EDITORIAL

The Constitution of India has proved to be an enduring one. Perhaps some of its strength draws from how detailed and lengthy it is, although it may well be proved that the Constitution has endured because it has proven malleable to the needs and aspiration of India, best exemplified by the sheer number of amendments it has undergone. These amendments, along with judicial decisions, appear to keep the constitution alive. Yet, even as the Indian constitution towers over most other constitutions of the world in terms of numbers of amendments, it has been faced with fresh and unprecedented challenges in the last year, at times, even from within the very judiciary that is tasked with safeguarding the rights guaranteed by it. The challenges to constitutional values, and particularly the disregard for rights, appear to be at their very peak when the central government is constituted by a single-party majority. The fresh challenges, which are seemingly uncharted territory, present the need for serious scholarship. The *Indian Journal of Constitutional Law* (IJCL) continues to strive to occupy this space with scholarship that is both significant and relevant to contemporary challenges. This volume of the journal is no different and engages with a range of issues that affect India and her neighbouring countries.

This editorial is split into three parts. The first part covers critical constitutional developments in the last year (1). It covers, not only decisions of the Supreme Court and various High Courts but also recent "amendments" to the Constitution. The second part introduces the scholarly contributions to this volume of IJCL (2). The third part contains acknowledgements (3).

1. A Smorgasbord of Constitutional Law Issues: 2019-20 in Review

Citizenship; asymmetric federalism; judicial independence and post-retirement appointments; reservations for teachers in scheduled areas; the right to internet; transparency of the Supreme Court under the Right to Information Act, 2005– the past year has thrown up a smorgasbord of issues in constitutional law. In keeping with tradition, this editorial will recap some of these developments in the year that has been. In the interest of brevity, we have omitted commenting on cases on which our authors have written longer form case comments, namely *Chebrolu Leela Prasad Rao v. State of Andhra Pradesh*[1], *Anuradha Bhasin v. Union of India*[2] and *Foundation for Media Professionals v. U.T. of Jammu & Kashmir*[3].

Amendments to the Constitution

The Constitution (103rd Amendment) Act, 2019 has amended Articles 15 and 16 to permit the government to provide for the advancement of "economically weaker sections". The amendment came into effect on January 14, 2019 and applies to Central Government-run educational institutions and private educational institutions. However, minority education institutions and State Government-run educational institutions are exempt from mandatory provision of this reservation. Further, the reservation of up to 10% for "economically weaker

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1 Chebrolu Leela Prasad Rao v. State of Andhra Pradesh, 2020 SCC Online SC 383.

2 Anuradha Bhasin & Anr. v. Union of India & Ors., 2020 SCC Online SC 25.

3 Foundation for Media Professionals & Ors. v. U.T. of Jammu & Kashmir & Anr., 2020 SCC Online SC 453.

sections" in educational institutions and public employment will be in addition to the existing reservation.

The Constitution (104th Amendment) Act, 2020 seeks to extend the reservation of seats in the Lok Sabha and Legislative Assemblies of states for individuals from Scheduled Caste and Scheduled Tribes upto till January 25, 2030. Before this amendment, the Constitution provided for the reservation of seats for Scheduled Castes, Scheduled Tribes and the Anglo-Indian communities for a period of seventy years since the enactment of the Constitution. Thus, this reservation would have expired on January 25, 2020.The amendment is an attempt to nullify the effect of the cessation of this reservation. However, the amendment does extend the period of reservation of the two Lok Sabha seats reserved for members of the Anglo-Indian community. This means that the practice of nominating two members of the Anglo-Indian community by the President of India under the recommendation of the Prime Minister of India has been effectively abolished.

The Constitution (Application to Jammu and Kashmir) Order, 2019 was passed on August 5, 2019 to supersede the Constitution (Application to Jammu and Kashmir) Order, 1954. This presidential order states that all the provisions of the Indian Constitution applied to Jammu and Kashmir. Thus, in effect, Article 370 of the Constitution, which grants the special status to Jammu and Kashmir, stands abrogated. This dilution of Article 370 implies that Article 35A stands null and void and that any Indian citizen from any part of the country can now buy property, take a state government job and enjoy scholarships and other government benefits in Jammu and Kashmir. Other implications of the presidential order include the applicability of the fundamental rights guaranteed by the Indian Constitution, the applicability of the provision to impose a financial emergency under Article 360 and the applicability of other legislations of the Parliament, such as the Right to Information Act, 2005 and the Right of Children to Free and Compulsory Education (Right to Education) Act, 2009.

