

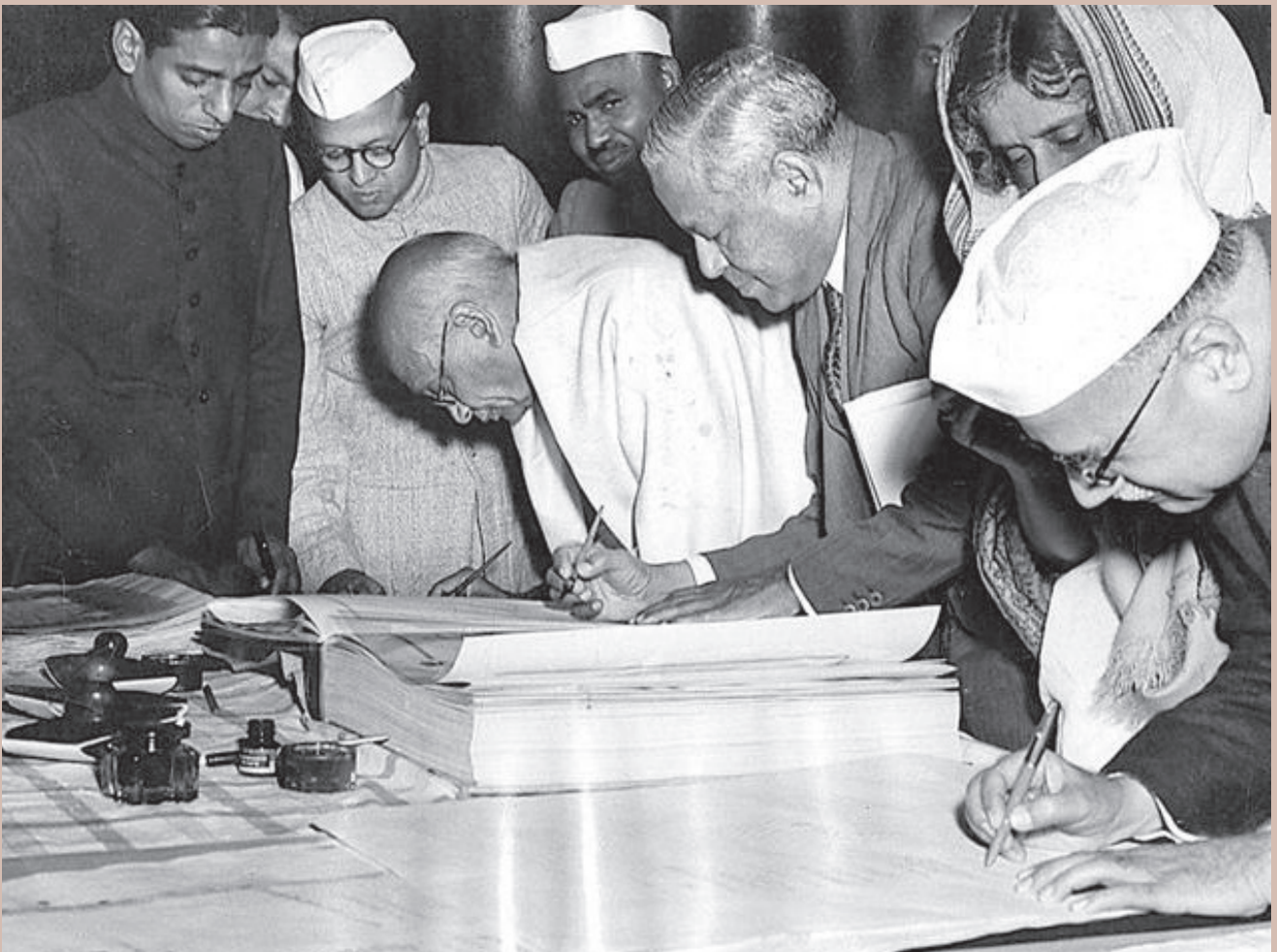


SUPREME COURT OF INDIA

The  
**Constitution**  
At **67**



# THE CONSTITUTION AT 67



**SUPREME COURT OF INDIA**







# Foreword

On this day, sixty-seven years ago, the people of this great nation gave to themselves a unique document – the Constitution of India – which was a result of long deliberations and research made by the eminent members of the Constituent Assembly. The Constitution is a dynamic and living document embodying a way of life towards the progress of the nation, the society and the individual and that is why, it has been aptly said:-

“Constitution is not a mere lawyers document, it is a vehicle of Life, and its spirit is always the spirit of Age.”

Nothing can express the potentiality of the power of an idea than the celebration of the Constitution Day on the 26th of November each year and the idea gets more fructified when the Bench and the Bar have a combined celebration. The salubrious purpose is to stand and live by the Constitution. The goal has its primacy and paramountcy. Last year it was decided that the 26th of November that had witnessed the participative celebration as the Law Day should be dedicated to the Nation for celebrating the Constitution Day. It has been done without affecting the Bar's observance of the Law Day.

The present volume commemorating the Constitution Day reaffirms our faith that the Supreme Court armed with the Constitution assures that cultural, economic and political India in all its diversities and differences exists for all Indians. The articles in this volume by Judges of the Supreme Court, senior advocates and academicians manifest the spectrum of constitutional issues which rapidly changing India faces in the context of the Supreme Court jurisprudence evolved from case to case since independence.

A very valuable contribution to this commemorative work encompasses manifold thoughts and perceptions covering many a range such as The Myth and Reality of Article 14 in the Light of Growing Inequalities, Creative Role of Supreme Court of India in Enlarging and Protecting Human Rights, Uniform Civil Code and the Quest for Gender Justice, Interpreting and Shaping the Transformative Constitution of India, Access to Justice and Legal Services in the Constitutional Framework of India, The Doctrine of the Invisible Constitution, A Relook at the Basic Structure Doctrine in the Context of Unenumerated Fundamental Rights, Judicial Perspective of Harmony Between Fundamental Rights and Directive Principles of State Policies in India for Protecting Democratic Norms, Fragments from a Manuscript, Anti-Defection Law in India – A Study of Emerging Problems and Issues and Curative Jurisdiction of the Supreme Court and it also covers Supreme Court on the Constitutional Position of the President of India, Role of the Judge in a Democracy, Impact of GST Laws on the Federal Structure of the Indian Constitution and Poverty as a Challenge to Human Rights.

This volume celebrates the freedom of thought and opinion in the conjoint struggle to create an India of composite culture respecting its diversity, plurality and heritage of faiths and ways of life with justice for all and prejudice to none under our Constitution. There is no doubt that professionals, academics and ordinary citizens will find it practically useful and inspirational. The contents of the articles are to be read and appreciated being wedded to the concept of cultivated reading that embraces catholicity of approach and a sense of objectivity which should always mirror a possible correlative in the constitutional framework.



[DIPAK MISRA]

New Delhi,

26th November, 2017

The Members of the Souvenir Committee:

- |    |  |           |
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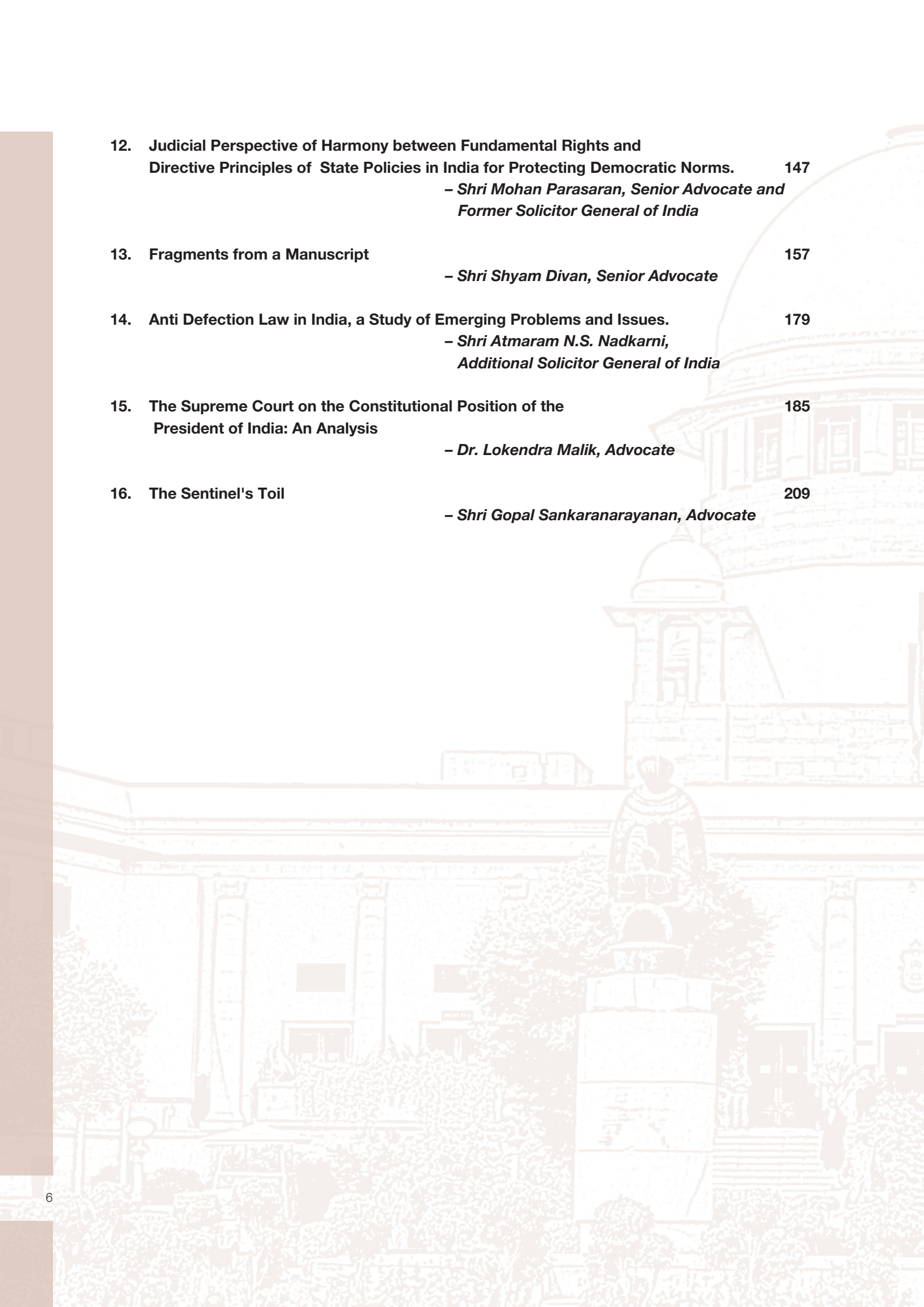
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# Fundamental Duties in the Indian Constitution

Justice Kurian Joseph\*

## Introduction:

The Constitution of India envisages a holistic approach towards civic life in a democratic polity. Certain rights have been guaranteed within the Constitution as Fundamental Rights. Additionally, the Constitution incorporates certain duties called Fundamental Duties. For the true success of a democracy, it is imperative that citizens assume responsibilities and discharge their duties in a sincere manner. The concept of Fundamental Duties is an attempt to reiterate the fact that the citizens have some duties towards the State, the society and towards each other.

The Fundamental Duties were incorporated in the Constitution through the 42nd Amendment in 1976. The Constitution of India, as it stands today, contains eleven duties which though not justiciable in Court, serve as a constant reminder to the citizens that while the Constitution confers upon them certain Fundamental Rights, it also requires them to observe certain basic norms of good behavior.

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\* Judge, Supreme Court of India

## FUNDAMENTAL DUTIES IN THE INDIAN CONSTITUTION

- **Article 51-A(a) - Duty to abide by the Constitution and respect its ideals and institution, the National Flag and National Anthem.**

The first duty assigned to every citizen is to abide by the Constitution and respect its ideals and institutions, the National Flag and National Anthem. The Constitution, National Flag and the National Anthem are symbols of our history, sovereignty, unity and pride. The ideals of the Constitution, such as justice, equality, liberty and fraternity, as mentioned in the Preamble, have to be obeyed and practiced by every citizen in their every day life. If we make an endeavor to respect these ideals then the society will become a better place to live in.

- **Article 51-A(b) - Duty to cherish and follow the noble ideals which inspired our national struggle for freedom.**

In the struggle for freedom, thousands of people sacrificed their lives for the sake of our

country. It is our duty to remember the sacrifices made by our forefathers for the cause of our freedom and to cherish and follow the noble ideals which inspired our freedom.

- **Article 51-A(c) - Duty to uphold and protect the sovereignty, unity and integrity of India.**

It is the duty of every citizen of India to protect the sovereignty, unity and integrity of India. The expressions unity and integrity have their place in the Preamble of the Indian Constitution as well. As per Article 19 (2), reasonable restrictions can be placed on freedom of speech and expression in the interest of the “Sovereignty and Integrity of India.” There are also statutory provisions (such as provisions in the Indian Penal Code, 1860) to protect the sovereignty and integrity of India. While unity and integrity are important ideals, they should not be used to impose one particular way of living on all citizens. The strength of India lies in its diversity and while striving to achieve unity we must keep this diversity in mind.

- **Article 51-A(d) - Duty to defend the country and render national service when called upon to do so.**

Clause (d) enshrines a Fundamental Duty entrusted to the common man as indicated by the expression “when called upon to do so”. The performance of this duty is obviously contingent upon the citizens being called upon to defend the country and render national service. The fundamental duty as it stands

does not give any pointers as to whether the said duty extends only to situations of external aggression/war or if the citizens can also be called upon to deal with an armed rebellion and if so, what should be the gravity of the rebellion for the State to call forth people. It is essential to remember that militarising a large part of the population without proper checks may itself pose a danger to the sovereignty and integrity of the country.

- **Article 51-A(e) - Duty to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religion, linguistic or sectional diversities and to renounce practices derogatory to the dignity of women.**

As mentioned before, the strength of India lies in its diversity and an attempt must be made to preserve that. However, it is important to treat all citizens equally irrespective of their language, religion, ethnicity, etc. The Constitution of India grants equality before law and equal protection of laws without any consideration to any of the aforesaid factors.<sup>1</sup> The Right to Freedom of Religion is also guaranteed to all the citizens in India.<sup>2</sup> The second part of this duty deals with gender justice and exhorts citizens to renounce practices derogatory to women. Legislations such as The Protection of Women from Domestic Violence Act, 2005, The Protection of Women from Sexual Harassment

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1 Article 14, Constitution of India.

2 Articles 25-28, Constitution of India.



at Workplace (Prevention, Prohibition and Redressal) Act, 2013, recent amendments to criminal law are all intended to safeguard the interests of women. In *Hiral P. Harsora and Ors v. Kusum Narottamdas Harsora and Ors*<sup>3</sup>, Section 2 (q) of the Protection of Women from Domestic Violence Act, 2005 was challenged and it was held by the Supreme Court that the respondent under section 2(q) should not be limited to 'adult male' and those two words have been removed from the definition clause. Consequently, the proviso was struck down. In the scheme of the Act, to have the complete household protection as intended by the Act, the Court was of the view that the respondent should include any family member in the shared household irrespective of gender. However, it is essential to point out that the State and the Courts can only work in conjunction with the citizens, it is also the duty of the citizens to renounce such practices on their own volition and treat women with the respect and dignity that they deserve.

- **Article 51-A(f) - Duty to value and preserve the rich heritage of our composite culture.**

India has witnessed the coming together of various cultures, religions, linguistic and social groups. India has also been the birthplace of major religions. The presence of so many majestic monuments of great archeological value- from temples to palaces and stupas to mosques reflects the rich past and culture

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3 (2016) 10 SCC 165

of our nation. It is unfortunate that there are instances of vandalizing of monuments and archeological sites, stealing of art treasures for the purposes of smuggling and private hoarding. The degradation of monuments of national importance due to the callous indifference and inaction on the part of the elected governments as well as the citizens is also very common. This clause imposes a positive duty upon every citizen to save and protect our rich and vibrant heritage. The future generation has at least the same right to enjoy the fruits of our spiritual legacy and to benefit from the same. It therefore becomes the ardent duty of every citizen to ensure that these monuments and pieces of art are not in any way damaged, disfigured, scratched, or subjected to vandalism or greed of unscrupulous traders and smugglers.

- **Article 51-A(g) - Duty to protect and improve the natural environment including forests, rivers and wildlife, and to have compassion for living creatures.**

In ancient India, nature was worshipped and regarded as sacred. The rate at which environment degradation is taking place is quite alarming and is threatening to wipe out our very existence. There are rising instances of frequent natural calamities which consume thousands of human lives every year. Under the guise of development, we have caused mindless destruction of our natural resources. The purpose behind Article 51-A (g) is to remind the citizens of their responsibility

towards the environment. Given the way human beings are treating the environment, the zeal for conservation of environment has to come from within or else we will reach the point of no return.

- **Article 51-A(h) - Duty to develop scientific temper and spirit of inquiry and reform.**

The observance of this duty is extremely relevant in the Indian context where people practice various superstitious rituals. This duty seeks to make an appeal to the citizens to discard the outdated ways of thinking. Scientific temper includes within its ambit objectivity and individuality, open mindedness and humility, unexacting nature and perseverance. The appeal is essentially to shed the superstitious beliefs or dogmas that have invaded the minds of the citizens due to a misconstruction of religion.

- **Article 51-A(i) - Duty to Safeguard Property and Abjure Violence.**

It is extremely unfortunate that in a country founded on the Gandhian ideal of non violence, this duty is one of the most breached ones. In recent times, it is not uncommon to hear news about gory violence on an everyday basis. The citizens must strive to follow this duty in letter and spirit, on their own volition. It is high time that we realize our duty of safeguarding public property and of renouncing all sorts of violence.

- **Article 51-A(j) - Duty to strive towards**

**excellence in all spheres of collective activity so that the nation constantly rises to higher levels of endeavor and achievement.**

Excellence is a virtue which is the demand of time in all spheres of individual and collective activity. The term 'excellence' requires a person to undertake the best of the efforts and strive to continuously improve himself in whatever activity he chooses to pursue. However, excellence is not synonymous with important and high paying jobs. Our society is inter-dependent and the role of every individual is equally important in all walks of life, regardless of their position in the pecking order.

- **Article 51-A(k) - Duty to provide opportunities for education to children between the age of six and fourteen years.**

The Right to Free and Compulsory Education for children between the age group of 6 to 14, is a fundamental right under Article 21-A. A corresponding duty was added in the form of Article 51-A(k) upon the parents or guardian of the child to ensure that the child is made to avail the right to education provided by the State under Article 21-A of the Constitution of India. Thus, the only positive obligation imposed upon the parents is to ensure that they support the endeavor of the State, by ensuring that their child is admitted in a school and not put to work for extra income. The need for educating our children cannot be overemphasized especially because a majority



of our population consists of children and youth. Education builds the foundation of life and no person in today's time can hope to live a reasonable and decent life without being educated.

## **WORKING TOWARDS NEW DUTIES**

As discussed earlier, the current set of Fundamental Duties in Part IV-A of the Constitution of India were added in the year 1976. The only Fundamental Duty that was added post the 1976 Constitutional Amendment is contained in Article 51A(k) i.e. the duty of every parent or guardian to provide opportunities for education to his child between the age of six and fourteen years. This duty was inserted through the 86th Constitutional Amendment in 2002.

Since then, the scope of Fundamental Rights under Part III of the Constitution has seen significant expansion through judicial pronouncements. As a result, an imbalance has been created between the current set of Fundamental Rights and Duties. With the advent of technology, new obligations have arisen that members of the society owe to each other and to the country. Along with that, certain duties that are essential to any democracy need to be reinforced within the current context so as to instil a new sense of civic responsibility.

(i) **Duty To Vote:** Active participation by citizens in the election process is the cornerstone of any democracy. India has

provided us with a Constitution which provides the citizens the right to vote. Article 326 of the Constitution read with Section 62 of the Representation of People's Act, 1951 confers the right to vote. Voting is considered as our civic duty determining our future and hence the citizens need to play a part in shaping it. Voting provides the citizens with an opportunity to benefit the society through their involvement in the democratic process. It has often been noted that the turnout in general elections is quite low. This voter apathy should be taken seriously and an attempt should be made to make voting a citizenship obligation. The Indian law permits its voters to cast a negative vote by voting for None of the Above (NOTA) and if the voters do not like any candidate in their Constituency, it is open to them to vote in favour of NOTA. What is important is the expression of the right as it would compel the political parties to take the expectations of the citizens more seriously.

(ii) **Duty to Pay Taxes:** The duty to pay taxes springs from providing the State with its means of existence. The State performs essential functions like maintenance of law and order, education, regulation of trade etc. and its ability to perform these functions is contingent on the fact that it has the finances to do so. All these functions are paramount for the civic organization of society. Without taxes, the very existence of the State would be in peril. Therefore, the duty to pay taxes becomes a salient part of

one's citizenship. The incorporation of the duty to pay taxes as part of Fundamental Duties in the Constitution will shift the onus on the taxpayer to pay taxes rather than the tax department to collect them. This reassertion of a citizen's moral duty to pay taxes may result in a much more effective and robust system of collection.

**(iii) Duty To Keep the Premises Clean:**

Prime Minister Narendra Modi's Swachh Bharat Mission has received tremendous support from people from all walks of life. In *M.C. Mehta v. Union of India & Ors.*<sup>4</sup>, the Supreme Court recognized the need for behavioural change and stressed upon the need for awareness. While issuing directions to the Municipalities, it noted that:

"Children should be taught about the need for maintaining cleanliness commencing with the cleanliness of the house both inside and outside, and of the streets in which they live. Clean surroundings lead to healthy body and healthy mind."

