RIGHTS IN REVIEW

The Supreme Court in 2015

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Introduction

CLPR released its first Rights in Review Report in December 2014. This Report analyzed key fundamental rights decisions of the Supreme Court of India from January 1 to December 15, 2014 in a format that was accessible to the public and insightful to law professionals. The Report was received enthusiastically by members of the judiciary, lawyers, academics and students. So, this year we have re-dedicated ourselves to intensively combing the law reports to identify those fundamental rights cases of the Supreme Court that make new law, settle an uncertain area of law or extend the application of the law to new arenas. This Report covers the period from December 15, 2014 to December 16, 2015 and the discussion is organized thematically around the core rights: life, liberty, equality and religion. The Report is written in a style that we hope makes it accessible to all those interested in public affairs irrespective of their familiarity with the Court's legal doctrine.

While this Report does not commit itself to a particular normative approach to the interpretation of fundamental rights, we do ask whether the decisions reviewed below are likely to advance or hinder the protection of fundamental rights in the constitution. We avoid a provocative and rhetorical style of presentation, so common in media discourse on these cases, and attempt to present this Report in a clear and precise fashion that leaves substantive judgment to you, the reader.

This focus on the notable fundamental rights cases across the past year has several advantages: we are able to portray the cumulative effect of the Supreme Court's decisions in any area across multiple benches of coordinate or variable strength. Too often Indian public debates are swayed by the politically salient decision that captures media attention, but is not truly representative of the Court's legal position in that area of law. Moreover, the public discussion isolates a single decision as the Court's view on the matter without paying attention to other decisions in the area that taken together represent the correct position in law. Secondly, we analyze all constitutional fundamental rights cases together so that we sketch a coherent picture of the Court's approach to all rights in the constitution rather than a narrow focus on case, or one area of fundamental rights at a time. Ideally, a Supreme Court that exercises an original and appellate fundamental rights jurisdiction should develop and articulate consistency across its constitutional rights jurisprudence. This call to principled reasoning is the best guarantee against idiosyncratic and erratic decision-making that has characterized the field in previous years.

As the Indian Supreme Court has considerable freedom to shape its own jurisdiction through an expansive special leave petition procedure, liberal rules of standing and suo motu proceedings, the output of the Court is in part a reflection of its priorities. Last year, we had noted that fundamental rights protection forms a rather small proportion of the Court's docket. This year is no different. If 2014 was the year when the Court developed new dimensions to the right to equality, 2015 will be remembered as the year the Court rigorously applied the fundamental right to life to death penalty cases and brought the internet firmly within the scope of constitutional rights protection. However, like 2014 there is a surprising and disconcerting absence of decisions on social and economic rights—the rights to food, livelihood, housing, education or health are notably absent.

The next section begins with the Court's reinvigorated application of the right to life.

I. The Right to Life

(i) Death Penalty

In the last few years India has witnessed significant civil society mobilization around challenges to the death penalty. In *Rights in Review 2014* we noted that litigation in this area was focused on the procedural integrity of the trial, methods of detention and the process of administration of the death penalty. This year the Court decided more cases in this field with mixed results. Late in 2014, the Supreme Court in *Shatrughan Chauhan*[1] had commuted the death sentence of 15 death row convicts to life imprisonment and laid down guidelines for quick disposal of mercy petitions to avoid inordinate delays. This year, many petitioners approached the Court to apply the *Shatrughan Chauhan* guidelines.

In *Ajay Kumar Pal* v. *Union of India,*[2] the Petitioner filed several mercy petitions to the President of India and the Governor of Jharkhand after his death sentence had been confirmed by the Supreme Court in 2010. These mercy petitions were finally rejected and this communication reached him in 2014, 3 years and 10 months after the Supreme Court decision. The Petitioner argued that his death sentence should be commuted to one of life imprisonment for the inordinate delay in processing his mercy petitions and moreover, as he was held in solitary confinement from the day the death sentence was awarded by the trial court.

As the delay in the disposal of mercy petitions arose due to the authorities and functionaries concerned, the Supreme Court commuted the death sentence.[3] Further, the Court clarified that the Petitioner should never have been segregated till his mercy petition was disposed, as only then is he under a finally executable death sentence.[4] As he was placed in solitary confinement right after the death sentence by the trial court, the Supreme Court held this to be an impermissible transgression of his right to life under Article 21 and an independent ground to commute his death sentence to life imprisonment.

1. (2014) 3 SCC 1

2. (2015) 2 SCC 478

3. *T.V. Vatheeswaran v. State of Tamil Nadu*, 1983 AIR 361; *Sher Singh and others v. State of Punjab*, 1983 AIR 465; *Triveniben v. State of Gujarat*, 1989 AIR 1335

4. The Supreme Court confirmed Justice Krishna Iyer's interpretation of Section 30(2) of the Prisons Act, 1894 in *Sunil Batra v. Delhi Administration* which provides for segregation of a person only 'under sentence of death': *"The crucial holding under Section 30(2) is that a person is not 'under sentence of death', even if the sessions court has sentenced him to death subject to confirmation by the High Court. He is not 'under sentence of death' even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, so long as an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, Section 30 does not cover him so long as his petition for mercy to the Governor and/ or to the President permitted by the Constitution, Code and Prison Rules, has not been disposed. Of course, once rejected by the Governor and the President, and on further application there is no stay of execution by the authorities, he is 'under sentence of death', even if he goes on making further mercy petitions. During that interregnum he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be 'under sentence of death' means 'to be under a finally executable death sentence".*

Later in the year the Court clarified the procedures to be followed while executing a death sentence in *Shabnam* v. *Union of India*.[5] The Supreme Court had confirmed the death sentences against Shabnam and Saleem for the murder of 7 members of Shabnam's family in May 2015. Within 6 days of this confirmation, a Sessions Court in Uttar Pradesh issued death warrants against them, stating that the execution should be held "as soon as possible." No date, time, or place was specified on the warrants. The Petitioners argued that the execution of a death sentence cannot be carried out in an arbitrary, hurried and secret manner, without allowing them to exhaust all legal remedies. They approached the Supreme Court under Article 32 of the constitution, seeking to quash the death warrants issued against them.