Constitution Bench decisions of the Supreme Court

In *M Siddiq v. Mahant Suresh Das & Ors.*[4] a five-judge bench of the Supreme Court sought to bring quietus to a legal dispute that was more than a century old, over the piece of land that contained the *Ram Janmabhumi and Babri Masjid*, in one of the most anticipated judgements of the Supreme Court. In the Court's words, the dispute was over "ownership over a piece of land" in Ayodhya that was claimed to be of immense significance to both Hindus and Muslims. The Court was deciding an appeal from the judgement of the High Court of Allahabad on five separate suits concerning the same dispute, wherein the High Court had held that Hindu and Muslim parties were joint holders of the property. The Court ruled that the High Court had completely erred in granting the three way split since it was beyond the parties' pleadings and also granted remedies to parties whose suits the High Court had determined was barred by limitation. To determine the ownership of the property, the Court considered the property to be divided into two parts – the 'inner courtyard' and the 'outer courtyard'. Insofar as the outer courtyard was concerned the Court said that upon a "preponderance of probabilities" it was "impossible" to accept that Muslims were in possession since the outer courtyard had established Hindu places of worship. To determine the possessory claim over the inner courtyard the Court observed that prior to 1856 the Muslim account of worship at the site was conspicuously absent when compared to Hindu accounts.

[4] M. Siddiq v. Mahant Suresh Das & Ors, (2020) 1 SCC 1.

Further, although the Muslims claim to property was not abandoned after the riots and restoration in 1934, it was contested. Ultimately, relying on the findings of the Archaeological Survey of India the Court determined that there was a pre-existing structure dating back to the twelfth century which on a preponderance of probabilities were thought to be of Hindu religious origin. The Mosque was constructed on the foundations of this structure. The Court acknowledged that the limitations of the ASI survey were that it could not establish the reasons for the destruction of the underlying structure and particularly whether the destruction was for the purpose of construction of the mosque. The ASI report also suggested that there was no conclusive evidence to show that the pillars used for the construction of the mosque were sourced from the underlying Hindu religious structure. Despite the existence of the mosque at the site, Hindu worship at the place was not restricted. According to the Court the establishment of the *Ramchabutra* close to the dividing wall set up by the British was an assertion by Hindus of their right to pray below the central dome and consequently the inner courtyard was a contested site. The Court did observe that the mosque was desecrated in 1949 when idols were installed in the mosque and that the subsequent destruction of the Mosque in 1992 was an "*egregious violation of the rule of law*". An assertion that the mosque did not comply with Islamic tenets was rejected and the Court also accepted that there was no abandonment of the mosque by the Muslim community. On the basis of these observations the Court sought to decree the suits consistently with principles of justice, equity and good conscience. Having found that "Bhagwan Shri Ram Virajman", the petitioner in the final suit, was a juristic person in order to "practically adjudicate the dispute", the same suit was also found to be maintainable. However, citing India's commitment to secularism, among other things, the Court rejected the argument that the *Ram Janmabhumi* itself i.e. the immoveable property possessed legal personality. The entire disputed property was decreed to the Hindus under this suit since they had a better possessory claim to the composite whole of the property on a balance of probabilities. Thus, the entire disputed property was to be handed over to a trust that was to be created for the temple by the Central Government. To compensate the Muslim community for the illegal destruction of their mosque that the Court termed as "wrongful deprivation", it directed the Central Government to allot 5 acres of land to the Sunni Central Waqf Board for the construction of a mosque and associated activities. The Court noted that the Hindu faith and belief that Lord Ram was born in Ayodhya was not in dispute. Rather it was contested whether the disputed site was the exact place of birth. Notably however, although the aforementioned reasons were unanimous, only one of the judges (anonymously) recorded separate observations as to whether the disputed structure was the birthplace of Lord Ram, concluding that this was indeed the case based on the faith and belief of the Hindus. The decision, although cloaked in legal reasoning, appears to be what the judges thought would be a workable compromise, rather than a decision of the Court that is well founded in law. This is betrayed by the Court's observations that they were awarding the entire site to the Hindus because they had a better claim to one part of the site, while ownership of the inner courtyard was contested and unsettled between both sides. One therefore wonders whether the Court might have reached the same conclusion had the mosque not been destroyed in 1992, or if the Muslim parties had not signed a settlement resulting from the Court ordered mediation, indicating their willingness to forsake the communities interests in the site in entirety.

