liability for the acts done or omissions, duties performed and policy laid down rest solely on the Minister of the Department. Therefore, they are indictable for their conduct or omission, or misconduct or misappropriation. ***The Council of Ministers are jointly and severally responsible to the Legislature. He/they is/are also publicly accountable for the acts or conducts in the performance of duties.***"

**120.** Again, in paragraph 11, this Court outlined the responsibility of the Ministers as follows:

> "**11.** The Minister holds public office though he gets constitutional status and performs functions under the Constitution, law or executive policy. The acts done and duties performed are public acts or duties as the holder of public office. Therefore, he owes certain accountability for the acts done or duties performed. In a democratic society governed by rule of law, power is conferred on the holder of the public office or the authority concerned by the Constitution by virtue of appointment. The holder of the office, therefore, gets opportunity to abuse or misuse the office. The politician who holds public office must perform public duties with the sense of purpose, and a sense of direction, under rules or sense of priorities. The purpose must be genuine in a free democratic society governed by the rule of law to further socio-economic democracy. The Executive Government should frame its policies to maintain the social order, stability, progress and morality. All actions of the Government are performed through/by individual persons in collective or joint or individual capacity. Therefore, they should morally be responsible for their actions."

**121.** In ***Vineet Narain*** vs. ***Union of India.***[110], this Court was concerned with a public interest litigation under Article 32

110(1998) 1 SCC 226

complaining about the inaction on the part of the Central Bureau of Investigation in a matter relating to the disclosures contained in what came to be known as *"Jain Diaries"*. After taking note of the Report of Lord Nolan on *"Standards in Public Life"*, this Court issued certain directions, though confined only to the Central Bureau of Investigation, Enforcement Directorate and Prosecution Agency. But Lord Nolan's Report dealt mainly with principles of public life and code of conduct.

**122.** The decision in ***Common Cause*** was little peculiar and riddled with some problems. The allotment of petroleum outlets by the then Minister of State for Petroleum and Natural Gas, under what was claimed to be a discretionary quota, was first set aside by this Court by a judgment reported in (1996) 6 SCC 530. Simultaneously, a show-cause notice was issued to the then Minister Capt. Satish Sharma as to why a criminal complaint should not be lodged against him and why he should not be directed to pay damages for his *malafide* action in wrongfully allotting the petrol outlets. After the Minister responded to the show-cause notice, an order was passed, reported in (1996) 6 SCC

593, directing the Minister to pay exemplary damages and also directing the initiation of prosecution. Later, a petition for review was filed by the Minister for recalling the order which directed payment of exemplary damages and also the registration of a case by the Central Bureau of Investigation. The decision in the petition for review, reported in (1999) 6 SCC 667, dealt with the question of collective responsibility in the context of the contention raised. It was argued by the delinquent Minister in the said case that under the business rules of the Cabinet, the act of a Minister is to be treated as the act of the President or the Governor as the case may be and that therefore the allotment made by him should be treated to have been made while acting only on behalf of the President. As an extension of this argument, it was also contended that the Minister having acted as a part of the Council of Ministers, his act should be treated to be the act of the entire Cabinet on the principle of collective responsibility. While rejecting the said contention, this Court held in ***Common Cause*** that the immunity available to the President under Article 361 of the Constitution cannot be extended to the orders passed in the name of the President under Article

77(1) or 77(2). Dealing with the concept of collective responsibility, this Court held in paragraph 31 as follows:

> "**31.** ***The concept of "collective responsibility" is essentially a political concept***. The country is governed by the party in power on the basis of the policies adopted and laid down by it in the Cabinet meeting. "Collective responsibility" has two meanings: the first meaning which can legitimately be ascribed to it is that all members of a Government are unanimous in support of its policies and would exhibit that unanimity on public occasions although while formulating the policies, they might have expressed a different view in the meeting of the Cabinet. The other meaning is that Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for its success and failure."

**123.** After having dealt with the concept of collective responsibility, this Court carved out an exception in paragraph 34 as follows:

> "**34.** From the above, it will be seen that in spite of the fact that the Council of Ministers is collectively responsible to the House of the People, there may be an occasion where the conduct of a Minister may be censured if he or his subordinates have blundered and have acted contrary to law."

**124.** Again in paragraph 36 this Court held as follows:

> "**36.** Even in England, all Ministers and servants of the Crown are accountable to the courts for the legality of their actions, and may be held civilly and criminally liable, in their individual capacities, for tortious or criminal acts. This liability may be enforced either by

> means of ordinary criminal or civil proceedings or by means of impeachment, a remedy which is probably obsolete. They are also subject to the judicial review jurisdiction of the courts. [See: *Halsbury's Laws of England*, Fourth Edn., (Re-issue), Vol. 8(2), para 422.]"

**125.** In ***State (NCT of Delhi)*** vs. ***Union of India***[111], the Constitution Bench of this Court was concerned with the interpretation of Article 239AA of the Constitution. The concept of collective responsibility was dealt with extensively by Dipak Misra, C.J., as he then was, from paragraphs 82 to 85. In his independent but concurring opinion Dr. D.Y. Chandrachud, J. also dealt with the question of collective responsibility from paragraphs 318 onwards.

**126.** What follows from the above discussion is, ***(i)*** that the concept of collective responsibility is essentially a political concept; ***(ii)*** that the collective responsibility is that of the Council of Ministers; and ***(iii)*** that such collective responsibility is to the House of the People/Legislative Assembly of the State. Generally, such responsibility correlates to ***(i)*** the decisions taken; and ***(ii)*** the acts of omission and commission done. It is not possible to extend this

111(2018) 8 SCC 501

concept of collective responsibility to any and every statement orally made by a Minister outside the House of the People/Legislative Assembly.

**127.** Shri Kaleeswaram Raj, learned counsel appearing for the special leave petitioner drew our attention to the code of conduct for Ministers of the Government of Australia, code of conduct for Ministers of the Government of India and the Ministerial Code of the United Kingdom. However, attractive such prescriptions may be, it is not possible to enforce such code of conduct in a court of law. Government servants stand on a different footing, as any misconduct on their part with reference to the Government Servants (Conduct) Rules, may attract disciplinary action under the Civil Services (Discipline and Appeal) Rules. Even in the case of Government servants, it may not be possible to justify a dismissal/removal from service on the basis of a statement uttered by a Government servant, as it may not pass the proportionality test, *viz-a-viz* the gravity of the misconduct.

**128.** The suggestion made by Shri Kaleeswaram Raj that the Prime Minister, in the case of a Minister of the Union of India and

the Chief Minister, in the case of a Minister of the State should be allowed to take appropriate action, against the erring Minister, is just fanciful. The Prime Minister or the Chief Minister does not have disciplinary control over the members of the Council of Ministers. It is true that in practice, a strong Prime Minister or Chief Minister will be able to drop any Minister out of the Cabinet. But in a country like ours where there is a multi-party system and where coalition Governments are often formed, it is not possible at all times for a Prime Minister/Chief Minister to take the whip, whenever a statement is made by someone in the Council of Ministers.

**129.** Governments which survive on wafer-thin majority (*of which we have seen quite a bit*), sometimes have individual Ministers who are strong enough to decide the very survival of such Governments. This problem is not unique to our country.

**130.** We have followed the Westminster Model but the Westminster Model itself became shaky after the United Kingdom saw the first coalition Government in 2010, since the Churchill Caretaker Ministry of 1945. It is interesting to note that in a Report

submitted by the Constitution Committee (UK) in the year 2014, under the title, "*Constitutional Implications of Coalition Government*" it was pointed out that "***collective ministerial responsibility has been the convention most affected by coalition Government***". The Report proceeds to state that the coalition Government formed in 2010 (in UK) set out five specific issues on which the parties would agree to differ. But, in reality the number of areas of disagreement has been greater resulting on one occasion, in Ministers being whipped to vote in opposite lobbies and on another, in MPs on the Treasury Benches attempting to amend the Address on the Queen's speech.

**131.** In the "*Briefing Paper*" (Number 7755, 14 November 2016) on "*Collective responsibility*" by Michael Everett available in the House of Commons Library, ***(i)*** the early origins and development of the concept of collective responsibility; ***(ii)*** what is collective responsibility; ***(iii)*** the conventions of collective responsibility; and ***(iv)*** departures from collective responsibility are dealt with. This Paper traces early beginnings of the doctrine of collective responsibility to the reign of George III (1760-1820). According to

the Briefing Paper, the development of today's concept of collective responsibility arose during the Victorian golden age of Parliamentary Government. In fact, the Briefing Paper quotes some commentators who have questioned whether the convention of collective responsibility remains appropriate for the Government of today. The Briefing Paper quotes Barry Winetrobe, a Research Fellow at the Constitution Unit who said ***that the doctrine of collective responsibility was developed at a time when a sense of coherence was required to be maintained among disparate ministerial forces in the face of the Monarch and that it is not necessarily appropriate in an age, not just of democracy, but of greater and more direct participative democracy***.

**132.** It will be useful to quote a portion of Chapter 2.3 under the heading "*Enforcing collective responsibility*" from the Briefing Paper as follows:

> "…Dr Felicity Matthews, Senior Lecturer in Governance and Public Policy at the University of Sheffield, has also argued that the respect accorded to the doctrine of collective responsibility "has varied", with its maintenance and disregard "owing as much to politics as to propriety".

> An interesting example of this occurred in 2003 during the build-up to the Iraq war. Robin Cook, the Leader of the House of Commons, resigned in protest in March 2003 over the then Labour Government's policy toward Iraq, being unable to maintain the official Government position. His actions were therefore consistent with the doctrine of collective responsibility. However, Clare Short, the Secretary of State for International Development, was allowed to stay in the Cabinet despite her own vocal opposition to military intervention and despite publicly denouncing the then Prime Minister as "deeply reckless" in March 2003.
>
> According to Felicity Matthews, despite her "extraordinary breach" of collective responsibility, Clare Short was persuaded and allowed to retain her ministerial portfolio. She then remained in the Cabinet for a further two months, until she decided to resign on 12 May 2003, following perceived mistakes in the US/UK coalition after the invasion. This example, according to Matthews, "underlines the extent to which Prime Ministers have proven unwilling or unable to enforce a strict interpretation of collective responsibility, even when their personal credibility has been besmirched".

**133.** Thus, the convention developed in the United Kingdom for Ministers, itself appears to have gone for a toss and hence, it is not possible to draw any inspiration from the UK Model.

**134.** We are not suggesting for a moment that any public official including a Minister can make a statement which is irresponsible or in bad taste or bordering on hate speech and get away with it. We are only on the question of collective responsibility and the vicarious liability of the Government.

**135.** As all the literature on the issue shows, collective responsibility is that of the Council of Ministers. Each individual Minister is responsible for the decisions taken collectively by the Council of Ministers. In other words, the flow of stream in collective responsibility is from the Council of Ministers to the individual Ministers. The flow is not on the reverse, namely, from the individual Ministers to the Council of Ministers.

**136.** Our attention was also drawn to the decision of this Court in ***Amish Devgan***. Though the said decision considered extensively the impact of the speech of "*a person of influence*", we are not, in this reference dealing with the same. This is for the reason that the said decision concerned "*hate speech*". None of the questions referred to us, including Question No.4 with which we are presently concerned, relates to hate speech, and understandably so. The writ petition as well as the special leave petition out of which this reference arose, concerned speeches made by the Ministers of the State of Uttar Pradesh and the State of Kerala. The speech made by the Minister of the State of Uttar Pradesh attempted to paint a case of robbery and gang-rape as a political conspiracy. The speech of

the Minister of the State of Kerala portrayed women in a disrespectful way. Since the statements concerned in both the cases were attributed to the Ministers, Question No.4 referred to us, specifically relates to "*statement made by a Minister*". ***Amish Devgan*** did not deal with the statement of a Minister traceable to any affairs of the State, though a Minister would fall under the category of "*person of influence*". Moreover, the statements attributed to the Ministers in the cases on hand may not come under the category of hate speech. Therefore, we do not wish to enlarge the scope of this reference by going into the questions which were answered in ***Amish Devgan***.

**137.** Therefore, ***our answer to Question No.4 would be that a statement made by a Minister even if traceable to any affairs of the State or for protecting the Government, cannot be attributed vicariously to the Government by invoking the principle of collective responsibility.***

**Question No.5**

**138.** Question No.5 referred to us for consideration is "whether a statement by a Minister, inconsistent with the rights of a citizen under Part-III of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort'?"

**139.** To begin with, we have some difficulty with the words "*a statement by a Minister*", appearing in Question No.5. A statement may be made by a Minister either inside or outside the House of People/Legislative Assembly of the State. A statement may also be made by a Minister in writing or by words spoken. A statement may be made in private or in public. A statement may also be made by a Minister either touching upon the affairs of the Ministry/ department of which he is in control or touching generally upon the policies of the Government of which he is a part. A Minister may also make a statement, in the form of an opinion on matters about which he or his department is not concerned or over which he has no control. All such statements need not necessarily give rise to an action in tort or in constitutional tort.

**140.** Take for instance a case where a Minister makes a statement that women are unfit to be employed in a particular avocation. It

may reflect his insensitivity to gender equality and also may expose his low constitutional morality. The fact that due to his insensitivity or lack of understanding or low constitutional morality, he speaks a language that has the potential to demean the constitutional rights of women, cannot be a ground for action in Constitutional tort. Needless to say that no one can either be taxed or penalised for holding an opinion which is not in conformity with the constitutional values. It is only when his opinion gets translated into action and such action results in injury or harm or loss that an action in tort will lie. With this caveat, let us now get into the core of the issue.

**141.** A tort is a civil wrong, that causes a claimant to suffer loss or harm resulting in legal liability for the person who commits the tortious act. Halsbury's Law of England states: *"Those civil rights of action which are available for the recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of right imposed or conferred by law rather than by agreement are rights of action in tort."*

**142.** If Crown Proceedings Act, 1947 changed the course of the law relating to tort in England, the Federal Tort Claims Act, 1946 changed in America, the course of law relating to the liability of the State for the tortious acts of its servants. Nevertheless, the claims for damages continued to be resisted for a long time both here and elsewhere on the principle of sovereign immunity. It is interesting to note that on the initiative of the President of India, the Law Ministry took up for consideration the question whether legislation on the lines of the Crown Proceedings Act, 1947 of the United Kingdom is needed and if so, to what extent. After the constitution of the Law Commission, the Law Ministry referred the matter to the Commission for consideration and report. In its First Report submitted on 11.5.1956 on *"Liability of the State in Tort"*, the Law Commission took note of ***(i)*** the existing law in India; ***(ii)*** law in England; ***(iii)*** law in America; ***(iv)*** law in Australia; ***(v)*** law in France; ***(vi)*** rule of statutory construction; and ***(vii)*** conclusions and proposals.

**143.** In Chapter VIII containing the conclusions and proposals, the First Report of the Law Commission suggested: ***(i)*** that in the

context of a welfare State, it is necessary to establish a just relation between the rights of the individual and the responsibilities of the State; ***(ii)*** that when the Constitution was framed, the question to what extent, if any, the Union and the States should be made liable for the tortious acts of their servants or agents was left for future legislation; ***(iii)*** that the question of demarcating the line up to which the State should be made liable for the tortious acts, involves a nice balancing of considerations, so as not to unduly restrict the sphere of the activities of the State and at the same time to afford sufficient protection to the citizen; ***(iv)*** that it is necessary that the law should, as far as possible, be made certain and definite, instead of leaving it to courts to develop the law according to the views of the judges; and ***(v)*** that the old distinction between sovereign and the non-sovereign functions or Governmental and the non-Governmental functions should no longer be invoked to determine the liability of the State.

**144.** Paragraph 66 of the First Report of the Law Commission contained the principles on which appropriate legislation should proceed. It will be useful to extract paragraph 66 of the First Report

of the Law Commission, to understand the sweep of constitutional tort, as it was conceived within a few years of the adoption of the Constitution. In fact, it has laid down the road map very clearly with lot of foresight. Paragraph 66 reads thus:

> "66. The following shall be the principles on which legislation should proceed:—
>
> I. *Under the general law*:
>
> Under the general law of torts i.e., the English Common Law as imported into India on the principle of justice, equity and good conscience, with statutory modifications of that law now in force in India (*vide* the Principles of General Law, Appendix VI)—
>
> (i) The State as employer should be liable for the torts committed by its employees and agents while acting within the scope of their office or, employment.
>
> (ii) The State as employer should be liable in respect of breach of those duties which a person owes to his employees or agents under the general law by reason of being their employer.
>
> (iii) The State should be liable for torts committed by an independent contractor only in cases referred to in Appendix VI.
>
> (iv) The State also should be liable for torts where a corporation owned or controlled by the State would be liable.
>
> (v) The State should be liable in respect of breach of duties attached under the general law to the ownership, occupation, possession or control of immoveable properly from the moment

the State occupies or takes possession or assumes control of the property.

(vi) The State should be subject to the general law liability for injury caused by dangerous things (chattels).

In respect of (i) to (vi) the State should be entitled to raise the same defences, which a citizen would be entitled to raise under general law.

II. *In respect of duties of care imposed by statute*:

(i) If a statute authorises the doing of an act which is in itself injurious, the State should not be liable.

(ii) The State should be liable, without proof of negligence, for breach of a statutory duty imposed on it or its employees which causes damage.

(iii) The State should be liable if in the discharge of statutory duties imposed upon it or its employees, the employees act negligently or maliciously, whether or not discretion is involved in the exercise of such duty.

(iv) The State should be liable if in the exercise of the powers conferred upon it or its employees the power is so exercised as to cause nuisance or trespass or the power is exercised negligently or maliciously causing damage.

*N.B.*—Appendix V shows some of the Acts which contain protection clauses. But under the General Clauses Act a thing is deemed to be done in good faith even if it is done negligently. Therefore, by suitable legislation the protection should be made not to extend to negligent acts however honestly done and for this purpose the relevant clauses in such enactments should be examined.

(v) The State should be subject to the same duties and should have the same rights as

a private employer under a statute, whether it is specifically binding on the State or not.

(vi) If an Act negatives or limits the compensation payable to a citizen who suffered damage, coming within the scope of the Act, the liability of the State should be the same as under that Act and the injured person should be entitled only to the remedy, if any, provided under the Act.

III. *Miscellaneous*:

*Patents*, *Designs and Copyrights:* The provisions of Sec. 3 of the Crown Proceedings Act may be adopted.

IV. *General Provisions:*

(i) *Indemnity and contribution*: To enable the State to claim indemnity or contribution, a provision on the lines of Sec. 4 of the Crown Proceedings Act may be adopted.

(ii) *Contributory negligence:* In England, the Law Reform (Contributory Negligence) Act,1945 was enacted amending the law relating to contributory negligence and in view of the provisions of the Crown Proceedings Act the said Act also binds the Crown. In India, the trend of judicial opinion is in favour of holding that the rule in *Merryweather v. Nixan* [(1799) 8 T.R. 186] does not apply and that there is no legal impediment to one tortfeasor recovering compensation from another. But the law should not be left in an uncertain state and there should be legislation on the lines of the English Act.

(iii) Appropriate provision should be made while revising the Civil Procedure Code to make it obligatory to implead as party to a suit in which a claim for damages against the State is made, the employee, agent or independent contractor for whose act the State is sought to

be made liable. Any claim based on indemnity or contribution by the State may also be settled in such proceeding as all the parties will be before the court.

V. *Exceptions*:

(i)*Acts of State*: The defence of "Act of State" should be made available to the State for any act, neglect or default of its servants or agents. "Act of State" means an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owning temporary allegiance, in pursuance of sovereign rights.

(ii) *Judicial acts and execution of judicial process*:The State shall not be liable for acts done by judicial officers and persons executing warrants and orders of judicial officers in all cases where protection is given to such officers and persons by Sec. 1 of the Judicial Officers Protection Act, 1850.

(iii) *Acts done in the exercise of political functions of the State such as acts relating to*:

(a) Foreign Affairs (entry 10, List I, Seventh Schedule of the Constitution);

(b) Diplomatic, Consular and trade representation (entry 11);

(c) United Nations Organisation(entry 12);

(d)Participation in international conferences, associations and other bodies and implementing of decisions made thereat (entry 13);

(e) entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries (entry 14);

(f) war and peace (entry 15);

(g) foreign jurisdiction (entry 16);

(h) anything done by the President, Governor or Rajpramukh in the exercise of the following functions:

Power of summoning, proroguing and dissolving the Legislature, vetoing of laws and anything done by the President in the exercise of the powers to issue Proclamations under the Constitution;

(i) Acts done under the Trading with the Enemy Act, 1947;

(j) Acts done or omitted to be done under a Proclamation of Emergency when the security of the State is threatened.