5. (2015) 6 SCC 632

The Supreme Court reaffirmed its previous decisions in *Sunil Batra* v. *Delhi Administration*[6], that those condemned to death retain a right to dignity under Article 21 and must be treated in a fair and dignified manner that allows them to exhaust all available legal remedies—in this case a review petition. The Court also endorsed the Resolutions of United Nations Social and Economic Council that protect the ability of the convict to seek clemency or pardon.[7] The Court quashed the death warrants in this case and set out a list of guidelines to be followed where a death warrant is issued.[8] The Court held that certain essential safeguards must be observed if the right to life under Article 21 is not to be denuded of its meaning and content. Firstly, the principles of natural justice must be respected and sufficient notice ought to be given to the convict before the issuance of a warrant of death by the session's court that would enable the convict to consult his advocates and to be represented in the proceedings. Secondly, the warrant must specify the exact date and time for execution and not a range of dates which places a prisoner in a state of uncertainty. Thirdly, a reasonable period of time must elapse between the date of the order on the execution warrant and the date fixed or appointed in the warrant for the execution so that the convict will have a reasonable opportunity to pursue legal recourse against the warrant and to have a final meeting with the members of his family before the date fixed for execution. Fourthly, a copy of the execution warrant must be immediately supplied to the convict. Fifthly, in those cases, where a convict is not in a position to offer a legal assistance, legal aid must be provided.

6. *Sunil Batra (I) v. Delhi Administration*, [1979] 1 SCR 392; *Sunil Batra (II) v. Delhi Administration*, [1980] 2 SCR 557.

7. United Nations Social and Economic Council Resolution 1984/50 and 1989/64.

8. The Court relied upon the Allahabad High Court Decision in *People's Union for Democratic Rights (PUDR) v. Union of India and Ors.* (Public Interest Litigation (PIL) No 57810 of 2014), available at http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do.in

The resolve of the Court to impose rigorous procedural safeguards on the imposition and execution of the death penalty was tested in slightly different circumstances in *Yakub Abdul Razak Memon* v. *State of Maharashtra*[9] where the Petitioner challenged the constitutionality of the execution warrant for his death sentence issued by the court established under the Terrorists and Disruptive Activities (Prevention) Act, 1985 (hereafter 'TADA Court'). The Petitioner had been convicted for his involvement in the 1993 Mumbai Blasts case and sentenced to death by the TADA Court in 2007. The judgment of the TADA Court was confirmed by the Supreme Court in 2013. His review petition before the Supreme Court was also dismissed in April 2015 after circulation among the relevant judges.

9. (2015) 9 SCC 552

Following the new directions on review petitions in death penalty cases, in *Mohd. Arif* v. *Supreme Court of India*[10], his review petition was revived and he was given the opportunity for an oral hearing in open court. The bench rejected this review petition, but a curative petition was filed on the grounds that the quorum required for the review petition under the Supreme Court Rules was not satisfied. The two judge bench deciding the curative petition disagreed[11] and the matter was referred to a larger Constitutional Bench.

10. (2014) 9 SCC 737

11. Justice Kurien Joseph disagreed with Justice Anil R Dave on rejection of the writ petition stating that due procedure of law was not followed in the dismissal of the curative petition.

In a parallel proceeding a mercy petition was filed by the Petitioner's brother in 2013 and this was rejected by the President in 2014. The rejection of the mercy petition was not challenged either by the Petitioner or his brother. After the rejection of the Petitioner's curative petition, the Petitioner submitted a new mercy petition to the Governor of Maharashtra and another mercy petition to the President of India, and both these mercy petitions were summarily rejected.

Once the death warrants had been issued, the Petitioner filed a writ petition challenging these warrants on several grounds. Firstly, the Petitioner argued that he had only recently discovered through news reports that his mercy petition was rejected and that he was entitled to challenge the rejection of his mercy petition and the death warrants need to be stayed to allow him this legal redress. Secondly, he argued that there were less than 14 days from the date of rejection of his mercy petition to the date of execution. Thirdly, he argued that there was too little time for him to meet with his family from the date of rejection of his mercy petition and the date of execution. The 3 judge bench constituted to dispose of all the connected matters rejected all three grounds. They held that the only

relevant constitutional requirement, as laid down in *Shatrughan Chauhan*[12] and the Prison Manuals, was that there should be a minimum period of 14 days between the communication of the death warrant to the Petitioner and the scheduled date of execution. As this was satisfied in this present case, the Court upheld the death warrants. Further, the Court considered the rejection of the first mercy petition filed by his brother in 2014 as the relevant date to calculate the feasibility of a legal challenge or to meet family members. It took the view that the rejection of the second mercy petition a few days before the execution was neither legally nor morally relevant, as it perceived the filing of multiple mercy petitions by the Petitioner and his brother to be an abuse of the legal process.

12. *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1.

Recent constitutional litigation in death penalty cases does not engage with a substantive challenge to the constitutional validity of the death penalty or focus on the quality of evidence and reasoning in the criminal trial and appeal leading to the death penalty. Instead, opponents of the death penalty have focused on procedural inadequacies in prison administration or the execution of death warrants. The Supreme Court in the last two years has been very receptive to such arguments and held higher executive and prison authorities to stricter standards of procedural justice than were previously applied. However, terrorism cases like the *Yakub Memon* case test the fidelity of the court to these norms of procedural justice. The impatience that the court displayed while denying Yakub Memon a possible review of the mercy petitions and the opportunity to meet his family, suggests that it is unlikely that this strategy of procedural protections will yield results in hard cases.

(ii) Right to Privacy

In 2015, the Supreme Court contended with the argument that Article 21 yielded no constitutional right to privacy. In *Justice K.S. Puttaswamy* v. *Union of India*[13] a batch of petitions challenging the establishment of the Unique Identification Authority of India and the Aadhaar scheme came up before a two Judge Bench of the Court. The Petitioners argued, amongst other things, that the collection of biometric data of citizens was a violation of the right to privacy protected under Article 21 and other rights in the Constitution.