The most effective mechanism to tackle uncleanliness is to sensitize people about this duty. Therefore, it is imperative that a Fundamental Duty to this effect be added to the Constitution.

**(iv) Duty To Help Accident Victims:** Often accident victims complain about how none

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4 (1988) 1 SCC 471

of the bystanders lend a helping hand. Accident cases require fastest care and help can be provided by those close to the scene of the accident and that is why Good Samaritans need to be empowered. With the increase in number of accidents, it is important for the State to recognise this as a duty which citizens owe to one another.

**(v) Duty To Afford Opportunities Of Rest, Play And Leisure To Children:**

Article 31 of the United Nations Convention on the Rights of the Child declares that, "State Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts". Article 29 states that "the education of the child shall be directed to.....the development of the child's personality, talents and mental and physical abilities to their fullest potential". The denial of right to play to children mainly seems to be a result of the shift in the cultural values of our society. The recognition of the right to play is absent in Indian households where disproportionate emphasis is laid on academic activities and the rights of children are sacrificed at the altar of academics.

Right to Play, though trivialized and misunderstood in our country, is an inalienable right of children. In order to ensure compliance with this avowed objective of our Constitution, it is necessary to ensure that the enjoyment of the right to play is made available to children in



India. A duty must be added in Chapter IV-A upon the parents to provide such opportunities within their means.

(vi) **Duty to Prevent Civil Wrongs:** A responsible citizenry is actually the backbone of the State. Any violation of law and any disturbance to public order by disorderly conduct is a wrong done to society. It is not enough that a citizen refrains from committing wrong; he has a duty to see that fellow citizens do not indulge in the commission of wrongs. Citizens also have a duty to prevent commission of civil wrongs by taking appropriate action. It is common to see people breaking the law by littering the streets and vandalising public property. The well meaning citizens of the country have a duty to inspire compliance of the law because they can dissuade wrongdoers from indulging in such activities by arousing their conscience. This way they can make the wrongdoers see the ill effects of their action.

(vii) **Duty to raise voice against injustice:** Today people seem to have stopped reacting to atrocities; they neither report crimes nor volunteer to testify in a court. The duties of a victim or a witness can be classified into two main categories, viz. duty to report a crime and duty to testify in court. The State must also on its part work to ensure that the fight to justice does not become a nightmare for the victim or witness.

(viii) **Duty to Protect whistle-blowers:** With the coming into force of the Right to Information Act, 2005, every citizen has become a “potential whistle-blower”. While the State has a great deal of responsibility in providing for their protection through appropriate legislative instruments, the responsibility to protect torchbearers of transparency vests on each one of us.

(ix) **Duty to support bona fide civil society movements:** Citizens have a moral duty to organise themselves or support citizen groups so that the gaps in governance left by the executive can be filled and the rights guaranteed by the Constitution are made available to every citizen. Therefore, it is proposed that there must be an addition to Part IV-A of the Constitution to that effect.

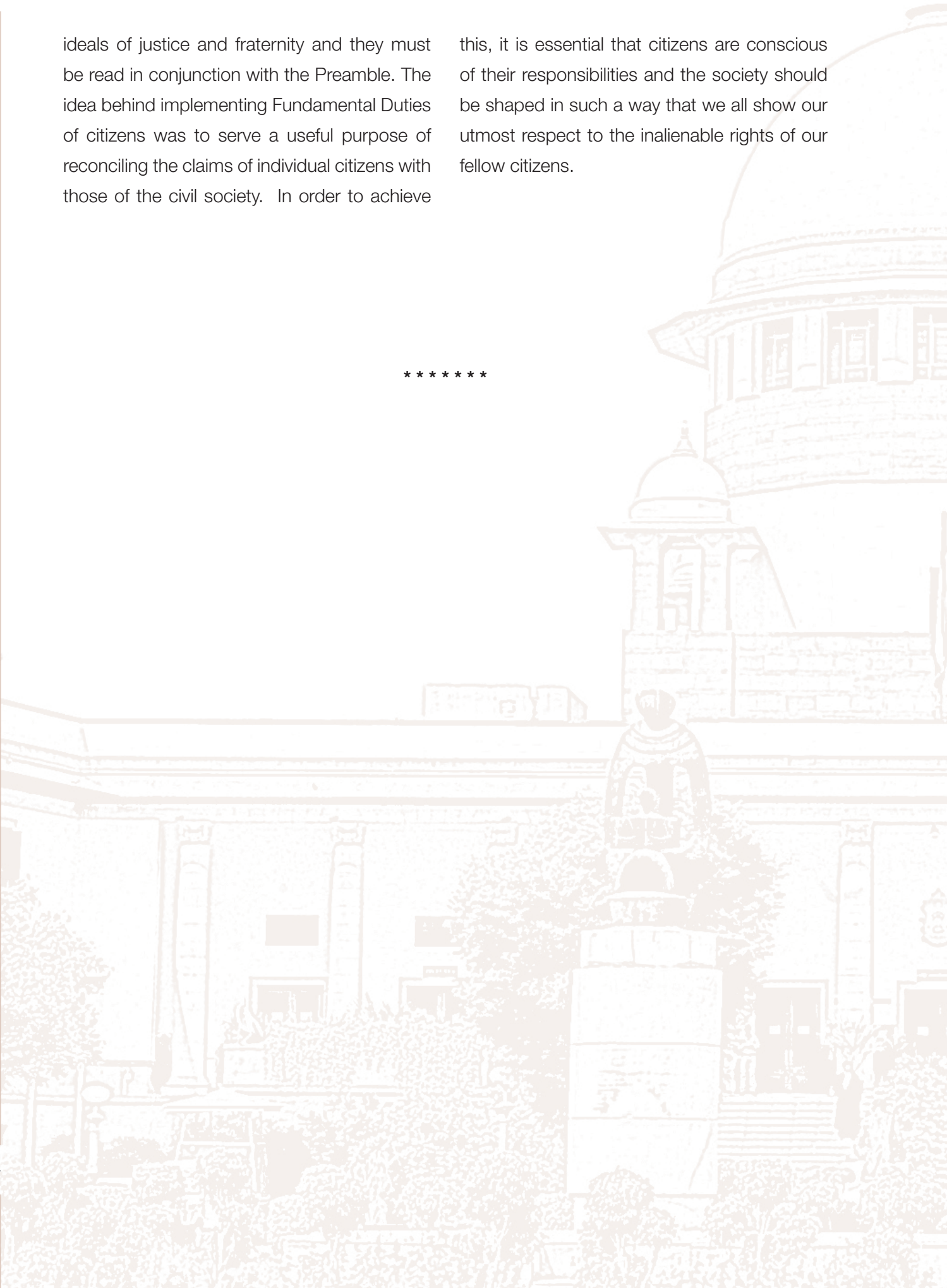
## CONCLUSION

The chapter on Fundamental Duties was added based on the recognition that in order to be successful, a democracy requires active participation of the citizens in the process of governance through the proper discharge of their civic duties. The eleven duties mainly pertain to abiding by the Constitution and respecting its ideals, promoting harmony and spirit of common brotherhood, development of scientific temper, humanism and the spirit of inquiry and striving for excellence in all spheres of individual and collective activity. These duties have an intimate connection with the

ideals of justice and fraternity and they must be read in conjunction with the Preamble. The idea behind implementing Fundamental Duties of citizens was to serve a useful purpose of reconciling the claims of individual citizens with those of the civil society. In order to achieve

this, it is essential that citizens are conscious of their responsibilities and the society should be shaped in such a way that we all show our utmost respect to the inalienable rights of our fellow citizens.

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# Role of the Judge in a Democracy\*

Justice A.K. Sikri\*\*

## Introduction: Why This Topic?

Why to have memorial lectures?

I see the importance of these lectures in two ways. First, we remember and tell the noble soul that we have not forgotten you. Secondly, we also tell him that on this occasion we are saying on solemn affirmation that we would endeavour to tread the path which was led by your wisdom.

When I was invited to give Justice Hans Raj Khanna Memorial Lecture, I treated it as an honour given to me. At the same time, I was in little dilemma about the topic which I need to choose for this lecture. So much is said and written about Justice Khanna during his life time and thereafter. Therefore, the challenge was to say something new or, at least, in the manner in which his personality has not been projected earlier and, at the same time, it should also be befitting his stature and aura. While deliberating in my mind on this aspect, it suddenly struck me that Justice *Aharon Barak*, the former Chief Justice of the Supreme Court

of Israel, has written a book titled ***The Judge in a Democracy***. I found that Justice Khanna is one Indian Judge who can be treated as a role model for how a Judge needs to acquit himself/herself in a constitutional democracy.

In any democracy, though governed by the rule of law, moments come when people face and suffer dark forces of division and State suppression. In Indian context, we underwent this period during the Emergency days between 1975-1977. It is during this period the liberty and freedom of the people were suppressed with the oppression exercised by the State machinery. As is well-known, numbers of persons were taken into preventive custody. Spate of *Habeas Corpus* writ petitions came to be filed in various High Courts. These writ petitions were contested by the State with the plea that during the Emergency citizens did not enjoy any fundamental rights as these rights, including right to life and personal liberty enshrined in Article 21, stand suspended. Rejecting this contention of the State, many High Courts issued the writ

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\*H.R. Khanna Memorial Lecture, delivered on October 13, 2017 at New Delhi, India

\*\*Judge, Supreme Court of India

declaring preventive detention to be bad in law and ordering the release of the detainees. The matter then reached the Supreme Court and the judgment of the Supreme Court in **ADM Jabalpur & Ors. v. Shivkant Sukla**<sup>1</sup> was the outcome. Plea of the State was accepted by the Supreme Court by a majority of 4:1. Lone dissenting voice was that of Justice H.R. Khanna who proved to be a valiant soul and embodiment of strength and tenacity. Justice Khanna was the lone dissenter. In his dissent, he stated: *‘what is at stake is the rule of law ... the question is whether the law speaking through the authority of the Court shall be absolutely silenced and rendered mute...’*. He rejected the ruthless formalism of law and its *Kafkaesque* outcomes. The Nazi Regime too had been strictly legal, he tersely observed, in response to the argument that detention was legal. On that day, he single-handedly defended our cherished values and dreams from being trampled by the forces of tyranny.

This sacrifice came at a great cost. Next in line to become the Chief Justice of India, he was superseded, and he eventually resigned. It was not that he did not possess any inkling of the repercussion. In his autobiography **Neither Roses Nor Thorns**, Justice Khanna writes of what he had told his sister – *‘I have prepared my judgment, which is going to cost me the Chief Justice-ship of India’*, he said to her. Despite knowing of an adverse outcome, he did not flinch or waver and remained true to his oath.

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1 (1976) 2 SCC 521

This lone crusader of democracy upheld the dignity of the Court during the most testing times and has been immortalized for this act ever since. The New York Times, on April 30, 1976, came out with an editorial which has become a classic and is cherished by many. It said:

*“If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first eighteen years as an independent nation, someone will surely erect a monument to Justice H.R. Khanna of the Supreme Court. It was Justice Khanna who spoke out fearlessly and eloquently for freedom.”*

He may not have had a monument erected in his honour (notwithstanding the portrait adorning the Court Room No.2 of the Supreme Court), but more than 41 years after the infamous **ADM Jabalpur** decision, Justice Khanna’s uncompromising integrity and courage has been rewarded. The Supreme Court, in its recent landmark judgment in **Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.**<sup>2</sup> (famously known as the Right to Privacy case), set aside the majority judgment in **ADM Jabalpur**. The Nine Judge Bench finally granted an imprimatur of authority to the revered and lauded dissent of Justice Khanna, which has been the shining beacon through the murkiness of our Democracy. Justice D.Y. Chandrachud observed that:

*“The view taken by Justice Khanna must be accepted, and accepted in reverence for the*

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2 (2017) SCC Online SC 996



*strength of its thoughts and the courage of its convictions.”*

Justice R.F. Nariman included Justice Khanna's dissent in one of the three great dissents of Indian Judiciary.

Therefore, I say that Justice Khanna, an audacious personality, showed courage and independence in upholding human rights, the rule of law and the independence of the judiciary. He upheld the Constitutional democracy. This continues to inspire and remind generations of Judges of their role in a democracy.

So, what is the role of a Judge in a Democracy that Justice Khanna fulfilled? This question has perplexed jurists, philosophers and Judges for as long as democracies have existed. It is the question which Justice Khanna faced and provided us the answer by his action. No doubt, Justice Khanna has inspired me to choose this topic. At the same time, I am inspired by Justice Aharon Barak, retired Chief Justice of the Supreme Court of Israel.

In the words of *Justice Aharon Barak*, *'each Judge is a distinct world unto himself. Ideological pluralism and not ideological uniformity is the hallmark of judges in a legal system'*. The common thread amongst all the diverse opinions, however, is that every Judge has a minimum role and responsibility in a constitutional democracy. This emanates from the Constitution, the fundamental ethos of a democracy and extends beyond mere dispute resolution. On that parameter, he delineates

two basic roles which judges are supposed to perform in a democracy and these are: (i) to uphold the Constitution and the rule of law; and (ii) to bridge the gap between the law and the society.

## **The First Role:**

Let me advert to the first role, namely, protecting the Constitution and upholding the rule of law in a democracy. Here, let us first understand fundamental of the Constitution. In the first place, we are talking of democracy in a constitutional set up, i.e. as provided under the scheme of our Constitution. In this sense, a constitutional democracy is not merely a formal democracy which is a Government of majority rule (of, by and for the people), but a substantive one. Let me explain here the basic feature of this constitutional democracy. It enshrines values such as the Rule of law, separation of powers, the independence of judiciary, human rights, political, social and economic justice, dignity, equality, peace and security. *Justice Aharon Barak* calls these values *'the inner morality of a democracy'*, ones which make a democracy a substantive democracy.

The American jurist, *Ronald Dworkin*, in his book ***A Bill of Rights for Britain***, had described a true democracy as:

*"not just a statistical democracy, in which anything a majority or plurality wants is legitimate for that reason, but communal democracy ...*

*where everyone must be allowed to participate in politics as an equal ... political decisions must treat everyone with equal concern and respect. Each individual must be guaranteed fundamental civil and political rights which no combination of other citizens can take away, no matter how numerous they are or how much they despise his/her race or morals or way of life.”*

The values of a constitutional democracy are protected by the Constitution, a formal document which enjoys a normative supremacy over the general law of the land by defining the roles and powers of the State. The three wings of the State are supposed to act within the domain prescribed by the Constitution. It also specifically limits their interference with individual rights which are enshrined as fundamental rights in Part III of the Constitution. Our Constitution also recognizes ascendancy to the substantive values of the democracy over its formal rules and acts as a counter-balance to majoritarianism.

Let me also explain the significance of common law for advancing and realizing the goals set out by the Constitution. We have adopted common law system in this country, which of course is given to us by the Britishers. What is significant about common law is that it indelibly marks our constitutional system of parliamentary democracy. Its central pillar is the rule of law. Its guardians are the Judges. They have preserved and protected this pillar through consistent renewal to meet the needs of time and circumstance. Evidence based fact

and reason based interpretation have been the principle judiciary deals for this purpose and for advancing the precepts of rule of law in a common law system.

Rule of law is the basic feature of our Constitution. In that sense, common law jurisprudence is imbibed in our Constitution, though impliedly.

Like the common law, the Constitution ensured separation of powers. And most uncommonly it relied on the Judge to ensure that all power in India delivered, in letter and spirit, the kind of India that the Constitution mandated. Power of judicial review of legislative as well as executive actions makes the judiciary final arbiter. From the year 1950 onwards, the Judge, especially in the constitutional courts, became the centre piece of the Indian State not only as the testing point of Parliamentary authority and Executive actions, but also the agency to ensure that institutions delivered justice, political, economic and social, to all Indians. The Indian judiciary was the common law guardian armed with the power of judicial review to make it function according to constitutional ethos, morality and values to ensure constitutional fraternity. The Fundamental Rights Chapter empowered it to ‘enforce’ equality and reasonableness as spelt out in it. The Directive Principles Chapter informed it about the reasonable Indian society as a fundamental principle of India’s governance, of which the judiciary constituted a critical part.



This very broadly described scheme of the Constitution brings out one distinctive feature. No doubt, the principle of separation of powers is a back bone of the constitutional system. It ensures that the power is not concentrated in the hands of any one Government branches and that they operate independently. The three branches of the Government, namely, Legislature, Executive and the Judiciary, play an equally important role in the governance of the country and there are checks and balances as well. At the same time, insofar as the Judiciary is concerned, not only its independence is ensured (which again is treated as inalienable basic feature of the Constitution), it is also given power of judicial review. This power extends to administrative/executive as well as legislative function. Thus, any act of the executive is amenable to challenge and it is the Judiciary which is to ultimately decide as to whether the said executive act was within the domain of the Executive. Likewise, the validity of any law made by the Legislature can be tested by the Judiciary in exercise of its rights of judicial review and to find out that the particular statute was within its powers (and not *ultra vires*) and also that it did not infringe any provision of the Constitution, including fundamental rights. In that sense, Judiciary becomes the final arbiter when it comes to testing the acts of the other two pillars of the State, namely, the Legislature and the Executive. Enforcement of laws is the function assigned to the Judiciary and it is the Judiciary which has to ultimately determine as to what a particular law is, by interpretative process.

This makes the impartial independent Judge the corner stone of the constitutional edifice. In his inaugural address at the Bangalore Judicial Colloquium in the year 1988, the late Chief Justice of India, P.N. Bhagwati, underlined this by stating, inter alia: *'The Bill of Rights can at best only enumerate the broad and general statements of human rights. But to positivise them, to spell out their contours and parameters, to narrow down their limitations and exceptions and to expand their reach and significance by evolving component rights out of them while deciding particular cases, is a task which the judicial mechanism is best suited to perform, provided of course the judges are fiercely independent and have the right attitudinal approaches.'* In a globalised world there is a global understanding that the role of a Judge in a democracy is meaningful only if the Judge is independent and impartial. Accordingly, the 1997 Beijing Principles on the Independence of the Judiciary in the Law Asia Region summarised the role of Judge in Article 10 in terms of the following objectives:

- (a) To ensure that all persons are able to live securely under the rule of law;
- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- (c) to administer the law impartially among persons and between persons and the State.

When we keep in mind the aforesaid pivotal

role of the Judiciary, it becomes apparent that the major task of the Judge is to protect the Constitution and rule of law, and thereby the democracy itself.

## Protecting The Constitution

Thus, first role is that of protecting the very Constitution under which a Judge has been appointed. How this is achieved? This part was performed by the majority Judges who decided the case in ***His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.***<sup>3</sup>, when they held that the Parliament, representing the sovereign will of the people, could not use its amending power to alter the basic structure or framework of the Constitution. Above all, it could not use its amending power to shut out judicial review for finding whether a statute enacted by a Legislature is in respect of the subject for which judicial review has been excluded. In this sense, judiciary protects the Constitution by striking down unconstitutional constitutional amendment, when it is found to be offending the basic feature of the Constitution. What are the parameters that a Judge must take cognizance of in deciding the width, scope and span of the power to amend the Constitution. Justice H.R.Khanna used a two pronged approach. First, how to protect the fundamental rights in the context of the unquestionable need for public welfare, and second, how to preserve the right of the future generation to seek their own destiny as they may like to see it. The first he achieved by holding that while the power of amendment of the Constitution could not

be denied by describing fundamental rights as natural rights or human rights, yet the '*basic dignity of man does not depend upon the codification of fundamental rights, nor is such codification a prerequisite for a dignified way of living.*' The right to property was not part of the basic structure of the Constitution. The second he achieved by declaring that there were no implied limitations on the power of amendment.

In a telling passage of *Judge Learned Hand* in ***The Contribution of an Independent Judiciary to Civilization***, he indicated the limits of the judicial role, by stating *inter alia*: '*...but this much I think I do know - - that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.*' Five years later in 1978 the 44th Constitution Amendment deleted the right to property from Article 19 of the Constitution.

A critical test of the judicial role in preserving the essence of the Constitution by going beyond it came up in ***ADM Jabalpur's*** case. Justice Khanna's voice rang out loud and clear concerning judicial review even when Article 21 has been suspended during an Emergency. In a lonely struggle as part of a five Judge Bench, he declared: '*I am unable to subscribe to the view that when right to enforce the right under Article 21 is suspended, the result would be that there would be no remedy*

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3 (1973) 4 SCC 225



*against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right as part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right . . . Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making this less favorable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as a fundamental right; because of the vulnerability of fundamental right, accruing from Article 359.'*

Two years later, in 1978, the 44th Constitution Amendment solved the problem for good by declaring that Article 21, along with Article 20, would remain unaffected by the Presidential Order under Article 359.

The role of the Judge on political questions was crystallised in the case of **Minerva Mills Ltd. & Ors. v. Union of India & Ors.**<sup>4</sup> by a five Judge Bench. The Court would decline to entertain a controversy which is political in character. Pure political questions are outside its domain. However, where the question related to the interpretation of the Constitution,

it is the duty of the Supreme Court to interpret it regardless of the fact that the answer to the question would have a political effect.

Again there was the brooding presence of Justice Khanna from the **Kesavananda Bharati's** case 'that all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour their decision.'