*(iv) Acts done in relation to the Defence Forces:*

(a) Combatant activities of the Armed Forces during the time of war;

(b) Acts done in the exercise of the powers vested in the Union for the purpose of training or maintaining the efficiency of the Defence Forces;

The statutes relating to these already provide for payment of compensation and the machinery for determining the compensation: *See* Manoeuvres, Field Firing and Artillery Practice Act, 1948; Seaward Artillery Practice Act, 1949;

(c) The liability of the State for personal injury or death caused by a member of the Armed Forces to another member while on duty shall be restricted in the same manner as in England (Sec. 10 of the Crown Proceedings Act)

*(v) Miscellaneous:*

> (a) any claim arising out of defamation, malicious prosecution and malicious arrest,
>
> (b) any claim arising out of the operation of quarantine law,
>
> (c) existing immunity under the Indian Telegraph Act, 1885 and Indian Post Offices Act, 1898,
>
> (d) foreign torts. (The English provision may be adopted.)"

**145.** It appears that based on the First Report of the Law Commission, a Bill known as *the Government (Liability in Torts) Bill* was introduced in 1967, but the same did not become the law. As a consequence, a huge burden was cast on the Courts to develop the law through judicial precedents, some of which we shall see now.

**146.** The judicial journey actually started off on a right note with the decision in ***The State of Bihar*** vs. ***Abdul Majid***[112], where a Government servant who was dismissed but later reinstated, filed a suit for recovery of arrears of salary. Though the State raised a defence on the basis of the doctrine of pleasure, this Court rejected the same on the ground that said doctrine based on the Latin

112 AIR 1954 SC 245

phrase "*durante bene placito*" (during pleasure) has no application in India. This decision was followed in ***State of Rajasthan*** vs. ***Mst. Vidhyawati***[113], which involved a claim for compensation by the widow of a person who was fatally knocked down by a jeep owned and maintained by the State. When sovereign immunity was pleaded, this Court observed in ***Vidhyawati*** (supra)***:*** "***when the rule of immunity in favour of the Crown, based on common law in the United Kingdom has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution.***"

**147.** On the question of the liability of the State, for the tortious acts of its servants, this Court opined in ***Vidhyawati***, as follows:

> "(10) This case also meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants, when such servants are engaged on an activity connected with the affairs of the State. In this connection it has to be remembered that under the Constitution we have established a welfare state, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, state trading, to name only a few of them. ..."

113 AIR 1962 SC 933

**148.** But despite the decisions in ***Abdul Majid*** (supra) and ***Vidhyawati***, this Court fell into a slippery slope in ***Kasturi Lal***. It was a case where the partner of a firm dealing in bullion and other goods was arrested and detained in police custody and the gold and silver that he was carrying was seized by the police. When he was released later, the silver was returned but the Head Constable who effected the arrest misappropriated the gold and fled away to Pakistan in October, 1947. The suit filed by ***Kasturi Lal*** for recovery of the value of the gold, was resisted on the ground that this was not a case of negligence of the servants of the State and that even if negligence was held proved against the police officers the State could not be held liable. While upholding the contention of the State, this Court said "*if a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if*

*the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose.*"

**149.** In fact, it was suggested by this Court in ***Kasturi Lal*** that the Legislatures in India should seriously consider making legislative enactments to regulate and control their claim for immunity. Before proceeding further with the journey in the chronological sequence, it must be mentioned that the decision in ***Kasturi Lal*** was diluted to some extent after nearly 30 years which we shall take note of at the appropriate stage.

**150.** In ***Khatri (II)*** vs. ***State of Bihar.***[114], which came to be popularly known as *Bhagalpur blinding case,* this Court was dealing with a brutal incident of Police atrocity which resulted in twenty-four prisoners being blinded. Though an opportunity was provided

114 (1981) 1 SCC 627

to this Court to signal the arrival of Constitutional tort in the said case and though the petitioners sought compensation for the violation of their Article 21 right, this Court simply postponed the decision to a future date by holding that they are issues of the gravest Constitutional importance, involving the exploration of new dimension of the right to life and personal liberty.

**151.** But within a couple of years, another opportunity arose in ***Rudul Sah*** (supra), which related to the unlawful detention of a prisoner for fourteen years even after his acquittal. This shook the conscience of this Court. Therefore, this Court awarded compensation in an arbitrary sum of money, even while reserving the right of the petitioner to bring a suit for recovery of appropriate damages. This Court said that the order of compensation passed by this Court was in the nature of palliative. When it is suggested by the State that the appropriate remedy would be only to file a suit for damages, this Court said that by refusing to order anything (towards compensation), this Court would be doing mere lip-service to the fundamental right to liberty and that one of the telling ways

in which the violation of the right by the State can be reasonably prevented, is to mulct its violators with monetary compensation.

**152.** After ***Rudul Sah***, there was no looking back. Instead of providing elaborate details, we think it is sufficient to provide in a tabular form, details of the cases where this Court awarded compensation in public law, invoking the principle of constitutional tort, either expressly or impliedly.

| **Sr. No.** | **Case Laws** | **Decision** |
|---|---|---|
| 1. | **Sebastian M.Hongray** vs. **Union of India**<br>(1984) 3 SCC 82 | • Two men who were taken for questioning by 21st Sikh Regiment never returned home.<br>• When a writ of habeas corpus was filed by a JNU student, this Court directed that the missing men be produced before the Court. This order could not be complied with.<br>• Court awarded compensation of Rs.1lac to the wives of the missing men on account of mental agony suffered by them. |
| 2. | **Bhim Singh, MLA** vs. **State of J&K.**<br>(1985) 4 SCC 677 | • An MLA was illegally arrested and detained to prevent him from attending a session of the Jammu & Kashmir State Legislative Assembly.<br>• FIR was registered u/s 153A, IPC and order of remand was obtained from the Magistrate without producing the MLA before Court.<br>• In a writ for habeas corpus filed by his wife, this Court observed that there had been a violation of his fundamental rights under Articles 21 and 22(2) of the Constitution and accordingly directed the State of Jammu and Kashmir to pay |

| | | |
|---|---|---|
| | | Bhim Singh a sum of Rs.50,000/- as compensation. |
| 3. | **Peoples' Union for Democratic Rights** vs. **State of Bihar &Ors.**<br>(1987) 1 SCC 265 | • A public interest litigation was filed against the illegal shooting by police officers against members of a peaceful assembly.<br>• Several were injured and 21 died (including children) due to this incident.<br>• While the State had paid a compensation of Rs.10,000 each to heirs of the deceased, this Court found it insufficient and directed payment of Rs.20,000 to dependants of each deceased and Rs.5,000 to each injured person. |
| 4. | **Saheli, a Women's Resources Centre through Ms. Nalini Bhanot & Ors.** vs. **Commissioner of Police, Delhi Police Headquarters & Ors.**<br>(1990) 1 SCC 422 | • Two women were forcefully evicted from their homes. The landlord was aided by the SHO and SI in the assault that led to demise of the nine-year-old son of one of the women.<br>• This Court awarded compensation of Rs.75,000 to the mother of the deceased child. |
| 5. | **Supreme Court Legal Aid Committee through its Hony. Secretary** vs. **State of Bihar & Ors.**<br>(1991) 3 SCC 482 | • A person injured in a train robbery, was taken to the nearest hospital by the Police by tying him to the footboard of a vehicle. This led to his death.<br>• This Court observed that had timely care been given to the victim he might have been saved.<br>• The State of Bihar was directed to pay Rs.20,000 to the legal heirs of the deceased. |
| 6. | **Nilabati Behera (Smt.) alias Lalita Behera (Through the Supreme Court Legal Aid Committee)** vs. **State of Orissa & Ors.**<br>(1993) 2 SCC 746 | • Petitioner was a mother whose son had died in police custody.<br>• This Court directed the State to pay compensation of Rs.1.5 lacs. |
| 7. | **Arvinder Singh Bagga** vs. **State of U.P. & Ors.**<br>(1994) 6 SCC 565 | • A married woman was detained and physically assaulted in a police station with a view to coerce her to implicate her husband and his family in a case of abduction and forcible marriage.<br>• After taking her statement, her husband |

| | | |
|---|---|---|
| | | and his family were also harassed by the police.<br>• This Court observed that the police had exhibited high-handedness and uncivilized behaviour and awarded the woman a compensation of Rs.10,000 and members of her family Rs.5,000 each. |
| 8. | **N. Nagendra Rao & Co.** vs. **State of A.P.**<br>(1994) 6 SCC 205 | • Appellant was in the business of food grains and fertiliser. On an inspection by the concerned authorities, his stocks were seized.<br>• As was the practice, the food grains in custody were sold and the proceeds deposited in the Treasury, but the fertilisers were not dealt with in the same manner causing great loss to the Petitioner.<br><br>• In a suit for negligence and misfeasance of public authorities, this Court further developed the concept of Constitutional Tort and limited the scope of sovereign immunity laid down in *Kasturilal*. The State was held vicariously liable for the actions of the authorities. |
| 9. | **Inder Singh** vs. **State of Punjab & Ors.**<br>(1995) 3 SCC 702 | • A Deputy Superintendent of Police along with his subordinates abducted and killed seven persons due to personal vengeance.<br>• This Court ordered an inquiry by the CBI.After CBI filed a report, this court directed the State to pay Rs.1.5 lacs to the legal heirs (to be recovered from guilty policemen later) and State to pay costs quantified at Rs.25,000. |
| 10. | **Paschim Banga Khet Mazdoor Samity & Ors.** vs. **State of W.B. & Anr.**<br>(1996) 4 SCC 37 | • The callous attitude on the part of the medical authorities at various Government-run hospitals in Calcutta in providing treatment to a train accident victim was highlighted in this case.<br>• This Court directed the State to pay Rs.25,000 for the denial of its constitutional obligations of care. |

| | | |
|---|---|---|
| 11. | **D.K. Basu** vs. **State of W.B.**<br>(1997) 1 SCC 416 | • In a public interest litigation involving incidents of custodial violence in West Bengal, this Court issued guidelines for law enforcement agencies to follow when arresting and detaining any person.<br>• This Court also discussed the award of compensation as a remedy for violation of fundamental rights as a punitive measure against State action. |
| 12. | **People's Union for Civil Liberties** vs. **Union of India & Anr.**<br>(1997) 3 SCC 433 | • Two persons alleged to be terrorists were killed by the police in a false encounter.<br>• This Court directed the State of Manipur to pay Rs.1 lac to the family of the deceased and Rs.10,000 to PUCL for pursuing the case for many years. |
| 13. | **Municipal Corporation of Delhi, Delhi** vs. **Uphaar Tragedy Victims Association & Ors.**<br>(2011) 14 SCC 481 | • A fire in a cinema hall resulted in injury to over 100 persons and death of 59 cinemagoers.<br>•<br>• The fire was caused by a transformer installed by Delhi Vidyut Board (DVB).<br>• HC had found the Municipal Corporation, Delhi Police, and the DVB responsible for the accident.<br>• This Court held only DVB and theatre owner liable to pay compensation in the ratio of 15:85.<br>• While doing so, this Court dealt extensively with the concept of Constitutional Tort. |

**153.** It will be clear from the decisions listed in the Table above that this Court and the High Courts have been consistent in invoking Constitutional tort whenever an act of omission and commission on the part of a public functionary, including a Minister, caused harm or loss. But as rightly pointed out by the learned Attorney General in his note, the matter pre-eminently

deserves a proper legal framework so that the principles and procedure are coherently set out without leaving the matter open ended or vague. In fact, the First Report of the Law Commission submitted a draft bill way back in 1956. This Court recommended a legislative measure in ***Kasturi Lal*** in 1965 and a bill called *Government (Liability in Torts) Bill* was introduced in 1967. But nothing happened in the past 55 years. In such circumstances, courts cannot turn a blind eye but may have to imaginatively fashion the remedy to be provided to persons who suffer injury or loss, without turning them away on the ground that there is no proper legal frame work.

**154.** Therefore, our answer to Question No. 5 is as follows:

***"A mere statement made by a Minister, inconsistent with the rights of a citizen under Part-III of the Constitution, may not constitute a violation of the constitutional rights and become actionable as Constitutional tort. But if as a consequence of such a statement, any act of omission or commission is done***

***by the officers resulting in harm or loss to a person/citizen, then the same may be actionable as a constitutional tort".***

**SUMMING UP**

**155.** To sum up, our answers to the five questions referred to the Bench, are as follows:

| | QUESTIONS | ANSWERS |
|---|---|---|
| 1. | Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights? | The grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other fundamental rights or under the guise of two fundamental rights staking a competing claim against each other, additional restrictions not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual. |
| 2. | Can a fundamental right under Article 19 or 21 of the Constitution of India be claimed other than against the 'State' or its instrumentalities? | A fundamental right under Article 19/21 can be enforced even against persons other than the State or its instrumentalities. |
| 3. | Whether the State is under a duty to affirmatively protect the rights of a citizen under Article 21 of the Constitution of India | The State is under a duty to affirmatively protect the rights of a person under Article 21, |

| | | |
|---|---|---|
| | even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency? | whenever there is a threat to personal liberty, even by a non-State actor. |
| 4. | Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility? | A statement made by a Minister even if traceable to any affairs of the State or for protecting the Government, cannot be attributed vicariously to the Government by invoking the principle of collective responsibility. |
| 5. | Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort"? | A mere statement made by a Minister, inconsistent with the rights of a citizen under Part-III of the Constitution, may not constitute a violation of the constitutional rights and become actionable as Constitutional tort. But if as a consequence of such a statement, any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen, then the same may be actionable as a constitutional tort. |

**156.** Now that we have answered the questions, the writ petition and the special leave petition are directed to be listed before the appropriate bench after getting orders from Hon'ble the Chief Justice of India.

**.....J.**
**(S. Abdul Nazeer)**

**.....J.**
**(B.R. Gavai)**

**.....J.**
**(A.S. Bopanna)**

**.....J.**
**(V. Ramasubramanian)**

**New Delhi;**
**January 03, 2023**

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CRIMINAL ORIGINAL/CIVIL APPELLATE JURISDICTION**

**WRIT PETITION (CRL.) NO. 113 OF 2016**

[redacted] **.....Petitioner(s)**

**Versus**

**State of Uttar Pradesh & Ors.** **..... Respondent(s)**

**With**

**SLP (C) @ Diary No.34629 of 2017**


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**J U D G M E N T**

**NAGARATHNA, J.**

I have had the benefit of reading the erudite judgment proposed by His Lordship V. Ramasubramanian, J. While I agree with the reasoning and conclusions arrived at by his Lordship on certain questions referred to this Constitution Bench, I wish to lend a different perspective to some of the issues by way of my separate opinion.

2. In the words of one of the Indian philosophers, Basaveshwara:

> *"NuDidare muttina haaradantirabeku,*
> *NuDidare maanikyada deeptiyantirabeku,*
> *NuDidare spatikada shalaakeyantirabeku,*
> *NuDidare Lingamecchi ahudenabeku."*

> One should speak only when the words uttered are as pure as pearls strung on a thread;
> Like the lustre shed by a ruby;
> Like a crystal's flash that cleaves the blue;
> And such that the Lord, on listening to such speech, must say "yes, yes, that is true!"

***Introduction:***

3. The concern of the petitioners in these cases is the misuse of the right to freedom of speech and expression under Article 19(1)(a) of the Constitution, particularly, by those persons holding political offices, public servants, public functionaries or others holding responsible positions in Indian polity and society. The concern of the petitioners is with regard to the manner in which public functionaries make disparaging and insulting remarks against certain sections of the

society, against countrymen and against certain individuals such as women who may be victims of crime. Such indiscreet speech is a cause of concern in recent times as it is thought to be hurtful and insulting. The questions raised in these matters are with regard to remedies available in law so as to counter such kind of hurtful or disparaging speech made, particularly, by public functionaries.

4. The facts giving rise to the present petitions may be encapsulated as under:

4.1. Writ Petition (Crl.) No. 113 of 2016, relates to the unsavory public comments made by a former Uttar Pradesh Cabinet Minister, in the context of an alleged gang rape of a woman and her minor daughter that took place on [redacted] on the [redacted] Relying on certain news articles, the petitioner in Writ Petition (Crl.) No. 113 of 2016 has brought to the notice of this Court the remarks made by the said public functionary, terming the alleged incident as an "*opposition conspiracy*," which was proliferated merely because "*elections were near, and the desperate opposition could stoop to any level to defame the government.*"

4.2. In relation to such statements, a First Information Report, being FIR [redacted] was registered against the said Minister on [redacted] by the [redacted]

[redacted] Uttar Pradesh, for offences under Sections 395, 397, 376-D, 342 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC' for the sake of convenience).

4.3. In the above background, the Writ Petition has been preferred, praying as follows:

"**P R A Y E R : -**

In view of the above stated submissions, it is therefore, most humbly prayed that this Hon'ble Court; may in the interests of justice, be pleased to :-

a. Issue a writ of mandamus and / or any other appropriate writ and / or direction against the respondents directing them to stop the infringement of the fundamental rights of the petitioner to live a lawful life; in addition to passing other appropriate directions to the respondents.
b. Direct the state to pay the appropriate compensation to the petitioner, other victims and the family members as per Law.
c. Direct the state to provide and ensure respectable and appropriate free of cost and safe education arrangements till the attainments of the highest degree in the interest of justice.
d. Direct the state to provide and ensure sufficient life security and appropriate job security to the petitioner, other victims and family members.
e. Summon the status report from the investigation agency in the interests of justice.
f. Monitor the investigation of FIR [redacted] under Section 154 Cr. P.C. 395, 397, 376-D and POCSO Act, 342.
g. Transfer the trial of the FIR [redacted] to Delhi from [redacted] in the interest of justice.
h. Pass directions to Respondent No.1 to register F.I.R. against [redacted] Minister for Urban Development, Govt. of UP; for making statements being outrageous to the modesty of the petitioner in the matters of the present case.
i. Direct to the Respondent No.1 for registration of F.I.R. [redacted] against erring police officials for disobeying the directions of law in the present case.

j. Pass any other or further orders as this Hon'ble Court may deem fit and proper in the light of the facts and circumstances of the present case in favour of the petitioners and against the respondents."

4.4. Special Leave Petition bearing Diary No. 34629 of 2017 has been filed impugning the common order dated 31st May, 2017 passed by the High Court of Kerala, at Ernakulam dismissing Writ Petition (C) No. 15869 and Writ Petition (C) No. 14712 of 2017. The said Writ Petitions were filed before the High Court alleging inaction on the part of Government of Kerala in connection with the derogatory statements made on separate occasions, by the then Minister of Electricity, Government of Kerala, against a woman Principal of a polytechnic college in Kerala, the mother of a student who allegedly committed suicide due to the alleged harassment by the college authorities and against women labourers of a tea plantation. Aggrieved by the dismissal of the said Writ Petition, SLP bearing Diary No. 34629 of 2017 came to be filed before this Court, which was directed to be tagged with Writ Petition (Crl.) No. 113 of 2016.

5. The questions raised for the consideration of this Constitution Bench are enumerated as under:

"1) Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in

Article 19(2) by invoking other fundamental rights?

2) Can a fundamental right under Article 19 or 21 of the Constitution of India be claimed other than against the 'State' or its instrumentalities?

3) Whether the State is under a duty to affirmatively protect the rights of a citizen under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?

4) Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?

5) Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort'?"