13. (2015) 8 SCC 735

The Attorney General argued that the petition needed to refer to a Constitution Bench of five judges as the status of the right to privacy as a fundamental right is not settled. He argued that *Kharak Singh* v. *State of UP*[14] did not announce such a right while *M.P. Sharma* v. *Satish Chandra*[15] expressly observed that there is no justification to import a fundamental

14. AIR 1963 SC 1295

15. AIR 1954 SC 300

right to privacy analogous to the Fourth Amendment in the US Constitution. Moreover, he pointed out that *R. Rajagopal* v. *State of Tamil Nadu*[16] and *People's Union for Civil Liberties (PUCL)* v. *Union of India*, which derived a 'right to privacy' under the freedom of speech in Article 19(1)(a) and the right to life in Article 21, are judgements by smaller benches of two or three judges. The Petitioners argued that the observations in *M.P. Sharma* are obiter and that *Kharak Singh* is bad law as a seven judge Bench in *Maneka Gandhi* v. *Union of India*[17] has confirmed that the Indian Constitution yields a right to privacy. Despite these compelling arguments, the Court yielded to the Attorney General and referred the case to a Constitutional Bench that will have the opportunity to clarify the law in this field in 2016. Though this substantive question about the status of a fundamental right to privacy has been deferred, it has not kept the court from deploying the constitutional right to privacy in other cases.

16. (1994) 6 SCC 632; See Para 9: "Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21."

17. (1978) 1 SCC 248.

In *ABC* v. *State of NCT*[18] the Petitioner was an unmarried Christian woman who had raised her son without any assistance from, or involvement of, his putative father. When she sought to nominate her son as the beneficiary of all her savings and insurance policies she was asked to either declare the name of the father or get a guardianship/adoption certificate from the Court. So, she filed an application under Section 7 of the Guardians and Wards Act, 1890 (the Act) before the Guardian Court to declare her as the sole guardian of her son. However, Section 11 of the Act requires a notice to be sent to the parents of the child before a guardian is appointed. The Petitioner published a notice of the petition in a daily newspaper, but was strongly averse to disclosing the name of the father. She also filed an affidavit stating that if at any time in the future the father of her son raises any objections regarding his guardianship, the same may be revoked or altered as the situation may require. However, the Guardian Court directed her to reveal the name and whereabouts of the father and consequent to her refusal to do so, dismissed her guardianship application. The Delhi High Court agreed with the Guardian Court on appeal and concluded that as a natural father could have an interest in the welfare and custody of his child even where there is no marriage this case should not be decided in the absence of a necessary party.

18. 2015 (7) SCALE 483

Two issues occupied centre stage on appeal in the Supreme Court: first, whether sections 7, 11 and 19 of the Guardian and Wards Act could be read in a manner that made naming of the absentee father optional. Secondly, the extent to which statutory interpretation in this case should

be shaped by the appellant's fundamental right to privacy. The Court held that the appellant's fundamental right of privacy would be violated if she was forced to disclose the name and particulars of the father of her child. The Court also held that it recognized that the father's right to be involved in his child's life may be taken away, but given his lack of involvement in the child's life, there was no reason to prioritize his rights over those of the mother or her child. Relying on previous judgements,[19] the Court held that the welfare of the child takes priority over all other interests, including the rights of the parents. The Court surveyed the law of guardianship in other personal laws in India and across the world to conclude that the dominant position is that the unwed mother possesses primary custodial and guardianship rights with regard to her children and that the father is not conferred with an equal position merely by virtue of his having fathered the child. It used this as an interpretation of the law as it exists in India. The Supreme Court concluded that in this case the views of an uninvolved father are not essential to protect the interests of a child born out of wedlock and being raised solely by his/her mother.

19. *Laxmikant Pandey v. Union of India* 1985 (Supp) SCC 701, *Githa Hariharan v. R.B.I.* (1999) 2 SCC 228

The Court recognized that *"[i]n today's society, where women are increasingly choosing to raise their children alone, we see no purpose in imposing an unwilling and unconcerned father on an otherwise viable family nucleus. It seems to us that a man who has chosen to forsake his duties and responsibilities is not a necessary constituent for the wellbeing of the child."* [20] Hence, the Court concluded that the Section 11 requirement that the natural parents need to be informed applied only to cases where guardianship is sought by a third party. Hence, there is no mandatory and inflexible procedural requirement of notice to be served to the biological father, provided the guardianship or custody petition is filed by the natural mother of the child who is a sole caregiver. The Court also stated that the child's right to know the identity of his parents must be safeguarded. The decision of the Delhi High Court and the Guardian Court were reversed.

20. Supra note 13.

The right to privacy and bodily autonomy straddles the distinction between the negative and positive dimension of the right to life. In 2015, the Court has emphasized the negative dimension of the right in the death penalty and privacy cases. Nevertheless, in a few cases the court has sustained the application of a positive dimension of the right to life to include the absence of noise pollution[21] and the payment of compensation to a victim of acid attacks.[22] The noise pollution case deserves close attention as it indicates the Court's willingness to address disturbingly common problems of civic urban life in India and adapt procedural rules of standing to permit such redress.

21. *Anirudh Kumar v. Municipal Corporation of Delhi* (2015) 7 SCC 779.

22. *Laxmi v. Union of India,* (2014) 4 SCC 427

(iii) Right to Environment

In *Anirudh Kumar* v. *Municipal Corporation of Delhi,*[23] Anirudh Kumar complained to the Corporation about the Regularization Certificate granted to an entity to establish a diagnostic and pathological lab in a building in a residential area, which contravened the Mixed Use Regulation in the Delhi Master Plan 2001. On appeal in the Supreme Court two issues drew focused attention: first, whether Anirudh Kumar had standing as he was a resident in the area and had a private interest in the outcome of the case, and second, whether there was a constitutional injury that would allow the Central Government to intervene in the case. On both counts, the Court agreed with Anirudh Kumar. It held that though he had a private interest as a resident of the building, he simultaneously represented the cause of all local residents. The Court affirmed the expanded definition of *locus standi* in public interest litigation where an 'aggrieved person'[24] should include the large sections of society that otherwise gets no benefit from the judicial system. This expanded rule of standing would apply to the jurisdiction of the Supreme Court and High Court[25] under Article 226.