In *The Central Public Information Office, Supreme Court of India v. Subhash Chandra Agarwal*[5],the Court took a monumental step and expanded the scope of the Right to Information

[5] The Central Public Information Office, Supreme Court of India v. Subhash Chandra Agarwal, 2019 SCCOnLine SC 1459.

Act, 2005. What was challenged before the Court was a 2009 Central Information Commission order asking the Central Public Information Office of the Supreme Court of India to disclose information regarding the decision-making of the Supreme Court Collegium with respect to appointment of certain judges. The primary question before the Court was whether disclosing the information requested by the Respondent interferes with the independence of the judiciary and therefore not in the public interest to disclose this information. Another point for adjudication was whether disclosing the information requested erodes the credibility of the Collegium's decision and/or curtail the future "free and frank expression" of Collegium members, when appointing judges to the Supreme Court. Balancing the competing values of confidentiality and transparency, the Court held that the office of the Chief Justice is a "public authority" within the meaning of the Right to Information Act, 2005 as it performs numerous administrative functions in addition to its adjudicatory role. Access to information is, therefore, regulated by the Right to Information Act, 2005. The Court also noted that the Chief Justice of India could not be a fiduciary vis-à-vis judges of the Supreme Court because judges held independent office and neither their affairs nor conduct was controlled by the Chief Justice of India. The Court also observed that the right to information cannot be used as a tool for surveillance and that any application under the Right to Information Act, 2005 which violates the right to privacy of the judges need not be responded to.

Other decisions of the Supreme Court

In *Vinubhai Haribhai Malviya v. State of Gujarat*[6], the question of law posed to the Supreme Court was whether a Magistrate has the power to order further investigation after taking cognizance of the chargesheet filed by the police, and if so, up to what stage of a criminal proceeding. The Court analysed this question on the touchstone of Article 21 and its interpretation in *Mrs. Maneka Gandhi v. Union of India and Another*[7]. In this case, the Court had unequivocally stated that procedures adopted in criminal trials must be *right, just and fair and not arbitrary, fanciful or oppressive*. Applying this test in the instant case, the Court held that a Magistrate has all powers necessary, which may also be incidental or implied, to ensure a proper investigation, including the ordering of further investigation after a report is received by him under Section 173(2) of the Criminal Procedure Code, 1973. The Court also observed that there is no good reason as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences.

In *Manohar Lal Sharma v. Narendra Damodardas Modi*[8], the Court took a remarkable stride towards ensuring greater transparency in the functioning of the government. The matter before the Court pertained to the admissibility of certain documents pertaining to the contentious Rafale deal which had been published by The Hindu without due permission. It was submitted that the documents had been removed without authorisation from the office of the Ministry of Defence and therefore could not be relied upon by the petitioners. It was further contended that unauthorised removal of the documents from the custody of the Government of India and their use to support the pleas, urged in the review petition, was in violation of the provisions of Sections 3 and 5 of the Official Secrets Act, 1923. Additionally, it was contended that the documents could not be

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6 Vinubhai Haribhai Malaviya v. State of Gujarat, JT 2019 (10) SC 537.
7 Mrs. Maneka Gandhi v. Union of India and Another, (1978) 1 SCC 248.
8 Manohar Lal Sharma v. Narendra Damodardas Modi, 2019 (1) MLJ 529.

accessed under Section 8(1)(a) of the Right to Information Act, 2005. Upholding the publisher's right to publish these documents, the Court held that the right of such publication would seem to be in consonance with the constitutional guarantee of freedom of speech. It was also held that Section 8(2) of the Right to Information Act, 2005 manifests a legal revolution that has been introduced and that none of the exemptions declared under sub section(1) of Section 8 or the Official Secrets Act, 1923 can stand in the way of the access to information if the public interest in disclosure overshadows the harm to the protected interests. Thus, this judgment has established that the Right To Information Act, 2005 having an "overriding effect" over the Official Secrets Act, 1923, that security and intelligence outfits have to disclose information on corruption and human rights and, that the government's duty to reveal details that are in "public interest".