6. His Lordship, Ramsubramanian, J. has answered the questions referred to this Constitution Bench in the scholarly judgment proposed by him. My view on each of such questions, as contrasted with those of His Lordship's have been expressed in a tabular form hereinunder, for easy reference.

| **Questions** | **His Lordship's views** | **My views** |
|---|---|---|
| 1) Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the | The grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other fundamental rights or under the guise of two | I respectfully agree with the reasoning and conclusion of His Lordship, in so far as Question No. 1 is concerned. |

| Questions | His Lordship's views | My views |
|---|---|---|
| right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights? | fundamental rights taking a competing claim against each other, additional restrictions not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual. | |
| 2) Can a fundamental right under Article 19 or 21 of the Constitution of India be claimed other than against the 'State' or its instrumentalities? | **A fundamental right under Article 19/21 can be enforced even against persons other than the State or its instrumentalities.** | **The rights in the realm of common law, which may be similar in their content to the Fundamental Rights under Article 19/21, operate horizontally; However, the Fundamental Rights under Articles 19 and 21, do not except those rights which have also been statutorily recognised. Therefore, a fundamental right under Article 19/21 cannot be enforced against persons other than the State or its instrumentalities.**<br>**However, they may be the basis for seeking common law remedies.**<br><br>**But a remedy in the form of writ of Habeas Corpus, if sought against a private person on the basis of Article 21 of the Constitution** |

| Questions | His Lordship's views | My views |
|---|---|---|
| | | **can be before a Constitutional Court i.e., by way of Article 226 before the High Court or Article 32 read with Article 142 before the Supreme Court.**<br><br>As far as non-State entities or those entities which do not fall within the scope of Article 12 of the Constitution are concerned, a writ petition to enforce fundamental rights would not be entertained as against them. This is primarily because such matters would involve disputed questions of fact. |
| 3) Whether the State is under a duty to affirmatively protect the rights of a citizen under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency? | **The State is under a duty to affirmatively protect the rights of a person under Article 21, whenever there is a threat to personal liberty even by a private actor.** | **The duty cast upon the State under Article 21 is a negative duty not to deprive a person of his life and personal liberty except in accordance with law.**<br>The State however has an affirmative duty to carry out obligations cast upon it under constitutional and statutory law. Such obligations may require interference by the State where acts of a private party may threaten the life or liberty of another individual. **Hence, failure to carry out the duties enjoined upon** |

| Questions | His Lordship's views | My views |
|---|---|---|
| | | **the State under constitutional and statutory law to protect the rights of a citizen, could have the effect of depriving a citizen of his right to life and personal liberty. When a citizen is so deprived of his right to life and personal liberty, the State would have breached the negative duty cast upon it under Article 21.** |
| 4) Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility? | **A statement made by a Minister even if traceable to any affairs of the State or for protecting the Government, cannot be attributed vicariously to the Government by invoking the principle of collective responsibility.** | **A statement made by a Minister if traceable to any affairs of the State or for protecting the Government, can be attributed vicariously to the Government by invoking the principle of collective responsibility, so long as such statement represents the view of the Government also. If such a statement is not consistent with the view of the Government, then it is attributable to the Minister personally.** |
| 5) Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation | **A mere statement made by a Minister, inconsistent with the rights of a citizen under Part-III of the Constitution, may not constitute a** | A proper legal framework is necessary to define the acts or omissions which would amount to constitutional torts, and the manner in which the same would be redressed |

| Questions | His Lordship's views | My views |
|---|---|---|
| of such constitutional rights and is actionable as 'Constitutional Tort' | **violation of constitutional rights and become actionable as a Constitutional tort. But if as a consequence of such a statement, any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen, then the same may be actionable as a constitutional tort.** | or remedied on the basis of judicial precedent.<br>It is not prudent to treat all cases where a statement made by a public functionary resulting in harm or loss to a person/citizen, as constitutional torts.<br><br>Public functionaries could be proceeded against personally if their statement is inconsistent with the views of the Government. If, however, such views are consistent with the views of the Government, or are endorsed by the Government, then the same may be vicariously attributed to the State on the basis of the principle of collective responsibility and appropriate remedies may be sought before a court of law. |

***Submissions*:**

7. We have heard learned Senior Counsel, Sri Kaleeswaram Raj, for the Petitioners and learned Attorney General for the Respondents, and learned Senior Counsel Ms. Aparajita Singh, amicus curiae.

***Arguments on behalf of the petitioners:***

8. The submissions of learned Senior Counsel, Sri Kaleeswaram Raj, appearing on behalf of the Petitioners may be epitomized as under:

8.1. That while upholding the constitutional right to freedom of speech and expression of Ministers, efforts should be made to frame a voluntary code of conduct for Ministers and public officials, which would ensure better accountability and transparency in their political activities and also place a check on the misuse of freedom of speech and expression exercised by public functionaries using the apparatus of the State.

8.2. That while the state's duty to protect life and liberty broadly falls within the right under Article 21, it is difficult to chain the State with responsibility in every instance where speech by a public functionary strikes at the dignity of another person. That in the absence of such a provision to vicariously attribute responsibility to the State, every instance of such speech cannot be actionable and remediable through the judiciary. That no duty corresponding to Article 21 is imposed on individual Ministers nor such duty is imposed on any government machinery to regulate the conduct of individual Ministers warranting judicial intervention. Therefore, even though no actionable breach of public duty can be said to have taken place when statements are

made by people in power, this in turn, postulates the desirability to have a voluntary code of conduct in the better interest of the government as well as the governed.

8.3. Reliance was placed on Article 75 (3) of the Constitution to contend that Ministers have a collective responsibility towards the legislature and thus, a code of conduct to self-regulate the speech and actions of Ministers is constitutionally justifiable. That a Minister is not supposed to breach her/his collective responsibility towards the Cabinet and the Legislature, hence, it is advisable to have a cogent code of conduct as available in advanced democracies.

8.4. Learned Senior Counsel lastly submitted that the instant cases do not involve a question as to conflict of any other right with Article 19. That the question herein, in sum and substance, is, whether, any restraint justifiable under the Constitution, can be placed on Ministers and public functionaries, to regulate their speech.

***Arguments on behalf of the Respondent-Union of India:***

9. Submissions of Learned Attorney General for India, Sri R. Venkataramani and Learned Solicitor General of India, Sri Tushar Mehta, appearing on behalf of the Respondent-Union of India, may be summarized as under:

9.1. At the outset, Sri R. Venkataramani, Learned Attorney General fairly submitted that restrictions on the freedom of speech enumerated under Article 19 (2) have to be taken to be exhaustive and thus, the court cannot invoke any other fundamental right, namely, Article 21 to impose restrictions on grounds which are not enumerated under Article 19(2). Further, that as a matter of constitutional principle, any addition, alteration or change in the norms or criteria for imposition of restrictions, on any fundamental right has to come through a legislative process. That the balancing of fundamental rights, either to avoid overlapping or to ensure mutual enjoyment, is different from treating one right as a restriction on another right.

9.2. It was next submitted that the Constitution of India sets out the scheme of claims of fundamental rights against the State or its instrumentalities and such scheme also addresses breaches or violations of fundamental rights by persons other than the State or its instrumentalities. Thus, any proposition to add or insert subjects or matters in respect of which claims can be made against persons other than the State, would amount to a constitutional change. That any enlargement of such constitutional principles would have the consequence of opening a flood gate of constitutional litigation.

9.3. It was further contended that there are sufficient constitutional and legal remedies available to a citizen whose liberty is threatened by any person and beyond the constitutional and legal remedies, there may not be any other additional duty to affirmatively protect the right of a citizen under Article 21.

9.4. Learned Attorney General urged that Ministerial misdemeanors, which have nothing to do with the discharge of public duty and are not traceable to the affairs of the State will have to be treated as acts of individual violation and individual wrongs. Thus, the state cannot be vicariously liable for the same. That the conduct of a public servant like a Minister in the government, if was traceable to the discharge of a public duty or duties of the office, was subject to the scrutiny of law. However, such misconduct including statements that may be made by a Minister, cannot be linked to the principles of collective responsibility.

***Submissions of learned amicus curiae, Ms. Aparajita Singh, Senior Advocate:***

10. The submissions of learned amicus curiae, Ms. Aparajita Singh, may be summarized as under:

10.1. At the outset she submitted that the right to freedom of speech and expression under Article 19(1)(a) is subject to clearly defined restrictions under Article 19(2). Therefore, any law seeking to

limit the right under Article 19(1)(a) has to fall within the limitation provided under Article 19(2).

10.2. That the right to freedom of speech and expression of a public functionary who represents the state has to be balanced with a citizen's right to fair investigation under Article 21 and if the exercise of a Minister's right under Article 19(1)(a) violates a citizen's right under Article 21 then the same would have to be read down to protect the right of the citizen. Thus, a Minister cannot claim the protection of Article 19(1)(a) to violate Article 21 rights of citizens.

10.3. Ms. Aparajita Singh next contended that a Minister, being a functionary of the State represents the State when acting in his official capacity. Therefore, any violation of the fundamental rights of citizens by the Minister in his official capacity, would be attributable to the State. Thus, it would be preposterous to suggest that while the State is under an obligation to restrict a private citizen from violating the fundamental rights of other citizens, its own Minister can do so with impunity. However, learned amicus curiae qualified such submission by stating that the factum of violation would need to be established on the facts of a given case and hence the law has to evolve from case to case. It would involve a detailed inquiry into questions such as i) whether the statement by the Minister was made in his personal

or official capacity; ii) whether the statement was made on a public or private issue; iii) whether the statement was made on a public or private platform.

10.4. It was submitted that a Minister is personally bound by the oath of office to bear true faith and allegiance to the Constitution of India under Articles 75(4) and 164(3) of the Constitution. That the code of conduct for Ministers (both for Union and States) specifically lays down that the Code is in addition to the *"...observance of the provisions of the Constitution, the Representation of the People Act, 1951".* Therefore, a constitutional functionary is duty bound to act in a manner which is in consonance with the constitutional obligations.

10.5. It was lastly submitted that the State acts through its functionaries. Therefore, an official act of a Minister which violates the fundamental rights of the citizens, would make the State liable by treating the said act of the Minister as a constitutional tort. However, the principle of sovereign immunity of the state for the tortious acts of its servants, has been held to be inapplicable in the case of violation of fundamental rights.

Question No. 1 referred to this Constitution Bench reads as under:

***"Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed***

***by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking fundamental rights?"***

***Preface:***

11. In my view, these cases call for an analysis of the ***content*** of Article 19(1)(a) of the Constitution of India which grants to all citizens of India the right to freedom of speech and expression. Before proceeding to analyse the relevant constitutional provisions, it may be appropriate to preface the discussion with the thought that freedom of speech is not contingent only upon the laws of a nation. The compulsion of social relations and the informal pressures of conformity, exerted in a pervasive manner, determine to a great extent, the content and limits of permissible speech in society. It is the laws, however, through their own unique methods, which reinforce social sanctions. Therefore, the Constitution, which is the fundamental law of the land, as well as the other laws which are measured on the touchstone of the Constitution, are to be interpreted, having regard, *inter-alia,* to the content and permissible limits of free speech in a peaceful society.

It is necessary to observe that freedom of speech and expression has always been closely linked with certain socio-political ideals that constitute the foundation of democracy: respect for individual dignity and equality; fraternity; ideals of tolerance; cultural and religious sensitivity. Many of these ideals are written into the text of our

Constitution and permeate its structure through the very Preamble to the Constitution. These ideals form the philosophical foundations of the discourse on free speech and therefore, any analysis of the same should be compatible with these ideals. It is in that background that one must set out to examine whether additional accountability and thus, a legal obligation can be cast upon public functionaries with respect to the permissible extent of free speech. Further, it is also necessary to examine the difference between *restraints* on the exercise of freedom of speech and expression, vis-à-vis *restrictions* thereon, and in that background examine the degree of *self-restraint* that needs to be exercised by every citizen, whether a public functionary or not, in exercising his/her right to freedom of speech and expression in a Country like ours which is so unique because of its diversity and pluralism.

***Article 19(1)(a) and Article 19(2): An overview***

12. At this stage, it would be useful to dilate on Article 19(1)(a) and Article 19(2) as under:

12.1. Article 19(1)(a) to (f) of the Constitution guarantees certain fundamental rights to the citizens of India. These fundamental rights are however, subject to reasonable restrictions as enumerated in Articles 19(2) to (6) thereof which could be imposed by the State. These fundamental rights are in the nature of inalienable rights of man or basic human rights which inhere

in all citizens of a free country. Yet, these rights are not unrestricted or absolute, and are regulated by restrictions, which may be imposed by the State, which have to be reasonable. The object of prescribing restraints or reasonable restrictions on the fundamental freedoms is to avoid anarchy or disorder in society. Hence, the founding fathers of our Constitution while enumerating the fundamental rights, have alongside prescribed reasonable restrictions in clauses (2) to (6) of Article 19 and the laws enacted within the strict limits of such restrictions are constitutionally permissible.

12.2. Since, these cases involve the freedom of speech and expression, it is unnecessary to analyse the nature of the other fundamental rights in Article 19(1) of the Constitution. Articles 19(1) (a) and 19(2) of the Constitution read as under:

> "**19. Protection of certain rights regarding freedom of speech, etc**.-
> (1) All citizens shall have the right –
> (a) to freedom of speech and expression;
>
> xxx xxx xxx
>
> (2) Nothing in sub-clause (a) of clause (a) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

12.3. The freedom of speech and expression as envisaged under Article 19(1)(a) of the Constitution means the right to free speech and to express opinions through various media such as by word of mouth, through the print or electronic media, through pictographs, writings, graphics or any other manner that can be discerned by the mind. The right includes the freedom of press. The content of this right also includes propagation of ideas through publication and circulation, the right to seek information and to acquire or impart ideas. In short, the right to free speech would include every nature of right that would come within the scope and ambit of free speech. Hence, Article 19(1)(a) in very broad and in wide terms states that all citizens shall have the right to freedom of speech and expression. The said right can be curtailed only by reasonable restrictions which are enumerated in Article 19(2) thereof which can be imposed by the State under the authority of law but not by exercise of executive power in the absence of any law. Further, the nature of restrictions on right to free speech must be reasonable, and in the interest of the sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. (Article 19(2)).

12.4. For a country like ours which is a Parliamentary Democracy, freedom of speech and expression is a necessary right as well as

a concomitant for the purpose of not only ensuring a healthy democracy but also to ensure that the citizens could be well informed and educated on governance. The dissemination of information through various media, including print and electronic media or audio visual form, is to ensure that the citizens are enlightened about their rights and duties, the manner in which they should conduct themselves in a democracy and for enabling a debate on the policies and actions of the Governments and ultimately for the development of the Indian society in an egalitarian way.

12.5. The right to freedom of speech and expression in Article 19(1)(a) of the Constitution has its genesis in the Preamble of the Constitution which, *inter alia,* speaks of liberty of thought, expression, belief. Since, India is a sovereign democratic republic and we follow a parliamentary system of democracy, liberty of thought and expression is a significant freedom and right under our constitutional setup.

12.6. This Court has, since the enforcement of the Constitution, been zealously upholding the right to freedom of speech and expression in innumerable judgments which may be highlighted with reference to a few of them.

i) In ***Romesh Thappar vs. State of Madras, AIR 1950 SC 124, 1950 SCC 436***, ***("Romesh Thappar")*** while highlighting that the freedom of speech is the foundation of

all democratic organisations, held that said freedom would also include the right to freedom of the press. This judgment highlighted that the free flow of opinion and ideas is necessary to sustain collective life of the well informed citizenry which is a *sine qua non* for effective governance.

ii) In ***S. Khushboo vs. Kanniammal, (2010) 5 SCC 600, ("Khushboo")*** this Court held that the freedom under Article 19(1)(a) envisaged dissemination of all kinds of views, both popular as well as unpopular.

iii) Recently in ***Shreya Singhal vs. Union of India, (2015) 5 SCC 1***, ***("Shreya Singhal")*** this Court speaking through Nariman, J. highlighted on the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2) in the following words:

> **"15.** It is significant to notice first the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2). The first important difference is the absoluteness of the US First Amendment—Congress shall make no law which abridges the freedom of speech. Second, whereas the US First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(a) speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject-matters—that is, any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject-matters set out in Article 19(2)."

It was further observed that insofar as the first apparent difference is concerned, the United States Supreme Court has never given effect to the declaration that Congress shall, under some circumstances, make any law abridging the freedom of speech. Insofar as the second apparent difference is concerned, para 17 of ***Shreya Singhal*** is extracted as under:

> **"17.** So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered under Article 19(1)(a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the US Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject-matters that there is a vast difference. In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject-matters set out under Article 19(2). If it does not, and is outside the pale of Article 19(2), Indian courts will strike down such law."

In ***Shreya Singhal***, there was a challenge to Section 66-A of the Information Technology Act, 2000, which was struck down as being violative of Article 19(1)(a) and was not saved under

Article 19(2) on the ground of vagueness and not providing manageable standards and clear guidance for citizens, authorities and courts for drawing a precise line between allowable and forbidden speech, expression or information. When a law uses vague expressions capable of misuse or abuse without providing notice to persons of common intelligence to guess their meaning, it leaves them in a boundless sea of uncertainty, conferring wide, unfettered powers on authorities to curtail freedom of speech and expression arbitrarily.

12.7. The present cases, however, are not really concerned with restrictions on the right to freedom of speech being imposed by the State. These cases are concerned with the content of Article 19(1)(a) of the Constitution, inasmuch as the grievance sought to be ventilated by the petitioners is, whether, there could be an inherent constitutional restriction on freedom of speech and expression on the citizens *vis-à-vis* other citizens. These cases are not with regard to reasonable restrictions that could be imposed by the State on the freedom of speech and expression, rather, what would be the content of free speech that should not be exercised as a right by an individual citizen which would not in any way give rise to a cause of action to another citizen to seek a remedy.

13. The content of a free speech right, as described hereinabove, is to be understood in terms of the structural elements or components of a free speech right. Only when a free speech right is understood as such, deductions can be made as to the precise boundaries thereof and the basis on which such right can be limited or restrained. Stephen Gradbaum, in his essay titled *"The Structure of a Free Speech Right,"* in the Oxford Handbook of Freedom of Speech has discussed six components of a free speech right, in the following words:

> "The first is the '**force**' of a free speech right. This includes what type of legal right to free speech is formally recognized or at issue: for example, common law, statutory, or constitutional. This in turn helps to determine whether and how easily a free speech right can be legally superseded. Another aspect of force is whether and how the right is judicially enforceable. The second component is the '**subject**' of free speech rights, or who are the rights-holders: for example, all persons within a jurisdiction or only citizens; legal persons including corporations or only natural persons? The third is the **'scope'** of a free speech right: a right to say or do what exactly? Does it include falsehoods, hate speech, or baking a cake? The fourth, as a distinct structural element concerning content, addresses **whether the right includes not only negative prohibitions on relevant others but also positive obligations**, such as a duty to affirmatively protect the free speech of rights-holders from third-party threats? The fifth component is the '**object**' of a free speech right: who are these 'relevant others' that are bound by the holder's rights? Against whom can the right be validly asserted? Finally, there is the '**limitation**' of a free speech right. If the prior questions have all been answered to the effect that a free speech right is implicated and infringed in a particular situation, when, if ever, might there be a legally justified limitation of that right? Is the right an absolute bar or 'trump' against inconsistent action and, if not, what presumptive weight attaches to it? How, when, and why can the presumption be rebutted? Collectively, by constituting and expressing

> the underlying structure of the right to free speech, the answers to these six questions help to define the nature and extent of any particular such right in a given legal system."
>
> **(Emphasis by me)**

Referring to the aspect of limitation of a free speech right, the learned author has observed that the teleology of a Constitutional order, can also play a role in fashioning the contours of free speech protections. That is to say, a free speech right may be fashioned to serve Constitutional commitments.

14. According to Wesley Hohfeld's analysis of the form of rights, every right has a complex internal structure, and such structure determines what the rights mean for those who hold them. Such rights are ordered arrangements of basic components. One of the components of a right, is a correlative duty. That is to say, if X has a right, he is legally protected from interference in respect of such right and such right carries with it the duty of the State, not to interfere with such right. If the State (or any other person) is under no corelative duty to abstain from interfering with the exercise of a right, then such a right is not a 'right' in the strict Hohfeldian sense. The boundaries of the protective perimeter within which a person can exercise their rights, depend on the degree to which the State is duty bound to protect the right.