On the substantive question of constitutional injury the Court found that a laboratory and diagnostic centre located in a residential area, which employed about 50 people, had installed numerous air conditioners, diesel generator sets, gas cylinders and electric panels. This had caused a major parking problem and generated substantial sound and air pollution that effectively deprived other residents of their right to life under Article 21. Hence the Court struck down the grant of permission on statutory[26] and constitutional grounds.

23. (2015) 7 SCC 779.

24. *S.P. Gupta and Ors. v. President of India and Ors.* (1981) Supp. SCC 87; *State Of Uttaranchal v. Balwant Singh Chaufal,* (2010) 3 SCC 402; *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, 1981 AIR 298, *Bandhua Mukti Morcha v. Union of India,* 1984 AIR 802, *Fertilizer Corporation Kamgar Union v. Union Of India And Others* 1981 AIR 344, *Ramsharan Autyanuprasi & Anr* v. *Union Of India & Ors* 1989 AIR 549

25. See *Gadde Venkateswara Rao v. State of A.P* AIR 1966 SC 828

26. Relying on *Priyanka Estate International (P) Ltd. v. State of Assam* (2010) 2 SCC 27

II. Fundamental Freedoms

(i) Freedom of Speech

In 2015, the Supreme Court for the first time extended the scope and exceptions of the fundamental right to free speech and expression to the internet. While there are constitutional jurisdictions that have evolved doctrines of free speech protection that do not depend on the medium of communication, the Supreme Court has historically morphed free speech doctrine when it confronts every new medium of instruction

In *Shreya Singhal v. Union of India*[27] a two-judge Bench of the Supreme Court heard a constitutional challenge to the validity of Sections 66A, 69A and 79 of the Information Technology Act, 2000 ("IT Act"). Earlier, two Mumbai girls who had posted their disapproval of the bandh to mourn Shiv Sena Leader Bal Thackeray's death in 2012 were arrested under Section 66A of the IT Act which criminalizes certain speech and conduct on the internet. Several petitions challenged the constitutional validity of section 66A on three grounds: first, that free speech under Article 19(1)(a) may only be restricted under the eight enumerated exceptions in Article 19(2).[28] As Section 66A went further to restrict the mere discussion or advocacy of unpopular or annoying views that fall short of incitement to violence[29] , it was overbroad. Secondly, as section 66A used expressions like 'grossly offensive', 'menacing character', 'annoyance', 'inconvenience' and 'persistently' to described prohibited speech, the criminal provision was too vague, subjective, undefined and nebulous in its meaning to serve as a judicial standard. Thirdly, as the provision potentially targets a vast amount of innocent speech it has a chilling effect on free speech. The court reviewed applicable precedent,[30] accepted all three arguments and declared section 66A to be unconstitutional.

However, the Court rejected a key argument raised by the Petitioners that has significant consequences for the future of media and internet regulation. The Court denied that Section 66A discriminated between speech offences on the internet and other media and thereby violated the Article 14 equality guarantee. It concluded that as the internet has a low access threshold that allows a person to disseminate their views with little or no cost, the state may intelligibly differentiate between the internet and other media. In line with earlier cases where the court has permitted

27. (2015) 5 SCC 1; Date decided: March 24, 2015 (Bench: J Chelameswar and Rohinton F Nariman, JJ.).

28. Interests of the sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality, contempt of court, defamation or incitement to an offence, are the 8 grounds in Article 19(2) for reasonably restricting freedom of speech.

29. The Court relied on *Bennett Coleman & Co. & Ors v. Union of India & Ors*, [1973] 2 SCR 757 and *S. Khushboo v. Kanniamal & Anr*, (2010) 5 SCC 600, to observe that Article 19(1)(a) is intended to protect speech even if it is in the form of public criticism or views that may be unpopular to the society in general.

30. *State of Madhya Pradesh v. Baldeo Prasad,* [1961] 1 SCR 970; *Harakchand Ratanchand Banthia & Ors v. Union of India & Ors*, 1969 (2) SCC 166; *K.A. Abbas v. Union of India & Anr,* [1971] 2 SCR 446; and *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569

distinctions between print and video technology, *Shreya Singhal* allows for a new free speech doctrine for the internet.

Apart from Section 66A, the Petitioners also spoke about Section 69A that permits the government to block public access to the internet without a prior hearing or following the procedures set out in the Criminal Procedure Code, 1973.[31] The Petitioners argued that this provision was unconstitutional as it was overbroad and allowed arbitrary bans. The Court disagreed, as it read down Section 69A to only allow the Central Government to block websites under the specific exceptions set out in Article 19(2). Further, the Court was satisfied that the section accommodated adequate procedural and substantive safeguards - it required a reasoned order in writing, and Rule 8 of the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 gives the originator an opportunity to be heard by a Committee that enquires into whether blocking is necessary. However, as the subsequent ban by the Central Government on porn websites[32] revealed, the Court may have imputed too much rationality to the government authorities in the application of section 69A.[33]

The third provision of the IT Act challenged was Section 79[34] which shields internet intermediaries from liability provided certain factual and legal conditions are satisfied. The Petitioners argued that as Section 79(3)(b), and the rules made under Section 79, empowered the intermediary to disable access to information used for 'unlawful acts', it went beyond the exceptions provided in Article 19(2) and empowered a private actor to censor public speech. However, the Court read down the statutory provisions and rules to mandate that the intermediary must act in accordance with a court order or government notification, which must interpret 'unlawful acts' to be one of those covered by the exceptions in Article 19(2). In this way - by upholding two out of three provisions of the IT Act, and striking down Section 66A - the Court chose to extend the application of the fundamental right of freedom of speech and expression.

The modesty of the Indian constitutional free speech doctrine visible in *Shreya Singhal's* myriad exceptions and weak procedural protections was once again on display in *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra*.[35] In *Devidas,* the author, editor and publisher of a Marathi poem titled 'Gandhi Mala Bhetala' in an in-house magazine of the All

31. Sections 95 and 96

32. The ban has now been limited to only child porn websites.

33. Sudhir Krishnaswamy, *Supreme Court Must not Conclude all Pornography Leads to Crime*, The Quint (August 10, 2015), available at http://www.thequint.com/technology/2015/08/10/supreme-court-must-not-conclude-all-pornography-leads-to-crime

34. Section 79A is a provision for intermediaries to be exempt from liability under the Act in certain cases.

35. (2015) 6 SCC 1.