In *Indian Social Action Forum (INSAF) v Union of India*[9], the Supreme Court pronounced a significant judgement to safeguard the functioning of civil society groups engaged in advancing causes. INSAF challenged the constitutionality of certain provisions of the Foreign Contribution (Regulation) Act, 2010 (FCRA) as well as certain rules under the Foreign Contribution (Regulation) Rules, 2011. The appellants alleged that the impugned provisions were vague and conferred "uncanalised power" to the government to determine that an organization possessed a "political nature". The immediate consequence was that the government could block foreign funding to these organizations at a whim, and thereby prevent certain issues from being advanced. Although the Supreme Court was loathe to finding any of the challenged provisions to be unconstitutional, it secured the rights of civil society groups to receive foreign contributions by applying the "doctrine of reading down" to Rule 3(v) and 3(vi) of the impugned Rules. To do so, the Court drew a distinction between "active politics or party politics" and advancing political interests. It observed that the objective of the FCRA was to prohibit funding of political objectives in active politics. Consequently, it found that organizations of farmers, workers or students, among others that did not make demands in active politics, could not be found to possess political nature. It also observed that organizations that used "common" political methods like hartals and bundhs did not possess "political interests". Cutting off external funding could be an easy way to drown out civil society's demands by nipping these organizations in the bud. This judgement is significant for preventing such abuse of power.

In *Mukesh Kumar & Anr v. The State of Uttarakhand*[10], the question before the Court was whether the State Government is bound to make reservations for public posts, particularly at the stage of promotions. As a corollary, the Court was also required to determine if the State Government could deny such reservations *only* on the basis of quantifiable data pertaining to the adequacy of representation of persons belonging to Scheduled Castes and Scheduled Tribes. The Court observed that it was trite law that Article 16 (4) and Article 16 (4-A) did not confer a fundamental right to reservations in promotions. Rather, these Articles were enabling provisions which granted the State Government some discretion to "*consider providing reservations, if the circumstances so warrant*." It further observed that if the State Government decided to provide for such reservations, only then would it be required to collect quantifiable data showing the inadequacy of representation of that class of persons in public services. In other words, the requirement of quantifiable data was envisioned as a shield for the Government to defend against a challenge to its reservation policy – by demonstrating to the Court that such measures were

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9 Indian Social Action Forum v. Union of India, 2020 SCCOnLine SC 310.

10 Mukesh Kumar & Anr v. The State of Uttarakhand, (2020) 3 SCC 1.

necessary. Consequently, the Supreme Court found that the State Government's decision not to provide for reservations in promotions was a legitimate exercise of its discretion provided for in the Constitution. It further overturned a decision of the Uttarakhand High Court that required the State Government to collect quantifiable data to justify its decision not to provide for reservations since such data was only required when discretion was exercised in favour of reservations.

In *Prithvi Raj Chauhan v. Union of India*[11] ("Prithvi Raj Chauhan"), the Supreme Court upheld the validity of the 2018 amendment to the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 ("Atrocities Act"). The 2018 amendment had been introduced by the government to undo the Supreme Court's decision in *Dr. Subhash Kashinath Mahajan v. Union of India*[12] ("Subhash Kashinath Mahajan"), in the wake of widespread public criticism. In Subhash Kashinath Mahajan, the Court had taken upon itself the duty to examine data and determine policy, in a criminal appeal pertaining to the quashing of a complaint under the Atrocities Act, wherein the appellant had alleged that the Act was being grossly misused. In the resulting judgement, the Supreme Court passed directions that severely diluted the provisions of the Atrocities Act, holding that the exclusion of anticipatory bail did not constitute an absolute bar for the grant of bail in cases where it could be discerned that the allegations of atrocities committed were false based on a "preliminary enquiry". Ultimately the Court in Subhash Kashinath Mahajan ruled that the complaint could not be registered based on a preliminary enquiry. Following this, the government moved the Court to review the judgement, and these directions were thus recalled and overruled in *Union of India v. State of Maharashtra*[13]. The 2018 amendments were introduced by parliament so that a "preliminary enquiry" would not delay the registration of a First Information Report. The Supreme Court in Prithvi Raj Chauhan upheld the amendments also observing that interfering with the operation of the Act would not be "a positive step"; basing this conclusion on the statistics provided by the National Crime Records Bureau. Crucially, however, the Court has held that where no prima facie materials exist to warrant a complaint under the Atrocities Act, courts have an "inherent power" to direct a pre-arrest bail. Notably, over the course of this saga, a key statistic that was quoted and misquoted was the low conviction rates under the act. The same was initially attributed to a high percentage of false cases rather than the empirically supported idea of power structures being abused to evade conviction. This critical error made in the highest court betrays an ignorance of Dalit and Adivasi experience. The whole saga highlights the need for more representation of members of the Dalit and Adivasi communities in the Supreme Court.