14.1. What emerges from the Hohfeldian conception of rights and corelative duties, *qua* the right to freedom of speech and expression may be summed up as follows:

a) The Constitution of India confers under Article 19(1)(a), the right to freedom of speech and expression to all its citizens. The State has a corelative duty to abstain from interference with such right except as provided in Article 19(2) of the Consitution which are reasonable restrictions on the right conferred under Article 19(1)(a). The extent of such duty depends upon the content of speech. For instance, in respect of speech that is likely to be adverse to the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality; or speech that constitutes contempt of court, defamation or is of such nature as would be likely to incite the commission of an offence, the duty of the State to abstain from interference, is nil. This principle is Constitutionally reflected under Article 19(2) which enables the State to enact law which would impose reasonable restrictions on such speech as described under the eight grounds listed hereinabove which are the basis for reasonable restrictions.

b) *Per contra*, in respect of speech and expression which constitutes an exchange of ideas, including dissent or disagreement, and such ideas are expressed in a manner compatible with the ethos cultivated in a civilised society, the duty of the State to abstain from interference, is high.

c) Similarly, in respect of commercial speech, the State is completely free to recall or curb commercial speech which is false, misleading, unfair or deceptive. Therefore, the threshold of tolerance towards commercial speech or advertisements depends on the content of such speech and the object of the material sought to be propagated/circulated. The duty of the State to abstain from interference would also depend upon the nature and effect of the commercial speech.

d) As is evident from the above illustrations, the extent of protection of speech would depend on whether, such speech would constitute a 'propagation of ideas' or would have any social value. If the answer to the said question is in the affirmative, such speech would be protected under Article 19(1)(a); if the answer is in the negative, such speech would not be protected under Article 19(1)(a). In respect of speech that does not form the content of Article 19(1)(a), the State has no duty to abstain from interference having regard to Article 19(2) of the Constitution and only the grounds mentioned therein.

e) Having noted that the protective perimeter within which a person can exercise his/her rights depends on the degree to which the State is duty bound to protect the right, it may also be said as a corollary that in respect of speech that does

not form the content of Article 19(1)(a), the State has no duty to abstain from interference and therefore, speech such as hate speech, defamatory speech, etc. would lie outside the protective perimeter within which a person can exercise his right to freedom of speech. Such speech can be subjected to restrictions or restraints. While *restrictions* on the right to freedom of speech and expression are required to be made only under the grounds listed under Article 19(2), by the State, *restraints* on the said right, do not gather their strength from Article 19(2). Restraints on the right to freedom of speech and expression are governed by the content of Article 19(1)(a) itself; i.e., any kind of speech, which does not conform to the content of the right under Article 19(1)(a), may be restrained. Questions pertaining to the voluntary or binding nature of such restraint, the force behind the same, the persons on whom such restraints are to be imposed, the manner in which compliance thereof could be achieved, etc., are aspects left to be deliberated upon and answered by the Parliament. However, the finding made hereinabove is only to the extent of clarifying that any kind of speech, which does not form the content of Article 19(1)(a), may be *restrained* as such speech does not constitute an exchange of ideas, in a manner compatible with the ethos cultivated in a civilised society. Such

*restraints* need not be traceable only to Article 19(2), which ***exhaustively*** lists eight grounds on which restrictions may be imposed on the right to freedom of speech and expression by the state.

***The Content of Article 19(1)(a):***

15. The freedom of speech and expression under Article 19(1)(a) is a right with diverse facets, both with regard to the content of speech and expression, and the medium through which communication takes place. It is also a dynamic concept that has evolved with time and advances in technology. In short, Article 19(1)(a) covers the right to express oneself by word of mouth, through writing, pictorial form, graphics, or in any other manner. It includes the freedom of communication and the right to propagate or publish one's views and opinions. The communication of ideas may be through any medium such as a book, newspaper, magazine or movie, including electronic and audio-visual media.

15.1. ***Right to Circulate:***

Freedom of the press takes within its fold a number of rights and one such right is the freedom of publication. Publication also means dissemination and circulation; indeed, without circulation, publication would be of little value, *vide* ***Romesh Thappar; Sakal Papers (P) Ltd. vs. Union of India, A.I.R. 1962 SC 305 ("Sakal Papers (P) Ltd.")***.

In ***Life Insurance Corporation vs. Prof. Manubhai D. Shah, (1992) 3 SCC 637 ("Prof. Manubhai D. Shah")*** this Court reiterated that the freedom of speech and expression under Article 19(1)(a) must be understood to take within its ambit the freedom to circulate one's view. That such circulation could be by word of mouth, in writing or through audio-visual media. The freedom to 'air one's view' was declared as a "lifeline of any democratic institution" and the Court expressed strong criticism at any attempt aimed at stifling or suffocating the right to circulation. In the said case, the appeals concerned separate instances of state-controlled entities (LIC and Doordarshan) refusing to publish or broadcast work that criticized the government. The Court reasoned that government-controlled means of publication have a greater burden to recognize an individual's right to defend themselves and if a state censors content, then it is obligated to provide reasons valid in law. That when a state-controlled entity refuses to circulate through its magazine or other platform, one's views, including one's defence, the right to circulate is violated.

This Court has therefore, on several occasions recognised the right to circulation, as a facet of the right to freedom of speech. The right to circulation includes, the right to optimise/maximise the volume of such circulation and also determine the content and reach thereof.

15.2. ***Right to dissent:***

Article 19(1)(a) serves as a vehicle through which dissent can be expressed. The right to dissent, disagree and adopt varying and individualistic points of view inheres in every citizen of this Country. In fact, the right to dissent is the essence of a vibrant democracy, for it is only when there is dissent that different ideas would emerge which may be of help or assist the Government to improve or innovate upon its policies so that its governance would have a positive effect on the people of the country which would ultimately lead to stability, peace and development which are concomitants of good governance.

15.3. The following judgments of this Court on the right to dissent are noteworthy:

(i) In ***Romesh Thappar***, this Court recognised that criticism or dissent directed against the Government, was not to be curtailed and any attempt to do so could not be justified as a reasonable restriction under Article 19 (2) of the Constitution. This declaration by this Court cemented the idea that the freedom of speech and expression covers the right to dissent or criticise, even when such right is employed with respect to criticism of governmental policy or action or inaction. It is now recognised that the right to

dissent is an essential pre-requisite of a healthy democracy and a facet of free speech.

(ii) In ***Kedar Nath Singh vs. State of Bihar, A.I.R. 1962 SC 955 ("Kedar Nath Singh")*** this Court considered a challenge to Sections 124-A and 505 of the IPC, which criminalised attempts targeted at exciting disaffection towards the Government, by words, or through writing and publications which may disturb public tranquillity. Although this Court dismissed the challenge to the *vires* of the aforestated provisions, it was clarified that criticism of measures adopted by the government, would be within the limits of, and consistent with the freedom of speech and expression.

(iii) Subsequently, in ***Directorate General of Doordarshan vs. Anand Patwardhan, (2006) 8 SCC 433 ("Anand Patwardhan")*** this Court observed that the State cannot prevent open discission, even when such discussion was highly critical of governmental policy.

(iv) The right of an individual to hold unpopular or unconventional views was once again upheld in ***Khushboo*** wherein this Court quashed First Information Reports (FIRs) registered pertaining to offences under Sections 292, 499, 500, 504, 505, 509 of the IPC, based on complaints regarding the unpopular comments made by the appellant

therein, an actor, in a news magazine on the subject of pre-marital sex wherein she had urged women and girls to take necessary precautions to avoid the transmission of venereal diseases. In doing so, this Court observed that criminal law could not be set into motion in a manner as would interfere with the domain of personal autonomy. The Court upheld the appellant's freedom of speech and expression and quashed the FIRs, expressing the need for tolerance even *qua* unpopular views.

15.4. ***Right to advertise (commercial speech):***

As per the dictionary meaning, the expression "advertise" means, to draw attention to, or describe goods for sale, services offered, etc., through any medium, such as newspaper, television or other electronic media, etc., in order to encourage people to buy or use them. In other words, it is to draw attention to any product or service. "Advertisement" is a public notice, announcement, picture in a newspaper or on a wall or hoarding in the street etc., which advertises something. In short, it is to advert attention to something and in the commercial sense, to draw attention to goods for sale or services offered. In that sense, an advertisement is commercial speech.

A glimpse of the following cases would be useful:

(i) In ***Hamdard Dawakhana (Wakf) Lal Kuan vs. Union of India, A.I.R 1960 SC 554 ("Hamdard Dawakhana")*** this Court held that an advertisement is a form of speech, but its true character is reflected by the object for the promotion of which it is employed. However, this Court qualified its observations with the caveat that when advertisement takes the form of commercial advertisement which has an element of trade or commerce, it no longer falls within the concept of freedom of speech, for, the object is not propagation of ideas - social, political or economic or furtherance of literature or human thought; but the commendation of the efficacy, value and importance of the product it seeks to advertise. In the said case, this Court did not recognize commercial speech on par with other forms of speech by holding that it did not have the same value as political or creative expression. That broadly, the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution, but not every advertisement is a matter which comes within the scope of freedom of speech, nor can it be said that it is an expression of ideas. In every case, one has to see what is the nature of advertisement and what is the business/commercial activity falling under Article 19(1)(g) it seeks to further.

In the aforesaid case, what was challenged was the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954. It was held that the object of the Act was the prevention of self-medication and self-treatment by prohibiting advertisements, which may be used to advocate the same or which tended to spread the evil. It was further held that the advertisements of Hamdard Dawakhana, appellant in the said case, were relating to commerce or trade and not propagation of ideas. Such advertising of prohibited drugs or commodities the sale of which was not in the interest of the general public, cannot be "speech" within the meaning of freedom of speech and would not fall within Article 19(1)(a).

It is therefore evident that this Court in the said case placed weight on the aspect as to whether, the advertisement sought to be protected, did in fact constitute 'propagation of ideas.' The true content and object of the material sought to be propagated/circulated was to be assessed, in order to declare whether such content would enjoy the protection of Article 19(1)(a).

(ii) Subsequently, in ***Indian Express Newspaper (Bombay) Pvt. Ltd. vs. Union of India, (1985) 1 SCC 641 ("Indian Express Newspaper (Bombay) Pvt. Ltd.")***, this Court considered the decision in ***Hamdard Dawakhana*** and

observed that the main plank of said decision was the type of advertisement or the content thereof and that particular advertisement did not carry with it the protection of Article 19(1)(a). It was further clarified that the observations made in ***Hamdard Dawakhana*** are too broadly stated. That all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen.

(iii) Subsequently, in ***Tata Press Limited vs. Mahanagar Telephone Nigam Limited, (1995) 5 SCC 139 ("Tata Press Limited")***, this Court clarified that commercial speech, which is entitled to protection under the First Amendment in USA is also protected under Article 19(1)(a) of the Indian Constitution. However, in the USA, the State was completely free to recall commercial speech which is false, misleading, unfair, deceptive and which proposes illegal transactions in USA. But, under the Indian Constitution, commercial speech which is deceptive, unfair, misleading and untruthful, would be hit by Article 19(2) of the Constitution and can be regulated/prohibited by the State.

15.5. ***Compelled Speech:***

Compelled or forced speech is speech which compels a person to state a thing. It is in the form of a "must carry"

provision in a statute. An example of compelled speech is a provision mandating printing of the ingredients, its measure and such other details on a food product or pharmaceutical item. The object is to inform and, in some cases, warn a potential consumer about the nature of the product. Such compelled speech cannot be a violation of the freedom of speech and expression. But if the State compels a citizen to carry out propaganda or a point of view contrary to his wish then it may be a restriction on his freedom of speech and expression, which must be justified as per Article 19(2) of the Constitution. But, if the "must carry" provision furthers informed decision making, which is the essence of free speech and expression, then it will not amount to a violation of Article 19(1)(a). The following judgments could be cited in the aforesaid context:

(i) In ***Union of India vs. Motion Picture Association, A.I.R. 1999 SC 2334 ("Motion Picture Association")***, this Court held that whether compelled speech will or will not amount to a violation of the freedom of speech and expression, would depend upon the nature of a "must carry" provision. It observed that, if a "must carry" provision further informed decision-making, which is the essence of the right to free speech and expression, it will not amount to any violation of the fundamental freedom of speech and expression. However, if such a provision compels a person to carry out

propaganda or project a partisan or distorted point of view, contrary to his wish, it may amount to a restraint on his freedom of speech and expression. It may also violate other fundamental rights such as Article 19 (1) (g) or right against self-incrimination which is protected under Article 20 (3) of the Constitution.

(ii) Therefore, this Court, in the said case, once again laid stress on the ideas and information sought to be communicated, by way of compelling the transmission of such ideas. The content of the information which is compelled to be carried was found to be highly relevant.

Thus, the right under Article 19(1)(a) is a multi-faceted freedom and includes within its expanse, *inter-alia*, the right to gender identity as a facet of freedom of expression, *vide* ***National Legal Services Authority vs. Union of India, (2014) 5 SCC 438 ("National Legal Services Authority")***; the right of the press to conduct interviews, *vide* ***Prabha Dutt vs. Union of India, (1982) 1 SCC 1 ("Prabha Dutt")***; the right to attend proceedings in Court and report the same, *vide* ***Swapnil Tripathi vs. Supreme Court of India, (2018) 10 SCC 639 ("Swapnil Tripathi")***; the right to fly the national flag *vide* ***Union of India vs. Naveen Jindal, (2004) 2 SCC 510 ("Naveen Jindal")***. The right to silence, often regarded as the very converse of 'speech,' is also implicit in the freedom of

speech under Article 19(1)(a), as recognised in ***Bijoe Emmanuel vs. State of Kerala, (1986) 3 SCC 615 ("Bijoe Emmanuel")***.

16. ***'Hate Speech':***

16.1. The various nuances of what has come to be termed as 'hate speech' could be discussed with reference to judgments of this Court as under:

Learned counsel appearing for the petitioner, Sri Kaleeswaram Raj submitted that, the contention of the petitioners in these cases is that the right to free speech which is a right against the State would also bring within its fold, a duty *vis-à-vis* not only the State but other citizens also in the matter of exercising the said freedom. In other words, what is sought to be addressed in these cases is what are the components or elements of the fundamental right of free speech and whether there could be limits on the right to free speech *de hors* Article 19(2) of the Constitution, with a view to check, what has ubiquitously come to be known as 'hate speech' or 'disparaging speech'. By this I do not restrict the scope of consideration in the instant cases only to speech made by public functionaries, but the same shall also extend to speech by ordinary citizens, especially on social media.

16.2. This Court, in ***Pravasi Bhalai Sangathan vs. Union of India, (2014) 11 SC 477 ("Pravasi Bhalai Sangathan")*** speaking through Dr. B.S. Chauhan, J., has dealt with 'hate speech' as having an innate relationship with the idea of discrimination. That the impact of such speech is not measured by its abusive value alone, but rather by how successfully and systematically it marginalises people. The definition of 'hate speech' as propounded by this Court in the aforesaid case, is extracted hereinunder:

> "Hate speech is an effort to marginalise individuals based on their membership in a group. **Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society.** Hate speech, therefore rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on [the] vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy."
>
> **(Emphasis by me)**

This Court referred to the judgment of the Supreme Court of Canada in ***Saskatchewan Human Rights Commission vs. William Whatcott, 2013 SCC 11 ("Saskatchewan") (Canada)*** wherein it was held that human rights obligations form the basis for the control of publication of "hate speeches." The Canadian

Supreme Court further declared that the repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment, is irrelevant. That the key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination. Placing reliance on the observations of the Canadian Supreme Court, this Court in ***Pravasi Bhalai Sangathan*** observed that the offence of hate speech is not limited to causing individual distress but would target persons who are members of certain groups or sections of society which breeds discrimination and consequently, hostility.

16.3. In India, human dignity is not only a value but a right that is enforceable. In a human-dignity-based democracy, freedom of speech and expression must be exercised in a manner that would protect and promote the rights of fellow-citizens. But hate speech, whatever its content may be, denies human beings the right to dignity. In this regard, it may be apposite to refer to a recent decision of this Court in ***Amish Devgan vs. Union of India, (2021) 1 SCC 1 ("Amish Devgan")*** wherein this Court speaking through Sanjeev Khanna, J. undertook an analysis of 'hate speech' as being antithetical to, and incompatible with the foundations of human dignity. Protection of 'Dignity' as a

justification for criminalization of 'hate speech' was discussed as follows:

> "46. [...] Dignity, in the context of criminalisation of speech with which we are concerned, refers to a person's basic entitlement as a member of a society in good standing, his status as a social equal and as bearer of human rights and constitutional entitlements. It gives assurance of participatory equality in inter-personal relationships between the citizens, and between the State and the citizens, and thereby fosters self-worth. Dignity in this sense does not refer to any particular level of honour or esteem as an individual, as in the case of defamation which is individualistic.
>
> 47. Preamble to the Constitution consciously puts together fraternity assuring dignity of the individual and the unity and integrity of the nation. Dignity of individual and unity and integrity of the nation are linked, one in the form of rights of individuals and other in the form of individual's obligation to others to ensure unity and integrity of the nation. The unity and integrity of the nation cannot be overlooked and slighted, as the acts that 'promote' or are 'likely' to 'promote' divisiveness, alienation and schematism do directly and indirectly impinge on the diversity and pluralism, and when they are with the objective and intent to cause public disorder or to demean dignity of the targeted groups, they have to be dealt with as per law. The purpose is not to curtail right to expression and speech, albeit not gloss over specific egregious threats to public disorder and in particular the unity and integrity of the nation. Such threats not only insidiously weaken virtue and superiority of diversity, but cut-back and lead to demands depending on the context and occasion, for suppression of freedom to express and speak on the ground of reasonableness. **Freedom and rights cannot extend to create public disorder or armour those who challenge integrity and unity of the country or promote and incite violence. Without acceptable public order, freedom to speak and express is challenged and would get restricted for the common masses and law-abiding citizens. This invariably leads to State response and, therefore, those who indulge in promotion and incitement of violence to challenge unity and integrity of the nation or public**

**disorder tend to trample upon liberty and freedom of others**."

**(Emphasis by me)**

Further, referring to the views of Alice E. Marwick and Ross Millers in the report titled "Online Harassment, defamation, and Hateful Speech: A Primer of the Legal Landscape," this Court in ***Amish Devgan*** elucidated as follows on three distinct elements that legislatures and courts can use to define and identify 'hate speech':

> "72.1. The content-based element involves open use of words and phrases generally considered to be offensive to a particular community and objectively offensive to the society. It can include use of certain symbols and iconography. By applying objective standards, one knows or has reasonable grounds to know that the content would allow anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender.
>
> 72.2. The intent-based element of 'hate speech' requires the speaker's message to intend only to promote hatred, violence or resentment against a particular class or group without communicating any legitimate message. This requires subjective intent on the part of the speaker to target the group or person associated with the class/group.
>
> 72.3. The harm or impact-based element refers to the consequences of the 'hate speech', that is, harm to the victim which can be violent or such as loss of self-esteem, economic or social subordination, physical and mental stress, silencing of the victim and effective exclusion from the political arena.
>
> 72.4. Nevertheless, the three elements are not watertight silos and do overlap and are interconnected and linked. Only when they are present that they

produce structural continuity to constitute 'hate speech'."

It was further clarified that the effect of the words must be judged from the standard of "reasonable, strong-minded, firm and courageous men and not those who are weak and ones with vacillating minds, nor those who scent danger in every hostile point of view." That in order to ensure maximisation of free speech, the assessment should be from the perspective of a reasonable member of the public.

16.4. Further, in a landmark Judgment of the United States' Supreme Court in the matter of ***Chaplinsky vs. State of New Hampshire, 315 U.S. 568 (1942) ("Chaplinsky")*** "hate speech" was defined by Murphy J. to mean *"fighting words, which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been observed that such utterances are no essential part of any exposition of ideas, and are of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."*

16.5. The term 'hate speech' does not find a specific place in Article 19(2) of the Constitution and it appears that it does not constitute a specific exception to the freedom of speech and expression under Article 19(1)(a). Possibly the framers of the Constitution

did not find the same to be of relevance in the Indian social mosaic considering that the other cherished values of our Constitution such as fraternity and dignity of the individual would be strong factors which would negate any form of hate speech to be uttered in our Country. This may be having regard to our social and cultural values. However, with the passage of time, a wide range of Indian statutes have been enacted with a view to control hate speech. It may be useful to refer to a few of such provisions, with a view to examine the sufficiency of the existing framework in checking 'hate speech' although, the said term has not yet been precisely defined till date by the Parliament.

i) The ***Indian Penal Code*** ("IPC") contains provisions which prohibit hate speech. Section 153-A penalises the promotion of class hatred. Section 153-B penalises "imputations, assertions prejudicial to national integration". Section 295-A penalises insults to religion and to religious beliefs. Section 298 makes it a penal offence to utter words, makes sounds or gestures with the deliberate intention of wounding the religious feelings of another. Section 505 makes it a penal offence to incite any class or community against another. Chapter XXII, IPC punishes criminal intimidation.

ii) Section 95 of the ***Code of Criminal Procedure, 1973*** ("CrPC") empowers the State Government to forfeit

publications that are punishable under Sections 124-A, 153-A, 153-B, 292, 293 or 295-A of the IPC. Section 107 empowers the Executive Magistrate to prevent a person from committing a breach of peace or disturbing public tranquillity or doing any wrongful act that may cause breach of peace or disturb public tranquillity. Section 144 empowers the District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf to issue orders in urgent cases of nuisance or apprehended danger. The above offences are cognizable.

iii) Section 7 of the ***Protection of Civil Rights Act, 1955*** penalises incitement to, and encouragement of untouchability through words, either spoken or written, or by signs or by visible representations or otherwise.

iv) Section 3(g) of the ***Religious Institutions (Prevention of Misuse) Act, 1988*** prohibits religious institutions to allow the use of any premises belonging to, or under their control for promoting or attempting to promote disharmony, feelings of enmity, hatred, ill-will between different religious, racial, linguistic or regional groups or castes or communities.

v) Section 3(1)(x) of the ***Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989*** punishes an intentional insult or intimidation with intent to humiliate a

member of a Scheduled Caste or Tribe in any place within public view.

vi) Section 8 of the ***Representation of the People Act, 1951*** disqualifies a person from contesting elections if he is convicted for indulging in acts amounting to illegitimate use of freedom of speech and expression. Section 123(3-A) of the same Act declares "the promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate", a "corrupt practice".

vii) ***The Cable Television Networks (Regulation) Act, 1995*** requires that all programmes and advertisements telecast on television conform to the Programme Code and the Advertisement Code. Rule 6, ***Cable Television Networks Rules, 1994*** lays down the Programme Code and prohibits the carrying of any programme on the cable service which:

(a) contains an attack on religion or communities or contains visuals or words contemptuous of religious groups or which promotes communal attitudes;

(b) is likely to encourage or incite violence or contains anything against maintenance of law and order or which promotes anti-national attitudes;

(c) criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country;

(d) contains visuals or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups.