India Bank Association Union were prosecuted for the criminal offence of obscenity. In response to a private complaint, the police registered offences of obscenity under Section 292 and promoting enmity between different groups under Sections 153A and 153B of the Indian Penal Code, 1860 for the publication of a poem that used Mahatma Gandhi's voice to make vulgar, obscene and indecent remarks. The accused persons petitioned a 2 judge bench of the Court to discharge them on the grounds that this prosecution violated the freedom of speech and expression.

The Court reviewed precedents,[36] including those in the United States,[37] United Kingdom and Europe,[38] and clarified that the applicable test in India was no longer the *Hicklin* test but the contemporary community standards test developed by the US Supreme Court in *Miller v California*.[39] It confirmed that the *Miller* three-step test required an enquiry into: (a) whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct or excretive functions specifically defined by the applicable State law and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[40]

However, while applying the *Miller* test to *Devidas* the Court did not show how the published poem satisfied all three limbs of enquiry. Instead the Court stressed two reasons absent in the *Miller* test. First, that the right to freedom of expression was not absolute and that the permissible limits on the right, as well as community standards, will vary across time.[41] Secondly, the Court emphasized that it was not just the choice of words that mattered but that these words were put into Gandhi's mouth. As communicating through a historically respected personality is a method of artistic expression to get public attention, the Court held that a higher standard of scrutiny would apply. The Petitioner's argument that the poem was a surrealistic effort to use Gandhi to express agony about contemporary affairs that could not be described as obscene in any sense found no sympathy, as the Supreme Court left this to be determined by the trial in the lower courts.[42]

Shreya Singhal and *Devidas* emphasize that the fundamental right to free speech and expression is not absolute and subject to the limitations set out in Article 19(2). In the third and final case in this section, *Reserve Bank of India* v. *JN Mistry*[43] a Division Bench of the Supreme Court

36. *Ranjit D Udeshi v. State of Maharashtra AIR 1965 SC 881, Chandrakant Kalyandas Kakodkar v. State of Maharashtra AIR 1970 SC 1390; K.A. Abbas* v.*Union of India AIR 1971 SC 481; Raj Kapoor v. Lakshman AIR 1980 SC 605, Samaresh Bose* v. *Amal Mitra AIR 1986 SC 967, Directorate General of Doordarshan v. Anand Patwardhan, Ajay Goswami* v.*Union of India, Bobby Art International v. Om Pal Singh Hoon, Gandhi Smaraka Samithi* v. *K. Jagadish Prasad Publisher, S. Khushboo, Aveek sarkar v. State of W.B.* and *Shreya Singhal.*

37. *Chaplinsky* v. *New Hampshire,* 315 US 568 (1942); *Roth v. United States,* 354 US 476; *Memoirs v. Massachusetts,* 383 US 413 (1966); *Miller v. California,* 413 US 15 (1973); *Reno v. American Union of Civil Liberties,* 521 US 844 (1997); *Oregon v. Henry* 732 P 2d 9 (Or 1987); *Ashcroft* v. *Free Speech Coalition*, 535 US 234 (2002).

38. *Vereinigung Bildender Kiinstler v. Austria*, Application No. 68354 of 2001, decided on 25.1.2007; *Muller v. Switzerland*, (1988) 13 EHRR 212; *Handyside* v. *United Kingdom*, Application No. 5493 of 1972, decided on 7.12.1976, Series A No. 24; *Wingrove* v.*United Kingdom* (1997) 24 EHRR 1

39. 413 U.S. 15 (1973)

40. While determining whether an article is obscene, regard must be given to the contemporary mores and national standards and it must be judged from the viewpoint of an average person and not of a group of sensitive persons.

41. *Devidas,* note 36, para 104

42. However, the Court quashed the charges against the appellant-publisher because he had tendered unconditional apology immediately after understanding adverse reactions against the poem and before the proceedings were initiated.

43. 2015 SCC Online SC 1326

focused more on the scope and meaning of the right rather than the breadth of the exception. Several Petitioners had sought information from the Reserve Bank under the Right to Information Act, 2005 on the details and procedure of inspections carried out on other banks as well as the minutes of meetings between officials at the Reserve Bank and the National Bank for Agriculture and Rural Development.

This information was denied by the Reserve Bank which claimed that as the regulator and supervisor of the banking system it receives information that it holds in a fiduciary capacity and that it has discretion to only disclose information that is in the public interest. Further, it argued that the information sought is exempted under sections 8(1) (a), (d) and (e) of the Right to Information Act, 2005. The Court rejected this defense of the Reserve Bank and held that the constitutional right to information derived from the fundamental right of free speech and expression in Article 19(1) (a) could only be limited by the permitted grounds in Article 19(2). It concluded that the Reserve Bank did not receive information in confidence or in a fiduciary capacity and moreover, none of the permitted grounds under Article 19(2) applied to the case. Though it did not go on to strike down any of the statutory exemptions under Section 8 of the Right to Information Act, 2005, the reasoning in this judgment opens the door to a broad construction of the Act and narrowing the constitutional limitations to the free speech right.

III. Equality and Non-Discrimination

In the last two decades reservation policy has been subject to pressure from two different directions: first, the demand to include new caste groups in the category of beneficiaries and second, to create newer sub-categories of beneficiaries to insulate more marginalized groups from those slightly better off. In 2014, we reviewed *National Legal Services Authority* v. *Union of India*[44] where the Court recommended the inclusion of the transgendered community in the category of other backward classes eligible for reservation benefits.

In 2015, in *Ram Singh* v. *Union of India* a Union government notification including the Jat community in the Central List of Backward Classes as a reservation beneficiary for public employment under Article 16(4) for 9 states[45] was challenged on the grounds that it did not satisfy the backwardness required for constitutional protection.