In *The Secretary, Ministry of Defence v. Babita Puniya*[14], while those of the Navy were clubbed in *Lt Cdr Annie Nagaraja and Ors v Union of India*[15] appeals involving the grant of permanent commission positions to women in the Army and Navy respectively, came before the Supreme Court. Both cases originated out of a policy letter dated September 26, 2008. The Union Government fell on its own sword. Here, the move to include women came from the Union Government, albeit with the Ministry of Defence dragging its feet. It is within this prolonged process that the Supreme Court located the policy considerations that paved the way toward equality of opportunity for women in the Armed Forces. Although the initial impetus came from

11 Prithvi Raj Chauhan v. Union of India, 2020 SCC OnLine SC 159.
12 Dr. Subhash Kashinath Mahajan v. Union of India, 2018 (4) SCC 454.
13 Union of India v. State of Maharashtra, 2019 (13) SCALE 280
14 The Secretary, Ministry of Defence v. Babita Puniya, 2020 SCC OnLine 200.
15 Lt Cdr Annie Nagaraja and Ors v Union of India, 2020 SCC OnLine SC 326.

the government itself, the Supreme Court sought to pave the way toward women joining the armed forces. To do so, it reiterated that Article 33 entailed a 'necessary' restriction of fundamental rights and not a complete voiding of the same. The Supreme Court then went on to use the Union Government's notifications against it. Taking note of stereotyping and gendered roles in defence forces, the Court observed that such blanket restrictions were based on unreasonable classification as the assumptions are based on socially ascribed roles for gender. The Court then struck down the classification in the Union Government's notification. However, the notification still remained the basis for the equality movement in the Armed Forces. Thus, the Supreme Court has finely maintained a balance between the public policy considerations of security and equality.

Decisions of the High Courts

In *Grievance Redressal Officer, Economic Times v. V.V. Minerals*[16], the Madras High Court laid down a significant precedent towards the judicial protection of free speech. The petitioners approached the Court seeking it to quash the proceedings under a private complaint of criminal defamation. The complaint arose due to an article in the Economic Times alleging illegal beach sand mining by the complainant. The Court discussed the Sullivan principle in civil defamation, laid down by the U.S. Supreme Court, and considered its application to criminal defamation. The Sullivan principle stated that mere inaccuracies would not make the writer liable for defamation, but that the test would be of 'actual malice'. The Madras High Court observed that this principle had been amplified by the Madras and Delhi High Courts, which extended its protection from cases involving public officials to cases involving questions of public interest. The Court held that this amplified principle has to be read into the exceptions to criminal defamation in Section 499 of the Indian Penal Code whenever the freedom of the press is involved. Therefore, mere inaccuracies in reporting about a public question would not constitute criminal defamation. The width of this margin of error would depend on the facts of each case. Further, the Court noted that it has a duty to be proactive when it comes to the protection of fundamental rights. It stated that it cannot let the petitioners go through the ordeal of trial to prove that they can claim the exceptions to Section 499. The Court held that where a summary examination can establish such defence, relief ought to be granted without a regular trial.

In *Kamil Siedczynski v. Union of India*[17], the Calcutta High Court safeguarded the right to life and personal liberty foreigners staying in India. The petitioner was a Polish student who had come to India on a student visa. He attended a protest against the Citizenship Amendment Act, consequent to which a Leave India Notice was issued to him. The Court held that a visa confers upon a foreigner the right to stay in India which cannot be taken away without any reason or prior hearing being given to them. With respect to the right to life and personal liberty, the Court held that this right is not limited to a "bare existence" and would include the right to follow one's interests and fields of specialization. The right to life and personal liberty also includes the right to have political views and participate in political activities. The Court further held that the language of Article 19 was not negative in nature and that the conferment of certain basic rights to citizens cannot cancel the basic rights of an individual. Based on the above reasons, the Court described the notice as a "paranoid overreaction" and set it aside.

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16 Grievance Redressal Officer, Economic Times v. V.V. Minerals, 2020 SCC OnLine Mad 978.