Similarly, the Advertising Code under Rule 7 of the ***Cable Television Networks Rules, 1994*** prohibits the carriage of advertisements on the cable service which hurt the religious susceptibilities of subscribers, which derides any race, caste, colour, creed or nationality, or incite violence or disorder or breach of law.

The ***Cable Television Networks (Regulation) Act, 1995*** empowers the authorised officer appointed under the Act to prohibit the transmission of a programme or channel, if it is not in conformity with the Programme Code or the Advertisement Code; or if it is likely to promote disharmony or feelings of enmity, hatred or ill-will between different religious, racial, linguistic or regional groups; or is likely to disturb public tranquillity. Further, the Central Government is empowered to prohibit the transmission or

re-transmission of any channel or programme in the interest of the sovereignty, integrity or security of India or of public order.

viii) Under the ***Cinematograph Act, 1952***, a film can be denied certification on various grounds, including on the ground that it is likely to incite the commission of an offence or that it is against the interests of the sovereignty and integrity of India or public order.

ix) The ***Information Technology Act, 2000*** (IT Act) allows the interception of information by the authorities in the interest of public order, or the sovereignty and integrity of India, or for the purpose of preventing incitement to the commission of a cognizable offence. Section 66-A of the same Act which sought to penalise information that is "grossly offensive" or of "menacing character" or despite knowledge that it is false, is sent to cause annoyance, inconvenience, danger, obstruction, insult, criminal intimidation, enmity, hatred or ill-will, was struck down in ***Shreya Singhal*** on the ground of, *inter alia*, vagueness.

x) ***Norms of Journalistic Conduct, 2010*** issued by the Press Council of India (constituted under the Press Council Act, 1978) contain extensive guidelines on the reporting of communal incidents.

The content of speech is sought to be controlled in all the aforesaid statutes when the same is made not only by public functionaries but any ordinary citizen also through whatever medium of dissemination.

16.6. One of the recommendations of the 267th Law Commission was to insert Sections 153C and 505A and associated provisions in the CrPC to deal with 'Hate Speech'. As per the Law Commission report, the proposed provisions would read as under:

> "153-C- Whoever on grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe–
> (a) uses gravely threatening words either spoken or written, signs, visible representations within the hearing or sight of a person with the intention to cause, fear or alarm; or
>
> (b) advocates hatred by words either spoken or written, signs, visible representations, that causes incitement to violence shall be punishable with imprisonment of either description for a term which may extend to two years, and fine up to Rs 5000, or with both."
>
> "505-A- Causing fear, alarm, or provocation of violence in certain cases: Whoever in public intentionally on grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe uses words, or displays any writing, sign, or other visible representation which *is* gravely threatening, or derogatory;
>
> (i)within the hearing or sight of a person, causing fear or alarm, or;
>
> (ii) with the intent to provoke the use of unlawful violence, against that person or another, shall be

> punished with imprisonment for a term which may extend to one year and/or fine up to Rs 5000, or both".

The proposed provision under Section 505-A, seeks to control not only speech that could potentially incite violence or hurt the feelings of a community or dampen national integrity, but also seeks to check threatening or derogatory remarks, made on grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe, and which cause fear or alarm. While speech of the former category has been traditionally regarded as 'hate speech,' generally vitriolic or 'derogatory' statements, which are made on the grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe, have traditionally not been considered to qualify as 'hate speech,' no matter how unwarranted or disparaging such statements may be.

16.7. Traditionally, 'hate speech' is the term used to describe speech that can potentially cause actual material harm through potential social, economic and political marginalisation of a community as declared by this Court in ***Pravasi Bhalai Sangathan***. However, in the present case, in my opinion, we are concerned with a more overarching area of derogatory, vitriolic and disparaging speech, which is actually not 'hate speech' simplicitor as has been traditionally sought to be defined

and understood. I am concerned with speech that may not be linked to systematic discrimination and eventual political marginalisation of a community, but which may nonetheless have insidious effects on the societal perception of human dignity, values of social cohesion, fraternity and equality cherished by "We the people" of India.

16.8. Andrew F. Sellars, in his essay published by Harvard University, titled *'Defining Hate Speech,'* has examined the concept of 'hate speech' in different democratic jurisdictions. The author has identified that certain remarks, which, although may not be 'hate speech' in the strict sense of the term, border on the said term. That even tacit elements of intent of the speaker to cause harm, may constitute some species of hate speech. Intent may refer to non-physical aspects like to demean, vilify, humiliate, or being persecutorial, disregarding or hateful. The author has also recognised that in some contexts, "at home speeches" may themselves amount to hate speeches as such speech can now be uploaded and circulated in the virtual world through internet etc. The only pre-requisite is that the speech should have no redeeming purpose, which means that "the speech primarily carries no meaning other than hatred, hostility and ill-will."

***Beyond 'hate speech':***

17. The expansive scope of 'hate speech' as set out above, would include within its sweep not only 'hate speech' simplicitor which is defined as speech aimed at systematic discrimination and eventual political marginalisation of a community, but also other species of derogatory, vitriolic and disparaging speech.

18. A philosophical justification to control and restrain derogatory, vitriolic and disparaging speech has been very poignantly conveyed by Lau Tzu, a celebrated Chinese philosopher and writer, in the following words:

> *"Watch your thoughts; they become words.*
> *Watch your words; they become actions.*
> *Watch your actions; they become habit.*
> *Watch your habits; they become character.*
> *Watch your character; it becomes your destiny."*

19. Theoretical and doctrinal underpinnings justifying restraints on derogatory and disparaging speech, may be traced to two primary factors: human dignity as a value as well as a right; the Preambular goals of 'equality' and 'fraternity.'

***Human dignity as a value as well as a right under the Constitution of India:***

20. As discussed supra, human dignity is not only a value but a right that is enforceable under Article 21 of the Constitution of India. In a human-dignity-based democracy, freedom of speech and expression

must be exercised in a manner that would protect and promote the rights of fellow-citizens.

***International practice:***

21. In attempting to justify restraints on free speech, on the argument founded on considerations of autonomy, dignity and self-worth of the person(s) against whom derogatory statements are made, reference may be made to international practice in this regard.

i) ***Canada:*** Canadian jurisprudence on the subject proceeds on the basis of inviolability of human dignity as its paramount value and specifically limits the freedom of expression when necessary to protect the right to personal honour. The Canadian approach emphasises on multiculturalism and group equality, as it places greater emphasis on cultural diversity and promotes the idea of an ethnic mosaic. Interestingly, the Canadian position, as discernible from the Canadian Supreme Court's verdict in ***R vs. James Keegstra, (1990) 3 SCR 697 ("Keegstra") (Canada)*** considers the likely impact of hate speech on both the targeted groups and non-targeted groups. The former are likely to be degraded and humiliated and experience injuries to their sense of self-worth and acceptance in the larger society and may well, as a consequence, avoid contact with members of the other group within the polity. The non-targeted members of the group, sometimes representing society at large, on the other hand, may gradually become de-

sensitised and may in the long run start accepting and believing the messages of hate directed towards racial and religious groups. These insidious effects pose serious threats to social cohesion in the long run rather than merely projecting immediate threats to violence.

Further, Dixon C.J. of the Canadian Supreme Court in ***Canada Human Rights Commission vs. Taylor, (1990) 3 SCR 892 ("Taylor") (Canada)*** has observed as follows, as regards the interrelationship between messages of hate propaganda and the values of dignity and equality:

> "...messages of hate propaganda undermine the dignity and self-worth of targeted group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open mindedness that must flourish in a multicultural society which is committed to the idea of equality."

ii) ***Australia***: The position of law in Australia is substantially aligned with that in Canada. The Australian Federal Court, in the case of ***Pat Eatock vs. Andrew Bolt, (2011) FCA 1103 ("Pat Eatock") (Australia)*** followed the dictum in ***Keegstra*** in holding that the right to freedom of expression could be restricted *vide* legislation which made racial hatred a criminal offence. The Australian Federal Court stated that the rationale for a legislation restraining free speech was as follows:

> "(a) The justification from pursuit of truth does not support the protection of hate propaganda, and may even detriment our search for truth. The more erroneous or mendacious a statement, the less its value in the quest of truth. We must not overemphasise that rationality will overcome all falsehoods.
>
> (b) Self-fulfilment and autonomy, in a large part, come from one's ability to articulate and nurture an identity based on membership in a cultural or religious group. The extent to which this value furthers free speech should be modulated insofar as it advocates an intolerant and prejudicial disregard for the process of individual self-development and human flourishing.
>
> (c) The justification from participation in democracy shows a shortcoming when expression is employed to propagate ideas repugnant to democratic values, thus undermining the commitment to democracy. Hate propaganda argues for a society with subversion of democracy and denial of respect and dignity to individuals based on group identities."

iii) ***South Africa***: The position which regards dignity as a paramount constitutional value has been recognised in South Africa. The Constitutional Court has expressed willingness to subjugate freedom of expression when the same sufficiently undermines dignity. The constitutional provision, therefore, enjoins the legislature and the court to limit free speech rights and the exercise of those rights which deprive others of dignity.

iv) ***Germany***: The German law on the subject posits that freedom of expression is one amongst several rights which is limited by principles of equality, dignity and multiculturalism. Further, value of personal honour always triumphs over the right to utter untrue statements or facts made with the knowledge of their falsity. Also,

if true statements of fact invade the intimate personal sphere of an individual, the right to personal honour triumphs over the freedom of speech. If the expression of opinion as opposed to a fact constitutes a serious affront to the dignity of a person, the value of dignity triumphs over the speech. Therefore, German application strikes a balance between rights and duties, between the individual and the community on the one hand and between the self-expression needs of the speaker and the self-respect and dignity of the listeners on the other. It recognises the content-based speech regulation and also recognises the difference between fact and opinion.

***The inalienability of 'human dignity' under the Constitution of India vis-à-vis the right to freedom of speech and expression:***

22. In ***Charu Khurana vs. Union of India, (2015) 1 SCC 192 ("Charu Khurana")***, this Court declared that dignity is the quintessential quality of personality and a basic constituent of the rights guaranteed and protected under Article 21. Dignity is a part of the individual rights that form the fundamental fulcrum of collective harmony and interest of a society. That while the right to speech and expression is absolutely sacrosanct, dignity as a part of Article 21 has its own significance. That dignity of an individual cannot be overridden and blotched by malice and vile and venal attacks to tarnish and destroy

the reputation of another by stating that the same curbs and puts unreasonable restriction on the freedom of speech and expression.

Further, in ***In Re. Noise Pollution (V), (2005) 5 SCC 733*** it was observed that Article 19(1)(a) cannot be cited as a justification for defeating the fundamental right guaranteed by Article 21. That a person speaking cannot violate the rights of others to enjoy a peaceful, comfortable and (noise) pollution free environment, guaranteed by Article 21.

Having regard to the unequivocal declaration of this Court, to the effect that Article 21 could not be sacrificed at the altar of securing the widest amplitude of free speech rights, this premise can serve as a theoretical justification for prescribing restraints on derogatory and disparaging speech. Human dignity, being a primary element under the protective umbrella of Article 21, cannot be negatively altered on account of derogatory speech, which marks out persons as unequal and vilifies them leading to indignity.

23. Rule of Law, includes certain minimum requirements without which a legal system cannot exist. Professor Lon L. Fuller, a renowned American legal philosopher, has described these requirements collectively as the 'inner morality of law'. Such an understanding of the concept of Rule of Law places much emphasis on the centrality of individual dignity in a society governed by the Rule of Law. Justice

Aharon Barak, former Chief Justice of Israel, has lucidly explained this facet of Rule of law in the following manner:

> "The Rule of law is not merely public order, the Rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to live in dignity and develop himself. The human being and human rights underlie this substantive perception of the Rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. **The substantive Rule of law "is the Rule of proper law, which balances the needs of society and the individual". This is the Rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. The Judge must protect this rich concept of the Rule of law."**
>
> **(Emphasis by me)**

24. As recognised by this Court in ***K.S. Puttaswamy (Retd.) vs. Union of India, (2019) 1 SCC 1 ("Puttaswamy")***, a substantive aspect of the Rule of Law is the balance between the individual and society. In that background, this Court discussed the scope of Constitutional rights under our Constitutional scheme and the extent of their protection. While emphasising that there are no absolute constitutional rights, this Court laid down, in the following words that one of the only rights which is treated as "absolute" is the right to human dignity:

> "62. **It is now almost accepted that there are no absolute constitutional rights [Though, debate on this vexed issue still continues and some**

**constitutional experts claim that there are certain rights, albeit very few, which can still be treated as "absolute". Examples given are:(a) Right to human dignity which is inviolable**,(b) Right not to be subjected to torture or to inhuman or degrading treatment or punishment. Even in respect of such rights, there is a thinking that in larger public interest, the extent of their protection can be diminished. However, so far such attempts of the States have been thwarted by the judiciary.] and all such rights are related. As per the analysis of Aharon Barak [Aharon Barak,Proportionality: Constitutional Rights and Their Limitation (Cambridge University Press 2012).], two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the Rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub-constitutional law i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as the Indian Constitution is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the cornerstone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in Clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others. This phenomenon--of both the right and its limitation in the Constitution--exemplifies the inherent tension between democracy's two fundamental elements. On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of

> democracy, though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the "losing" facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles. This is one of the expressions of the multi-faceted nature of democracy. Indeed, the inherent tension between democracy's different facets is a "constructive tension". It enables each facet to develop while harmoniously coexisting with the others. The best way to achieve this peaceful coexistence is through balancing between the competing interests. Such balancing enables each facet to develop alongside the other facets, not in their place. **This tension between the two fundamental aspects--rights on the one hand and its limitation on the other hand--is to be resolved by balancing the two so that they harmoniously coexist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context."**
>
> **[Emphasis by me]**

25. It is clarified that at this juncture that it is not necessary to engage in the exercise of balancing our concern for the free flow of ideas and the democratic process, with our desire to further equality and human dignity. This is because no question would arise as to the conflict of two seemingly competing rights, being the right to freedom of speech and expression, *vis-à-vis* the right to human dignity and equality. The reason for the same is because, the *restraint* that is called for, is only in relation to unguided, derogatory, vitriolic speech, which in no way can be considered as an essential part of exposition of ideas, which has little social value. This discourse, in no way seeks to pose a potential danger to peaceful dissenters, who exercise their right to freedom of speech and expression in a critical, but measured fashion.

The present cases pertain specifically to derogatory, disparaging speech, which closely resembles hate speech. Such speech does not fall within the protective perimeter of Article 19(1)(a) and does not constitute the content of the free speech right. Therefore, when such speech has the effect of infringing the fundamental right under Article 21 of another individual, it would not constitute a case which requires balancing of conflicting rights, but one wherein abuse of the right to freedom of speech by a person has attacked the fundamental rights of another.

***The Preambular goals of 'equality' and 'fraternity':***

26. Equality, liberty and fraternity are the foundational values embedded in the Preamble of our Constitution. 'Hate speech', in the sense discussed hereinabove, strikes at each of these foundational values, by marking out a society as being unequal. It also violates fraternity of citizens from diverse backgrounds, the *sine-qua-non* of a cohesive society based on plurality and multi-culturalism such as in India that is, Bharat.

27. Fraternity is based on the idea that citizens have reciprocal responsibilities towards one another. The term takes within its sweep, *inter-alia,* the ideals of tolerance, co-operation, and mutual aid.

27.1. The meaning of the term fraternity, in the context of criminal defamation and restraints on the freedom of speech and

expression has been examined by this Court in ***Subramanian Swamy vs. Union of India, (2016) 7 SCC 221 ("Subramanian Swamy")*** wherein it was observed that fraternity under the Constitution expects every citizen to respect the dignity of the other. Mutual respect is the fulcrum of fraternity that assures dignity. This Court qualified its observations with the caveat that 'fraternity' does not mean that there cannot be dissent or difference, more so because all citizens have the right to freedom of speech and expression. However, it was unequivocally declared that a constitutional value which is embedded in the idea of fraternity is dignity of the individual, which is required to be respected by fellow citizens. That the Preamble consciously chooses to assure the dignity of the individual, in the context of fraternity and therefore, rights enshrined in Part III have to be exercised by individuals against the backdrop of the ideal of fraternity. This Court observed that the fraternal ideal also finds resonance in Part IVA of the Constitution. In upholding the permissibility of the law on criminal defamation, on the touchstone of the concept of constitutional fraternity, this Court speaking through Dipak Misra, J. (as his Lordship then was) observed in paragraphs 155 and 163, as follows:

> "155**. It is a constitutional value which is to be cultivated by the people themselves as a part of their social behavior.** There are two schools of thought; one canvassing individual liberalization and the other advocating for protection of an individual as

a member of the collective. The individual should have all the rights under the Constitution but simultaneously he has the responsibility to live upto the constitutional values like essential brotherhood-the fraternity-that strengthens the societal interest. Fraternity means brotherhood and common interest. Right to censure and criticize does not conflict with the constitutional objective to promote fraternity. Brotherliness does not abrogate and rescind the concept of criticism. In fact, brothers can and should be critical. Fault finding and disagreement is required even when it leads to an individual disquiet or group disquietude. Enemies Enigmas Oneginese on the part of some does not create a dent in the idea of fraternity but, a significant one, liberty to have a discordant note does not confer a right to defame the others."

"163. We have referred to two concepts, namely, constitutional fraternity and the fundamental duty, as they constitute core constitutional values. Respect for the dignity of another is a constitutional norm. **It would not amount to an overstatement if it is said that constitutional fraternity and the intrinsic value inhered in fundamental duty proclaim the constitutional assurance of mutual respect and concern for each other's dignity. The individual interest of each individual serves the collective interest and correspondingly the collective interest enhances the individual excellence. Action against the State is different than an action taken by one citizen against the other. The constitutional value helps in structuring the individual as well as the community interest. Individual interest is strongly established when constitutional values are respected. The Preamble balances different and divergent rights. Keeping in view the constitutional value, the legislature has not repealed Section 499 and kept the same alive as a criminal offence.** The studied analysis from various spectrums, it is difficult to come to a conclusion that the existence of criminal defamation is absolutely obnoxious to freedom of speech and expression. As a prescription, it neither invites the frown of any of the Articles of the Constitution nor its very existence can be regarded as an unreasonable restriction."

**(Emphasis by me)**

27.2. The decision of this Court in ***Subramanian Swamy*** establishes precedent of justifying a restraint on free speech, on the ground of promotion of fraternity. It has been recognized that the constitutional value of fraternity imputes an obligation on all citizens to subserve collective interest and respect the dignity and equality of fellow citizen. Restraints on free speech prescribed to secure these ends, have been held to be justified, as being aimed at preserving the Preambular ideal of fraternity. It is also to be noted that this Court in the said case recognized that fraternity as a value is to be cultivated by citizens themselves as a part of their social behavior by refraining from uttering defamatory statements. This chord of the said judgment, acknowledges the idea of self-restraint or inherent restraints as being read into the right to freedom of speech and expression.