The protection of constitutional democracy necessitates an independent judiciary that protects not only its own independence but also the base of a parliamentary democracy - free and fair elections. In **People's Union for Civil Liberties v. Union of India** (NOTA Case), the Supreme Court developed the already established concept of democracy as a basic feature of the Constitution to hold that free and fair elections are the necessary means for ensuring this basic feature. It declared: "Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion.

<sup>4</sup> (1980) 2 SCC 591

Protection of elector's identity and affording secrecy is, therefore, integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Secrecy is required to be maintained for both category of person." Further, "Giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. In **Kihoto Hollohan v. Zachillhu & Ors.**<sup>5</sup>, concerning the validity of the Xth Schedule of the Constitution the Court held: "Democracy is a part of the basic structure of our Constitution and rule of law and free and fair elections are basic features of democracy. The judiciary constantly tried to purify the electoral process to protect this basic feature. In **Common Cause (A registered society) v. Union of India & Ors.**<sup>6</sup> while dealing with the issue of money power in elections, the Supreme Court held that the Election Commission has power under Art 324 to ask the candidates about the expenditure incurred by them and their political party for ensuring the purity of elections, which is fundamental to democracy. In 1998, **Vineet Narain & Ors. v. Union of India & Anr.**<sup>7</sup>, the court spelt out its obligation under Article 32 to protect and enhance fundamental rights even in the absence of legislation by Parliament, as emanating from Art.32 and the Beijing Statement of Principles of Independence of the Judiciary in LAWASIA region. Continuing

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5 1992 Supp. (2) SSC 651

6 (1992) 2 SSC 752

7 (1998) 1 SSC 226

the right to know declarations in **State of U.P. vs Raj Narain & Ors.**<sup>8</sup>, the judicial role in a democracy based on free and fair elections was further enhanced by declaring that in a nation wedded to republican and democratic form of government, where election of an MP or an MLA is of the utmost importance for governance of the country, voters have a right to know relevant particulars of their candidates. Accordingly, Article 324 is a reservoir of power to ensure free and fair elections even in the absence of a law by Parliament. Voters had a right to know the criminal antecedents, the educational qualification and the assets and liabilities of the candidate.

I am deliberately eschewing the discussion on the development of human rights jurisprudence and the manner in which, through the method of purposive interpretation of legal text as well as bold and expansive interpretation of the fundamental rights, particularly, Articles 14, 19 and 21 of the Constitution. The Courts have liberally interpreted the concept of equality as well as the meaning of the words 'life', 'liberty' and 'law' in Article 21. I have avoided discussion on this aspect only because of the reason that this itself would consume substantial time and we will deviate from the fulcrum of the topic. However, some of the judgments which have social impact would be referred to by me while discussing the second function of the Judge, viz., bridging the gap between the law and the society.

With this, I advert to the aforesaid second function.

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8 (1975) 4 SSC 428



## The Second Role:

### ***Relationship between Law and Society in a Democracy***

In order to describe the second role, it is necessary to first understand the relationship between the law and the society. The law sets down the legal norms and thereby controls and governs the behaviour of the society. At the same time, there are certain ethical and moral norms which the society lays down for itself from time to time. Without going into the discussion insofar as connect between the law and morality is concerned, suffice is to say that in many areas there is an overlap between the law and the morality. Many laws are influenced by moral and ethical values, thereby converting those moral norms into legal norms and, in the process, providing consequences for violating these norms. In this context, there has always been a debate as to whether societal norms influence the law making or it is the law, prescription thereof, which leads to change in the behavioural norms in the society. Short answer would be that at times it is the society which influences a particular law making and at times it is the law which changes the society. In this process, in exceptional circumstances, judges act as catalyst, though that is not their normal function. This happens while accomplishing this second role of bridging the gap between the law and the society.

In a modern and democratic society, the objective of the rule of law should not be simply to maintain peace in a frozen or paralyzed state. Rather, the rule of law should have the

dynamism of life itself, and it should adapt itself to the constant process of transformation which characterizes all living organisms. Law is a fact of transformation and growth of human society, and it is the Judiciary that ensures that this process takes place in an orderly, non-violent, and peaceful fashion, while at the same time contributing towards greater justice.

How a judge, in a democratic society, performs the role of bridging the gap between law and society? It is done in two ways:

#### **(I) Interpretative Process**

One way is by interpretative process, i.e. by giving purposive interpretation to the statutes. No doubt, the Legislature makes the law, however, while enforcing that law by applying the same in a given case; it is the Judge who states, by interpretative process, what actually the law is. It is, therefore, a myth that a Judge merely states the law and does not create it. The reality is that, while interpreting a statute and declaring what the Legislature meant thereby, Judge is the final arbiter in deciding as to what law is. So, what is interpretation of law? It means the extraction of legal meaning from semantic meaning, the translation of “human” language into “legal” language. An interpretation system must resolve the relationship between text and context, words and its spirit.

In both constitutional and statutory interpretation, a judge must sometimes exercise discretion in determining the proper

relationship between the subjective and objective aspects of the law. A Constitutional interpretation is however, very different from a statutory one. To quote **Justice Dickson** of Supreme Court of Canada, who rightly enunciated the difference:

*“The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental powers and, when joined by a Bill or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted its provisions cannot be easily repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind”*

The words of **Holmes** while dealing with the U.S. Constitution said:

*“The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.”*

The Supreme Court and High Court of our country have a rich tradition of interpreting the Constitution and upholding its values. The laws are often interpreted to incorporate principles of human rights, democracy, social justice and equality.

In **State of Karnataka & Anr. v. Shri Ranganatha Reddy & Anr.**<sup>9</sup>, the Court speaking through Justice Krishna Iyer observed:

*“The social philosophy of the constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril.... Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a sociocultural vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality. A Judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension I his complex duties.”*

In **Dattatraya Govind Mahajan & Ors. v. State of Maharashtra & Anr.**<sup>10</sup> he observed;

*“Our Constitution is a tryst with destiny, preamble with lucent solemnity in the words*

9 (1977) 4 SCC 471

10 (1977) 2 SCC 548



*'Justice- Social, economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of those high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country's struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation... Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice"*

Thus, the role of a judge today is charged with the job of bridging the gap between law and society. The role of a judge today is to understand the purpose of law in society and to help the law achieve its purpose. In most cases, if not all, a change in the law is the result of a change in social reality.

As Barak puts it, the legal norm is flexible enough to reflect the change in reality naturally, without the need to change the norm and without creating a rift between law and reality. Often however, the legal norm is not flexible

enough, and it fails to adapt to the new reality. A gap may be formed between law and society. It is this gap that judges seek to fill in the form of interpretation and Judicial Activism. The judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life's changing reality without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs.

The attempts of the Courts to bridge the gap between provisions of existing law and the requirements of justice, is the occasion for the development of new dimensions of justice by way of evolving juristic principles within the framework of law for doing complete justice according to the current needs of the society. It is the quest for justice in the process of administration of justice which occasions the evaluation of the "New Dimensions of Justice", the phrase used by Justice J.S. Verma, former Chief Justice of India. The new dimension is actually not really a new dimension. It only seeks first to bridge the gaps in existing laws, and then it fulfills the needs of the society by evolving juristic principles within the framework of law and with the objective of doing complete justice.

As I understand, such cases, where gap between the law and the society can be bridged, with the objective of doing complete justice, through interpretative process, may fall in two categories:

(a) Where there is a clear recognition of a right in the law and the society also accepts such a right. Still it is found that in reality that particular class which is given the right in law is not able to enjoy the same and is deprived thereof. The judge in such a case enforces the right and bridges the gap. Examples in this category would be the cases of child labour, bonded labour, trafficking, etc.

(b) In second category, those cases would fall where the society recognises or accepts a particular right and there is a legal norm as well. However, having regard to the fact situation, by applying the technique of purposive interpretation, the scope of the right is widened thereby achieving the purpose of justice and bridging the gap between the law and the society. The Supreme Court has done so by invoking its powers under Article 142 of the Constitution. For example, passing orders of termination of pregnancy of a raped minor girl even when pregnancy is for more than twenty weeks, which is the limit prescribed under the Medical Termination of Pregnancy Act, 1971, after verifying from medical experts that such termination would not endanger the life of the pregnant women/girl<sup>11</sup>.

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11 Though Section 3 of the Medical Termination of Pregnancy Act, 1971 prescribes the limitation of twenty weeks beyond which the termination is impermissible, this provision has become outdated having regard to the advancement in medical science which ensures safe termination of pregnancy even after it is more than twenty weeks old. In a particular case where termination is in the interest of the pregnant women/

Another example is the recent judgment of the Supreme Court in **Independent Thought v. Union of India & Anr.**<sup>12</sup> wherein sex with a minor (even when she is a wife) is treated as rape, after finding dichotomy in law insofar as child marriages are concerned.

Likewise, it is by purposive interpretation that rights of destitute women, persons with disability and children have been expanded.

In 2013, the Supreme Court in **Badshah v. Urmila Badshah Godse & Anr.**<sup>13</sup> while recognizing the duty of a Judge to bridge the gap between law and society, and the need to give a purposive interpretation to the provisions of Section 125, Cr.P.C. stated “*While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve “social justice” which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the*

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girl and also in larger public interest, the powers are exercised by the superior courts making it a classical case of bridging the gap between the law and the society.

12 Writ Petition (C) No. 382 of 2013, decided on October 11, 2017.

13 (2014) 1 SCC 188



*gap between the law and society.*” Likewise, awarding a compensation of Rs.10 lakhs to a disabled person, who was deboarded from a plane by an airline, the Court observed:

“41. Earlier the traditional approaches to disability have depicted it as health and welfare issue, to be addressed through care provided to persons with disabilities, from a charitable point of view. The disabled persons are viewed as abnormal, deserving of pity and care, and not as individuals who are entitled to enjoy the same opportunities to live a full and satisfying life as other members of society. This resulted in marginalising the disabled persons and their exclusion both from the mainstream of the society and enjoyment of their fundamental rights and freedoms. Disability tends to be couched within a medical and welfare framework, identifying people with disabilities as ill, different from their non-disabled peers, and in need of care. Because the emphasis is on the medical needs of people with disabilities, there is a corresponding neglect of their wider social needs, which has resulted in severe isolation for people with disabilities and their families.

42. However, the nations have come a long way from that stage. Real awareness has dawned on the society at large that the problems of differently-abled are to be viewed from human rights perspective. This thinking is reflected in two major declarations on the disability adopted by the General Assembly of the United Nations on 20-12-1971 and thereafter in the year 1975. The position was reiterated in the Beijing Conclave by the

Government of Asian and Pacific Countries that was held from 1-12-1992 to 5-12-1992 and in order to convert the resolutions adopted therein into reality, the Indian Parliament also passed the enactment i.e. the 1995 Act.

43. All these rights conferred upon such persons send an eloquent message that there is no question of sympathising with such persons and extending them medical or other help. What is to be borne in mind is that they are also human beings and they have to grow as normal persons and are to be extended all facilities in this behalf. The subject of the rights of persons with disabilities should be approached from human rights perspective, which recognised that persons with disabilities were entitled to enjoy the full range of internationally guaranteed rights and freedoms without discrimination on the ground of disability. This creates an obligation on the part of the State to take positive measures to ensure that in reality persons with disabilities get enabled to exercise those rights. There should be insistence on the full measure of general human rights guarantees in the case of persons with disabilities, as well as developing specific instruments that refine and give detailed contextual content of those general guarantees. There should be a full recognition of the fact that persons with disability were integral part of the community, equal in dignity and entitled to enjoy the same human rights and freedoms as others. It is a sad commentary that this perception has not sunk in the mind and souls of those who are not concerned with the enforcement of these rights. The persons suffering from mental or

physical disability experience and encounter nonpareil form of discrimination. They are not looked down by people. However, they are not accepted in the mainstream either even when people sympathise with them. Most common, their lives are handicapped by social, cultural and attitudinal barriers which hamper their full participation and enjoyment of equal rights and opportunities. This is the worst form of discrimination which the disabled feel as their grievance is that others do not understand them.”

The approach adopted in aforesaid cases in order to advance the cause of justice, and in particular, to impart justice to the weaker and marginalized section of the society, is also known as, “*social justice adjudication*” or “*social context adjudication*”. Professor N.R. Madhava Menon has eloquently assigned following meaning to this manner of judging:

*“It is therefore, respectfully submitted that social context judging” is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the socio-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the*

*imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication.”*

Courts in India have adverted to this social context adjudication technique, by drifting from strict adversarial approach for dispensing equal justice.

## (II) Law Creating Process

By interpretative process the judge is required to fill the gap. In this hue, the judge decides what the law is and may lay down a new norm as well. In that sense, the judge may ‘create’ law. However, in this category I may refer to those cases where the Supreme Court has, in fact, assumed the role of Legislature in creating the law while enforcing the rights of a particular class of persons, thereby bridging the gap between the law and the society. It may be clarified that the discussion is confined to human rights aspect only.

A classical example where the Court endeavored to bridge this gap between the law and the society is the judgment in **Vishaka & Ors. v. State of Rajasthan & Ors.**<sup>14</sup> where Court dealt with the menace of sexual harassment of women at workplace. Taking aid of the International Convention (CEDAW) to which India is a signatory, the Court stepped in even when there was no law to tackle the aforesaid problem and laid down various guidelines with the direction that these guidelines would prevail till the Parliament steps

<sup>14</sup> (1997) 6 SCC 241



in and enacts a law. It is a matter of record that the Parliament has passed the law, *albeit*, after 16 years from the said judgment, in the year 2003 by enacting the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Another case which needs to be highlighted is **Aruna Ramachandra Shanbaug v. Union of India & Ors.**<sup>15</sup> dealing with the subject of passive euthanasia. Here again, there was no statutory framework to deal with this important facet of human dignity. Again, after extensively discussing the law in other nations/ jurisprudence and referring to earlier judgment in **Gian Kaur v. State of Punjab**<sup>16</sup>, the Court laid down the guidelines which are to be governed till the law is made by the Legislature. We may also refer to the NALSA judgment wherein rights of transgender as third sex have been recognised.

Likewise, in the **National Legal Services Authority v. Union of India & Ors.**<sup>17</sup>, the Supreme Court had observed that

*“The **basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up.** Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard*

15 (2011) 4 SCC 454

16 (1996) 2 SCC 648

17 (2014) 5 SCC 438

*of the people and to give opportunities to every person to develop his/her personality.*

[...]

*By recognizing TGs as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to TGs but also justice to the society as well. Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the TGs which legitimately belongs to them.”*

**D.K. Basu v. State of West Bengal**<sup>18</sup> is another example where the Supreme Court laid down specific guidelines which are required to be followed while making arrest.

## **BALANCING JUDICIAL RESTRAINT AND ACTIVISM – A NOTE OF CAUTION FOR THE FUTURE**

Let me touch upon the aspect of judicial activism, at this stage. Some of the judgments which I have mentioned above clearly reveal that judges have ‘created’ law thereby. However, I have chosen those judgments where the Supreme Court, by doing so, not

18 (1997) 1 SCC 416

only tried to bridge the gap between the law and the society but ensured that human right based on human dignity to a particular class becomes a reality. It is for this reason those judgments have always been commended by one and all for their scholarship, and thereby advancing the rule of law. At the same time, there are many other judgments, particularly those touching upon the policy matters or the governance etc. which are criticised on the ground that by entering into the said arena the courts have trampled into the domain that belonged to either the legislature or the executive and, therefore, violated the principle of separation of powers. It can be said that at times it may have happened. However, I am not touching that particular area in the present speech, which revolves around “rights issues” and the need for a judge to show “activism” in guaranteeing these rights.

At the same time, it has to be kept in mind that judicial activism and judicial overreach have different connotations. According to me, the concept of judicial activism is to be seen as judicial pragmatism, i.e. adopting a pragmatic approach to a particular issue, but at the same time confining this within the boundaries of law. Here the distinction is to be made between judicial activism and judicial restraint. There are various jurisprudential yardsticks propounded in this behalf.

However, in the context of today’s topic, I would like to borrow and adopt what Aharon Barak defines as judicial activism or judicial restraint. According to him, activism and self

restraint must relate to how well they realize the aforesaid twin judicial roles. Against this background, he defines judicial activism as under:

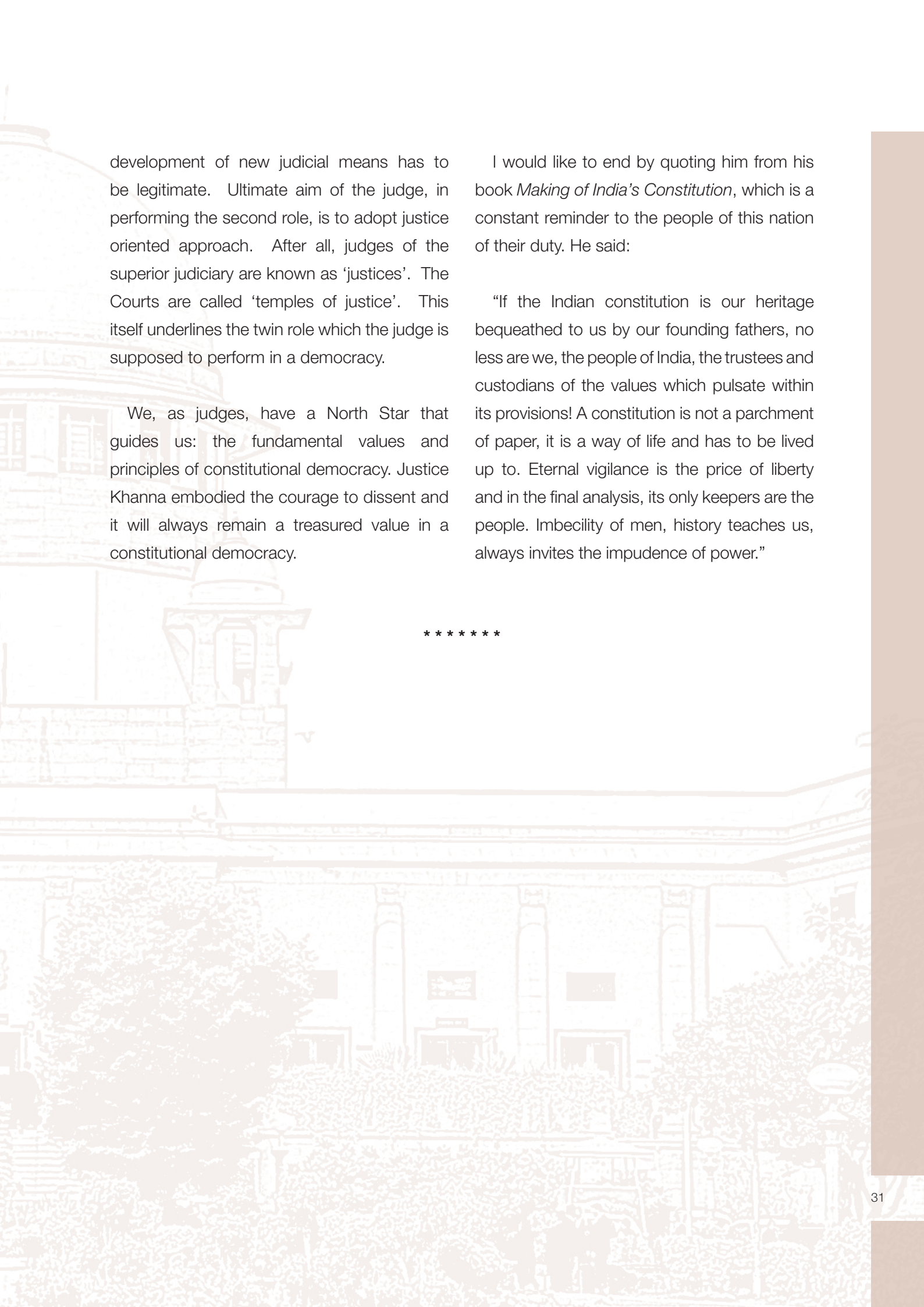
“judicial activism is the judicial tendency – conscious or unconscious – to achieve the proper balance between conflicting social values (such as individual rights against the needs of the collective, the liberty of one person against that of another the authority the authority of one branch of government against another) through change in the existing law (invalidating an unconstitutional statute i8nvalidating secondary legislation that conflicts with a statute, reversing a judicial precedent) or through creating new law that did not previously exist (through interpreting the constitution or legislation, through developing the common law).”

In contrast, he defines ‘self restraint’ as under:

“It is the judicial tendency – conscious or unconscious – to achieve the proper balance between conflicting social values by preserving existing law rather than creating new law. It finds expression in a judge’s reluctance to invalidate a legal policy that was determined in the past.”

Judicial activism, therefore, would not mean changing the law or creating new law. An activist judge tends to develop new means, including new systems of interpretation, in order to play an activist role. However, any





development of new judicial means has to be legitimate. Ultimate aim of the judge, in performing the second role, is to adopt justice oriented approach. After all, judges of the superior judiciary are known as ‘justices’. The Courts are called ‘temples of justice’. This itself underlines the twin role which the judge is supposed to perform in a democracy.

We, as judges, have a North Star that guides us: the fundamental values and principles of constitutional democracy. Justice Khanna embodied the courage to dissent and it will always remain a treasured value in a constitutional democracy.

I would like to end by quoting him from his book *Making of India’s Constitution*, which is a constant reminder to the people of this nation of their duty. He said:

“If the Indian constitution is our heritage bequeathed to us by our founding fathers, no less are we, the people of India, the trustees and custodians of the values which pulsate within its provisions! A constitution is not a parchment of paper, it is a way of life and has to be lived up to. Eternal vigilance is the price of liberty and in the final analysis, its only keepers are the people. Imbecility of men, history teaches us, always invites the impudence of power.”