17 Kamil Siedczynski v. Union of India, 2020 SCC OnLine Cal 670.

In *Faheema Shirin R.K. v. State of Kerala*[18], the petitioner moved the Kerala High Court to challenge the new regulations applicable to the petitioner's university hostel which restricted the use of mobile phones within the hostel from 10:00 pm to 6:00 am and then from 6pm to 10pm, while the use of laptop by undergraduates was prohibited. The petitioner contended that the new regulations violated her right to access the internet, which is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Indian Constitution. Further, it was contended that the restriction of the use of mobile phones in the present case did not come within reasonable restrictions covered by Article 19(2) of the Indian Constitution. Additionally, the petitioner argued that the forceful seizure of mobile phones by the hostel authorities infringed upon the right to privacy and personal autonomy of the residents. After careful consideration of the facts of the case, the Kerala High Court held that the restriction imposed on the use of mobile phones in a women's hostel was an unreasonable infringement upon the right to access the internet, the right to privacy, and the right to education. Further, it observed that internet has become part of the right to education as well as right to privacy under Article 21 of the Indian Constitution.

In *Lipika Pual v. State of Tripura*[19], the Tripura High Court heard a petition filed by the petitioner Pual, who had been suspended from the state fisheries department and was facing proceedings, just days before her retirement. The petitioner had moved the Court seeking quashing of the inquiry against her and the suspension order. The petitioner had been suspended because she had attended a "political programme" in December 2017 and wrote a "political" post about it on Facebook. The state contended that these acts of the petitioner were in violation of the Conduct Rules of the state. The conduct rules prohibit government servants from being members of or being associated with any political party or political activity and from canvassing, interfering with or taking part in an election to any legislature or local authority. The High Court, on examination of the facts, held that government servants are entitled to hold and express their political beliefs. Further, the Court asserted that in the instant case, the petitioner had only expressed certain beliefs in general terms and that this does not amount to canvassing for or against any political party.

In *Ajay Maken v. Union of India*[20], the petitioner moved the Delhi High Court to seek relief in relation to the forced eviction of around 5000 dwellers of a jhuggi jhopri basti (JJ basti) 1 at Shakur Basti (West) near the Madipur Metro Station in Delhi on December 12, 2015. The High Court held that the right to housing is a bundle of rights not limited to a bare shelter over one 's head. This right includes the right to livelihood, right to health, right to education and right to food, including right to clean drinking water, sewerage and transport facilities. Further, the Court observed that slum dwellers have a 'right to the city' which stems, in part, from the fundamental rights that allow a person to move and reside anywhere freely within the nation. Further, the High Court held the 'right to the city' arises from the fact that the city is a common good and that those who contribute to the social and economic life of a city have a right to housing in it.

In *Sanjaya Bahel v. Union of India*[21], the petitioner was an Indian diplomat who had been convicted in the United States of America. After his subsequent deportation from the United States of America, the petitioner sought permission from the Ministry of External Affairs under Section 86 of the Civil Procedure Code, 1908 in order to initiate legal action the United Nations

18 Faheema Shirin R.K. v. State of Kerala, AIR 2020 Ker 35.
19 Lipika Pual v. State of Tripura, 2020 (1) SCT 688.
20 Ajay Maken v. Union of India, 260 (2019) DLT 581.
21 Sanjaya Bahel v. Union of India, W.P.(C) 981/2019 & CM APPL. 4407/2019 & 6592/2019.

Organization for the non-observance of due process in his case. In response, the ministry stated that the consent of Government of India is not required to initiate a legal suit against the United Nations Organization as it is not a foreign state and is only an internal organization. Further, the ministry stated that the United Nations Organization and its officials enjoy immunity under the United Nations (Privileges and Immunities) Act, 1947. Challenging the extent of operation of this immunity, the petitioner filed a writ petition before the Delhi High Court. Examining the maintainability of the petition, the High Court reiterated that a writ under Article 226 lies only when the petitioner establishes that his or her fundamental right or some other legal right has been infringed by the State or other authority under Article 12 of the Indian Constitution. Since in the instant case, United Nations Organization is not a 'State' within the meaning of Article 12, the writ petition was dismissed.