27.3. Democracy, being one of the basic features of our Constitution, it is implicit that in a rule by majority there would be a sense of security and inclusiveness. Further, the Preamble of the Constitution which envisages, *inter alia,* fraternity, assures that the dignity of individuals cannot be dented by means of unwarranted speech being made by fellow citizens, including public functionaries. Thus, the Preamble of the Constitution and the values thereof assuring the people of India not only justice,

liberty, equality but also fraternity and unity and integrity of the nation, must remind every citizen of this Country irrespective of the office or position or power that is held, of the sublime ideals of the Constitution and to respect them in their true letter and spirit. There is an inbuilt constitutional check to ensure that the values of the Constitution are not in any way undermined or violated. It is high time that we, as a society in general and as individuals in particular, re-dedicate ourselves to the sacred values of the Constitution and promote them not only at our individual level but at the macro level. Any kind of speech which undermines the values for which our Constitution stands would cause a dent on our social and political values.

***Employing the Fundamental Duties under Part IV-A of the Constitution as a means to check disparaging, unwarranted speech:***

28. Every right engulfs and incorporates a duty to respect another's right and secure mutual compatibility and conviviality of the individuals based on collective harmony, resulting in social order. The concept of fraternity under the Constitution expects every citizen to respect the dignity of the other. Mutual respect is the fulcrum of fraternity that assures dignity. In the context of constitutional fraternity, fundamental duties engrafted under Article 51-A of the Constitution gain significance.

Sub-clause (c), (e) and (j) of Article 51-A of the Constitution which are relevant to these cases read as follows:

> "Article 51-A. Fundamental Duties- .—It shall be the duty of every citizen of India—
>
> (a) xxx
> (b) xxx
> (c) to uphold and protect the sovereignty, unity and integrity of India;
> (d) xxx
> (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
> (f) xxx
> (g) xxx
> (h) xxx
> (i) xxx
> (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;"

Fundamental duties also constitute core Constitutional values for good citizenship in a democracy such as ours. The duties enumerated above, enjoin all citizens with the obligations of promoting fraternity, harmony, unity, collective welfare etc. Fundamental duties have a keen bond of sorority with the Constitutional goals and must therefore be recognised not merely as Constitutional norms or precepts but as obligations, corelative to rights. In short, the permissible content of the right to freedom of speech and expression, ought to be tested on the touchstone of fraternity and fundamental duties as envisaged under our Constitution.

29. Although the questions for consideration before the Constitution bench, were with specific regard to the possible restraints on unwarranted and disparaging speech by public functionaries, the observations made hereinabove, will apply with equal force to public functionaries, celebrities/influencers as well as all citizens of India, more so because technology is being used as a medium of communication which has a wide spectrum of impact across the globe.

30. The internet represents a communication revolution and has enabled us to communicate with millions of people worldwide, with no more difficulty than communicating with a single person, at a click or by touch on a screen. Ironically, the very qualities of the internet that have revolutionised communication are amenable to misuse. The internet, through various social media platforms has accelerated the pace as well as the reach of messages, comments and posts to such an extent that the difference between a celebrity and a common man, has been practically negated, in so far as the reach of their speech is concerned.

31. However, given the specific submission of the petitioners herein that disparaging and vitriolic speech expressed at various levels of political authority have exacerbated a climate bordering on intolerance and tension in the society, which perhaps may lead to insecurity, it may be appropriate to sound a strong word of warning in this regard.

32. It may be appropriate at this juncture to refer to the writings of Michael Rosenfeld, on the key variables which determine the impact of hate speech. One of the key variables highlighted by the learned author in his paper titled "*Hate Speech in Constitutional Jurisprudence: A Comparative Analysis,*" published in Cardozo Law Review, is the question as to "**who**" the speaker is. The learned author notes that speech made by a person of influence, such as a top government or executive functionary, opposition leader, political or social leader of following, or a credible anchor on a TV show carries far more credibility and impact than a statement made by a common person.

Public functionaries and other persons of influence and celebrities, having regard to their reach, real or apparent authority and the impact they wield on the public or on a certain section thereof, owe a duty to the citizenry at large to be more responsible and restrained in their speech. They are required to understand and measure their words, having regard to the likely consequences thereof on public sentiment and behaviour, and also be aware of the example they are setting for fellow citizens to follow.

33. While there are no infallible rules that can be formulated by the Court to define the precise threshold of acceptable speech, every citizen's conscious attempt to abide by the Constitutional values, and to preserve in letter and spirit the culture contemplated under the Constitution will significantly contribute in eliminating instances of

societal discord, friction and disharmony, on account of disparaging, vitriolic and derogatory speech, particularly when made by public functionaries and/or public figures. This does not in any way imply that ordinary citizens who form the great mass of the citizenry of this Country can shun responsibility for vitriolic, unnecessarily critical, diabolical speech, bordering on all those aspects mentioned under Article 19 (2) either against public functionaries / figures or against other citizens in general or against particular individuals.

34. Every citizen of India must consciously be restrained in speech, and exercise the right to freedom of speech and expression under Article 19(1)(a) only in the sense that it was intended by the framers of the Constitution, to be exercised. This is the true content of Article 19(1)(a) which does not vest with citizens unbridled liberty to utter statements which are vitriolic, derogatory, unwarranted, have no redeeming purpose and which, in no way amount to a communication of ideas. Article 19(1)(a) vests a multi-faceted right, which protects several species of speech and expression from interference by the State. However, it is a no brainer that the right to freedom speech and expression, in a human-rights based democracy does not protect statements made by a citizen, which strike at the dignity of a fellow citizen. Fraternity and equality which lie at the very base of our Constitutional culture and upon which the superstructure of rights are

built, do not permit such rights to be employed in a manner so as to attack the rights of another.

Verse 15 of Chapter 17 of the ***Srimad Bhagavad Gita*** describes what constitutes discipline of speech or *'vāṅ-maya tapas:'*

**अनुद्वेगकरं वाक्यं सत्यं प्रियहितं च यत् |**
**स्वाध्यायाभ्यसनं चैव वाङ्मयं तप उच्यते ||**

***Anudvega-karaṁ vākyaṁ satyaṁ priya-hitaṁ cha yat***
***Svādhyāyābhyasanaṁ chaiva vāṅ-mayaṁ tapa uchyate***

***Words that do not cause distress, are truthful, inoffensive, pleasing and beneficial, are said to be included within the discipline of speech, and are likened to regular recitation of the Vedic scriptures.***

35. The discussion presented hereinabove was with a view to rekindle some ideas on the content of Article 19 (1) (a) of the Constitution and on other pertinent issues surrounding the right to free speech guaranteed under the aforesaid Article. However, as far as the substantial analysis of Question No. 1 is concerned, I respectfully agree with the reasoning and conclusions proposed by His Lordship, Ramasubramanian, J.

**Re: Question No. 2:** ***Can a fundamental right under Article 19 or 21 of the Constitution be claimed other than against the 'State' or its instrumentalities?***

36. All human beings are endowed at birth, with certain inalienable rights and among such rights are right to life and liberty, including liberty of thought and expression. These rights have been recognized as

inalienable rights, having regard to the supreme value of human personality. Incidentally, some of such rights have come to be Constitutionally recognized under Part III of the Constitution of India. Fundamental Rights were selected from what were previously natural rights and were later termed as common law rights. However, it is to be noted that Part III of the Constitution, is not the sole repository of such rights. Even after some of such inalienable rights have come to be Constitutionally recognised as Fundamental Rights under the Constitution of India, the congruent rights under common law or natural law have not been obliterated. It also follows, that the corresponding remedies available in common law, are also not obliterated. The object of elevating certain natural and common law rights, as Fundamental Rights under the Constitution was to make them specifically enforceable against the State and its agencies through a Courts of law. These observations gain legitimacy from the judgment of Mathew, J. in ***His Holiness Kesavanada Bharati Sripadagalvaru vs. State of Kerala, (1973) 4 SCC 225 (Kesavanada Bharati)*** wherein His Lordship recognized the object of Constitutions to declare recognised natural rights as applicable *qua* the state. Adopting the picturesque language of Roscoe Pound, the following observations were made:

> "1514. While dealing with natural rights, Roscoe Pound states on page 500 of Vol. I of his Jurisprudence:

> "Perhaps nothing contributed so much to create and foster hostility to courts and law and Constitutions as this conception of the courts as guardians of individual natural rights against the state and against society; this conceiving of the law as a final and absolute body of doctrine declaring these individual natural rights; **this theory of Constitutions as declaratory of common-law principles, which are also natural-law principles, anterior to the state and of superior validity to enactments by the authority of the state; this theory of Constitutions as having for their purpose to guarantee and maintain the natural rights of individuals against the government and all its agencies.** In effect, it set up the received traditional social, political, and economic ideals of the legal profession as a super-Constitution, beyond the reach of any agency but judicial decision.

1515. I may also in this connection refer to a passage on the inherent and inalienable rights in A History of American Political Theories by C. Marriam: By the later thinkers the idea that men possess inherent and inalienable rights of a political or quasi-political character which are independent of the state, has been generally given up. It is held that these natural rights can have no other than an ethical value, and have no proper place in politics. There never was, and there never can be,' says Burgess, 'any liberty upon this earth and among human beings, outside of state organization'. In speaking of natural rights, therefore, it is essential to remember that these alleged rights have no political force whatever, unless recognized and enforced by the state. It is asserted by Willoughby that 'natural rights' could not have even a moral value in the supposed 'state of nature'; they would really be equivalent to force and hence have no ethical significance. (see p. 310)."

x x xx x x x

"1522. I am also of the view that the power to amend the provisions of the Constitution relating to the fundamental rights cannot be denied by describing

> the fundamental rights as natural rights or human rights. **The basic dignity of man does not depend upon the codification of the fundamental rights nor is such codification a prerequisite for a dignified way of living. There was no Constitutional provision for fundamental rights before January 26, 1950 and yet can it be said that there did not exist conditions for dignified way of living for Indians during the period between August 15, 1947 and January 26,. 1950.** The plea that provisions of the Constitution, including those of Part III, should be given retrospective effect has been rejected by this Court. Article 19 which makes provision for fundamental rights, is not applicable to persons who are not citizens of India. Can it, in view of that, be said that the non-citizens cannot while staying in India lead a dignified life? It would, in my opinion, be not a correct approach to say that amendment of the Constitution relating to abridgement or taking away of the fundamental rights would have the effect of denuding human beings of basic dignity and would result in the extinguishment of essential values of life."
>
> **[Emphasis by me]**

37. This proposition was further highlighted in the enlightened minority opinion of His Lordship, H.R. Khanna, J, in ***Additional District Magistrate, Jabalpur vs. Shivakant Shukla, A.I.R. 1976 SC 1207 ("ADM Jabalpur")*** wherein while refusing to subscribe to the view that when the right to enforce Fundamental Right under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law, observed, that Article 21 was not the sole repository of the right to life and personal liberty. That such rights inhered in men even prior to the enactment of

the Constitution, and were not created for the first time by enacting the Constitution. It was also recognised that though the Constitutionally recognised remedy under Article 32, for infringement of the Right under Article 21 may not be available as the said rights remained suspended or notionally surrendered on account of declaration of an Emergency, remedies under the laws which were in force prior to the coming into effect of the Constitution would still operate to ensure that no person could be deprived of his life or liberty except in accordance with law. In that context, it was held that the rights Constitutionally recognised under Article 21, represented 'higher values' which were elementary to any civilised State and therefore the sanctity of life and liberty was not traceable only to the Constitution. The relevant portions of His Lordship's judgment can be usefully extracted hereinunder:

> "152. The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that Article for obtaining relief from the court daring the period of emergency. Question then arises as to whether the rule that no one shall be deprived of ins life or personal liberty without the authority of law stiff survives during the period: of emergency despite the Presidential order suspending the right to move any court for the enforcement of the-right contained in Article 21. The answer to this question is linked with the answer to the question as to whether Article 21 is, the sole repository of the right to life and personal liberty. **After giving the matter my earnest consideration, I am of the opinion that Article 21 cannot be considered" to be the sole repository of the right to life and; personal liberty. The right to life, and personal: liberty is the most precious**

**right of human beings in civilised societies governed by the rule of law. Many modern constitutions incorporate certain fundamental rights, including the one relating to personal freedom."**

xxx

"155. **Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a fact of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of ins life and liberty without the authority of law was not the gift of the Constitution.** It was a necessary corollary of the concept relating to the sanctity of life and liberty; it existed and was in force before the coming into force, of the Constitution. The idea about the sanctity of life and liberty as well as the principle that no one shall be deprived of his life and liberty without the authority of law are essentially two facets of the same concept. This concept grew and acquired dimensions in response to the inner urges and nobler impulses with the march of civilisation. Great writers and teachers, philosophers and political thinkers nourished and helped in the efflorescence of the concept by rousing the conscience of mankind and by making it conscious of the necessity of the concept as necessary social discipline in self-interest and for orderly existence. According even to the theory of social compact many aspects of which have now been discredited, individuals have surrendered a part of their theoretically unlimited freedom in return or the blessings of the government. Those blessings include governance in accordance with certain norms in the matter of life and liberty of the citizens. Such norms take the shape of the rule of law. Respect for law, we must bear in mind, has a mutual relationship with respect for government. Erosion of the respect for law, it has accordingly been said, affects the respect for the government. Government under the law means, as observed by Macdonald, that the power to govern shall be exercised only, under conditions laid down in constitutions and laws approved by either the people or their representatives. Law thus emerges as a norm limiting the application of power by the government

over the citizen or by citizens over their fellows. Theoretically all men are equal before the law and are equally bound by it regardless of their status, class, office or authority. At the same time that the law enforces duties it also protects rights, even against the sovereign."

x x x

158. **I am unable to subscribe to the view that when right to enforce the right under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right.** Its real effect was to ensure that a law under which a person can be deprived of ins life or personal liberty should prescribe a procedure for such deprivation or, according to the dictum laid down by Mukherjea, J. in Gopalan's case, such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution. **Recognition as fundamental right of one aspect of the pre-Constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because, of the vulnerability of fundamental rights accruing from Article 359.** I am also unable to agree that in view of the Presidential Order in the matter of sanctity of life and liberty, things would be worse off compared to the state of law as it existed before the coining into force of the Constitution."

x x x

"162. It has been pointed out above that even before the coming into force of the Constitution, the position under the common law both in England and in India was that the State could not deprive a person of ins life and liberty without the authority of law. The same was the position under the penal laws of India. It was an offence under the Indian Penal Code, as already mentioned, to deprive a person of ins life or liberty unless such a course was sanctioned by the laws of the land. An action was also maintainable under the law of torts for wrongful confinement in case any person was deprived of ins personal liberty without the authority of law. In addition to that, we had Section 491 of the CrPC which provided the remedy of habeas corpus against detention without the authority of law. Such laws continued to remain in force in view of Article 372 after the coming into force of the Constitution. According to that article, notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority. The law in force, as observed by the majority of the Constitution Bench in the case of Director of Rationing and Distribution v. The Corporation of Calcutta and Ors. 1960 CriLJ 1684, include not only the statutory law but also custom or usage haying the force of law as also the common law of England which, was adopted as the law of the country before the coming into force of the Constitution. The position thus seems to be firmly established that at the time, the Constitution came into force, the legal position was that no one could be deprived of ins life or liberty without the- authority of law.

163. **It is difficult to accede to the contention that because of Article 21 of the Constitution, the law which was already in force that no one could be deprived of ins life or liberty without the authority of law was obliterated and ceased to remain in force. No rule of construction interpretation warrants such an inference. Section 491 of the CrPC continued to remain an integral part of that Code despite the fact that the High Courts were**

> **vested with the power of issuing writs of habeas corpus under Article 226.** No submission was ever advanced on the score that the said provision had become a dead letter of enforceable because of the fact that Article 226 was made a part of the Constitution, indeed, in the case of Makhan Singh (supra) Gajendragadkar J. speaking for the majority stated that after the coming into force of the Constitution, a party could avail of either the remedy of Section 491 of the CrPC or that of Article 226 of the Constitution. The above observations clearly go to show that constitutional recognition of the remedy of writ of habeas corpus did not obliterate or abrogate the statutory remedy of writ of habeas corpus. Section 491 of the CrPC continued to be part of that Code till that Code was replaced by the new Code. Although the remedy of writ of habeas corpus is not now available under the new CrPC, 1973, the same remedy is still available under Article 226 of the Constitution."
>
> **[Emphasis by me]**

In holding thus, H.R. Khanna, J. refused to subscribe to the majority view in the said case that once a right is recognised and embodied in the Constitution and forms part of it, it could not have any separate existence apart from the Constitution, unless it were also enacted as a statutory principle by some positive law of the State. His Lordship rejected the proposition that the intention of the Constitution was not to preserve something concurrently in the field of natural law or common law; it was to exclude all other control or to make the Constitution the sole repository of ultimate control over those aspects of human freedom which were guaranteed therein.

38. The strength of H.R. Khanna, J's minority opinion was subsequently acknowledged and affirmed by this Court in

***Puttaswamy***, wherein it was held that the rights to life and personal liberty were 'primordial rights' and were not bounties which were conferred by the State and created by the Constitution. That the right to life existed even before the advent of the Constitution and in recognising such right, the Constitution did not become the sole repository of such rights. That every constitutional democracy including our country, is rooted in an undiluted assurance that the Rule of law will protect their rights and liberties against any invasion by the State and that judicial remedies would be available when a citizen has been deprived of most precious inalienable rights. Dr. D.Y. Chandrachud. J. (as His Lordship then was) enunciated the aforesaid principles in the following words:

> "119. The judgments rendered by all the four judges constituting the majority in **ADM Jabalpur** are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in **Kesavananda Bharati**, primordial rights. They constitute rights under natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the state without either the existence of the right to live or the means of enforcement of the right. **The right to life being inalienable to each individual, it existed prior to**

> **the Constitution and continued in force Under Article 372 of the Constitution. Justice Khanna was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the state on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the Rule of law which imposes restraints upon the powers vested in the modern state when it deals with the liberties of the individual.** The power of the Court to issue a Writ of Habeas Corpus is a precious and undeniable feature of the Rule of law.
>
> 120. A constitutional democracy can survive when citizens have an undiluted assurance that the Rule of law will protect their rights and liberties against any invasion by the state and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights. The view taken by Justice Khanna must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions."
>
> **[Emphasis by me]**

39. What emerges from the aforesaid decisions of this Court, may be culled out as follows:

i) That some natural/primordial rights of man have been accorded a secure position under the Constitution so as to protect such rights against undue encroachments by organs of State. The object of elevation of such common law rights/natural rights to the Constitutional plane was to make them specifically enforceable against the State and its agencies through Courts of Law.

ii) Notwithstanding that such rights have been placed in Part III of the Constitution of India, the rights are concurrently preserved in the field of natural law or common law. Remedies available in common law for actualising such rights are also preserved. There are therefore two spheres of rights, and corresponding remedies: *first*, relatable to the Fundamental Rights enshrined under Part III the Constitution of India, which correspond to the remedies under Article 32 and Article 226 of the Constitution of India; *second*, inalienable/natural/common law rights, which are pre-constitutional rights, and may be protected by having recourse to common law remedies.

iii) While the content of a certain common law right, may be identical to a Fundamental Right, the two rights would be distinct in two respects: *first*, incidence of the duty to respect such right; and s*econd*, the forum which would be called upon to adjudicate on the failure to respect such right. While the content of the right violated may be identical, the status of the violator, is what is relevant.

With that primer, I shall proceed to consider whether the Fundamental Rights under Article 19 or 21 of the Constitution of India can be claimed against any person other than the State or its instrumentalities.

40. With historical and political changes and the advent of democracy and of Constitutional government, the "State" was created under and

by a constitution and placed at a position which renders it capable of interfering with natural and common law rights. On the other hand, as is evident from the text of the Preamble of the Constitution of India, the "We the People of India created the State as an entity to serve their interests. In order to reconcile the competing effects of creation of the State, certain common law rights were elevated to the constitutional plane by accommodating them in Part III of the Constitution of India to make them specifically enforceable against the State and its agencies through the Courts. Part III of the Constitution was therefore enacted to dictate the relationship between citizens and the State- this is the true character and utility of Part III. This idea has also found resonance in ***Puttaswamy***, wherein it was observed as follows:

> "251. Constitutions address the rise of the new political hegemon that they create by providing for a means by which to guard against its capacity for invading the liberties available and guaranteed to all civilized peoples. Under our constitutional scheme, these means - declared to be fundamental rights - reside in Part III, and are made effective by the power of this Court and the High Courts Under Articles 32 and 226 respectively. This narrative of the progressive expansion of the types of rights available to individuals seeking to defend their liberties from invasion - from natural rights to common law rights and finally to fundamental rights - is consistent with the account of the development of rights that important strands in constitutional theory present."