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# Curative Jurisdiction of Supreme Court

Justice C.K. Thakker\*

## JURISDICTION OF SUPREME COURT

The Supreme Court of India is the highest court of the country established under the Constitution of India (Article 124). The Constitution confers on the Supreme Court original jurisdiction (Articles 32, 131), appellate jurisdiction (Articles 132, 133, 134), discretionary jurisdiction to grant special leave to appeal (Article 136), advisory jurisdiction (Article 143), plenary power for doing complete justice between the parties (Article 142), power to withdraw and/or transfer any case (Article 139-A), etc. Article 141 enacts that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Article 144 states that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court. The Supreme Court is a Court of Record and possesses all powers of a Court of Record including power to punish for its contempt (Article 129).

## POWER TO REVIEW JUDGMENT

Article 137 of the Constitution expressly provides that subject to the provisions of any law made by Parliament or any rules made under Article 145, it has power to review any judgment pronounced or order made by it.

Stated simply “review” means “to reconsider”, “to look again”, “to re-look” or “to re-examine” the case. It is thus a judicial re-examination of the case by the same court and by the same judge. It is also an exception to general rule that once a judgment is pronounced or order is made, the court becomes *functus officio* (ceases to have control over the matter). The remedy has a remarkable parity to a *writ of error*. The basic philosophy inherent in the recognition of the doctrine of review is acceptance of human fallibility. If there is an error due to human failing, it cannot be permitted to perpetuate and to defeat justice. Such mistakes/errors must be corrected to prevent miscarriage of justice. Justice is above all. It is a virtue which transcends all barriers. The law must bend before justice.<sup>1</sup>

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\*Former Judge, Supreme Court of India

## **ASHOK HURRA vs. RUPA BIPIN ZAVERI<sup>2</sup>**

In this case, a joint petition for divorce was filed on 30.06.1983 by husband and wife seeking consent divorce under Section 13-B of the Hindu Marriage Act, 1955. It was signed by both the parties. Both of them even appeared before the court. No decree for divorce, however, could be passed then. The matter was adjourned from time to time. All attempts of reconciliation failed. After six months of presentation of petition but before passing of divorce decree, the husband remarried to one Sonia on 18.08.1985. On 27.03.1986, the wife filed an application withdrawing her consent for divorce. The husband objected to withdrawal of consent. The Trial Court dismissed the petition for divorce holding that there was no consent by wife. Learned Single Judge of the High Court, however, granted divorce *inter alia* observing that the marriage has *irretrievably broken down* and reunion was not possible. But the Division Bench of the High Court set aside the said order. The husband approached the Supreme Court.

Keeping in view cumulative effect of various aspects including the one that from the new wed-lock, a child was also born, the Apex Court granted divorce subject to fulfillment of certain conditions. The review petition against the judgment was also dismissed.

## **RUPA ASHOK HURRA vs. ASHOK HURRA<sup>3</sup>**

Rupa Ashok then challenged the said decision in Ashok Hurra by invoking original jurisdiction of the Supreme Court under Article 32 of the Constitution. Initially, the matter was placed before a three Judge Bench. One of the questions which was raised before the Bench was whether a judgment of the Supreme Court (i.e. a judicial decision of a competent court) can be challenged by an aggrieved party under Article 32 of the Constitution of India. The three Judge Bench thought it fit that the said question should be considered by the Constitution Bench of the Supreme Court and accordingly, the question was referred to Constitution Bench.

## **CURATIVE JURISDICTION**

The Constitution Bench<sup>4</sup> noticed the relevant provisions of the Constitution<sup>5</sup> as also several decisions on the point<sup>6</sup>. It also noted that a party aggrieved by a decision of the Supreme Court may prefer a review petition under Article 137 of the Constitution. But further application of review is barred<sup>7</sup>. The Court, in the circumstances, held that in order to prevent abuse of process and to cure gross miscarriage of justice, it must be open to the court to reconsider its decision in exercise of its inherent jurisdiction.

To achieve the aforesaid object and to do full



and complete justice, the Apex Court devised a method which had been termed as “curative” petition. Speaking for the majority<sup>8</sup>, Quadri, J. stated;

“The concern of this Court for rendering justice in a cause is not less important than the principle of finality of its judgment. We are faced with competing principles - ensuring certainty and finality of a judgment of the Court of last resort and dispensing justice on reconsideration of a judgment on the ground that it is vitiated being in violation of the principle of natural justice or apprehension of bias due to a Judge who participated in decision making process not disclosing his links with a party to the case, or abuse of the process of the court. Such a judgment, far from ensuring finality, will always remain under the cloud of uncertainty. Almighty alone is the dispenser of absolute justice - a concept which is not disputed but by a few. We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question we are persuaded to hold that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in public interest that a final judgment of the final court in the country should not be open to challenge yet there

may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and cause perpetuation of irremediable injustice”.<sup>9</sup>

The Hon’ble Court, however, was conscious of inherent dangers of floodgates being opened under the name and style of ‘curative’ petitions. On the one hand, the Court was inclined to grant such opportunity to prevent the abuse of process of court and to prevent gross miscarriage of justice taking note of human fallibility, while on the other hand, it intended to deter unscrupulous litigants to institute repeated review petitions under the attractive label of ‘curative’ petitions.

The Hon’ble Court conceded that “it is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained”,<sup>10</sup> but stated that the petitioner is entitled to relief *ex debito justitiae* if he establishes –

- (i) violation of the principle of natural justice in that he was not a party to the *lis* but the judgment adversely affected his interests or, if he was a party to the *lis*, he was not served with notice of the proceedings and the matter proceeded as if he had notice,<sup>11</sup> and
- (ii) where in the proceedings a learned Judge failed to disclose his connection with the subject – matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.<sup>12</sup>

The Hon'ble Court proceeded to observe that in the curative petition, the applicant should aver specifically that the grounds mentioned therein had been taken in the review petition and that the review petition was dismissed by circulation. The Court also insisted that such curative petition must contain a certificate by a Senior Advocate stating that all the requirements had been fulfilled.<sup>13</sup>

The Hon'ble Court further stated that as the matter relates to re-examination of final judgment of the Supreme Court, though on limited grounds, the curative petition has to be first circulated to a Bench of three senior-most Judges and the Judges who passed the judgment complained of, if available. It is only when a majority of the learned Judges conclude that the matter needs hearing that it should be listed before the same Bench (as far as possible) which may then pass appropriate orders.<sup>14</sup>

## CONCLUSIONS

Curative jurisdiction of the Supreme Court is really an exception to the general rule that once a decision is rendered by a competent court, it has to be accepted. Keeping in view human fallibility only on limited grounds even after review, the Court has allowed the aggrieved party to invoke this extraordinary jurisdiction. It is submitted that the majority rightly held that such jurisdiction should be exercised in rarest of cases though one of the judges who concurred with the final judgment had some reservation whether it should be exercised in

exceptional cases<sup>15</sup>. The author, however, is of the opinion that the jurisdiction exercised by the Supreme Court under curative petition is extraordinary and exceptional in nature and should be exercised with extreme care, caution and circumspection.

1. S. Nagraj v. State of Karnataka: 1993 Supp (4) SCC 595; Sow Chandra Kante v. S K Habib, (1975)1 SCC 674: AIR 1975 SC 1500; Northern India Caterers v. Lt. Governor of Delhi; (1980) 2 SCC 167: AIR 1980 SC 674; A. R. Antulay v. R. S. Nayak, (1988) 2 SCC 602: AIR 1988 SC 1531; Lily Thomas v. Union of India, (2000) 6 SCC 224: AIR 2000 SC 1650; Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388: AIR 2002 SC 1771.
2. (1997) 4 SCC 226.
3. (2002) 4 SCC 388: AIR 2002 SC 1771.
4. S. P. Bharucha, CJI, SSM Quadri, UC Banerjee, S.N. Variava, Shivraj Patil, JJ.
5. Articles 32, 124, 131-34, 136, 137, 139, 139A, 140, 141, 142, 143, 144, Constitution of India.
6. Naresh Shridhar Mirajkar v. State of Maharashtra, (1966) 3 SCR 744: AIR 1967 SC 1; A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602: AIR 1988 SC 1531; Triveniben v. State of Gujarat, (1989) 2 SCC 678;



Krishna Swami v. Union of India, (1992) 4 SCC 605; Mohd. Aslam v. Union of India, (1996) 2 SCC 749; Khoday Distilleries v. Registrar General, Supreme Court of India; (1996) 3 SCC 114; Gurbachan Singh v. Union of India, (1996) 3 SCC 117; Babu Singh v. Union of India, (1996) 6 SCC 565; P. Ashokan v. Union of India, (1998) 3 SCC 56.

7. Order XL, Rule 5, Supreme Court Rules.

8. S.P. Bharucha, CJI, SSM Quadri, SN Variava and Shivraj Patil, JJ.

9. (2002) 4 SCC 388 : AIR 2002 SC 1771 (1787).

10. Ibid.

11. This is based on well known maxim "*audi*

*alteram partem*" ("hear the other side" or "no man should be condemned unheard" or "both the sides must be heard")

12. This principle is based on the doctrine of interest reflected in maxim "*nemo debet esse judex in propria causa*" ("no man shall be a judge in his own cause" or "adjudicating authority must be impartial and without bias").

13. It may be stated that after the decision in Rupa Ashok Hurra, the Registry of the Supreme Court has issued "Practice Note" on 15.04.2002 for compliance of requirements regarding filing of curative petitions.

14. (2002) 4 SCC 388 : AIR 2002 SC 1771.

15. Ibid, see concurring judgment of U.C. Banerjee, J.

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# 'Poverty as a Challenge to Human Rights'

K.K. Venugopal\*

On the occasion of the 68th Constitution Day, let us take stock as to what we have achieved during this very long period of almost seven decades with respect to the onerous task of alleviating poverty and restoring dignity to the poor.

I believe that it was Pope Francis who had said,

***“Human rights are not only violated by terrorism, repression or assassination, but also by unfair economic structures that creates huge inequalities.”***

We have been given in 1950 a very powerful Constitution and its outstanding characteristics is its egalitarian concepts woven into its Preamble and its chapter on Fundamental Rights. Among its vibrant provisions are Article 21 of the Constitution which protects life and personal liberty and above all the equality provision contained in Article 14 followed by Articles 15 and 16 and these together sum up the profound philosophy of the Constitution. The Preamble

declares justice, (social, economic, political), liberty and equality of status and opportunity among all and fraternity assuring the dignity of the individual and integrity of the nation. We find Articles which provide for the abolition of untouchability and prohibiting enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with the law. Begaar or any kind of slavery is abolished. This raises the question as to how far have we, as a people, been able to secure these lofty ideals of our founding fathers. We find that a vast percentage of the population of this country is living in utter-penury and this goes into hundreds of millions. The State has been unable to provide for universal education in the period of 70 years. The health services of the poor appears to be in shambles. Employment is still to achieve its goals.

The popular belief is that it is only torture, physical abuse and illegal detentions that would be comprehended within the concept of Human Rights. When I started researching the topic, it dawned on me that jurists and economists had been exploring this topic decades earlier. In fact, a mere perusal of the United Nations Universal Declaration of

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\* Attorney General for India

the Human Rights (UDHR) would show the multifaceted aspects which are acknowledged to be a part of Human Rights.

Over 65 years have passed since the UDHR in 1948. The declaration covered the traditional concepts of human rights, namely a statement that no one shall be subjected to torture or cruel and inhuman treatment or punishment; no one shall be subjected to arbitrary arrest, detention or exile and so on. But tucked away practically at the end of the declaration is Article 25 which reads as follows:

***25.1 "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."***

What is the reality behind the implementation of the declaration contained in Article 25? Today, those of us in developing countries, when we look around, we see a large population living in sub-human conditions; when our cars stop at traffic signals, one can scarcely fail to notice the people who crowd around near the window asking for food or money. There are persons sleeping on pavements on cold, wintry nights. Every day in newspapers we read about people in villages, far away from the comfortable lives that we lawyers lead, who are compelled

to eat roots to fill their stomach, as they are unable to have access to food; we hear of girl children being sold by mothers so that they may be able to feed the rest of their starving children; we hear of admission being refused in free government hospitals by the security guard at the gate, though the child was dying - because the mother had no wherewithal to pay the bribe that the guard demanded. We even read of the vast numbers of persons from the poorest corners of the world, being forced to migrate over large distances in search of food and employment. We have not experienced the extreme pain of the bitter cold biting into the bones of a pavement dweller at the height of winter, who had only a thin sheet to cover himself. Surely, all these cannot be consistent with the solemn declaration in Article 25 of the UDHR. I believe that it was Confucius who said:

***"In a country well governed, poverty is something to be ashamed of. In a country badly governed, wealth is something to be ashamed of."***

The statistics today make grim reading. The World Bank Development Indicators 2016, which has assessed the actual situation in regard to poverty, and is not based on estimates or projections, paints a tragic picture. According to the World Bank Development Indicators 2016, about 750 million poor people around the world are living in extreme poverty i.e. below the \$1.90 per day poverty line (before 2015, the poverty line was defined



by the World Bank at \$1.25 per day, which has been readjusted to \$1.90 accounting for price inflation). The United Nations estimates that as of 2012, more than 2 billion people lived on less than \$3.10 per day of which 900 million reside in the South Asian Countries. According to a UNICEF report titled 'State of the World's Children 2016', 46% of the world's population living in extreme poverty are children, with the United Nations 'Report on Sustainable Development Goals 2016' placing the number of children with stunted growth to be about 156.4 million as of 2014. The World's Women 2015 Report found that of the 781 million adults over the age of 15 estimated to be illiterate, 496 million were women. The report further concluded that women make up more than half the illiterate population in all regions of the world. More than 122 million youth globally, with about 60.7% of them being girls are illiterate, and are growing up without access to basic education. According to the UN Report on Sustainable Development Goals, cited above, between 2000 and 2015, the proportion of the global population using improved sanitation increased from 59 to 68 percent. Yet the plight of 2.4 billion people did not improve, and a staggering 946 million people, left without any sanitation facility at all, continue to practice open defecation.

It is not as if the poor are hungry because of lack of food. The world produces enough food to feed everyone. World agriculture produces 17 percent more calories per person today than it did 30 years ago, despite a 70 percent population increase. This is enough to provide

everyone in the world with at least 2,770 kilocalories (kcal) per person per day according to a 2012 Food and Agricultural Organisation estimate. However, the principal problem is that many people in the world do not have sufficient land to grow, or income to purchase, enough food. Poverty, conflict, disregard by the State and the lack of development result in the poor not being able to have access to this food which is produced in excess each year.

A long time back, as early as in 1876, the U.S. Supreme Court in a judgment in ***Munn v. People of State of Illinois*** 94 U.S. 113, had to say this:

***“No State ‘shall deprive any person of life, liberty, or property without due process of law,’ says the Fourteenth Amendment to the Constitution. By the term ‘life,’ as here used, something more is meant than mere animal existence”.***

The Supreme Court of India through Chief Justice P.N. Bhagwati, had expanded on this concept of the right to life not being a mere animal existence and declared in Francis Coralie's case [(1981) 1 SCC 608], that

***“right to life is not a mere right to life under Article 21 and cannot be restricted to mere animal existence. It means much more than just physical survival and that further that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate***

***nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in adverse forms, freely moving about and mixing and mingling with fellow human beings.... .”***

I had come across an article reported in the international press, which referred to findings published by Oxfam, which showed that just eight men own as much wealth as the poorest half of the world’s population. Oxfam had called this gap “obscene”. It should of course be mentioned that at least some of these eight men are known to be extremely charitable. Yet this statistic sheds light on the grossly inequitable world order that we now live in. The English author, John Berger once said: ***“The poverty of our century is unlike that of any other. It is not, as poverty was before, the result of natural scarcity, but of a set of priorities imposed upon the rest of the world by the rich. Consequently, the modern poor are not pitied...but written off as trash”***<sup>1</sup>.

Perhaps this is the reason why Mahatma Gandhi had once famously said ***“the world has enough for everyone’s need but not enough for everyone’s greed”***.

It is rather tragic that it took the world 45 years to recognize extreme poverty as violation of the Human Rights Charter: At the 1993 world conference on Human Rights, it was affirmed that extreme poverty and

social exclusion constitute a violation of human dignity. At the 1995 World Summit for social development held in Copenhagen, the international community committed itself to devising policies, strategies and concrete action aimed at the eradication of poverty. The UN proclaimed the decade between 1997-2006 as the International Decade for the Eradication of Poverty. It was for the first time in 2000 that all the then member states of the United Nations subscribed to the Millennium Development Goals. In 2015, the Sustainable Development Goals were adopted which aim at completely eradicating “extreme poverty” by the year 2030.

Very many thinkers and writers have had no hesitation in linking “dire poverty”, “absolute poverty” or “extreme poverty”, call it what you may, to an unequivocal violation of human rights. As the U.N. Commissioner for Human Rights, Mary Robinson, put it,

***“Extreme poverty...is the greatest denial of the exercise of human rights. You don't vote, you don't participate in any political activity, your views aren't listened to, you have no food, you have no shelter, your children are dying of preventable diseases - you don't even have the right to clean water. It's a denial of the dignity and worth of each individual which is what the Universal Declaration proclaims.”***

The Committee on Economic, Social and Cultural Rights stated in 2001 that poverty was

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<sup>1</sup> Jeremy Seabrook, The No Nonsense Guide To World Poverty



**“a human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights<sup>2</sup>”.** Extreme poverty, in turn, has been defined as **“the combination of income poverty, human development poverty and social exclusion<sup>3</sup>”**, where a prolonged lack of basic security and capabilities affects several aspects of people’s lives simultaneously, severely compromising their chances of exercising or regaining their rights in the foreseeable future<sup>4</sup>. The UN Human Rights Commission has specifically referred to “extreme poverty” as the key human rights concern of our times. One of the core aims of the Sustainable Development Goals, 2015, is to end extreme poverty by 2030.

Today every State extends to its people a catena of basic rights, fundamental rights and human rights. This includes the right to freedom of speech, right to property, right to move freely, the right to form associations and among others, the right to carry on one’s profession, trade or business. But to me, it seems that all these basic rights are meaningless to a whole population suffering from utter deprivation and poverty. Of what use is the freedom of speech if you do not have a job to fetch you two meals, you have no shelter, you have no access to medical facilities or to basic education. Poverty

2 (E/C.12/2001/10, para. 8)

3 (A/HRC/7/15, para. 13)

4 (see E/CN.4/Sub.2/1996/13)

engenders all these deprivations or conversely, the deprivation of all these basic rights is a sure and undeniable proof of the existence of dire poverty in that section of the population.

But it is the misfortune of these poor, disadvantaged sections of society that States have miserably failed in carrying out these obligations cast on them. In approaching this problem, one must remember that the Universal Declaration of Human Rights makes it clear that rights are not conferred by Government; they are **the birth right of all people** and Governments are bound to protect them. Poverty, anywhere in the world constitutes, at the most fundamental level, a denial of the rule of law. The reality is that the promise of equality, guaranteed by the United Nations Declaration of Human Rights and also the Constitutions of all our countries would ring hollow for an unconscionably large section of society even today.

We therefore arrive at the big question – who is to blame for these gross failures? As already stated, the easiest way out is to blame it on fate or on God. In such an event, one can treat the victims of intense poverty as invisible beings who had disappeared from sight and hence no more required amelioration by positive, overt action. The answer however, is provided by Scott Leckie, a renowned international human rights advocate, who in his paper presented in 1998 stated:

**“When someone is tortured or when a person's right to speak freely is restricted,**

**observers almost unconsciously hold the State responsible. However, when people die of hunger or thirst, or when thousands of urban poor and rural dwellers are evicted from their homes, the world still tends to blame nameless economic or 'developmental' forces or the simple inevitability of human deprivation, before liability is placed at the doorstep of the State. Worse yet, victims of such violations are increasingly blamed themselves for creating their own dismal fates, and in some countries even characterized as criminals on this basis alone".**

Treating poverty as a violation of human rights would also enable the Courts at the international and more importantly, at the national level, to enforce such rights. The Indian Supreme Court, for instance, has treated the various facets of poverty such as the right to food, right to shelter etc. as a part of the fundamental right to life under Article 21 of the Constitution of India, which declares that no person shall be deprived of his life or liberty other than through procedure established by law. This has enabled the Indian Courts to attempt to enforce these rights as they now create a positive obligation on the State.

The idea that ignoring poverty is a violation of human rights has also been propounded by some renowned academics. For instance, Pierre Sane, the Assistant Director-General Social and Human Sciences Sector of UNESCO had said in a paper published on poverty:

**"If, however, poverty were declared to be abolished, as it should with regard to its status as a massive, systematic and continuous violation of human rights, its persistence would no longer be a regrettable feature of the nature of things. It would become a denial of justice. The burden of proof would shift. The poor, once recognized as the injured party, would acquire a right to reparation for which governments, the international community and, ultimately, each citizen would be jointly liable.<sup>5</sup>"**

Tom Campbell in his paper titled "Poverty as a violation of Human Rights" says:

**"...approaching poverty through the prism of human rights is to lift it from the status of a social problem to that of an unavoidable imperative. To talk of poverty in terms of human rights violations is to endorse the parity and inter-connection of basic social and economic rights with fundamental civil and political rights... Torture is held to be unacceptable, poverty merely unfortunate. The idea of poverty as a human rights violation is clearly intended to send a powerful moral message that this bifurcation of human rights is a thing of the past."**

We have, therefore, come to the conclusion that the obligation and duty to enforce the

<sup>5</sup> Pierre Sane, 'Poverty, the next frontier in the struggle for human rights' Paper presented to an International Seminar on 'Poverty and Inequality in Brazil', Brasilia, 8-9 May 2003, p.4.