In *Sowmya Reddy v. State of Karnataka*[22], the petitioners challenged the order issued by the District Magistrate of Bengaluru under section 144 of the Code of Criminal Procedure. The order, which applied to the entire city of Bengaluru, was issued in light of the protests against the Citizenship Amendment Act. The order was issued by the Commissioner of Police, acting as a District Magistrate, on the basis of reports from Deputy Commissioners of Police. It also directed that the permissions granted for any protests would stand cancelled. The Court observed, relying on the precedent laid down in *Anuradha Bhasin v. Union of India*[23] that a District Magistrate has to carefully inquire into the issue and form an opinion that immediate prevention. This formation of opinion was held to be a condition precedent to the exercise of power under section 144. The Court held that there was no indication of such inquiry or formation of opinion from the order and that the District Magistrate did not apply an independent mind to the facts of the case. Further, the Court held that a Commissioner exercising power under section 144(1) of the Code must act as a District Magistrate. Hence, he must inquire and form a reasoned opinion instead of acting as a police officer and relying on the opinions expressed by other officers, particularly superior officers. The Court held the order to be illegal as it was an unreasoned order with no formation of opinion that took away the fundamental rights of the citizens.

2. Contributions

This Edition of IJCL features a mélange of essays, articles and case comments by young academics, practitioners, and students alike. The themes covered in these pieces touch upon constitutional law issues of contemporary relevance- the abrogation of Article 370 and the reorganization of Jammu and Kashmir, weak form constitutional review, constitutionality of the law of criminal defamation and judicial accountability. This Edition also hosts scholarship on constitutional law questions from Bangladesh and China and thus, provides its readers food for thought in areas of both Indian constitutional law and comparative constitutional law.

The Articles section of this Volume begins with John Sebastian and Aparajito Sen's fascinating exploration of the role of consent within a privacy rights analysis by studying the Supreme Court's recent constitutional jurisprudence. The authors argue that the Court has

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[22] Sowmya Reddy v. State of Karnataka, Writ Petition No.52731 Of 2019.

[23] Anuradha Bhasin v. Union of India, 2020 SCC Online SC 25; See also D. Mukhopadhyay & A. Gupta, *Jammu & Kashmir Internet Restrictions Cases: A Missed Opportunity To Redefine Fundamental Rights In The Digital Age*, 9 Indian. J. Const. L.208 (2020).

recognised an autonomy-rich conception of dignity, which focuses upon an individual's continued capacity to make autonomous choices. This both enhances and limits the role of consent in privacy – while consent is an important factor to be considered by courts, it does not completely determine whether a person can effectively claim a right to privacy. The authors then situate this understanding of consent within the doctrinal tools adopted by the Court to adjudicate privacy claims – the reasonable expectations test and proportionality. The authors conclude with the observation that consent is an important variable, but does not operate in an 'all-or-nothing' manner, and has to be balanced with other factors such as the autonomy of the individual, public interest and the rights of others.

In their article, M. Jashim Ali Chowdhury and Nirmal Kumar Saha examine the power of constitutional amendment in Bangladesh. The authors dissect the 2011 amendment to the constitution of Bangladesh, which has included a very widely framed perpetuity clause and, also, a very vague reference to the basic structure doctrine and consider the fragilities of these two parallel tracks to unamendability. Chowdhury and Saha show how a median line could be drawn by installing a system of popular referendum in the constitution amendment process. On this basis, they make a case for a reformulated version of the referendum system that was introduced in Bangladesh in 1979 but scrapped by the amendment of 2011.

Devashri Mishra and Muskan Arora put to test the constitutionality of the law of criminal defamation. In their piece, the authors seek to consolidate tools in the form of uncanvassed constitutional arguments that must be considered by the Supreme Court in a challenge to the law of criminal defamation, as they ought to have been in *Subramanian Swamy v. Union of India*. Mishra and Arora move past anecdotal accounts of the colonial origins of this law to examine its history, and intent, as well as its presence in modern India as the 'afterlife of colonialism'. On this basis, they make a compelling argument that the law on criminal defamation should be struck down for falling foul of the standard of a 'reasonable restriction' under Article 19(2). Placing reliance on the proportionality review as well as constitutional values that India's jurisprudence espouses, the authors criticise the Swamy judgment to finally advocate that defamation must be solely a civil offence.

In their piece, Rangin Pallav Tripathy and Chandni Kaur Bagga assess the information disclosure practices of the judges of the Supreme Court. The authors find that there exists a pervasive reluctance in judges to disclose essential educational and professional details. The authors argue that it is insincere to expect the public to trust judges when people have limited information about them. By exploring the democratic foundation of the idea of public faith in the judiciary, Tripathy and Bagga contend that people need information about the judges they are expected to trust and that judges have the primary responsibility to adopt robust disclosure practices and share more about themselves.