Therefore, the primary object of Part III of the Constitution was to forge a new relationship between the citizens and the State, which was the new site of Governmental power. The realm of interaction between

citizens *inter-se*, was governed by common law prior to the enactment of the Constitution and continued to be so governed even after the commencement of the Constitution because as recognised hereinabove, the common rights and remedies were not obliterated even after the Constitution was enacted. These inalienable rights, although subsequently placed in Part III of the Constitution, retained their identity in the arena of common law and continued to regulate relationships between citizens and entities, other than the State or its instrumentalities. It is therefore observed that the incidence of the duty to respect Constitutional and Fundamental Rights of citizens is on the State and the Constitution provides remedies against violation of Fundamental Rights by the State. These observations are in consonance with the recognition by this Court in ***People's Union for Civil Liberties vs. Union of India, (2005) 2 SCC 436*** (**"*People's Union for Civil Liberties*"**) that the objective of Part III is to place citizens at centre stage and make the state accountable to them.

41. On the other hand, common law rights, regulate the relationship between citizens *inter-se*. Although the content of a common law right may be similar to a Fundamental Right, the two rights are distinct in so far as, the incidence of duty to respect a common law right is on citizens or entities other than State or its instrumentalities; while the incidence of duty to respect a Fundamental Right, except where expressly otherwise provided, is on the State. Remedies against violation of

Fundamental Rights by the State are Constitutionally prescribed under Articles 32 and 226; while common law remedies, some of which are statutorily recognised, are available against violation of common law rights. Such remedies are available even as against fellow citizens or entities other than State or its instrumentalities. To this extent, horizontality is recognised in common law. Further to some extent certain Fundamental Rights are recognised statutorily and some others are expressly recognised in the Constitution as being applicable as horizontal rights between citizens *inter se* such as Articles 15(2), 17, 23, 24. A similar declaration as regards the right to privacy is found in the decision of this Court in ***Puttaswamy***. The relevant excerpts from the said decision have been reproduced hereinunder:

> "253. Once we have arrived at this understanding of the nature of fundamental rights, we can dismantle a core assumption of the Union's argument: that a right must either be a common law right or a fundamental right. The only material distinctions between the two classes of right - of which the nature and content may be the same - lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. **Common law rights are horizontal in their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the 'state', as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the state. It is perfectly possible for an interest to simultaneously be recognized as a common law right and a fundamental right. Where the interference with a recognized interest is by the state or any other like entity recognized by Article**

> **12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-state actor, an action at common law would lie in an ordinary court.**
>
> 254. Privacy has the nature of being *both* a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form."
>
> **[Emphasis by me]**

It has therefore been unequivocally declared by this Court that while the content of a right recognised under Part III of the Constitution may coincide or overlap with a common law right, the remedies available against violation of the respective form of right, operate in different spheres of law. That is, although the content of a common law right and a fundamental right may be almost identical, the remedy against violation of a common law right, shall lie under common law and not under the Constitution; similarly, the remedy against violation of a Fundamental Right is provided for under the Constitution itself expressly against the State under Article 19(2) thereof.

42. The status of the violator of the right, is also an essential parameter for distinction between the two rights and corresponding remedies. Where the interference with a recognized right is by the State or any other entity recognized under Article 12, a claim for the violation of a fundamental right would lie under Articles 32 and 226 of the Constitution before this Court or before the High Court respectively. Where interference is by an entity other than State or its

instrumentalities, an action would lie under common law and to such extent, the legal scheme recognises horizontal operation of such rights.

43. Though the content of the Fundamental Right may be identical under the Constitution with the common law right, it is only the common law right that operates horizontally except when those Fundamental Rights have been transformed into statutory rights under specific enactments or where horizontal operation has been expressly recognised under the Constitution. This is because, the following difficulties would surface if the Fundamental Rights enshrined under Article 19 and 21 are permitted to operate horizontally so as to seek the remedy by way of a writ petition before a Constitutional Court:

i) No recognition that Fundamental Rights enshrined under Article 19 and 21 are permitted to operate horizontally can be made except by ignoring the elementary differences between a Fundamental Right and the congruent common law right. Such a recognition could proceed only by ignoring the fact that the incidence of the duty to respect a Fundamental Right is on the State and its instrumentalities. Recognition of horizontal enforceability of Fundamental Rights would also ignore the status of the violator of the right except when a Fundamental Right is also recognised as a statutory right against another person or citizen. Therefore, such a recognition is misplaced as it proceeds with total disregard to the elementary differences in status of the two forms of rights, incidence of duty to respect each of such forms of rights, and the

forum which would be called upon to adjudicate on the failure to respect each of such rights.

ii) The following decisions of this Court are demonstrative of its disinclination or reluctance in recognising that Fundamental Rights enshrined under Article 19 and 21 are permitted to operate horizontally:

a) In ***P.D. Shamdasani vs. Central Bank of India Ltd., A.I.R. 1952 SC 59***, a Constitution Bench of this Court refused to entertain a Writ Petition filed under Article 32 of the Constitution, wherein a prayer was made to enforce the right under Article 19(1)(f) and Article 31(1), as they then stood, against a private entity. In that context, it was held that the language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the Article was intended to protect those freedoms against State action. This Court declared that violation of rights of property by individuals or entities other than the State and its instrumentalities, was not within the purview of Article 19(1)(f).

Further, this Court made a comparison between Article 31(1), as it then stood, and Article 21 as both Articles cast a negative duty on the State. In that context it was held that although there is no express reference to the State in Article 21, it could not be suggested that the Article was intended to

afford protection to life and liberty against violation by private individuals. That the words "except by procedure established by law" exclude such suggestion that Article 21 would operate horizontally.

The aforesaid decision is illustrative of this Court's reluctance to hold that the Fundamental Rights under Articles 19 or 21 of the Constitution, would operate horizontally. It is also to be noted that in the aforesaid case, this Court has acknowledged that a suitable remedy exists under statutory law to redress the infraction complained of. Therefore, while this Court was mindful that the rights in the realm of common law, some of which have gained statutory recognition, operate horizontally, the Fundamental Rights under Articles 19 and 21, do not, except in the case of seeking a writ in the nature of habeas corpus.

(b) In ***Zoroastrian Cooperative Housing Society Limited vs. District Registrar, Cooperative Societies (Urban), (2005) 5 SCC 632***, the Petitioner society was a registered society with its own bye-laws, under its parent legislation, the Bombay Cooperative Societies Act. As per bye-law 7, only members of the Parsi community were eligible to become members of the Society. The effect of this was that since housing shares could be transferred only to members, effectively, only Parsis could

buy plots under the aegis of the Cooperative Society. This restrictive covenant in the bye-laws became the subject matter of challenge before this Court, *inter-alia*, on the ground that it violated the right to equality enshrined in the Constitution. This Court refused to accept such a challenge and held that the Society's bye-laws were in the nature of Articles of Association of a company and were not like a statute. The bye-laws were only *"binding between the persons affected by them."* That a private contractual agreement is not subject to general scrutiny under Part III of the Constitution. This Court further distinguished between a discriminatory legislation passed by the State and a discriminatory bye-laws of a society or association, which is not 'State'. Accordingly, it held that while a legislation may be subject to a challenge on the touchstone of Part III of the Constitution, bye-laws of a society or association, could not.

This decision is also demonstrative of this Court's disapproval of horizontal operation of fundamental rights, making them directly applicable to interactions, whether contractual or otherwise, between private parties.

iii) I am however mindful of the fact that over the years, the conception of "State" as defined under Article 12 of the Constitution has undergone significant metamorphosis.

Through its jurisprudential labour, this Court has devised several principles and doctrines, so as to enable citizens to enforce their fundamental rights not only against "State" as defined in the strict sense to mean "agency of the Government," but also against entities imbued with public character, or entitles which perform functions which closely resemble governmental functions. [See: ***Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology, (2002) 5 SCC 111; Zee Telefilms Ltd. vs. Union of India, (2005) 4 SCC 649; Janet Jeyapaul vs. S.R.M. University, (2015) 16 SCC 530]***

This Court has progressively expanded the scope of Article 12 of the Constitution so as to ensure that a private entity, which performs a public duty/function and therefore informs our national life, does not get away scott-free merely because it is not "State" *stricto sensu*. Such entitles are imbued with constitutional obligations on account of the public or statutory functions performed by them. At this juncture, it is necessary to reflect on the difference between holding that Fundamental Rights may be enforced against a private entity on account of the public nature of its functions, as contrasted with universal operation of fundamental rights claims against all persons. A private body, acting in private capacity, fulfilling a private

function, cannot be axiomatically amenable to the claims of fundamental rights violations.

The decision of this Court in ***Ramakrishna Mission vs. Kago Kunya, (2019) 16 SCC 303*** is also highly instructive on the issue of amenability of actions of private entities, to judicial review under Article 226 of the Constitution of India. In the said case, the issue before this Court was whether the Hospital run by the Petitioner Mission performed a public function that made it amenable to writ jurisdiction under Article 226. This Court found that the Hospital and the Mission were not amenable to writ jurisdiction under Article 226 since running a hospital would not constitute a public function. This Court further highlighted that even when a private entity performs a public function, the Court would be required to enquire as to whether the grant in aid received by the said entity covers a significant portion of its expenditure. This Court went on to declare that regulation of a private body by a statute does not give it the colour of a public function. A public function was held to be one which is "closely related to functions which are performed by the State in its ***sovereign capacity.***" Accordingly, it was held that the Hospital was not performing a public function since the functions it performed were not "akin to those solely performed by State authorities." It was

held that medical services were provided by private as well as State entities and therefore, the nature of medical services was not such that they could be carried out solely by State authorities.

Thus, according to the decision of this Court in ***Ramakrishna Mission***, regulation by the State either through a statute or otherwise; receipt of a meagre amount of aid from the State; receipt of concessions by the State; do not make a private entity amenable to the writ jurisdiction of Courts under Article 226 of the Constitution.

Thus, recognising a horizontal approach of Fundamental Rights between citizens *inter se* would set at naught and render redundant, all the tests and doctrines forged by this Court to identify "State" for the purpose of entertaining claims of fundamental rights violations. Had the intention of this Court been to allow Fundamental Rights, including the rights under Articles 19 and 21, to operate horizontally, this Court would not have engaged in evolving and refining tests to determine the true meaning and scope of "State" as defined under Article 12. This Court would have simply entertained claims of fundamental rights violations against all persons and entities, without deliberating on fundamental questions as to maintainability of the writ petitions. Although this Court has

significantly expanded the scope of "State" as defined under Article 12, such expansion is based on considerations such as the nature of functions performed by the entity in question and the degree of control exercised over it by the State as such. This is significantly different from recognising horizontality of the fundamental rights under Articles 19 and 21, except while seeking a writ in the nature of habeas corpus. Such a recognition would amount to disregarding the jurisprudence evolved by this Court as to the scope of Article 12 of the Constitution.

iv) Another aspect that needs consideration is that a Writ Court, does not ordinarily adjudicate to issue Writs in cases where alternate and efficacious remedies exist under common law or statutory law particularly against private persons. Therefore, even if horizontal operation of the Fundamental Rights under Article 19/21 is recognised, such recognition would be of no avail because the claim before a Writ Court of fundamental rights violations would fail on the ground that the congruent common law right which is identical in content to the Fundamental Right, may be enforced by having recourse to common law remedies. Therefore, on the ground that there exists an alternate and efficacious remedy in common law, the

horizontal claim for fundamental rights violations would fail before a Writ Court.

This may be better understood by way of an illustration. Let me assume for the purpose of argument that the Fundamental Right under Article 19(1)(a) read with Article 21 is allowed to operate horizontally. A person would then be eligible to file a writ petition, against another private individual or entity for violation of such right. The violation may for instance be a verbal attack at the aggrieved person, which may have the effect of undermining such person's dignity or reputation. Dignity and reputation are essential facets of the right to life under Article 21; at the same time, they are also recognised as common law rights as they are fundamental attributes of human personality which is regarded as a supreme value in common law. Common law remedies, including declarations, injunctions and damages, are available to redress any injury to common law rights, including the right to dignity and reputation. Such remedies are also statutorily recognised under the Specific Relief Act, 1963 and the Indian Penal Code. Therefore, on account of availability of an alternate remedy under common law, the Courts would be reluctant to entertain a writ petition under Articles 226 or 32, as the case may be.

v) Further, it is trite that Writ Courts do not enter into adjudication of disputed questions of fact. But, questions regarding infringement of the fundamental rights under Article 19/21, by a private entity, would invariably involve disputed questions of fact. Therefore, this is another difficulty that must be borne in mind while determining the horizontal operation of such rights in a writ proceeding.

However, there is another aspect of the matter that requires to be discussed. A writ of habeas corpus is an order directing the person who has detained another to produce the detainee before the court in order for the court to ascertain on what ground or for what reason he has been confined, and to release him if there is no legal justification for the detention. A writ of habeas corpus is granted *ex debito justiae* and the applicant must only demonstrate *prima-facie,* unlawful detention of himself or any other person. If there is no justification for the detention and the same is unlawful, a writ is issued as of right *vide* ***Union of India vs. Paul Manickam, (2003) 8 SCC 342***. The importance of a writ of habeas corpus is the duty being cast on a Constitutional Court to issue the writ to safeguard the freedom of a citizen against illegal and arbitrary detention. In my humble view, an illegal detention is a violation of Article 21 of the Constitution, irrespective of whether the detention is by the State or by a private person.

A petition under Article 226 of the Constitution would therefore lie before the High Court, not only when the person has been detained by the State but also when he/she is detained by a private individual *vide* ***Mohd. Ikram Hussain vs. State of Uttar Pradesh, A.I.R. 1964 SC 1625 at 1630***. In my view, such a petition under Article 32 of the Constitution would also lie before this Court for seeking a writ of habeas corpus in terms of Article 32 (2). Such a writ could be issued not just against the State which may have illegally detained a person, but even as against a private person. Hence, in the context of illegal detention, Article 21 would operate horizontally against private persons also. Such a departure has to be made although Fundamental Rights are normally enforced against the State under Article 32 of the Constitution. Otherwise, the remedy by way of a writ of habeas corpus would be rendered incomplete if the said remedy is not available against a private person under Article 32 of the Constitution. Hence in the context of illegal detention, even by a private person, I would opine that Article 21 would operate horizontally and the writ of habeas corpus could be issued against a private person just as under Article 226 of the Constitution, the High Court can issue such a writ against any person or authority. But even in the context of Article 32(2) of the Constitution, it may not be proper to restrict the said remedy only as against the State but the same may be made available even as against private persons, in which event the power exercised by this Court could be in accordance

with Article 142 (1) of the Constitution to do complete justice in the matter. For ease of reference Article 142(1) may be extracted as under:

vi) "**142. 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."

Therefore, a writ of habeas corpus could be issued by this Court under Article 32 of the Constitution, not only against the 'State' as defined under Article 12 of the Constitution but also against a private individual. This is because illegal detention by a private person is a tort and of a nature similar to a constitutional tort. The reason for saying so is because an illegal detention whether by a State or a private person has a direct and identical effect on the detainee. The detainee loses his liberty and there may be a threat to his life.

Directions in the nature of writs of habeas corpus have been issued by this Court on previous occasions, against private individuals, particularly in cases of kidnapping, child custody etc. [See for instance: ***Nirmaljit Kaur (2) vs. State of Punjab, (2006) 9 SCC 364***] In such cases, resorting to the process of instituting a criminal case before a police station, may prove to be futile because the need of the hour in such cases is swift action. The writ of habeas corpus under Article 226

as well as Article 32 of the Constitution, is *festium remidium*, i.e., a speedy remedy, and such remedy needs to be made available even as against a private individual.

It is appropriate that the High Court concerned under whose jurisdiction the illegal detention has occurred should be approached first. In order to invoke jurisdiction of this Court under Article 32 of the Constitution by approaching this Court directly, it has to be shown by the Petitioner as to why the concerned High Court has not been approached. In cases where it would be futile to approach the High Court, and where satisfactory reasons are indicated in this regard, a petition seeking issuance of a writ of habeas corpus, may be entertained. However, in the absence of such circumstances, filing a petition under Article 32 of the Constitution is not to be encouraged, *vide* ***Union of India vs. Paul Manickam, (2003) 8 SCC 342***.

The judicial precedent referred to above are aligned with the aforesaid discussion.

In light of the aforesaid discussion, Question No. 2 is answered as follows:

***"The rights in the realm of common law, which may be similar or identical in their content to the Fundamental Rights under Article 19/21, operate horizontally: However, the Fundamental Rights under Articles 19 and 21, may not be justiciable horizontally before the Constitutional Courts except those rights which have been statutorily recognised and in accordance with the applicable law. However, they may be the***

***basis for seeking common law remedies. But a remedy in the form of writ of Habeas Corpus, if sought against a private person on the basis of Article 21 of the Constitution can be before a Constitutional Court i.e., by way of Article 226 before the High Court or Article 32 read with Article 142 before the Supreme Court."***

**Re: Question No. 3:** ***Whether the State is under a duty to affirmatively protect the rights of a citizen under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?***

44. In order to answer this question, it may be prudent to consider the circumstances under which this Court has previously observed that the State is bound to protect the life and liberty of every human being, from the following judgments:

i) In ***Pt. Parmanand Katara vs. Union of India, A.I.R. 1989 SC 2039***, this Court was confronted with the question as to whether a doctor has the professional obligation to instantaneously extend his services to a person brought for medical treatment, without any delay on the pretext of compliance with procedural criminal law. This court declared that the obligation of a doctor to extend his services with due expertise, for protecting life was paramount and absolute and any laws of procedure which would interfere with the discharge of this obligation, would be antithetical to Article 21 of the Constitution. It was further observed that where there is delay

on the part of medical professionals to administer treatment in emergencies, state action can intervene.

ii) In ***National Human Rights Commission vs. State of Arunachal Pradesh, (1996) 1 SCC 742***, this Court considered a writ petition filed under Article 32 of the Constitution, pertaining to the threats held out by the All Arunachal Pradesh Students' Union, to force *Chakmas* out of the State of Arunachal Pradesh. It was the case of the Petitioner therein that a large number of *Chakmas* from erstwhile East Pakistan (now Bangladesh) were displaced by the Kaptai Hydel Power Project in 1964. They had taken shelter in Assam and Tripura. Most of them were settled in these States and became Indian citizens in due course of time. Since a large number of refugees had taken shelter in Assam, the State Government had expressed its inability to rehabilitate all of them and requested assistance in this regard from certain other States. As a result of such consultations between the North Eastern States, some population of *Chakmas* began residing in Arunachal Pradesh. It was also stated that many of such persons had made representations for the grant of citizenship under Section 5(1)(a) of the Citizenship Act, 1955, however, no decision was communicated in this regard. In the interim, relations between citizens residing in Arunachal Pradesh and the *Chakmas* deteriorated and the latter were being subjected to repressive measures with a view to forcibly expel them from the State. In that background, a writ

petition came to be filed, alleging, *inter-alia*, unwillingness on the part of the State to contain the hostile situation. In that background, this Court issued a writ of mandamus, *inter-alia,* directing the State of Arunachal Pradesh to ensure that the life and liberty of every *Chakma* residing in the State is protected, and any attempt by organised groups to evict or drive them out of the State is repelled, if necessary, by requisitioning the service of para-military or police force. It was also directed that the application made by *Chakmas* for the grant of citizenship under Section 5(1)(a) of the Citizenship Act, 1955 be considered, and pending such consideration, no *Chakma* shall be evicted from the State.