Earlier, the National Commission for Backward Classes (hereafter 'NCBC') [46] had advised the Central Government that the Jat Community did not fulfil the criteria for inclusion in the list. After an elaborate public consultation exercise it concluded that the Jats were not socially and educationally backward despite being a predominantly agricultural community. Moreover, it found that the community was adequately represented in the armed forces, government services and educational institutions. The Union Cabinet rejected the advice of the NCBC and issued the notification including the Jat community.

The Petitioners challenged the notification on the grounds that the Jat community is not a socially and educationally backward class and that the Union government was bound by the advice of the NCBC. The Court substantially agreed with the Petitioners on both counts but clarified that based on the observations in *Indra Sawhney*[47] and the provisions of Section 9 of the NCBC Act[48] the advice tendered by the NCBC is only ordinarily binding on the Government which may overrule or ignore such advice for strong and compelling reasons to be set out in writing. As the NCBC Report in this case was well grounded there was no reason for the Union government to disregard its recommendations. Hence, the Court struck down the notification including Jats into the Central list of Backward Classes.

44. See Rights in Review: The Supreme Court in 2014 (CLPR Bangalore 2015) 2-3. (2014) 5 SCC 438

45. This notification dated 4-3-2014 was issued pursuant to a decision taken by the Union Cabinet on 2-3-2014 rejecting the advice tendered by the National Commission of Backward Classes on excluding the Jat community from the Central List.

46. The National Commission of Backward Classes (NCBC) Act was passed in 1993, following the *Indra Sawhney Case*. It is a permanent specialized body to which complaints of inclusion/non-inclusion to the List of Other Backward Classes(OBC) can be made. According to Section 9 of this Act, advice and recommendations of the NCBC are ordinarily binding on the Central Government.

47. *Indira Sawhney v. Union of India,* AIR 1993 SC 477

48. Section 9
Functions of the Commission
(1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in such lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate. (2) The advice of the Commission shall ordinarily be binding, upon the Central Government.

Significantly, the Court embraced the view expressed in the NCBC report that 'caste' need not be the primary basis on which a backward class is identified. It emphasized that 'backwardness' as envisaged under Article 16(4) is essentially social backwardness. Educational and economic backwardness may contribute to social backwardness but by themselves do not make a backward class under Article 16(4). Moving away from existing precedent,[49] it held that the phrases "backward class" and "socially and educationally backward classes" are not equivalent. Instead it emphasized the need to move away from the identification of internally homogenous (based on caste or occupation) to heterogeneous (based on disability or transgender identity) social groups that may backward due to diverse social, cultural, economic, educational or even political factors.

49. In *M.R. Balaji v. State of Mysore* AIR 1963 SC 649 and *Janaki Prasad v. State of Jammu & Kashmir* AIR 1973 SC 930 the court had interpreted the two phrases in Articles 15(4) and 16(4) respectively to be identical in meaning and scope.

While the Supreme Court has intensively engaged with the constitutional standards for reservation policy, the law relating to discrimination and equal protection remains poorly developed in India. In *Rajbala* v. *State of Haryana,* the Petitioners challenged the constitutionality of Section 175 1 (t), (u), (v) and (w) of the Haryana Panchayati Raj (Amendment) Act, 2015, which prescribed new minimum eligibility qualifications to contest elections to any electoral offices under the Act. The amendment introduced five new[50] disqualifications for election candidates or for those holding office. The persons disqualified are those: (i) against whom criminal charges are framed and judicial proceedings initiated for serious offences (ii) who fail to pay arrears owed by them to either a Primary Agricultural Cooperative Society or District Central Cooperative Bank or District Primary Agricultural Rural Development Bank (iii) who have arrears of electricity bills (iv) who do not possess the specified educational qualifications[51] and (v) not having a functional toilet in their homes.

50. Section 175 of the Haryana Panchayati Raj Act, 1994 already prescribed many disqualifications including unsoundness of mind, insolvency, holding salaried office or office of profit, etc.

51. Section 175(1)(v): A person is disqualified if he/she has not passed matriculation examination or its equivalent examination from any recognized institution/ board: Provided that in case of a woman candidate or a candidate belonging to Scheduled Caste, the minimum qualification shall be middle pass: Provided further that in case of a woman candidate belonging to Scheduled Caste contesting election for the post of Panch, the minimum qualification shall be 5th pass.

Three aspiring women candidates challenged all but the first condition of disqualification on the grounds that: it violated the equal protection of the law and equality before the law guaranteed by Article 14; the disqualifications are unreasonable and make arbitrary classifications with no nexus to the purpose of the Act thereby leaving out a majority of candidates who are otherwise eligible to contest; thirdly, that they had a constitutional right to vote that unreasonably restricted by this legislation.

Justice Chelameswar quickly disposed the 'arbitrariness' challenge. He relied on *State of Andhra Pradesh v McDowell & Co.*,[52] for the proposition that

52. (1996) 3 SCC 709.

'*a law made by the Parliament or the Legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part-III of the Constitution or of any other constitutional provision……. There is no third ground.*' He sought to avoid declaring legislation unconstitutional on the ground that it is 'arbitrary' as this implies a value judgment and courts should not examine the wisdom of legislative choices.

Furthermore he pointed out that this sort of constitutional review resembles the doctrine of 'substantive due process' employed by the US Supreme Court which was expressly rejected by the Indian courts.[53] Despite Justice Chelameswar's clear and stirring call to reject the arbitrariness ground of review under Article 14, echoing several other eminent constitutional commentators,[54] the 2 judge Bench in *Rajbala* has no legal authority to overrule a number of constitutional bench precedents that permit constitutional judicial review of legislation on the ground of arbitrariness under Article 14.[55]

The Court engaged in an elaborate but ultimately inconclusive debate on the constitutional status of the right to vote and the right to contest elections. The Court equivocates on whether the right to vote, as set out in *PUCL* v. *Union of India*[56] and the *DMK v Election Commission*[57] is a fundamental right derived from the freedom of expression of a voter[58] or is a constitutional right under Article 326. The Court embarks on a broad constitutional survey of the right to contest elections that appears to confirm that it is a constitutional right analogous to the right to vote that is only subject to those restrictions expressly permitted by the constitution. However, not every person who enjoys a constitutional right to vote under Article 326 has the right to contest elections. The Court reiterated that the right to contest elections was nevertheless a constitutional right, subject only to the permissible qualifications and disqualifications set out in the constitution or by the legislature. These restrictions on this constitutional right vary by the constitutional provisions that apply to the Union and State legislatures and third tier of government—Panchayats and Municipalities. While the constitution is silent about the qualifications for Panchayat candidates, it allows the State government to prescribe disqualifications by law under Article 243F. As the law that prescribed disqualifications in this cases was made by the State under Article 243F, the Court was satisfied that there was no constitutional damage to the constitutional right to contest elections. The effort of the Court to emphasize that the right to contest elections was a constitutional right and not just a statutory right