Kashish Mahajan explores the topical issue of abrogation of Article 370 of the Constitution and the consequent dilution of the special status and bifurcation of Jammu and Kashmir. The author examines the constitutional validity of the legal measures adopted to effectuate these changes and contends that the Legislative Assembly of the State can be construed to mean the Constituent Assembly of the State thereby keeping the mechanism for the abrogation of Article 370 alive. The paper also lays down a legal standard for the kinds of decisions that may be taken by the President and the Parliament during the operation of President's rule and argues that the actions of abrogating

Article 370 and bifurcating the State of Jammu and Kashmir are unconstitutional when tested against this standard. Lastly, the paper discusses the scope of judicial review in the instant case by analysing previous decisions of the Supreme Court on matters of executive and legislative policy.

The article by Anirudh Belle examines what Mark Tushnet had referred to as the "weak-form" system of judicial review. The author argues for weak- form review in India as a system that breaks away from the traditional contrasts between legislative and judicial supremacy, and which better protects rights by reallocating powers between the legislatures and the courts. In order to make his case for the adoption of weak-for review, Belle outlines the evolution of judicial review in India and explores the arguments made for weak-form review and concerns that are commonly placed against it.

Wenjuan Zhang delves into the debate of whether China has constitutionalism and offers a new analysis framework for examining the same. The author highlights the theoretical development of Constitutionalism in English Literature and reviews the evolution of constitutional design to show the struggling journey of the constitutional transition from revolution oriented to the rule of law direction. Zhang then introduces the constituted form in the Chinese constitution and analyses it from the perspective of popular sovereignty. Testing the Chinese constitution designing and practice against the proposed analysis framework, the author concludes that China has a thin version of constitutionalism.

The Essays section of this Volume features powerful and thought-provoking pieces.

True to form, Abhinav Sekhri's essay launches a spirited challenge of Article 22 of the Indian Constitution. The essay is of immense significance given the wanton abuse of preventive detention within India, particularly in Jammu and Kashmir, in the last year. Sekhri tactfully argues that the protections guaranteed by Article 22, particularly the minimum threshold that it sets for legislatures, is painfully inadequate and subverts the ideal of safeguarding individual liberty against legislative tyranny. He asks, "is it time, then, to rid the Constitution of Article 22?"

Prannv Dhawan's essay revisits the controversial issue of appointment of judges to constitutional courts in India. It attempts to address the inadequacies of the collegium system, while underscoring the need to safeguard the institutional independence of the judiciary. Prannv's solution entails rigorous public scrutiny and debate about the judicial appointment process in a bid to increase objectivity and transparency. In an attempt to address the recurring judicial-political discord, the author proposes that the judiciary and other branches of government must engage in meaningful dialogue.

Volume 9 also features two powerfully written case comments on recent decisions delivered by the Supreme Court.

Shrutanjaya Bharadwaj comments on the Supreme Court's recent decision in *Chebrolu Leela Prasad Rao v. State of Andhra Pradesh*, better known as the 100% reservation judgement. Bharadwaj strikes at two aspects of the Court's decision with surgical dexterity. First, it is argued that the court erroneously interpreted the non-obstante clause in Paragraph 5(1) of Schedule V of the Constitution. Second, the Court's ruling that the non-obstante clause cannot override Article 14 of the Constitution, is contested on the grounds that the basic structure doctrine has been held

to apply prospectively, and that since the basic structure is a reflection of the original Constitution, it cannot be violated by an original provision.

Devdutta Mukhopadhyay and Apar Gupta provide an inside account of the twin decisions by the Supreme Court concerning internet shutdowns in Jammu & Kashmir in the last year – *Anuradha Bhasin v. Union of India*, and *Foundation for Media Professionals v. U.T. of Jammu & Kashmir*. The authors reveal how the principled recognition of a derivative fundamental right to internet access without any tangible relief in *Anuradha Bhasin*, required a second round of litigation on the same issues in *Foundation for Media Professionals*. They then critique the absence of any form of judicial review by the Court despite endorsing the proportionality standard in both judgements. It is also pointed out that these cases are an aberration from other cases in which the 'national security' defence has been advanced by the state, in that previous cases involved some form of facial review. The authors' then turn their focus to the negative and positive conceptions of a derivative fundamental right to internet access, criticizing the Court's non-enforcement of the former, and cursory dismissal of the latter. Although the Court failed to meaningfully check excesses by the executive in these cases, the authors contend that both decisions possess precedential value for future litigation.

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