UDHR and the achievement of the Sustainable Development Goals, is primarily on the State. The Government would be violating Human Rights if it were not to take positive, concrete steps for the purpose of rescuing that section of the population suffering grievous poverty from its tentacles. This raises the further question, is the obligation one that the State alone has to discharge, or, are there other actors who have to participate in the exercise of eradication of poverty. Today we have in most of our countries, multi-national corporations which control industrial or business empires with all the trappings of a State. Their budget equals or exceeds that of an entire small country. Their employment goes into hundreds of thousands. The influence that they wield is so great that they can affect the future of people and Governments. They are **quasi states** and, therefore, would have to share the burden of eradicating poverty from within the sphere of their influence. I firmly believe that the time has now come for creative solutions. The international community cannot continue to rely solely upon the same methods that have been tried for decades. I had for a long time been suggesting that an obligation be placed on corporations with turnovers that exceed a certain pre-determined number to adopt villages, and make themselves responsible for the provision of basic amenities and facilities to the inhabitants of these areas. I am aware of some Indian companies both private and government, which have taken steps in this regard, since the “eradicating extreme hunger and poverty” is one of the aspects specified under the Indian Companies Act, 2013,

wherein companies may fulfill their obligations towards ‘Corporate Social Responsibility’. Imagine, if each company took upon itself such an obligation, we might be able to significantly cut short the battle against poverty. As the former President of the United States, Franklin Roosevelt once said,

***“The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.”***

In his book titled the ‘End of Poverty : Economic Possibilities for Our Time’, Jeffrey Sachs made some estimates as to what it would cost to end extreme poverty in the world in about twenty years and according to him, to end extreme poverty, the total cost per year would be about \$175 billion. This represents less than one percent of the combined income of the richest countries in the world and this cost is 0.7% of the total income of the 30 countries who comprised the Organization for Economic Co-operation and Development (OECD) in 2005. Jeffrey Sachs points out that ending global poverty by 2025 will require concerted efforts and actions by the rich countries as well as the poor, beginning with a “global compact” between the rich and the poor countries. The poor countries will have to take ending poverty seriously and will have to devote a greater share of their national resources to ending poverty rather than to war, corruption, and political infighting. The rich countries will need to move beyond the platitudes of helping the poor, and

follow through on their repeated promises<sup>6</sup>.

It is interesting that while rich countries find it difficult to meet their pledged donor assistance, annual expenditure on nuclear weapons is estimated at **US\$105 billion – or \$12 million an hour**. Now consider this World Bank's forecast in 2002 - an **annual investment of just US\$40–60 billion, or roughly half the amount currently spent on nuclear weapons by all countries**, would have been enough to meet the internationally agreed Millennium Development Goals on poverty alleviation (that is halving the number of global poor) by the target date of 2015 <sup>7</sup>. It is startling to see that the nuclear weapons spending in 2010 was more than twice the official development assistance provided to Africa and is equal to the gross domestic product of Bangladesh, a nation of some 160 million people<sup>8</sup>. Less than one per cent of what the world spent every year on weapons was needed to put every child into school by the year 2000 and yet it didn't happen<sup>9</sup>. Is the need for nuclear weapons in the modern world more important than saving the millions of poor from grinding poverty and providing for the most basic human needs like food, shelter and primary health care or sending a child to school?

6 Jeffrey Sachs, The End of Poverty, Chapter 14 – A Global Compact to End Poverty

7 <http://www.icanw.org/the-facts/catastrophic-harm/a-diversion-of-public-resources/>

8 <http://www.icanw.org/the-facts/catastrophic-harm/a-diversion-of-public-resources/>

9 State of the World, Issue 287 - Feb 1997, New Internationalist

I am reminded of a quote by Dwight D. Eisenhower, who had said:

***“Every gun that is made, every warship launched, every rocket fired signifies in the final sense, a theft from those who hunger and are not fed, those who are cold and are not clothed. This world in arms is not spending money alone. It is spending the sweat of its laborers, the genius of its scientists, the hopes of its children. This is not a way of life at all in any true sense. Under the clouds of war, it is humanity hanging on a cross of iron.”***

We cannot, therefore, escape from the conclusion that it is primarily the Governments concerned that have to ensure that their wealth is evenly distributed so that they achieve the pious hope in Article-1 of the UDHR, ***“all human beings are born free and equal in dignity and rights”***.

It is the lack of will on the part of Governments in regard to an entire class of deprived citizens, who are invisible because they do not mostly carry that great attraction to the powers-that-be, namely the vote. The poor migrants who move from place to place, trying to eke out a bare minimum livelihood while being on the verge of starvation stand totally excluded. They have to be given a voice, at least at the grassroots level, where the poor have to be represented by just one representative in the unit of local self Government. Their voice would



then be heard and once their voice is heard throughout the country, one could expect an indifferent Government to wake up and carry out its obligations under the UN Charter. We, who are passive spectators to this great wrong which is being done to thousands of our fellow countrymen, are equally to blame. The State, if in need of funds, would have to levy a cess on every individual on his income above a particular level. Every corporate entity, having a turnover above a particular level, will have to adopt a whole village to ensure that the poverty stricken population has access to the promise held out in Article 25 of the UDHR **“to a standard of living, adequate for the health and well being of himself and his family, including food, clothing, housing and medical care....and the right to security in the event of unemployment, sickness, disability...”**

No Government has the right to exist as a signatory to the United Nations Declaration on Human Rights and the various Conventions on Civil and Political as well as Economic, Social and Cultural Rights while allowing vast sections of its population to remain destitute, powerless and on the verge of starvation. I would end with the words of that great humanist Nelson Mandela, who said:

**“Massive poverty and obscene inequality are such terrible scourges of our times – times in which the world boasts breathtaking advances in science, technology, industry and wealth accumulation – that they have to rank alongside slavery and apartheid as social evils.”**

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# The Myth and Reality of Article 14 in the light of Growing Inequalities

Fali S. Nariman\*

Equality before the law is universally recognized. It has become an integral part of the written constitutions of nation-states around the world. Nearly 75 per cent of these Constitutions contain clauses about EQUALITY: a fundamental principle of modern democracy and of government based on the rule of law. In a book published in 1945 (then, the first of its kind), Sir Hersch Lauterpacht,<sup>1</sup> renowned jurist and president of the International Court of Justice, wrote about the pre-eminence of Equality in the governance of states:

“The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written Constitutions. It is the starting point of all other liberties.”

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\* Senior Advocate

1 Sir Hersch Lauterpacht was a scholar-judge who expanded the frontiers of law. It was he who expounded for the first time what came to be known as ‘the modern view’ of international law, which was that states, though primarily the subject of international law, were not exclusively so – a view that he introduced into the eighth edition of *Oppenheim’s International Law* (Cambridge University Press, Cambridge, 1945), which was edited by him. [Oppenheim (1858–1919) was a respected German jurist.]

But the “starting point of all other liberties” was not always successful in Courts – not even in the International Court of Justice: as was graphically illustrated when the practice of *apartheid* was first challenged before the International Court of Justice, in the *South West Africa Cases (1966)*. The charge before the Court by the Applicant States (Ethiopia and Liberia) was that South Africa had violated her international obligations by observing a system of ‘apartheid’ in the mandated territory of South West Africa, and had denied to its inhabitants the universal human right of equality before law and the right not to be discriminated against on account of colour or race – a bundle of rights, that had been expounded in the UN Declaration of Human Rights, (1948). In the *South West Africa Cases (1966)*, the International Court of Justice by the casting vote of its President, refused to deal with the merits of the submission of the applicant States. This furnished a glaring instance of how lawyers – and Judges as well – quite often miss the opportunity to right the wrongs of ages. Half of the Court’s members (including the Japanese member Judge Tanaka) were prepared to deal with the issue of

substance raised by the Complaining States. Judge Tanaka's judgment contains the best exposition in legal literature of the concept of Equality. The purple passages in that judgment have been reproduced in an Appendix, in *Ian Brownlie's Compilation of Basic Documents of Human Rights* – even though Judge Tanaka had voiced the dissenting view – not the majority view of the Court!

Judge Tanaka wrote<sup>2</sup>:

“Human rights have always existed with the human being. They existed independently of, and before, the State. Alien and even stateless persons must not be deprived of them. Belonging to diverse kinds of communities and societies – ranging from family, club, corporation, to State and international community, the human rights of man must be protected everywhere in this social hierarchy, just as copyright is protected domestically and internationally. There must be no legal vacuum in the protection of human rights. Who can believe, as a reasonable man, that the existence of human rights depends upon the internal or international legislative measures, etc., of the State and that accordingly they can be validly abolished or modified by the will of the State?”

“Under the constitutions which express this principle in a form such as ‘all citizens are equal before the law’, there may be doubt whether or not the legislators also are bound by the

principle of equality. From the nature of this principle the answer must be in the affirmative. The legislators cannot be permitted to exercise their power arbitrarily and unreasonably. They are bound not only in exercising the ordinary legislative power but also the power to establish the constitution. The reason therefore is that the principle of equality being in the nature of natural law and therefore of a super-constitutional character, is placed at the summit of hierarchy of the system of law, and that all positive laws including the constitution shall be in conformity with this principle.”

If Judge Tanaka's dissent had been the majority view of the International Court of Justice, pressures, which the nations of the world had begun to exert against South Africa only from the nineteen-eighties would have been exerted much earlier: The practice of Apartheid may well have been discontinued many years before, without the oppressed turning to the streets for redress! It may even have kept Mr. Nelson Mandela on the path which he first chose – of non-violent resistance – which, as a policy he later abandoned only after the Sharpville shootings of the nineteen-sixties. But these are some of the ‘ifs’ of History.

Nearer home, if Judge Tanaka's dissent had been noticed in the case dealing with the effect of the suspension of Article 21 (the Life and Liberty Clause in our Constitution) during the brief period of India's Internal-Emergency (imposed in June 1975), Chief Justice Ray may not have given expression to the facile view

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<sup>2</sup> See Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice 1996 at pages 284-296.



“that liberty itself is the gift of the law, and may by the law be forfeited or abridged.”<sup>3</sup>

Another instance – of missed opportunities – was when a Special Bench of nine Judges was constituted “to finally settle the legal position relating to reservations”. The reason given was that several judgments of the Supreme Court had not spoken in the same voice on the issue of reservations, and that the final look by a larger Bench would *settle the law in an authoritative way*. But expectations so raised (in the referral order) were dashed by the decision subsequently rendered by a majority in a Bench of nine Justices.

On the vital points raised in *Indira Sawhney*<sup>4</sup>, there did emerge a majority view (6:3), but the opinion of the majority was not expressed firmly nor in peremptory language. This is what the majority said<sup>5</sup>:

- that neither the Constitution nor the law prescribes the procedure or method of

3 AIR 1976 S.C. 1207 at para 27 - ADM Jabalpur v. S. Shukla

4 1992 (Supp.3) SCC 217.

5 Justice B. P. Jeevan Reddy on behalf of himself and Chief Justice M. H. Kania, Justice M. N. Venkatachaliah and Justice A. M. Ahmadi, concurred in by Justices S. R. Pandian and P. B. Sawant, each of whom delivered separate judgments. The dissenting justices – Justices T. K. Thommen, Kuldeep Singh and R. M. Sahai – did not agree that the office memorandum of 13 August 1990, which had been upheld by the majority, was valid. They were in favour of declaring it to be unenforceable; according to them reservation was a remedy only for *historical discrimination* and its continuing ill-effects whilst other affirmative action programmes were intended to redress discrimination of all kinds whether current or historical.

identification of backward classes; *nor was it possible or advisable for the Court to lay down any such procedure or method;*

- *that it must be left to the appointed authorities to identify backward classes, and so long as the identification (by a survey) covered the entire populace no objection could be taken to it;*
- *that it was not necessary for a class to be designated as a backward class [and] that it was similarly situated to the Scheduled Castes and Scheduled Tribes; backward classes of citizens could not be identified only and exclusively with reference to economic criteria;*
- *that the distinction made in the office memorandum of 25 September 1991 between ‘poorer sections’ and others among the backward classes was not invalid ‘if the classification is understood and operated as based upon relative backwardness among the several classes identified as ‘Other Backward Classes’;*
- *that the adequacy of representation of a particular class in the services under the State was a matter within the subjective satisfaction of the appropriate Government: not to be ordinarily interfered with by Courts on judicial review.*

Foreclosing judicial review is a perilous step. One of America’s longest serving justices in the history of the US Supreme Court, Justice

William Douglas – his term lasted 36 years and 209 days – had wisely observed that ‘*judicial review gives time for the sober second thought*’.

In the Constituent Assembly Dr. Ambedkar had indicated what he perceived as the court’s role in the determination of reservations for OBCs.<sup>6</sup> He had said that the rule of equality of opportunity must not get destroyed by the magnitude of the reservation prescribed by the executive authorities. This is how he put it:

“My honourable friend Mr. T. T. Krishnamachari [a member of the Constituent Assembly who went on to become the Union finance minister in 1957] asked me whether this rule (viz., that a backward community is that which is backward in the opinion of the Government) will be justiciable. It is rather difficult to give a dogmatic answer. *Personally I think it would be a justiciable matter* [emphasis added]. If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.”

In the majority judgment – in *Indira Sawhney*

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6 Constituent Assembly Debates, 8 November 1948, Vol. 7, p. 702.

– of Justice Jeevan Reddy speaking for himself and three other Justices (concurring in by separate judgments of Justices S. R. Pandian and P. B. Sawant), only the first part of Dr Ambedkar’s speech was quoted, which read:

“Somebody asked me: ‘What is a backward community?’ Well, I think anyone who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government ...”

But the latter part (“*personally I think it would be a justiciable matter*”) – the more pertinent, the more relevant part – where the architect of the Constitution had opined that it was a *justiciable matter*, was not even mentioned in the main judgment of Justice Jeevan Reddy, nor in the concurring judgments of Justices Pandian and Sawant!

*In Indira Sawhney, a great opportunity to lay down the limits beyond which the government could not go was passed over.*

Where the court could have, and should have, spoken authoritatively it refrained from doing so, particularly in that portion of its judgment dealing with ‘*whether reservations are anti-meritarian*’? Whilst correctly holding that ‘it may not be said that reservations (per se) are anti-meritarian’, the court (majority) did say that there were certain services and positions where, whether on account of the nature of the duties attached to them or the level (in the



hierarchy) at which they obtain, ‘*merit alone counts*’. But then the court went on to simply caution that ‘in such situations it *may not* be advisable to provide for reservations’; it was for the Government of India (the court said) to consider and specify the service and posts to which the rule of reservation shall not apply.

Again, even after enumerating in detail the services and posts where (in the opinion of the majority) ‘*there should be no rule of reservation in certain services* (mentioned in detail in the judgment of Justice Jeevan Reddy), viz.:

“In defence services, in technical posts in establishments engaged in Research and Development including those connected with atomic energy and space, in teaching posts of Professors, in posts in super-specialities in medicine, engineering and other scientific and technical subjects, in posts of pilots and co-pilots in Indian Airlines and Air India”;

the court (majority) went out of its way to add:

“The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the rule of reservation shall not apply, but on that account the implementation of the impugned Office Memorandum dated 13 August 1990 cannot be stayed or withheld.”

The passages quoted above – in my view – indicate an almost deliberate abdication by the majority of its solemn duty of upholding the

constitutional guarantee of Equality before the Law and the Equal Protection of the Law. It appeared as if Articles 15 and 16 had become the *reality*, and the Great Article 14 had retreated into the *myth!*]

The concept of equality in our Constitution has two distinct dimensions. First, it embodies the principle of non-discrimination [Articles 14, 15(1), (2) and 16(2)], and second, at the same time, it obligates the state to take affirmative action for ensuring that unequals (the downtrodden, the oppressed and the *have-nots*) in society are brought at a level where they can compete with others (the *haves* of society) [Articles 15(3) (4) (5), 16(4), (4-A), (4-B), 39, 39-A and 41].<sup>7</sup> But as to which ‘dimension’ is the more important in a given case, and as to what should be the balancing factor in the broad conspectus of the Equality Provisions, was for the Supreme Court to say. It could not be left – it cannot be left – for the government of the day to provide or for a commission appointed by the government to determine!

Marc Galanter has offered a philosophical justification for the lack of a strong consistent judicial approach in the field of (what he describes as) ‘compensatory discrimination’:<sup>8</sup>

<sup>7</sup> See *Union of India vs Pushpa Rani*, 2008 (9), SCC 242, para 39, p. 271 (Justice B. N. Agrawal and Justice G. S. Singhvi).

<sup>8</sup> Marc Galanter: *Competing Equalities, Law and the Backward Classes in India*, University of California Press, Los Angeles, 1984, p. 567. The same passage is repeated in the paperback Indian edition, Oxford University Press, New Delhi, 1991.

“Compensatory discrimination offers a way to leaven our formalism without entirely abandoning its comforts. The Indian example is instructive: India has managed to pursue a commitment to substantive justice without allowing that commitment to dissolve competing commitments to formal equality that make law viable in a diverse society with limited consensus. The Indian experience displays a principled eclecticism that avoids suppressing the altruistic fraternal impulse that animates compensatory policies, but that also avoids being enslaved by it. *From afar* it reflects to us a *tempered legalism* – one which we find more congenial in practice than in theory [emphasis added].

But whatever the view ‘from afar’ (sometimes, distance does, lend enchantment to the view!), the experience of others, within India, has been far more pragmatic and realistic; it has been expressed in the following terms:

“From being an instrument of egalitarianism, the reservation policy is now seen as the most blatant expression of what has come to be known as ‘vote-bank politics’. This is particularly so in regard to reservations for the OBCs in the post-Mandal scenario, where the most contentious controversies are centred. It is precisely here that affirmative action seems to be falling short. *Addressing one injustice or inequality at the cost of causing others will only politicise society further, not make it more equitable or egalitarian.* Both Parliament and the Court must *critique* reservation policies and legislation from a

constitutional understanding of inclusive and integral justice.” [emphasis added].<sup>9</sup>

What has been sorely lacking in India is *the critique* of the country’s highest court!

It is precisely because Indian society is so diverse and there is little or no consensus (as Galanter says) that an effective judicial pronouncement by the Supreme Court would have provided a very helpful guide, and, more importantly, it would have served as a most useful check. The court, when called upon to lay down the ‘law’, unfortunately, yielded to the temptation of not firmly saying either yea or nay. If only the majority in *Indira Sawhney* (and it was a learned, experienced and distinguished majority) had set the goalposts, and had specified what could or could not be done in the matter of ‘reservations’, its exposition in its judgment would then have been regarded as ‘law’, binding on us all under Articles 141 and 144 of the Constitution.<sup>10</sup> Instead, there have been only bits of advice and recommendations from the court, which, since they were not expressed in authoritative terms, have been largely ignored!

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9 Rudolf C. Heredia: ‘Quotas and Minority Rights: Recapturing the Constitutional Vision’, *Economic and Political Weekly*, 23 July 2011, Vol. XLVI, pp. 66-67.

10 Articles 141 and 144 of the Constitution read as follows:

141. Law declared by Supreme Court to be binding on all courts. The law declared by the Supreme Court shall be binding on all courts within the territory of India.

144. Civil and judicial authorities to act in aid of the Supreme Court: All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.



In *Indira Sawhney* (1992), in para 861 of the majority judgment, the following directions were given:

1. that the Government of India and each of the State Governments and the Administrations of Union Territories would within four months constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the lists of other backward classes of citizens – the advice tendered by such body being ordinarily binding upon the Government; and
2. within four months the Government of India would specify the bases, apply the relevant and requisite socio-economic criteria to exclude socially advanced persons/sections ('creamy layer') from Other Backward Classes and the implementation of the impugned Office Memorandum of 13 August 1990 would be subject to exclusion of such socially advanced persons ('creamy layer').

The directions were complied with. Pursuant to these directions, Parliament then passed the National Commission for Backward Classes Act 1993,<sup>11</sup> in which the term 'backward classes' was defined exhaustively as meaning such backward classes of citizens other than the Scheduled Castes and the Scheduled Tribes, as may be specified by the Central

<sup>11</sup> A permanent body was to be set up known as the National Commission of Backward Classes.

Government in the list, i.e., the list prepared by the Government of India from time to time for purposes of making provisions for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India. The list is an ongoing one to be revised (with inclusions or exclusions) every 10 years based on the advice of the Backward Classes Commission. But the 'advice' of the commission is declared to be '*ordinarily* binding upon the Central Government' (Sections 9 and 11).<sup>12</sup>

There is no guidance either from Parliament or the Supreme Court as to the governing legal principles. The Central Government is now empowered (under Section 11) to include in the list 'new backward classes', but on

<sup>12</sup> 9. Functions of the Commission:

(1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the 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.

11. Periodic revision of lists by the Central Government:

(1) The Central Government may at any time, and shall, at the expiration of 10 years from the coming into force of this Act and every succeeding period of 10 years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.

(2) The Central Government shall, while undertaking any revision referred to in subsection (1), consult the Commission.

what criteria is not stipulated. The National Commission for Backward Classes Act 1993 has conferred far-reaching powers on the commission. Parliament has also viewed Articles 15 and 16 as distinct and separate provisions, independent even of the main equality clause (Article 14), overlooking prior Constitution Bench decisions rendered by the Supreme Court<sup>13</sup>, which have held that the ‘three provisions (Articles 14, 15 and 16) form part of the same constitutional role of guarantees and supplement each other’.