53. *A.S. Krishna & Others* v. *State of Madras* AIR 1957 SC 297

54. H.M. Seervai *Constitutional Law of India,* Vol on Article 14.

55. *R.C. Cooper* v. *Union of India* AIR 1970 SC 564; *R.K. Garg v. Union Of India* AIR 1981 SC 2138 (7 Judge Bench); *Shashikant Laxman Kale v. Union Of India* AIR 1990 SC 2114

56. *People's Union for Civil Liberties (PUCL) & Anr. v. Union of India and Anr*. (2003) 4 SCC 399

57. *Desiya Murpokku Dravida Kazhagam (DMDK) & Another v. Election Commission of India*, (2012) 7 SCC 340. Though this conclusion was part of a dissenting opinion given by Justice, no difference of opinion on this matter was recorded by the other judges.

58. The Court disagreed with earlier judgments in *Shyamdeo Prasad Singh v. Nawal Kishore Yadav* (2000) 8 SCC 46, *K. Krishna Murthy (Dr.) and Ors. v. Union of India and Anr*, (2010) 7 SCC 202 and a two judge bench decision in *Krishnamoorthy v. Sivakumar* (2015) 3 SCC 467 where the Court held that the right to vote and the right to contest were merely statutory rights.

did not ultimately result in any substantive constraint on the power of State legislature to make a law under Article 243F.

The equal protection analysis under Article 14 is where the Court engages in a substantive analysis of the 4 legislative disqualifications: here the Court asks whether the disqualifications are discriminatory or whether the classification was unreasonable with no nexus to the object of the legislation. The disqualification based on education was challenged on the ground that more than 50% of the otherwise eligible women (and Scheduled Caste women in particular) by this rule.

The State justified this rule on the grounds that basic education was essential to effectively discharge these public duties and hence was a reasonable classification related to the legislative object. The Court agreed with the State and concluded that the education disqualification was a legitimate restriction based on capacity like those on lunacy and age in other constitutional provisions.

In a similar vein, the Court concluded that the disqualification based on arrears of loan amounts repayable to co-operative banks and unpaid electricity bills was analogous to indebtedness and insolvency based disqualifications recognized by the Constitution as a bar to holding certain offices.[59] The Court observed that as elections at any level are expensive affairs a deeply indebted person was unlikely to contest elections but nevertheless the law rightly expected such a person to clear these errors before doing so.

The third disqualification made the absence of a functional toilet in a candidate's residence a ground to reject a candidate. Petitioners argued that this ground had no relationship to the legislative object of ensuring suitable candidates for election to the Panchayat. The State pointed out that there are several schemes to provide financial assistance to construct a toilet and hence, the absence of a functional toilet is not on account of poverty but due to a lack of requisite will. The Court agreed with the State especially because one of the primary duties of any civic body is to maintain sanitation within its jurisdiction and those who aspire to get elected to these civic bodies and administer them must set an example for others.

In *Rajbala* the Court employs a highly deferential standard of reasonableness review of State legislation under Article 14 equal protection analysis that would permit almost any legislative classification to survive judicial scrutiny. The rejection of the arbitrariness limb of Article 14 does not mean

59. Article 102(1)(c)48 and Article 191(1)(c) declare that an undischarged insolvent is disqualified from becoming a Member of Parliament or the State Legislature respectively. By virtue of the operation of Article 58(1)(c) and 66(1)(c), the same disqualification extends even to the seekers of the offices of the President and the Vice-President.

that equal protection analysis is incapable of imposing any meaningful constraint on the legislature. The Court must carefully scrutinize legislative classifications that impose restrictions on constitutional rights and fundamental rights on facially neutral grounds that nevertheless have differential and potentially socially discriminatory impact.

IV. Freedom of Religion

In *Adi Saiva Sivachariyargal Nala Sangam* v. *The Government of Tamil Nadu*[60] the Petitioners, an association of priests, challenged a Tamil Nadu government order that allowed "any Hindu" with "requisite qualification and training" to become an *archaka*(priest) in Hindu temples across Tamil Nadu. They challenged it on the grounds that this order violated their freedom of religion guaranteed under Articles 25 and 26. The scope of the constitutional guarantees of freedom of religion extends only to essential religious practices and it is the role of the Court as a constitutional arbiter to determine whether a belief or practice is a fundamental part of the religious practice of a group.[61] Moreover, even an essential practice of a religion is subject to all other fundamental rights in the constitution and other permissible restrictions under Article 25.

In this case the Court held that the 'true tenets of Hinduism' understood in the context of the development of the Hindu religion and philosophy includes image worship in accordance with the *Agamas*.[62] However, while adherence to the *Agamas* may be an essential practice of the Hindu religion could it be regulated by the State on other grounds? In *Seshammal* v. *State of Tamil Nadu,*[63] a Constitutional Bench of the Supreme Court upheld the validity of an amendment to the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 which abolished hereditary succession in religious institutions but retained the obligation to appoint the *archaka* in accordance with the *Agamas* as they applied to a particular denomination/ group/sect. However, in *Adhithyan* v. *Travancore Devaswom Board*[64] the Kerala High Court held that even such an essential practice cannot restrict duly qualified persons from performing *poojas* solely on the ground that such a person is not a Brahmin by birth. In this case, as the restrictions imposed by the *Agamas* were not among castes, but even between the Brahmin upper castes the Court found that the *Agamas* did not violate the restrictions on caste discrimination in Articles 14, 15 or 17 per se. Instead, the Court resolved that each individual appointment may be tested to assess whether the inclusion or exclusion is based on the criteria of caste, birth or any other constitutionally unacceptable parameter.