It is to be noted that in the said case, this Court cited the Fundamental Rights of persons under Article 21 in directing the State to protect the rights of *Chakmas* from threats by private actors. The said directions were issued in the backdrop of the State's inaction to mobilise the available machinery to contain the hostile situation and such inaction had or could have had the effect of depriving *Chakmas* of their right to life and personal liberties. It was in that context that this Court declared that the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise.

iii) In ***Gaurav Kumar Bansal vs. Union of India, (2015) 2 SCC 130***, this Court, in directing the respondents therein to provide *ex gratia*

monetary compensation to the families of the deceased who have succumbed to the pandemic of Covid-19, in view of Section 12 of the Disaster Management Act, 2005, relied on Article 21 of the Constitution.

iv) Similarly, in ***Swaraj Abhiyan vs. Union of India, (2016) 7 SCC 498***, this Court relied on Article 21 of the Constitution, in issuing a writ of mandamus to the Union of India, to effectively implement the National Food Security, 2013 in certain parts of the country which had been affected due to drought.

The aforesaid cases illustrate that this Court has observed that the State is bound to protect the life and liberty of every human being, in the following contexts:

a) Where inaction on the part of the State, to contain a hostile situation between private actors, could have had the effect of depriving persons of their right to life and liberty;

b) Where the State had failed to carry out its obligations under a statute or a policy or scheme, and such failure could have had the effect of depriving persons of their right to life and liberty.

c) It is therefore clear that the acknowledgement of this Court of the duty of the State under Article 21, only pertains to a negative duty not to deprive a person of his right to life and personal liberty, except in accordance with law. This Court has not recognised an affirmative duty on the part of the State under Article 21 of the

Constitution to protect the rights of a citizen, against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency. Of course, there exist a plethora of statutes which cast an obligation on the State and its machinery to contain hostile situations between private actors; to repel any action by private actors which would undermine the life and liberty of other persons etc. This Court has, on several occasions, issued writs of mandamus directing State authorities to carry out such statutory obligations. In directing so, this Court may have referred to the right to life and personal liberties under Article 21. However, such reference to Article 21 is not to be construed as an acknowledgement by the Court of an affirmative duty on the part of the State under Article 21 of the Constitution to protect the rights of a citizen, against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency. Given that Article 21 only imposes a negative duty, a violation of the same would occur only when the State undertakes an obligation by enacting a statute or a scheme, but does not fulfil it. Thus, the violation will only occur when a scheme has been initiated but is not being appropriately implemented, as was noted in the aforecited cases.

In light of the aforesaid discussion, Question No. 3 is answered as follows:

***"The duty cast upon the State under Article 21 is a negative duty not to deprive a person of his life and personal liberty except in accordance with law. The State has an affirmative duty to carry out obligations cast upon it under statutory and constitutional law, which are based on the Fundamental Right guaranteed under Article 21 of the Constitution. Such obligations may require interference by the State where acts of a private actor may threaten the life or liberty of another individual. Failure to carry out the duties enjoined upon the State under statutory law to protect the rights of a citizen, could have the effect of depriving a citizen of his right to life and personal liberty. When a citizen is so deprived of his right to life and personal liberties, the State would have breached the negative duty cast upon it under Article 21."***

**Re: Question No. 4:** ***Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?***

45. A Minster may make statements in two capacities: *first*, in his personal capacity; *second*, in his official capacity and as a delegate of the Government. It is a no brainer that in respect of the former category of statements, no vicarious liability may be attributed to the Government itself. The latter category of statements may be traceable to any affair of the State or may be made with a view to protect the Government. If such statements are disparaging or derogatory and represent not only the personal views of the individual Minister making them, but also embody the views of the Government, then, such statements can be

attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility. In other words, if such views are endorsed not only in the statements made by an individual Minister, but are also reflective of the Government's stance, such statements may be attributed vicariously to the Government. However, if such statements are stray opinions of an individual Minister and are not consistent with the views of the Government, then they shall be attributable to the Minister personally and not to the Government.

Therefore, Question No. 4 is answered as follows:

***"A statement made by a Minister if traceable to any affairs of the State or for protecting the Government, can be attributed vicariously to the Government by invoking the principle of collective responsibility, so long as such statement represents the view of the Government also. If such a statement is not consistent with the view of the Government, then it is attributable to the Minister personally."***

**Re: Question No. 5:** ***Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort'?***

46. While public law and private law are in theory, treated as analytically different, in practice, the divide between the two spheres is often blurred. As a result, ideas, concepts and devices from one sphere, influence the other. Such an intermingling has given rise to the doctrine of horizontal effects as discussed hereinabove, wherein a constitutional

directive or norm (Fundamental Right) is interpreted by Courts to apply between individuals.

47. Another concept which can be traced to the interaction between public law and private law is that of a Constitutional tort, which in essence attributes vicarious liability on the State for acts and omissions of its agents which result in violation of fundamental rights of an individual or group. A constitutional tort is a violation of one's constitutional rights, particularly fundamental rights, by an agent of the government, acting in his/her official capacity. The alleged constitutional violation creates a cause of action that is distinct from any other available state tort remedy. It however, carries with it, the essential element of tort law, which seeks to redress a harm or injury by awarding monetary compensation by a competent court of law.

***Writ Petition: Principles of Procedure***

48. Normally the filing of a writ petition invoking Article 32 of the Constitution before the Supreme Court or Article 226 before the High Court is resorted to seeking an extraordinary remedy. The prerogative powers of the High Court are not exercised for enforcement of private rights of the parties but are for the purpose of ensuring that public authorities act within the limits of law. Writ remedy is thus not a private law remedy except writ of habeas corpus. Thus, writ petition would lie against the State including local authorities and other authorities as defined under Article 12 of the Constitution which is an inclusive

definition which takes within its scope and ambit all statutory bodies instrumentalities and authorities or persons charged with, or expected to exercise, public functions or discharge public duties. A writ petition may be instituted for the enforcement of any fundamental rights guaranteed by Part III of the Constitution under Article 32 before the Supreme Court but under Article 226 of the Constitution, the jurisdiction of the High Courts is wider than the jurisdiction of the Supreme Court inasmuch as the said Article may be invoked for enforcement of fundamental rights as also "*for any other purpose*".

***Tortious liability:***

49. In India, the government can be held liable for tortious acts of its servants and can be ordered to be paid compensation to the persons suffering as a result of the legal wrong. Article 294(b) of the Constitution declares that the liability of the Union Government or the State Government may arise *"out of any contract or otherwise*". The word *otherwise* implies that the said liability may arise for tortious acts as well. Article 300 enables institution of appropriate proceedings against the government for enforcing such liability.

50. Even prior to the commencement of the Constitution, the liability of the Government for tortious acts of its servants or agents were recognised *vide* ***Peninsular & Oriental Steam Navigation Co. vs. Secy. Of State, (1868-69) 5 Bom HCR APP 1.*** After the commencement of the Constitution, there have been several cases in which the Union

of India and State Governments were held liable for tortious acts of their employees, servants and agents. All those cases were not necessarily by invoking the writ jurisdiction of the Supreme Court and the High Courts. Though, the Government is liable for tortious acts of its officers, servants or employees, *normally*, such liability cannot be enforced by a Writ Court. An aggrieved party has the right to approach the competent court or authority to seek damages or compensation in accordance with the law of the land.

51. But if fundamental rights have been violated, and if the court is satisfied that the grievance of the petitioner is well founded, it may grant the relief by enforcing a person's fundamental right. Such relief may be in the form of monetary compensation/damages. Instances of such cases are ***Rudul Sah vs. State of Bihar, (1983) 4 SCC 141; Sebastian M. Hongray vs. Union of India, (1984) 3 SCC 82; Bhim Singh vs. State of J&K, (1985) 4 SCC 677; People's Union for Democratic Rights vs. Police Commissioner, (1989) 4 SCC 730; Saheli vs. Commissioner of Police, (1990) 1 SCC 422; State of Maharashtra vs. Ravikant S. Patil, (1991) 2 SCC 373; Kumari vs. State of Tamil Nadu, (1992) 2 SCC 223; Shakuntala Devi vs. Delhi Electric Supply Undertaking, (1995) 2 SCC 369; Tamil Nadu Electricity Board vs. Sumanth, (2000) 4 SCC 543; Railway Board vs. Chandrima Das, (2000) 2 SCC 465.***

52. Article 21 has played a significant role in shaping the law on tortious liability of the Government. This Court has asserted that the concept of sovereign function, which acts as an exception to attracting tortious liability, ends where Article 21 begins. Therefore, this Court has been willing to defend life and liberty of persons against state lawlessness by holding that where Article 21 is violated, the State has to pay compensation and the concept of sovereign function does not prevail in this area.

53. This proposition may be specifically traced to early PILs, which began in India in the 1980s, primarily in cases where officials of the State, such as prison officials had mistreated prisoners. The focus of the first phase of PIL in India was on exposure of repression by the agencies of the state, notably the police, prison, and other custodial authorities. These early PILs were essentially Constitutional tort actions which concerned allegations of violation of protected fundamental rights, as a result of acts or omissions on the part of officials of the State. Therefore, Constitutional law and tort law came to be merged by this Court under the rubric of PIL, and this Court began allowing successful petitioners to recover monetary damages from the State for infraction of their fundamental rights. In such cases, there may have been statutory rights of persons also which would then be an enunciation of an aspect of Fundamental Rights particularly under Article 21 of the Constitution.

54. In ***Rudul Sah vs. State of Bihar, (1983) 4 SCC 141***, Y.V. Chandrachud, CJ., gave further momentum to fundamental rights to combat state lawlessness by granting cash compensation to a victim of unlawful incarceration for fourteen years. It is to be noticed that His Lordship, in the said case, took note of the dilemma in allowing a litigant to seek damages in a writ petition/PIL action against the State. His Lordship noted that this could have the effect of ordinary civil action being circumvented on a routine basis, by invoking writ jurisdiction of the High Courts and the Supreme Court as an alternative to ordinary civil action. However, it was recognized that granting such remedies would enhance the legitimacy of the vehicle of PIL. Therefore, this Court in ***Rudul Sah*** ultimately chose to grant monetary damages, in order to 'mulct' the violators, as well as to offer a 'palliative' for victims. Subsequent to the decision in ***Rudul Sah***, compensatory relief has been granted as a means to 'civilize public power' in several cases involving abrogation of Fundamental Rights, [See for instance, ***Sabastian M. Hongray vs. Union of India, A.I.R. 1984 SC 1026***; ***Bhim Singh, MLA vs. State of Jammu and Kashmir, A.I.R. 1986 SC 494***.]

55. In ***Nilabati Behera vs. State of Orissa, (1993) 2 SCC 746,*** this Court observed that the award of compensation in a proceeding under Article 32 or Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights. In respect of such actions, the doctrine of sovereign immunity

does not apply, though it may be available as a defence in a private law in an action based on tort. Drawing a distinction between proceedings under the private and public law, it was observed that a public law proceeding may serve a different purpose than a private law proceeding. Public law proceedings are based on the concept of strict liability for contravention of guarantee basic and indivisible rights of the citizens by the State. The purpose of public law is not only to civilise governmental power and but also to assure the citizens that they live under a legal system which gains to protect their interest and preserve their rights. Therefore, when the court moulds the relief by granting compensation, in proceedings under Article 32 and Article 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under public law by way of employing elements of the law of torts and fixing the liability on the State which has been negligent and has failed in its public duty to protect the fundamental rights of the citizens. The payment of compensation under such cases is not to be understood as it is generally understood in a civil action for damages under private law, but in the broader sense of providing relief by ordering monetary amounts to be paid for the wrong done due to breach of public duty which would have the effect of violation of fundamental rights of citizens. Such grant of damages in exercise of a writ jurisdiction by the constitutional courts is independent of the rights available to the aggrieved party to claim compensation under private law in an action based on tort. Therefore, a suit may be instituted in a competent court

of law or proceedings may be initiated to prosecute the offender under the penal law.

56. Though, in ***D.K.Basu vs. State of West Bengal, (1997) 1 SCC 416*** monetary compensation was granted, in ***Hindustan Paper Corporation Ltd. vs. Ananta Bhattacharjee, (2004) 6 SCC 213*** this Court cautioned that a direction to pay compensation under Article 226 of the Constitution is permissible as a public law remedy and resorted to only when there is a violation by the State or its agents acting in official capacity of the fundamental right guaranteed by Article 21 of the Constitution, and not otherwise. It was further observed that it is not every violation of the provisions of the Constitution or a statute which would enable the court to direct grant of compensation. The power of the court to grant compensation in public law is limited. Therefore, normally in case of tortious liability, the person aggrieved has to approach a civil court for ventilating his grievances and he cannot invoke the writ jurisdiction of the Supreme Court or a High Court. However, if the duty breached is of a public nature or there is violation or breach or infringement of a fundamental right by an act or omission on the part of the authority, it is open to the party who has suffered a "legal wrong" to invoke the jurisdiction of the Supreme Court or a High Court by instituting the writ petition. In that case, the court, in exercise of its extraordinary jurisdiction and discretion judiciously may grant relief to the person wronged without relegating him to avail a remedy,

otherwise available to him under private law having regard to the facts and circumstances of the particular case.

57. In ***Chairman, Railway Board vs. Chandrima Das***, ***(2000) 2 SCC 465***, this Court was presented with an appeal against an order of the Calcutta High Court in a writ petition filed by a civil rights lawyer on behalf of a foreign national-victim of rape, allegedly committed by railway employees at a government-owned railway station. The events in question happened when the employees were off duty, but were present at the premises owned and operated by the Government (Railways) . The writ petition was filed against the employer, in addition to initiating criminal proceedings against the individuals. A specific prayer was made in the writ petition for monetary compensation for the victim, payable by the Government, alleging that its failure to protect the victim and prevent the crime, had violated the victim's fundamental right. The High Court awarded a sum of Rs. 10 Lakhs as compensation to the victim of rape, as it was of the opinion that the offence was committed at the building (Rail Yatri Niwas) belonging to the Railways and was perpetrated by the Railway employees. An appeal against the said judgment was preferred before this Court.

58. This Court dismissed the appeal holding that where public functionaries are involved and the matter relates to violation of Fundamental Rights, or the enforcement of public duties, the remedy would be available under public law, notwithstanding that a suit could

be filed under private law, for damages. Since the crime of rape amounted to a violation of the victim's right to life under Article 21 of the Constitution, this Court concluded that a public law remedy was wholly appropriate.

59. The decisions in ***Rudul Sah*** and ***Chandrima Das*** establish that a public law action seeking monetary compensation for violation of fundamental rights was no longer an action in lieu of a private law claim, but was to serve an independent and more important purpose. However, it cannot be ignored that the decisions of Courts to award compensation in such cases, proceed on the basis of lower evidentiary standards, as noted by this Court in ***Kumari vs. State of Tamil Nadu, (1992) 2 SCC 223***.

60. In ***Tamil Nadu Electricity Board vs. Sumathi Das, (2000) 4 SCC 543***, this Court held that exercise of writ jurisdiction would be inappropriate where there were disputed questions of fact that required proof through substantial evidence. However, it has been clarified that the restriction applied only to the higher judiciary's writ jurisdiction under Articles 32 and 226, and that it did not restrain this Court's power to address the matter under Article 142, which allows this Court to pass any order 'necessary for doing complete justice in any cause or matter.'

Therefore, this Court has recognised that factual disputes could operate as a limit on the Courts' ability to treat a matter as being

actionable as a Constitutional tort but has nevertheless awarded monetary compensation in certain cases possibly having regard to the glaring facts of those cases by exercising power under Article 142 of the Constitution.

61. Scholarly views suggest that the concept of Constitutional tort challenges the ability of law to deter socially harmful behaviour of different kinds, by forcing the perpetrator to internalise the costs of their actions. However, in case of a Constitutional tort action, the entity saddled with the cost, is not the same as the entity who is to be deterred. This absurdity is stated to be threatening to the corrective justice idea that tort law embodies. In other words, an actor's direct ability to alter the injury-causing behaviour is critical to the foundation of tort law. However, given that an action of Constitutional tort imposes the burden of damages on an entity, other than the violator of the right, a doubt has been cast on its effectiveness in serving as a vehicle of corrective justice.

62. In light of the aforesaid discussion, it is observed that it is not prudent to treat all cases where a statement made by a public functionary resulting in harm or loss to a person/citizen, as a constitutional tort. Regard must be had in every case to the nature of resultant harm or loss. Further, it is to be noted that even the cases cited hereinabove have permitted treating an act or omission as a constitutional tort only where there has been an infraction of

fundamental right as a direct result of such act or omission. Therefore the causal connection between the act or omission and the resultant infraction of fundamental rights, is central to any determination of an action of constitutional tort.

63. In ***Delhi Jal Board vs. National Campaign for Dignity & Rights of Sewerage & Allied Workers, (2011) 8 SCC 568***, this Court refused to entertain a matter against an interim order passed by the Delhi High Court in a writ petition, whereby the Petitioner Board had been directed to deposit compensation in favour of the family of a sewerage worker who had died while performing his duties. Dismissing the case, this Court held that since the deceased had died due to insensitivity on the part of the State apparatus, to the safety and well-being of its employees, the State would be liable to pay compensation to the family of the deceased. This Court invoked Article 142 of the Constitution to enhance the amount of compensation payable.

64. At this juncture, it may be apposite to sound a word of caution as regards the approach of the Courts in granting monetary compensation as a means for vindication of fundamental rights. It is to be noted that in the absence of a clear, cogent and comprehensive legal framework based on judicial precedent, which would clarify what harm or injury is actionable as a constitutional tort, such a device is to be resorted to only in cases where there are brutal violations of fundamental rights, such as the violations that were involved in ***Rudul***

***Sah*** and ***Chandrima Das***. This Court has acknowledged such a view in ***Sebastian M. Hongray***, by noting that compensation was being awarded in the said case having regard to "torture, the agony and the mental oppression" which the family of the victim therein had to endure due his death by an encounter. Similarly, this Court, in ***Bhim Singh*** stated that the compensation was awarded by taking note of the "bizzare acts" of police lawlessness. As already highlighted, compensation was awarded in ***Delhi Jal Board***, by exercising power under Article 142. Thus, the remedy provided is on a case to case basis on an evolution of the concept of constitutional tort through judicial dicta.

65. While it is true that the Courts must mould their tools to deal with particularly extreme and threatening situations, and the device of a 'constitutional tort' has evolved through such an exercise, it must be borne in mind that the tool of treating an action as a constitutional tort must not be wielded only in instances wherein state lawlessness and indifference to the right to life and personal liberties have caused immense suffering. The law would have to evolve in this regard, in respect of violation of other Fundamental Rights apart from issuance of the prerogative writs.

66. Therefore, it is observed that presently invocation of writ jurisdiction to grant damages, by treating acts and omissions of agencies of the State as Constitutional torts, must be an exception

rather than a rule. The remedy before a competent court or under criminal law is, in any case available as per the existing legal framework.

In light of the aforesaid discussion, Question No. 5 is answered as follows:

***"A proper legal framework is necessary to define the acts or omissions which would amount to constitutional tort and the manner in which the same would be redressed or remedied on the basis of judicial precedent. Particularly, it is not prudent to treat all cases where a statement made by a public functionary resulting in harm or loss to a person/citizen, as a constitutional tort, except in the context of the answer given to Question No. 4 above."***

67. In light of the above discussion as well as the answers given to the questions referred, the following other conclusions are drawn:

a) It is for the Parliament in its wisdom to enact a legislation or code to restrain, citizens in general and public functionaries, in particular, from making disparaging or vitriolic remarks against fellow citizens, having regard to the strict parameters of Article 19(2) and bearing in mind the freedom under Article 19(1) (a) of the Constitution of India. Hence, I am not inclined to issue any guideline in this regard, but the observations made hereinabove may be borne in mind.

b) It is also for the respective political parties to regulate and control the actions and speech of its functionaries and members. This could be through enactment of a Code of Conduct which would prescribe

the limits of permissible speech by functionaries and members of the respective political parties.

c) Any citizen, who is prejudiced by any form of attack, as a result of speech/expression through any medium, targeted against her/him or by speech which constitutes 'hate speech' or any species thereof, whether such attack or speech is by a public functionary or otherwise, may approach the Court of Law under Criminal and Civil statutes and seek appropriate remedies. Whenever permissible, civil remedies in the nature of declaratory remedies, injunctions as well as pecuniary damages may be awarded as prescribed under the relevant statutes.

However, answers given to Question Nos. 4 and 5 may have a bearing in the context of collective responsibility of government and Constitutional tort.

Writ Petition (Crl.) No.113 of 2016 and Special Leave Petition (Civil) bearing Diary No.34629 of 2017 are directed to be listed before an appropriate Bench after seeking orders of Hon'ble the Chief Justice of India.

**.....J.**
**B.V. NAGARATHNA**

**NEW DELHI,**
**03 JANUARY, 2023.**