By the 1992 judgment in *Indira Sawhney*, and ever since the enactment of the National Commission for Backward Classes Act 1993, the highest court has denied itself its constitutional function as the guardian of Equal Protection under the Law – a right solemnly guaranteed by Article 14 of the Constitution of India.

In balancing ‘equal treatment’ and ‘compensatory discrimination’, *Indira Sawhney* (followed in subsequent decisions) has left it to politicians and administrators as to how far they could go. It is only in *M. Nagaraj vs Union of India* (2007)<sup>14</sup> that a Constitution Bench of the Supreme Court of India said (for once, boldly not timidly), but only in respect of one aspect of ‘reservations’, viz., that the ceiling limit of 50 per cent reservation for backward classes, was, and is ‘a constitutional mandate’!

Then again (another opportunity missed!)

13 See *General Manager, Southern Rly vs. Rangachari*, AIR 1962, SC 36 (five judges), p. 41, para 16, and *State of Mysore Vs. P. Narasinga Rao*, AIR 1968, SC 349 (five judges), p. 351.

14 *M. Nagaraj VS. Union of India*, AIR 2007, SC 71.

– in *Ashoka Kumar Thakur vs Union of India and Ors.* (2008), the constitutional validity of Article 15(5) – added by the Constitution 93<sup>rd</sup> Amendment Act 2005 – was challenged before a bench of five justices of the Supreme Court on the ground that it was contrary to the ‘basic structure of the Constitution’, because the thrust of our Constitution was to establish a *casteless society* – the challenge was *negated* (4:1).<sup>15</sup>

The court held that Article 15(5) was valid to the extent that it has permitted reservation for socially and educationally backward classes in state (or state-aided) educational institutions with the exclusion of the ‘creamy layer’ from amongst the OBCs. Justice R. V. Raveendran (in a separate judgment, concurring with the majority) went on to add:

“Failure to exclude the ‘creamy layer’ from the benefits of reservation would render the reservation for other backward classes under Act 5 of 2007 unconstitutional.”<sup>16</sup>

That is to say, failure to exclude the ‘creamy layer’ would violate the *basic structure of the Constitution*<sup>17</sup>. But these were empty words:

15 2008 (6), SCC 1.

16 2008 (6), SCC 1, para 650, p. 711.

17 The court also held, in keeping with the unanimous decision of a bench of seven judges in *P. A. Inamdar vs State of Maharashtra* (2005), that the exclusion of minority educational institutions from the purview of Article 15(5) was valid, but the question of validity (i.e., the constitutional validity) of the inclusion of private unaided institutions within the purview of Article 15(5) was ‘left open’: soon to be ‘closed’ by the decision of two justices (in a bench of three) in *Society for Unaided Private Schools of Rajasthan vs Union of India and Anr.* The judgment, dated 12 April 2012, held that it was constitutionally permissible to include private unaided educational institutions within the purview of Article 15!



because the mode or method for exclusion from the ‘creamy layer’ was neither prescribed by Parliament nor by the Judges!

Lacteal phraseology like ‘creamy layer’ has now come into vogue in judicial pronouncements! In a recently published book,<sup>18</sup> the author refers to a black union leader who described the economy of South Africa as ‘cappuccino economy’ with ‘white cream over the large black mass, sprinkled with some black chocolate on top’! The remark may or may not have been appropriate. But in the context of OBCs, the expression ‘creamy layer’ is hopelessly inappropriate: because when milk is boiled, the ‘creamy layer’ readily floats up to the top and is easily skimmed off: but alas not when determining who, or how many OBCs, have become economically better off by having ‘floated to the top’ (and to be henceforth skimmed off and so excluded from the general class of OBCs)!

*Ashoka Kumar Thakur vs Union of India* (2008) was not a unanimous judgment of the Constitution Bench of five justices. The judge who dissented was in a (brave) minority of one. At the very commencement of his separate judgment, Justice Dalveer Bhandari (now a Judge in the International Court of Justice) posed what he rightly described as ‘the fundamental question’:

“361. The fundamental question that arises in these writ petitions is: Whether Article 15(5),

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18 Ruchir Sharma: *Breakout Nations*, Allen Lane, London, 2012.

inserted by the Ninety-third Amendment, is consistent with the other provisions of the Constitution or whether its impact runs contrary to the constitutional aim of achieving a *casteless and classless society* [emphasis added].

362. On behalf of the petitioners, it was eloquently argued that if Article 15(5) is permitted to remain in force, then, instead of achieving the goal of a casteless and classless society, India would be converted into a caste-ridden society. The country would forever remain divided on caste lines. The Government has sought to repudiate this argument. The petitioners’ argument, however, echoes the grave concern of our Constitution’s original Framers.

363. On careful analysis of the Constituent Assembly and the Parliamentary Debates, one thing is crystal clear: our leaders have always, and unanimously, proclaimed with one voice that our constitutional goal is to establish a casteless and classless society.

He then dealt with the question (posed in para 361) in succeeding paragraphs (537–560) of his judgment and concluded as follows:

“605. In conclusion, the First Parliament, by enacting Article 15(4), deviated from the original Framers’ intent. They passed an amendment that strengthens rather than weakens casteism. If caste-based quotas in education are to stay, they should adhere to a basic tenet of secularism: they should not take caste into account. Instead, exclusively economic criteria

should be used. For a period of 10 years, other factors such as income, occupation and property holdings, etc., including caste, may be taken into consideration and thereafter only economic criteria should prevail. [But] *Indira Sawhney* (1992) has tied our hands. I nevertheless believe that caste matters and will continue to matter as long as we divide society along caste lines. Caste-based discrimination remains. Violence between castes occurs. Caste politics rages on. Where casteism is present, the goal of achieving a casteless society must never be forgotten. Any legislation to the contrary should be discarded.”

Justice Bhandari’s regret that ‘caste-based discrimination remains’ is a cry of distress – albeit in the wilderness – and a courageous appeal (as in the case of all dissents) to ‘the brooding spirit of the future’! But after the majority decision (4:1) in *Ashoka Kumar Thakur* (2008), whatever the Preamble may say, the vision of a secular society can no longer be said to be the true aim of our written Constitution. A great opportunity has been missed by the court to steer the ship of state into casteless waters. It is the Supreme Court of India itself that has helped to perpetuate the division of Indian society along caste-based lines.

We in India have not (so far!) resolved the complexities that lie buried in the great, but elusive, doctrine of EQUALITY spelt out in Article 14 which provides that:

“The State shall not deny to any person equality before the law or the equal protection

of the laws within the territory of India.”

The tension (in this Article) between a commitment to non-discrimination as well as to equality had been poignantly expressed by India’s Prime Minister, Jawaharlal Nehru, during the debate in Parliament at the time of the Constitution First Amendment Bill (in May 1951):

“We cannot have equality because in trying to attain equality we come up against some principles of equality .... We cannot have equality because we cannot have non-discrimination because if you think in terms of giving a lift up to those who are down, and out, you are somehow affecting the present status quo undoubtedly. Therefore you are said to be discriminating because you are affecting the present status quo. Therefore if this argument is correct, then we cannot make any major change in that respect because every change means a change in the status quo, whether economic or in any sphere of public or private activity. Whatever law you may make, you have to make some change somewhere. Therefore we have to come to grips with this subject in some other way.<sup>19</sup>

Over the past 70 plus years, we have not as yet - ‘come to grips with this subject’!

To what extent should the claim based on merit and on the Fundamental Right to Equality

<sup>19</sup> Parliamentary Debates, Vol. XII-XIII, Part II, Col. 9617, 29 May 1951.



be ignored? How far does our document of governance, truly interpreted, direct us to go? How soon are we to atone for the oppression of the lower castes for centuries? Should we go on equalizing under a regime of enforced downward uniformity? And for how long? These questions keep surfacing periodically, but the answers given are never quite satisfactory or convincing.

Some time ago one of America's youngest College Presidents, Anthony Marx, was on a visit to India – and he provided us with some home-truths about the elusive doctrine of equality. Anthony Marx is President of the Amherst College, a college established in the United States way back in the year 1821. In an interview to a national newspaper in Delhi he said that his college *Amherst*, supports 64 per cent of its students with financial aid – the highest number in any US College; and he also said that colleges like Yale, Princeton and Harvard, which have been traditionally catering to 'white' privileged students, have now been realising the social need to reach out to 'the blacks', 'the browns' and the less privileged!

He then spoke about talent. He said that those who have had privileged backgrounds are often visibly talented – but that is only because they have had exposure. The obsession about merit is really only one facet of better exposure: and the truly meritorious are often the ones who are better exposed!

Young people who are poor are not talented because they are not exposed in an obvious

way: and competition, by itself, simply does not necessarily bring the best results. Anthony Marx spoke about the history of inequality in America: about how in the United States, poor neighbourhoods have poor schools and bad teaching, whilst rich neighbourhoods have very good schools; and the divide is sharp.

There is a history of inequality in America, and he emphasised the need for higher education to be an equaliser – “no society, not American or Indian” (he has said) “can progress with inequality. If you have affirmative action in education, it is a win-win situation for everyone for the underprivileged and the economy.”

Anthony Marx spent some years in South Africa where black students had been subjected to apartheid education, designed to keep them down. And he said that when these young people were given high quality courses for a year the same students who were kept down started doing well. He quoted Nelson Mandela, the wisest of all living statesman who had said:

“we need to make sure that the doors of learning are always kept open.”

Words that need re-telling – we in this country also “need to make sure that the doors of learning are always kept open.”

Even in the year 2017, the representation of the underprivileged in public employment has continued to remain grossly disproportionate when compared to those belonging to the more

privileged classes. And as Ralph Bunche<sup>20</sup> had warned: 'Inalienable rights can never be enjoyed posthumously!'

But on the other side of the argument, there is the spectre of agitated public opinion, which cannot be ignored: The judges, who have the final say in all constitutional matters, have interpreted compensatory discrimination clauses in our Constitution differently at different times.

One thing is certain: so long as poverty – dire poverty – continues to stalk the land and

so long as gross disparities between the very rich and the very poor get accentuated (as they have in recent years), the ideal of an egalitarian society envisaged in our basic document of governance will remain an evanescent dream. Whatever the nation's karma, our founding fathers cannot be faulted for a lack of idealism; nor can Providence. It is not in our stars but in ourselves that we are thus! It is not because of our Constitution, but, despite its provisions that, as a nation, we have failed to fulfil what were naïvely assumed to be achievable goals. We, the people of India, boldly abolished untouchability in our Constitution – but after nearly 70 years of its working we have not been able to eliminate it from our hearts!

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20 Ralph Bunche (African-American) was an academic and diplomat who was awarded the 1950 Nobel Peace Prize.

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# Creative Role of Supreme Court of India in Enlarging and Protecting Human Rights

Soli J. Sorabjee\*

15th August 1947 was a historic event in the life of our nation when “after a long night of waiting and of silent prayers”, India attained freedom.

On 26th November 1949 after debates in the Constituent Assembly which lasted for nearly three years, the people of India gave unto themselves a Constitution which among other things guaranteed to them a comprehensive array of basic human rights. These occupy pride of place in Part III of the Constitution under the heading of Fundamental Rights. They broadly correspond to the International Covenant on Civil and Political Rights 1966 [ICCPR]. They comprise constitutional guarantees of equality, freedom of expression, assembly and association, freedom of movement, freedom to carry on profession and business, freedom of conscience and religion. There are guarantees against retrospective criminal laws, double jeopardy and self-incrimination and against

deprivation of life and personal liberty. There are constitutional provisions to prevent exploitation of children. Minorities are guaranteed linguistic and cultural rights, and the right to establish and administer educational institutions of their choice.

Fundamental rights are enforceable against the State and its manifold instrumentalities and also against bodies and institutions in which there is significant government control and involvement.

Fundamental rights are enforced by an independent judiciary exercising the power of judicial review. Laws and executive action which are in breach of any fundamental right have been invalidated.

The Indian judiciary has played a creative role in the interpretation of the Constitution. Fundamental rights which are not specifically

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\* Former Attorney General for India

mentioned have been spelt out and deduced on the theory that certain unenumerated rights are implicit in the enumerated guarantees.

May I give some illustrations. The Constitution of India does not specifically guarantee freedom of the press as a fundamental right. In several decisions of the Supreme Court freedom of the press has been held to be implicit in the guarantee of freedom of speech and expression and has thus acquired the status of a fundamental right by judicial interpretation. The Supreme Court by interpretation of the free speech guarantee deduced the right to know and the right of access to information on the reasoning that the concept of an open government is the direct emanation from the right to know which is implicit in the guarantee of free speech and expression.

The right to travel abroad and return to one's country has been spelt out from the expression "personal liberty" in Article 21 of the Constitution. Although there is no specific provision in the Constitution prohibiting cruel, inhuman and degrading punishment or treatment, the Court has evolved this guarantee from other provisions of the Constitution. Right to privacy has also been spelled out based on the inherent human right to be left alone.

The expression "life" in Article 21 received an expansive interpretation. The Court ruled that "life" does not connote merely physical or animal existence but embraces something more, namely "the right to live with human dignity and all that goes along with it, namely

the bare necessities of life such as adequate nutrition, clothing and shelter over the head". Based on this interpretation our Supreme Court has ruled that the right to live with human dignity encompasses within its ambit, the protection and preservation of an environment free from pollution of air and water. Health and sanitation have been held to be an integral facet of the right to life.

In its efforts to prevent environmental degradation the Court has ordered certain tanneries and chemical industries which were discharging effluents into lakes and rivers to stop functioning, unless the effluents were subjected to a pre-treatment process by setting up primary treatment plants as approved by the State Pollution Boards. In its battle against pollution Supreme Court has issued directions that all commercial vehicles in Delhi which were 15 years old and which could cause vehicular pollution should be debarred from plying on public roads.

It is rightly accepted that guaranteed fundamental rights are not absolute. They can be reasonably restricted in public interest. The question whether the restriction imposed is unreasonable, excessive or disproportionate has to be determined by an independent judiciary exercising the power of judicial review. This delicate judicial task of striking the balance requires understanding not merely of the legal and constitutional provisions but of the prevalent economic and sociological forces and the contemporary mores of society. The endeavour of Courts in India has been



to achieve an acceptable accommodation of the conflicting interests of the individual, the society and the State. There is no royal road to achieve such accommodation. Courts have on occasions not struck the balance right. Perfection is not the attribute of common humanity, and judges have not been vouchsafed the divine gift of infallibility.

The distinction between generational rights, namely civil and political liberties (first generation), social, economic and cultural (second generation) and environmental (third generation) is a bit rigid. It fails to recognise the dynamic aspect of evolution of human rights. It would be more appropriate to regard the change in the idea of rights over a period of time as different 'waves'.

The first wave of human rights came around the late eighteenth century which witnessed the drafting of the US Bill of Rights and the French Declaration of the Rights of Man, which were primarily concerned with guaranteeing liberty against state tyranny and against religious persecution. The second wave was generated by the atrocities committed by the Nazis before and during the Second World War. The present new wave of rights focuses upon the values of dignity, equality and community. It has been aptly described as a search for certain basic values to guide human behaviour. Dignity is the moral and intellectual source of human rights in present times.

The Vienna Declaration on Human Rights in June 1993 explicitly recognises that “all

human rights are universal, indivisible and interdependent and interrelated”. This has put to rest the controversy regarding the superiority of one set of rights over the other. However at the operational level in developing countries socio-economic rights would have priority in matter of implementation. For example, if the choice is between a new television tower which would enhance freedom of expression and the building of roads and hospitals limited financial resources would tilt the choice in favour of the latter.

The most remarkable craftsmanship displayed by the Supreme Court in promoting human rights has been to incorporate into fundamental rights some of the Directive Principles, such as those imposing an obligation on the state to provide a decent standard of living, a minimum wage, just and humane conditions of work, and to raise the level of nutrition and of public health. This has been achieved by placing a generous interpretation on the expression ‘life’ in Article 21 of the Constitution which has been mentioned above.

Access to justice is recognised as a basic human right. In order to achieve that it is necessary that the doctrine of locus standi should not be rigid. Our Supreme Court has liberalized this rule of standing in public law and ruled that where judicial redress is sought for legal injury done to indigent and disadvantaged persons, who on account of economic disabilities are unable to approach the courts themselves, any member of the public acting bona fide and not for oblique considerations,

can maintain an action on their behalf.

Rights without remedies are useless. A mere declaration of invalidity of an executive order or an administrative decision which has resulted in the violation of person's fundamental rights would not provide a meaningful remedy. The ICCPR provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation" [see Article 9(6)]. The Indian Constitution contains no such explicit provision. Nonetheless the Supreme Court has, in some cases, ordered payment of compensation by the State as a remedy in public law. The National Commission to Review the Working of the Constitution [NCRWC] has recommended that right to compensation for violation of a person's life or liberty be made an enforceable fundamental right by an express provision in the Constitution. This salutary recommendation has not yet been fully implemented. Judicial activism seems to provide an alibi for procrastination.

In countries where fundamental rights are violated extensively, whether in flouting of labour laws, illegal detentions, discriminatory actions, and other violations, a cynic may well taunt and question the utility of the Chapter on Fundamental Rights. The answer is that it empowers citizens and groups fighting for justice to approach the court and provides opportunities for vindicating the Rule of Law. It also establishes norms and standards which can be used to educate people to know, demand and enforce their basic rights. It has a salutary effect on administration which knows that it has to conform to the discipline of fundamental rights. The effort should be to ensure that fundamental rights guaranteed in a Constitution are made living realities for the weak, vulnerable and marginalised sections of Society. Moreover, the Chapter of Fundamental Rights in the Constitution is a constant reminder that the powers of the State are not unlimited and that human personality is sacred and human rights are invaluable. We need these reminders constantly.

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# Uniform Civil Code and the Quest for Gender Justice

Prof. N. R. Madhava Menon\*

*“The State shall endeavour to serve for the citizen a uniform civil code throughout the territory of India”.*<sup>1</sup>

## **The Constitutional Scheme for Gender Justice and Equality:**

Equality and social justice are two fundamental values repeatedly elaborated throughout the Constitution of India. The Preamble declares the resolve of WE, THE PEOPLE OF INDIA to secure to all its citizens JUSTICE, social, economic and political; EQUALITY of status and of opportunity and FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation. Among the guaranteed Fundamental Rights, priority is given to Right to Equality (Articles 14 to 18) under which the State is prohibited from denying to any person equality

before the law or the equal protection of the laws and from discriminating against any citizen on grounds only of religion, race, caste, sex, or place of birth for any employment or office under the State. Untouchability is abolished and made an offence punishable under law.

The Directive Principle of State Policy which are made fundamental in the governance of the country direct the State to minimise the inequalities in income and eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocation. The State, shall, in particular, direct its policy towards securing, inter alia, that men and women equally, have the right to an adequate means of livelihood and that there is equal pay for equal work for both men and women. The Directive to secure for the citizens a Uniform Civil Code is part of the Constitutional Scheme to bring about gender justice in a society which has for long practised institutionalised discrimination, among others, on grounds of sex/gender. To be able to evolve a gender-just legal system, the State has been enabled to make special provision in favour of women which, the Constitution declared, will

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1 Article 44, Directive Principle of State Policy, The Constitution of India.

not be treated as discrimination on ground of sex otherwise prohibited by Article 15.

### **Common Civil Code mired in Controversies:**

For different reasons different political parties which ruled the country have refrained from legislating a Common Civil Code despite the clear mandate of the Constitution. In the 1950s many aspects of Hindu personal law got codified despite stiff opposition from some sections of Hindus. However, the codified laws have not been totally free from discrimination against women. A series of amendments followed to address the issue. Court interventions at the instance of aggrieved citizens further strengthened the idea of equal protection of the laws guaranteed to women under the Constitution. While it is still not gender-just in all aspects of family relations law, the Hindu Code did bring about a great deal of equality to Hindu women. Christian family laws which were mostly codified even during the British period had discriminatory provisions against Christian women. They were challenged before the Courts which got them reformed towards greater gender justice. In these matters judiciary has been weighing so-called religious freedom against secular, egalitarian human rights and the demands of social justice. An example of this approach can be seen in the 1986 judgement of the Supreme Court in *Mary Roy's case*<sup>2</sup> in which the court

<sup>2</sup> *Mary Roy v. State of Kerala* 1986 SCR (1) 371

upheld the contention of the petitioner, a Syrian Christian woman, to inherit ancestral property equally with her male siblings.

The above practice of incremental reforms of personal laws through codification, legislative amendments and judicial interpretations did not happen in any significant measure in the case of Muslim personal law. It was left to the Muslim Community to evolve a consensus for reforms. The so-called uncodified personal law regime gave an impression that people of a particular religion are uniformly following certain religion-ordained practices in relation to the institutions of marriage, inheritance, divorce, maintenance, custody of children, adoption etc. The legitimisation of these customary practices developed under a patriarchal framework in the name of personal laws actually helped institutionalisation of discrimination against women. In fact, in varying degrees, personal laws of all religious groups discriminated against women which became visible when women got empowered with education, economic independence and political participation.

### **Common Civil Code in the Constitution-making process:**

Multi-culturalism, religious freedom and minority rights are beautifully blended in the Indian Constitution with right to equality not only for individuals but groups with-different identities. Group rights include self-government rights for tribals, personal laws and



legal pluralism in family relations for religious groups, and reservation rights for marginalised sections in legislatures, government jobs and educational institutions.