60. MANU/SC/1454/2015

61. *Durgah Committee, Ajmer and another v. Syed Hussain Ali* AIR 1961 SC 1402

62. See *Gopala Mooppanar and Others v. Subramania Iyer and Others* AIR 1915 Madras 363 and *Sri Venkataramana Devaru and Others v. State of Mysore and Others* AIR 1958 SC 255

63. (1972) 2 SCC 11

64. AIR 1996 Ker 169

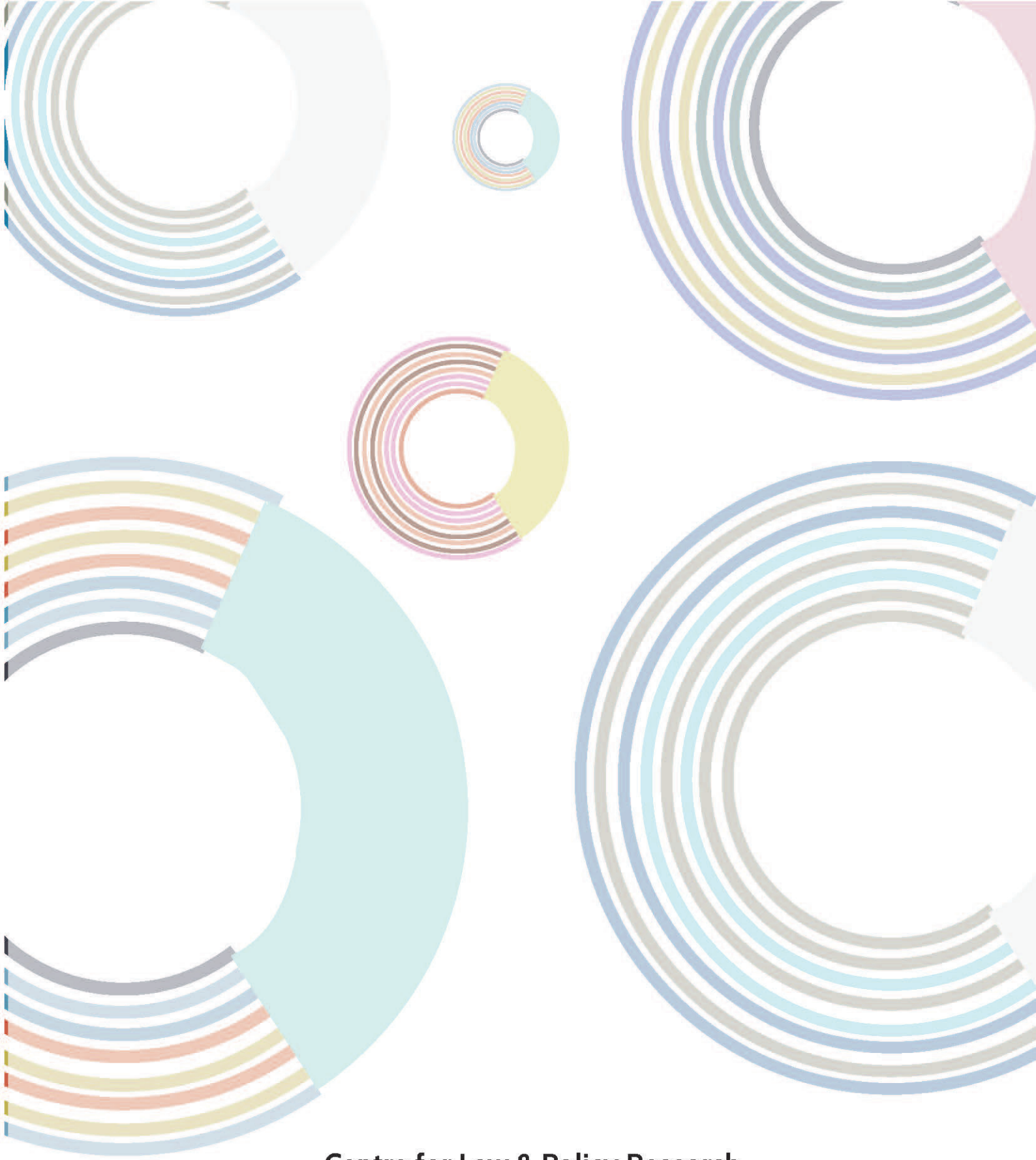
Conclusion

In 2015, the Supreme Court developed and clarified the procedural restrictions on the administration of the death penalty, including when a prisoner on death row may be placed in solitary confinement, and the manner in which execution warrants may be carried out. Though the Court struck down section 66A of the IT Act, its historical emphasis on the exceptions to the free speech right rather than the scope of the freedom has now been extended to the internet. The highly deferential standard of judicial review in Article 14 equal protection cases cedes considerable ground to the legislature, and the rejection of the Jat community from the list of Backward Castes may well be a form of aggressive judicial review for executive action.

In this Report we have excluded some fundamental rights cases which do not make any new law[65] or cases which merely lay down procedural measures for legal intervention in matters of social concern without articulating or elaborating on whether these are based on fundamental rights.[66] All things considered, the Court has not made significant progress in 2015 towards articulating a model of constitutional judicial review for fundamental rights with clarity about the nature of constitutional injury necessary to trigger judicial review, the absolute or relative character of rights and whether there is any place for deference to the legislature and executive in Indian constitutional rights adjudication. For these reasons, among others, we look forward to the opportunity in 2016 to make some real progress on these fronts.

65. *Wayanad Institute of Medical Sciences v. Union of India* AIR 2015 SC 2940 where the Supreme Court held that the institute does not have a fundamental right under Article 19(1)(g) to recognition or affiliation of their institutions.

66. *Laxmi v. Union of India* (2015)5 SCALE 77 where the Supreme Court laid down guidelines for the treatment, rehabilitation and compensation of victims of acid attacks; *D.K. Basu v State of West Bengal & Ors.* (2015) 41 SCD 800, where the Court directed some of the Union territories to set up State Human Rights Commissions, directed all States to fill up vacancies in these Commissions, install CCTV cameras in all the prisons in their respective States, and other measures.



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