However, while drafting the Constitution, there was strong opposition in retaining religion based personal laws which a large section of the Constituent Assembly viewed as a threat to national unity and a barrier to the commitment to eliminate discriminatory socio-religious practices prevailing against women, Dalits and backward classes. While Muslim leaders in the Assembly demanded continuation of personal laws on the ground of religious freedom and minority rights, powerful leaders of the Congress including Rajkumari Amrit Kaur, Minoo Masani, Alladi Krishnaswamy Iyer, K.M. Munshi and the Drafting Committee Chairman Dr. B.R. Ambedkar vehemently argued for Uniform Civil Code as a fundamental right of all citizens. Mr. K.M. Munshi felt that social reform required the State to intervene on the so-called religious freedom, a practice even Muslim Countries exercised against their minorities. He was of the view that personal laws being linked with religion is danger to the Unity of the Country. He argued that the authority of the State to legislate on family relations law of minorities was exercised by the Central Legislature in 1937 when the Shariat Act was enacted including Khoyas and Kutchi Memons within its scope even though they were following Hindu customs till then. He pointed out that Hindu personal laws as interpreted by Manu and Yagnavalkya discriminated against

women which, if allowed to continue, would deny equality to women forever. Dr. Ambedkar was expressly surprised at the position taken by Muslim members of the Assembly and said that traditionally, even Muslims in different parts of India followed Hindu customs in family relation at least till the Shariat Act, 1937 was adopted. He clarified that even after adoption of a UCC by a future Indian Parliament, the law may allow those who want to continue under the pre-existing regime to do so. Dr. Ambedkar was emphatic that religions should not be given vast, expansive jurisdiction to control all aspects of life.

At the end as a compromise that was worked out UCC was placed as a Directive Principle of State Policy and personal laws were retained as part of religious freedom. However, there was no constitutional guarantee incorporated for protection of personal laws as demanded by the minorities. State could restrict the scope of religious freedom upholding fundamental right to equality and could take steps to create a uniform civil code for all communities.

Despite the clear constitutional mandate, successive governments and political parties have ignored their obligation and let the judiciary do the job whenever concerned parties take up the matter in court. During the seventy years of the Indian Republic there has never been any concreted move either from the part of the State or of the Society to even debate the issue involved or create a consensus for a secular Civil code for equal rights for women. It is in this context, recent developments arising

from the Triple Talaq judgement<sup>3</sup>, the Times of India initiative in generating public opinion<sup>4</sup> and the reference from the Government to the Law Commission have to be analysed to understand the prospect of a UCC in the not too distant a future.

### **Triple Talaq Judgement and Movement for Gender Justice:**

There was a time in Indian history when Muslim clergy and the Muslim Personal Law Board questioned the authority of courts presided by non-Muslim judges interpreting Muslim personal law on matter of divorce, custody and marriage. Even today a section of Muslims believe that non-believers are not entitled to administer Muslim personal law. Within the Muslim Community itself there are major differences on the law governing a given issue in family relations as there are different schools of thought giving different interpretation to the text (Quran, Shariat). A former Union Minister<sup>5</sup> suggests a way out in the following words:

*“Personal laws are of civil nature and civil laws do not forbid any action on the pain of*

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3 Muslim Women’s Quest for Equality & Ors Vs. Jamait-Ulema-i-Hind & Ors Suo Moto Writ (C) No. 2 of 2015 dated 22 August 2017

4 Times of India newspaper from September 4, 2017 started publishing a series of articles by experts on the issues involved in making of a UCC. ONE NATION, ONE CODE, <http://timesofindia.india-times.com/uniform-civil-code>.

5 Mr. Arif Mohamad Khan, “When the Constitution and Religious Laws Collide”, Times of India, 10 September 2017

*punishment. These personal laws may be treated as customs and rituals, and the freedom to practise what one believes on a personal basis is well recognized. But if any dispute arises and the matter comes to the Court, those disputes should be settled by an Indian Civil Code as envisaged by our Constitution. This Code will prescribe equal rights and obligations and permit no discrimination or special rights on the basis of religion, caste, gender or sex. This will ensure not only full freedom of religion to the individual but also fulfil the Constitutional goal of a Uniform Civil Code. But a detailed discussion of this subject cannot happen in the absence of a draft proposal, and for that, the government need to take the initiative.”*

Another commentator wanted Indian Muslim to embrace liberal opinion<sup>6</sup> “...in the matter of personal laws and challenge the regressive view of the organizations like the Muslim Personal Law Board which object even the law on the Right of the Children to Free and Compulsory Education Act (2009) on the ground that it will infringe on the Madrasa system of education. The Board also supported child marriage and justified Triple Talaq as well as the practise of Nikah Halala wherein a divorced Muslim woman must sleep with another man before she can remarry her first husband. One cannot counter Hindu fundamentalism by pandering to Muslim fundamentalism. Both need to be condemned and opposed.”

It is indeed sad that a progressive liberal

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6 Pavan K Verma, “Time for Muslims to Embrace Liberal Opinion”, Deccan Chronicle, 22nd October, 2017



democracy like India is unable to ensure equal rights for women and has to seek repeated interventions of the highest Court of the land to fight customs evolved in a patriarchal society. In a recent judgement the Supreme Court<sup>7</sup> ruled that sex between a man and his wife below 18 years of age would be rape and the provision in the Indian Penal code (Section 375(2)) which exonerated a husband in such circumstances was unconstitutional. By this ruling, the Supreme Court established a uniform 18 year as age of consent and the age of marriage.

It was again the land mark judgement of the Supreme Court in the Triple Talaq case<sup>8</sup> which changed the mood of the nation vis-à-vis the uniform Civil code and kindled hope for a gender-just family law for all citizens including Muslims. The petitioners in the case were five divorced Muslim women who wanted the Court to declare the Talaq-e-Biddat (instant talaq) under which they were divorced, to be declared violative of their right to equality, liberty and dignity and therefore illegal and unconstitutional. They argued that they were deserted arbitrarily and unilaterally and were left homeless without any reasonable cause and that too, through letters, phone calls and uttering the word thrice at one go. Interestingly, the five judges of the Constitution Bench who heard the case belonged to five different religions. They gave three different judgements with the majority declaring Talaq-e-Biddat

illegal and unconstitutional.

The minority was written by Chief Justice J.S. Khehar and Justice Abdul Nazeer. Though they found the practice sinful but not illegal, the reason being that the Sunni Muslim accepted it as lawful and long practised as part of personal law. Being part of the personal law it is protected as religious freedom under Article 25 and can be interfered with only on grounds of public order, morality or health as provided in that Article. Therefore if Talaq-e-Biddat had to be set aside as unconstitutional it can only be done under the conditions set out in Article 25(2) through legislature. Accepting the views of the All India Muslim Personal Law Board, the minority judges said that it was not within the realm of judicial discretion to set aside a matter of faith and religion. They added that constitutional courts are obliged to protect and enforce personal laws and not to find fault with it, a position that tends to make the task of Parliament in enacting the UCC more difficult and leaving women suffer injustice under personal laws for ever.

The majority opinion given by the three judges in two separate judgement adopted different logic to strike down the practice. Justices Rohinton Nariman and U.U. Lalit got over the Challenge through a technical argument based on Constitutional provision and interpretations. They took the help of the Muslim Personal Law (Shariat) Application Act, 1937 and found that Triple Talaq is recognised and enforced as part of codified Muslim Personal law since 1937 and any pre-independence legislation not in

7 Independent thought vs. Union of India & Ors WP(C) No. 382 of 2013 on 11 October 2017

8 Muslim Women's Quest for Equality vs. Jamait-Ulema-i-Hind & Ors Suo Moto Writ (C) No. 2 of 2015 dated 22 August 2017

conformity with Part III (Fundamental Rights) of the Constitution shall to the extent of such inconsistency has to be treated as void under Article 13 (1) of the Constitution. They thus brought down the issue to the narrow focus of whether any of the fundamental rights of the petitioners are violated by the Shariat Act provision in so far as it seeks to enforce Triple Talaq as a rule of law in the Courts in India.

The majority opinion decided the practice unconstitutional on these distinct grounds:

(a) A practice does not acquire the sanction of religion simply because it is permitted. What is protected under Article 25 are essential religious practices without which religion will lose its fundamental character. Non-essential practices are alterable and do not form the core of religion. Applying this test, the Court found that Talaq-e-Biddat is only one form of Talaq permissible in law, though considered to be sinful and therefore to be avoided. It is not an essential part of religion and therefore it does not require to satisfy the test under Article 25 (2) (b).

(b) Depending on a series of decisions rendered earlier<sup>9</sup>, the majority opinion pointed out that any action found to be arbitrary, and therefore unreasonable, would have to be struck down as violative of right to equality under Article 14. Arbitrariness doctrine contained in Article 14 can negate

legislative and executive action and is distinct from the doctrine of discrimination. Given the fact that Triple Talaq is instant and irrevocable, it is manifestly arbitrary. No attempts at reconciliation are possible. The marital tie can be broken capriciously and whimsically. The Shariat Act which recognise it is the “law in force” under Article 13 (1) and since it is violative of fundamental right to equality it must be struck down to the extent that it recognises and enforces Triple Talaq. As the practice is found void on the ground of arbitrariness, there is no need to examine it under the test of discrimination.

(c) For the third judge in the majority, Justice Kurian, Triple Talaq is against the basic tenets of the Holy Quran as the text allows Talaq only in extremely unavoidable circumstances and that too, if attempts at reconciliation fail. What is Quranically wrong cannot be legally right. So Triple Talaq lacks legal sanctity and is not an integral part of religion. What is expressly declared to be impermissible cannot be valid by showing that it was practised for long.

There are few things which open up the prospects of an UCC which follow from the judgement of the apex court. These include:

(a) There is no bar in secular India in deciding the constitutionality of religious practices in Islam by non-Muslims judges. Theological issues can be ascertained by

9 S.G. Jaisinghani vs. Union of India (1967) 2 SCR 703; E.P. Royappa vs. State of Tamil Nadu (1974) 4 SCC 3; Ajay Hasia vs. Schrawandi (1981) 1 SCC 722



judges by looking into religious texts and interpretations.

(b) Whether a religious practice is followed for long periods or is permissible under personal law is not conclusive proof of its validity or legality.

(c) 'Personal law' is "law in force" whether codified or not, for purpose of Article 13 (1) and if it is violative of the right to equality, it can be struck down as void. The minority opinion tends to treat it as part of fundamental right to religion and therefore beyond judicial scrutiny.

(d) The key test for determining whether a law, practice or executive action in relation to matters of personal law is constitutional or not is whether it is unreasonable or arbitrary. If it is found arbitrary it is violative of the right to equality.

(e) The protection given to religious freedom under Article 25 extends only to practice which are integral to religion. Non-essential practice are alterable. What is non-essential practice can be answered by asking the question whether the said practice constitutes the core of religion and if altered will change the fundamental character of the religion itself.

(f) Parliament is entitled to codify personal law of all communities to bring certainty and to make it gender-just to fulfil the requirements of fundamental rights of citizen. Freedom

of religion is not violated if legislation on personal laws is brought forward for social welfare and reforms.

(g) Court judgement may not change easily social attitudes and traditions. Nevertheless, it will enable an aggrieved citizen to seek justice through court and help mould public opinion on right direction.

(h) Even the minority judges (Chief Justice Khehar and Justice Nazeer) after having declared that Triple Talaq is protected by the fundamental right to practise religion and is beyond judicial examination, have directed the Union of India to consider appropriate legislation on the practise of Triple Talaq and till then enjoined Muslim husbands from pronouncing Triple Talaq.

### **Can UCC survive Democratic Politics and Legal Pluralism:**

Asking the question "why nobody is sincere about UCC." an academic of repute wrote<sup>10</sup>:

*"...Personal law is not personal at all; arguably it is not even law. It bestows rights to a community.... In India's circumstances it pits the Hindu majority against the Muslim minority. Few care to recognise that the crux of the matter is gender inequality across the board..... From the days of the nationalist movement, this controversy has unfolded in*

<sup>10</sup> Partha S. Ghosh, Times of India, One Nation One code, Part 10

*multifaceted ways. Sometimes it is Islam in danger, at other it is Hinduism in danger; but, barring the occasional intervention of women's rights groups, it is never 'women in danger'. It is man's world. Unless this reality is challenged and altered, all talks about UCC is simply superficial, high voltage TV debate."*

There is justifiable apprehension on the part of different religious groups whether their group identities will be obliterated by the enactment of UCC. The minorities particularly fear how their religious freedom and minority rights guaranteed by the Constitution can survive after merging personal laws in a UCC. The absences of an actual Draft UCC aggravate the apprehensions and contribute to strengthening the opposition from fundamentalist groups of all religions. Public opinion is being shaped by ignorance and vested interests take advantage of the situation. The Law Commission which is asked by the Union Government to examine the issue has a difficult job in hand. Meanwhile, a group of law students as part of a law reform competition launched by Mar Gregorios College of Law, Trivandrum has undertaken a year long exercise to gather the view of the Communities concerned, assemble the law declared by the Court and legislature, and sought to reconcile them with the demands of Fundamental Rights and gender justice within a possible Draft UCC. This draft code is now available in the public domain<sup>11</sup>.

Democratic politics will demand consensus-

11 Mar Gregorios College of Law, Trivandrum website at [www.mgcl.ac.in](http://www.mgcl.ac.in)

building for policy making. The consensus required in the matter of marriage, divorce, maintenance, custody, adoption and inheritance if they violate fundamental rights of citizen deny equality on the basis of sex and gender. It does not necessarily mean liquidating legal pluralism which will inevitably continue to exist in a multicultural society. But religion cannot be mixed up with politics and State to the detriment of individual rights and social justice.

There can be many routes to evolve the consensus and legislate on the subject. Firstly, parliament can go ahead and enact a legislation (UCC) replacing personal laws of different religions incorporating the best practices (conducive to human rights) from all religions. Customary practices not violative of fundamental rights may still continue giving legal pluralism its legitimate space in the diversity that is India. Parliament can make the law (UCC) optional for people for a certain period of time or let those who want to continue with their personal law do so even after the enactment of a UCC provided dispute arising from such personal laws are allowed to be adjudicated through regular Courts on the basis of the law of the land. This will be the extension of the Uniform Civil Code implied under the Special Marriage Act. If matters of marriage and divorce can thus be regulated by a secular code, there is no reason why the marriageable age, ground for divorce, conditions for divorce, ability to adopt and rules of inheritance cannot be so regulated by a Parliamentary legislation.

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# Interpreting and shaping the Transformative Constitution of India

M. P. Singh\*

## Understanding a transformative constitution:

Generally speaking, constitutions of states are made in times of crisis and in a constrained environment.<sup>1</sup> There are rare exceptions to the later premise such as that of the United Kingdom, whose constitution has evolved progressively through comparatively small political and generally peaceful demands in course of long history of that country.<sup>2</sup> This is why the constitution of a country is heralded as a fresh beginning in its life despite the fact that it may draw a lot of sustenance from the country's past. To that extent the constitution of every country is a transformative event in the

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The paper is a revised and updated version of a paper written some time back. It appeared in Chinese Yearbook of Constitutional Law 2014, which is not read anywhere outside China because of its Chinese medium, while it is written primarily for Indian readers.

1 Donald L. Horowitz, *Constitution-Making: A Process Filled with Constraint*, 12 Review of Constitutional Studies 1 (2006).

2 Perhaps the only major exception was the Glorious revolution of 1688-89. See for details Harold J. Berman, *Law And Revolution: The Formation of the Western Legal Tradition* (Harvard University Press).

life of that country. Interestingly, however, the constitutions such as that of the United States or France or that of the Soviet Union which followed revolutions were not labelled as transformative. Even the post-colonial constitutions made after WW II did not acquire the label of transformative. They were generally perceived as structuralist. The label "transformative" has become part of the constitutional discourse since the making of the Constitution of South Africa, 1996.<sup>3</sup> The events preceding the making of the Constitution of South Africa such as the existence and strict enforcement of apartheid, inhuman and crude suppression of any political activity against that regime despite its persistent and almost universal condemnation by the world community, an almost sudden turn in the policy of the then South African regime towards the beginning of the last decade of the last millennium, release of Nelson Mandela from his long solitary incarceration, holding of elections and making of the new constitution based on principles of universal suffrage and human rights

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3 See, Karl Klare, *Legal culture and transformative constitutionalism*, SAJHR 146 (1998) followed by many writings referring to it. See, T. Roux, *Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?* (2009) 20 Stellenbosch L. Rev. 258-285.

including social and economic rights, were a series of historic events celebrated all over the world. The background to and the events associated with the making of the Constitution of South Africa were so momentous that the making of the Constitution and its refreshing contents evoked a euphoria strong enough to assigning a new label to the Constitution. Therefore, it should not be a surprise if the expression “transformative” was coined in its context and was brought into the domain of constitutional discourse.

Using, perhaps again for the first time, in an incisive and substantial writing on the nature of the South African Constitution Klare explains transformative constitution as follows:

By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase ‘reform,’ but something short of or different from ‘revolution’ in any traditional sense of the word.<sup>4</sup>

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4 P. 150.

Later he also explains it as a “*post-liberal constitution*, one that may plausibly be read not only as open to but committed to large scale, egalitarian social transformation.”<sup>5</sup>

In a recent project on transformative constitutionalism in Brazil, India and South Africa, Baxi seems to explain the concept of transformative constitution “in terms of ‘recognition of human rights, democracy and peaceful co-existence and development opportunities’ ”<sup>6</sup> to which one of the participants from South Africa expresses his disagreement because such a description of transformative constitution implies condemnation of European liberal constitutional traditions which contained all these features and adds that even transformative constitutions are generally liberal, non-conservative and democratic.<sup>7</sup>

Numerous scholars have responded to Klare expressing their agreement or disagreement on issues taken up by him in his paper, but apparently nobody seems to disagree with his

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5 P. 150-151. Cf. V. Sripathi, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 *Tul. J. Int'l & Comp. L.* 49 at 54 (2007-2008): “The overarching thematic argument of this Article is that a constitution may play a transformative role in advancing constitutionalism in four critical ways: (1) by defining the nature of the state, including a broad equality provision; (2) by addressing social and societal oppression and past injustices; (3) by defining property and land rights; and (4) by defining social and economic rights.”

6 U. Baxi, *Preliminary notes on transformative constitutionalism*, in O. Vilhena, U. Baxi & F. Viljoen (eds.), *Transformative Constitutionalism: comparing the apex courts of Brazil, India and South Africa*, 22 (Pretoria University Law Press & National Law University Delhi Press, 2014).

7 T. Roux, *A brief response to Professor Baxi*, in the collection mentioned in the preceding note, 48 at 51.



description of the South African Constitution as transformative.<sup>8</sup> The agreement or disagreement is on the scope and application of the concept of transformative constitution and to its interpretation and application. Klare would like the judges to interpret and apply the Constitution with a clear understanding that it was made with a view to transforming the grim social, economic, political and other realities of life caused by the colonial past, and more so by the policy of apartheid. Such an understanding will require the judges to depart from the traditional techniques of interpreting the Constitution and laws as a continuity of the legal system proceeding on the basis of precedents. In calling the Constitution post-liberal he also expected the judges to subordinate liberty and property to equality which is the highest value and goal to be achieved by the Constitution. For the realisation of these goals the judges must invent and apply new tools and techniques different from the ones used in pre-Constitution time. They are expected to do so because departing from the common law tradition of the same courts interpreting the constitution that interpreted and applied all other laws too, the Constitution of South Africa created a separate court, i.e. a Constitutional Court exclusively bestowed with the responsibility of interpreting and applying the Constitution.

It seems that after labelling of the

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8 For the citation of these writings see fn 1 in T.Roux, Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference? 20 Stellenbosch Law Review 258 (2009).

Constitution of South Africa as transformative constitution, the label has been extended to other constitutions also which have similar features. The book referred to above which brackets the constitutions of India and Brazil along with the Constitution of South Africa is one of such examples.<sup>9</sup> The extension of the label is not misplaced because though not all Constitutions may be having the same background and provisions as the Constitution of South Africa, they may have similar background and provisions. In the light of their background not unexpectedly they may have not made exactly the same provisions as the Constitution of South Africa does, so long as they share the background and make provisions which are aimed at wide ranging social and political changes in their respective societies, they may justifiably be called transformative constitutions. As we noticed above, the label or adjective “transformative” was first associated with the Constitution of South Africa, it was not one of the adjectives associated with those constitutions. Therefore, speaking for the Constitution of India, I can say that in the light of its background, its process of formation and ultimately in its architecture and details it is definitely a transformative Constitution.<sup>10</sup> Accordingly, I have no hesitation in including it among the transformative constitutions. The assertion will be justified by the discussion that follows. The important issue for consideration

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9 See, fn 5 above.

10 This premise has found voice in some other writings also, See, for example, Sandipto Das Gupta, *A Language Which is Foreign To Us- Continuities and Anxieties in the Making of the Indian Constitution*, Comparative Studies of South Asia, Africa and the Middle East, Vol. 34, No. 2, 2014.

is whether the transformative provisions of the Constitution have been worked out in practice on the lines of the constitutional text.

## **II. Indian Constitution as transformative constitution:**

Following Klare's description of transformative constitutionalism as a long-term project of constitution-making, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships successively.

### **A. Preparation and making of India's Constitution:**

The background to the constitution of an ancient and unbroken civilization and culture like that of India cannot be completely detached from its at least known past which has admittedly influenced making of some of the provisions of the Constitution, but it is primarily a modern project in response to mainly the political developments during approximately a century preceding its making. It is during this period that realizing the design of the formally trading East India Company to colonize the country for the British Empire the people of India made an unsuccessful armed attempt in 1857 to oust it. Following this defeat the British government replaced the ailing and ousted Moghul Empire by British Empire in 1858. Nearly three decades later in 1885 the subjugated intelligentsia of the country founded the Indian National Congress (INC) to negotiate political issues with the British rulers. One of their main and early demands was establishment of

a constitution for India ensuring participation of Indians in the formation and working of the government with a guarantee of rights similar to those enjoyed by British subjects in England. A blueprint to that effect was presented to the British government in the Constitution of India Bill, 1895.<sup>11</sup> In pursuance of persistent demand from the INC, the government conceded some of the demands in the constitutional documents of 1909 and 1919. The latter devised some sort of federal arrangement conceding partial participation of Indians in the provincial governments. As these arrangements failed to satisfy their expectations, they continued to persist on reforms in such proposals as Ms. Beasant's Commonwealth of India Bill of 1925<sup>12</sup> in which they also repeated their demand for the guarantee of basic rights including civil and political as well as social and economic rights followed by Motilal Nehru report in 1928<sup>13</sup> and the Karachi Resolution in 1931, the last of which included a much more comprehensive list of social and economic rights along with civil and political rights.<sup>14</sup> These proposals played, says Granville Austin "a vital share in shaping India's future Constitution, and the provisions did in fact become the spiritual and in some cases the direct, antecedents of the DPs [Directive Principles of State Policy]."<sup>15</sup> By this time the

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11 For the text of the Bill see, B. Shiva Rao (ed.), *The Framing of India's Constitution*, vol. I, p. 5 (IIPA, New Delhi, 1966). The volume contains record of most of the events preceding the making the process of making the Constitution of India.

12 For the text of the Bill see, id. at 43.

13 For the text of the Report see, id at 58.

14 For the text of Resolution see, M. Gwyer & A. Appadorai, *Speeches and Documents on the Indian Constitution 1921 – 47*, Vol. I, 248 (OUP, 1957).

15 G. Austin, *The Indian Constitution*, 56 (OUP, 1966).



people also started demanding independence from the British rule and, therefore, even the constitutional Act of 1935, which sought to fulfill the demands of the people of India, could not satisfy them inter-alia for the reason that it did not have a Bill of Rights as well as self-rule at the Centre in an unrealized and unrealizable federal structure. The struggle for independence from British rule was intensified during the WW II and continued beyond until the British Prime Minister made a statement in Parliament on February 20, 1947 to hand over power into Indian hands latest by June 1948. But by a later announcement on June 3 the Prime Minister advanced the date for transfer to August 1947 with a division of the country into India and Pakistan and thus India secured its independence on August 15, 1947.

Prior to the declaration of independence, based on a plan announced on May 16, 1946 by a Cabinet Mission of the British government a Constituent Assembly comprising Indian members, mostly indirectly elected but a few of them also nominated, was in place by the end of September. A notable feature of the Assembly was its inclusiveness even though the vast majority of its members belonged to INC. INC ensured inclusion of all the prominent leaders of different political formations and sections of the society including women, minorities, depressed classes or *dalits* as well as tribals or aboriginals so much so that Dr. Ambedkar, a staunch critic, if not opponent, of Gandhi was specially brought into CA and was later appointed Chairperson of the Constitution Drafting Committee of CA on the

advice of Gandhi himself. Even though elected indirectly, CA was a highly representative body of the people because almost all its leaders had closely worked with the people and knew well their problems and expectations.<sup>16</sup> Though most of the prominent members of CA were also members of the government, to maintain dignity and independence of CA they never mixed their two capacities except by influencing the making of the constitutional provisions by their practical experience of governance. Some of its main leaders like Nehru, Patel, Prasad and Azad were practicing democrats and representative of masses and, therefore, they brought a sense of unity among the members of CA to produce a constitution in the interest of all four hundred million people of India.<sup>17</sup>

After settling some of the preliminary issues the CA met on 9 December 1946. Expressing their distress on the absence of Muslim members from those territories which they were demanding for the formation of a separate independent state of Pakistan, the assembled members proceeded to transact the business of the Assembly. The most important business transacted in this meeting was the introduction on 13 December 1946 of the Objectives Resolution on the making of the future constitution of India. Excluding those parts of the Resolution which became irrelevant after declaration of independence and partition

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<sup>16</sup> They were not elites like the makers of the US Constitution who were all property and slave owners white males as Sripathi seems to be assuming. See Sripathi fn. 4 above.

<sup>17</sup> For details on the formation and nature of CA see, id. 8 ff.

of the country, the Resolution read as follows:<sup>18</sup>

(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;

...

(4) wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

(5) wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and public morality; and

(6) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes.

... .<sup>19</sup>

Thus well before the declaration of independence the CA, unlike the previous constitutional enactments of 1919 and 1935, spoke not in the name of the King of

18 Constituent Assembly Debates of India, Volume 1, Part 5, Available at "<http://parliamentofindia.nic.in/ls/debates/vol1p5.htm>" (Last visited April 14, 2015).

19 For the text of the Resolution, see, Shiva Rao, above n. vol. II, p. 3.

England acting on the advice and consent of British Parliament attributed the making of the Constitution to the people of a sovereign and independent India,<sup>20</sup> and assured justice and rights to all the people with special guarantees to minorities, backward and depressed classes as well as tribal communities and areas, which the British Parliament declined to concede. In defence of the Resolution Nehru alluded "to the 5,000 years India's history" which assured India a great future.<sup>21</sup> Referring to some revolutions in the remote past and in USA, France and Soviet Union and his faith in socialism which he did not press for being included in the Resolution, he wished a constitution which could take care of the interests of all people of India.<sup>22</sup> In a longer defence Radhakrishnan referring to the above three revolutions expressed the "wish to bring a fundamental alteration in the structure of Indian society" and "to gain the revolutionary ends by methods which are unusual so far as past history is concerned."<sup>23</sup> The object was to "establish *Swaraj* for all the Indian people... where no individual will suffer from undeserved want" and "where no group will be thwarted in the development of its cultural life."<sup>24</sup> Speaking of "a socio-economic revolution" that the Constitution was expected to bring, he also clarified that "apart from re-making the material conditions, we have to safeguard the liberty of the human spirit."<sup>25</sup>

20 For comparison see, the preamble and enacting clause respectively of the Government of India Acts of 1919 and 1935.

21 Id, n. 15 at 6.

22 Id at 8.

23 Id, n. at 12.

24 Ibid.

25 Id. at 17.



He also alluded to India's ancient traditions of republicanism.<sup>26</sup> With these two speeches the debate on the Resolution was concluded by its unanimous adoption without any amendment or change on 22 January 1947. Thus the Resolution made it plain that though the Constitution is expected to bring revolutionary changes in Indian society, it will not resort to Russian model even though it rejected age old monarchy. These goals clearly satisfied Klare's concept of transformative constitution.

The Resolution became the guiding mantra at every step for the making of the Constitution and finally became its Preamble with the addition of democracy, fraternity and human dignity which were all incorporated in full measure in the Constitution. Closely examining the proceedings of CA from the beginning to end Austin finds that "The theme of social revolution runs throughout the proceedings and documents of the Assembly."<sup>27</sup>

### **Transformative provisions of the Constitution of India:**

On the structural aspects of the state and governments the Constitution may have to some extent followed the Government of India Act, 1935 but as regards its flesh and blood, brain and respiration from the beginning to the end are entirely new and inspired its background briefly alluded above. Its Preamble represents what it aspires to achieve. Subject to addition by the 42nd Amendment in 1976 of "SECULAR

<sup>26</sup> Id. at 15.

<sup>27</sup> At xvii.

SOCIALIST" after "SOVEREIGN" and before "DEMOCRATIC" and "and integrity" after "unity" and before "the Nation", it remains as adopted originally on 26 November 1949. The Preamble attributes the origin of the Constitution to the people of India and not to any other human or divine authority. The people of India are the ones who have resolved to constitute India into a "SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC" and to secure to its citizens JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and opportunity; and to promote among them FRATERNITY assuring the dignity of the individual and the unity and integrity of the nation". Special attention may be paid to the sequence of different values in the Preamble which places "JUSTICE" above all others including freedom and equality and which is repeated and reinforced in the Directive principles of State Policy. Within justice also social justice is foremost. Special attention has been drawn to the placing of justice in the Preamble at least by one keen author on the background of India's Constitution.<sup>28</sup>

Concretising and operationalising these goals the Constitution defines citizenship and uniformly converts immensely diverse people of India from subjects to citizens.<sup>29</sup> It confers suitably crafted fundamental rights on all citizens and with a few minor exceptions

<sup>28</sup> For details see, M. Mukherjee, *India in the Shadows of Empire*, 185 ff& 199 ff (OUP, 2010, Paperback, 2012). Also see, Art. 38 (1).

<sup>29</sup> Part II.

also on non-citizens.<sup>30</sup> They include the right to equality and non-discrimination on grounds of race, religion, caste, sex or place of birth in all matters including state employment.<sup>31</sup> Most importantly it abolishes age-old social evil of “Untouchability” and forbids its practice in any form.<sup>32</sup> The state is prohibited from conferring any title on any person and the citizens are also prohibited from accepting any title from any foreign state.<sup>33</sup> Subject to reasonable restrictions on specified grounds all citizens can exercise freedom of speech and expression, assembly, associations and unions, movement, residence and settlement, and of profession, occupation, trade or business. No new offences can be created or punishments enhanced retrospectively.<sup>34</sup> Double jeopardy and self-incrimination are prohibited.<sup>35</sup> No person can be deprived of his life or liberty without due procedure established by law and persons accused of any offence are entitled to certain safeguards.<sup>36</sup> All citizens between the age of six to fourteen have the right to free and compulsory education.<sup>37</sup> Traffic in human beings, forced labour and employment of children under fourteen in hazardous industries is prohibited.<sup>38</sup> Freedom of religion is guaranteed to all persons and religious denominations.<sup>39</sup> While all state funded or aided educational

30 Part III. Some of the exceptions, for example, the ones in Article 19 (1) may be covered in Article 21 which applies to all people.

31 Arts. 15 & 16.

32 Art. 17.

33 Art. 18.

34 Art. 19.

35 Art. 20.

36 Arts. 21 & 22.

37 Art. 21-A.

38 Arts. 23 & 24.

39 Arts. 25 & 26.

institutions are open to all citizens, religious and linguistic minorities have the right to establish and administer educational institutions of their choice.<sup>40</sup> Besides, any section of the citizens residing in India having a distinct language, script or culture of its own has the right to conserve it.<sup>41</sup> For ensuring compliance with these rights the right to approach the Supreme Court is also guaranteed.<sup>42</sup>

Notable features of these rights are that some of them expressly and others impliedly are available not only against the state or public authorities but also against the private persons or bodies;<sup>43</sup> some of them make special provisions for women and children<sup>44</sup> while others make similar provisions for weaker sections of the society designated as socially and educationally backward classes or simply backward classes, and Scheduled Castes and Scheduled Tribes<sup>45</sup> while still others make similar provisions for minorities and certain sections of the society.<sup>46</sup>

Moving further, the Constitution sets certain directive principles of state policy which though not enforceable in the courts are still “fundamental in the governance of the country” and the state, which the Supreme Court has on occasions held to include courts too,<sup>47</sup> is

40 Arts. 29 (2) & 30.

41 Art. 29 (1).

42 Art. 32.

43 E.g., Arts. 15 (2), 16 (5), 17, 18, 19, 21, 23, 24, 25, 26, 28, 29, 30. For details, see, M.P. Singh, cited above in fn 44.

44 E.g., Arts. 15 (3), 21-A & 24.

45 E.g., Arts. 15 (4) & (5), 16 (4), (4-A) & (4-B), 19 (5),

46 E.g., Arts. 25 Explanation I, 29 (1) & 30.

47 See, e.g., Mathew J. in Kesavananda Bharati v. State



duty bound to apply them in the making of the laws.<sup>48</sup> They include promotion of the welfare of the people “by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all institutions of the national life”;<sup>49</sup> minimization of inequalities among individuals as well as groups;<sup>50</sup> equal means of livelihood and equal pay for equal work for women and men; ownership and control of material resources for the common good; avoidance of concentration of wealth and means of production to the common detriment; protection of workers and children and aged against abuse as well as special care for children;<sup>51</sup> equal justice and free legal aid to all;<sup>52</sup> right to work, education and public assistance in cases of unemployment, old age, sickness, disablement and other cases of undeserved want;<sup>53</sup> humane conditions of work and maternity relief;<sup>54</sup> living wages and conditions of work ensuring decent life for workers and their participation in management;<sup>55</sup> early childhood care and provision for education for children up to the age of six;<sup>56</sup> promotion of educational and economic interests of Scheduled Castes and Scheduled Tribes and other weaker sections;<sup>57</sup> raising of levels of nutrition and

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of Kerala, AIR 1973 SC 1461 & State of Kerala v. N.M. Thomas, AIR SC 490, 515 and Unni Krishnan v. State of AP, (1993) 1 SCC 645.

48 Art. 37.

49 Art. 3 (1).

50 Art. 38(2).

51 Art. 39.

52 Art. 39-A.

53 Art. 41.

54 Art. 42.

55 Arts. 43 & 43-A.

56 Art. 45.

57 Art. 46.

standards of living and improvement of public health;<sup>58</sup> organization of agriculture and animal husbandry;<sup>59</sup> and protection of environment, forests and wild life.<sup>60</sup>

The Constitution also provides for certain duties of the citizens which include abiding by the Constitution and respecting its ideals and institutions; cherishing and following the ideals that inspired national struggle for freedom; upholding and protecting the sovereignty, unity and integrity of India; defending the country and rendering national service when called upon to do so; promoting harmony and the spirit of common brotherhood amongst all persons and renouncing of practices derogatory to the dignity of women; valuing and preserving the rich heritage of our composite culture; protecting environment and having compassion for living creatures; developing scientific temper, humanism and the spirit of inquiry and reform; safeguarding of public property and abjuring of violence; striving towards excellence in all spheres of activity; and providing opportunities for education to one's child or ward between the age of six and fourteen.<sup>61</sup>

Notable features of the rights, directives and the duties are that they express special concern for women, children and weaker sections of the society, prominently among them socially and educationally backward classes, Scheduled Castes and Scheduled Tribes and, for some specific purposes, also

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58 Art. 47.

59 Art. 48.

60 Art. 48-A.

61 Art. 51-A.

the minorities. These concerns are presumed to inform all our laws and legal institutions either expressly or impliedly.

These concerns are further supported by the provisions of the Constitution in Parts IX, IX-A and IX-B relating respectively to Panchayats, municipalities and cooperative societies in which special provisions have been made for the representation of women, SCs and STs<sup>62</sup> and also in Part XVI which makes similar provisions for the representation of the SCs, STs and a minority community – Anglo-Indians –for representation in the national Parliament and State Legislatures.<sup>63</sup> Additional provisions have been made in this part for the representation of SCs and STs in State services and also for a minority for such representation in some services and for special grants for education.<sup>64</sup> The Constitution also provides for special commissions to look after the interests of the SCs, STs and backward classes.<sup>65</sup> Special provisions for SCs, STs and backward classes, especially for STs, are scattered all over the Constitution including its Schedules.<sup>66</sup> Some safeguards are also provided for the linguistic minorities.<sup>67</sup>

The multiplicity of special provisions for certain classes within the society amply proves

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62 Arts. 243-D, 243-T & 243-Z.

63 Arts. 330 – 333,

64 Arts. 335, 336 & 337. The special provisions for the Anglo-Indian community in Arts. 336 and 337 have, however, ceased to apply since 26 Jan. 1960.

65 Arts. 338, 338-A & 340.

66 Art. 164 (1) Proviso, Part X, Arts. 339, 371-A, 371-B, 371-G, 371-H, & 5th & 6th Schedules.

67 Art. 350-A & 350-B.

and supports the transformative nature of the Constitution which not only places all citizens at the same level but also takes due note of the age old social, economic, political and other kinds of disabilities and practices that have been part of the Indian society since time immemorial and have caused as well as sustained gross inequality to certain identifiable classes and sections of the society. The Constitution expects and obliges the state to take special, legislative and administrative measures to remove their age old shackles and disabilities and bring them at par with the rest of the society through such measures. This definitely is the most outstanding aspect of the transformative character of the Constitution. Perhaps in this regard the Constitution of India has taken a lead over all other constitutions made until then.

Another notable transformative feature of the Constitution is introduction of democracy based on universal adult suffrage to elect people's representatives for the Parliament and for the State legislatures out of whom executive governments are created at the national and State levels. To these bodies local self-governments at the municipal and village levels as well as cooperative societies have also been added by subsequent amendments. Right to be an elector was extended slowly and successively on educational, property, sex and other considerations until the recognition of adult suffrage even in the oldest and the most robust democracies such as of the United Kingdom or the United States. Even in India until independence it was restricted on



educational, property and other considerations to less than one fourth of the adult population. But the Constitution extended it to every adult – initially of 21 years and above and of 18 years since 1989 without regard to religion, race, caste, sex or any of them.<sup>68</sup> In course of time this right has proved to be the most effective weapon in making the social, economic and political changes envisaged by the Constitution. Communities and the sections of the people, who remained excluded from the main stream of life of the country since time immemorial, have been raised to the level of ruling classes or classes that equally share political power. They have not yet all acquired equal social and economic status with the former dominant classes, but they are on the road to break the traditional hierarchical order of the country that impoverished them for ages.

Examining these provisions and their background Granville Austin discovered two revolutions in India since the end of WW I, the national and the social. “With independence,” he says “the national revolution will be completed, but the social revolution must go”<sup>69</sup> and that:

The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the *social revolution* or attempt to foster this revolution by establishing the conditions necessary for its achievement.<sup>70</sup>

68 Arts. 325 & 326.

69 G. Austin, cited above, p. 26.

70 Id. at 50. Emphasis supplied.

Austin again notes that out of the several goals which the Constitution wanted to achieve “social revolution” was transcendent among them because it would fulfill “the basic needs of the common man, and ... bring about fundamental changes in the structure of Indian society – a society with a long and glorious cultural tradition, but greatly in need ... of a powerful infusion of energy and rationalism.”<sup>71</sup>

On similar lines but without reference to social revolution or transformation Ananya Vajpeyi looks at the Constitution as a protective cover for all Indians:

“This new India – whose key text, the Constitution of 1950, Ambedkar shepherded into its inaugural form – had to be imagined on the basis of a kind of selfhood that would appeal as much to Hindus as to minorities, to upper castes as to Sudras and Untouchables, and to those in the mainstream as to those on the margins.”<sup>72</sup>

## **Transformative constitution in practice:**

### *i. Initial twenty-five years:*

The foregoing transformation envisaged and provided for in the text of the Constitution could not be expected to be self-operative.

71 Id. at xvii. The other two goals of the same level were national unity and stability and democracy and the three together constituted a seamless web being interdependent.

72 A. Vajpeyi, *Righteous Republic The political Foundations of Modern India*, 209 (Harvard Uni. Press, 2012).

It could be realized only through appropriate institutions supported by the people and occupied by persons well aware and supportive of, if not committed to, the constitutional goals. Therefore, the Constitution provides for lawmakers or legislatures elected for five years at a time by all the citizens of eighteen years and above.<sup>73</sup> Leaders of the majority in the legislature constitute the executive. This arrangement initially made at the Central and State level has with some modifications also been extended even to municipal and village levels as well as cooperative societies.<sup>74</sup> Ever since the first election at the Centre and the States in 1952, they have consistently been held with occasional variations permissible under the Constitution.

It also provides for an independent judiciary equipped with the power of judicial review ensuring compliance with the Constitution and the laws made in pursuance of it by the legislature and the executive. Though the judiciary is said to be the weakest or the least dangerous out of the three branches of the government, the Constitution of India conceives it “an arm of the social revolution, upholding the equality [and other rights] that Indians had longed for during colonial days but had not gained.”<sup>75</sup> For that reason:

The Assembly went to great lengths to

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73 Art. 327. Initially the voting age was 21 years which was lowered to 18 years by the Constitution (61st Amendment) Act, 1988 w.e.f. 28.3.1989.

74 See, Parts IX, IX-A & IX-B, of which the first two were introduced in 1993 while the last one was introduced in 2011.

75 164.

ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect of the provisions. If the beacon of the judiciary was to remain bright, the court must be above reproach, free from coercion and from political influence.<sup>76</sup>

Accordingly, the Constitution makes elaborate provisions conferring wide powers of judicial review supported by adequate provisions for enforcement of their orders. It also ensures the independence of the judiciary in every possible way its makers could conceive.<sup>77</sup> Out of the three levels of judiciary – the Supreme Court, the High Courts and the subordinate or district courts - the Supreme Court is considered to be the beacon light to guide the ship of the Constitution and all that which was expected to be achieved through it. Therefore, unprecedented powers are conferred upon it which perhaps no other highest court in the world has or exercises. Apart from its other vast jurisdictions it may be approached as a matter of fundamental right to enforce any of the FRs guaranteed in the Constitution. Such FRs included even those DPs which have been incorporated into FRs by its own interpretation of the Constitution. The High Courts also have the vast powers of judicial review and of enforcing FRs through appropriate orders and directions including the power to issue writs. The subordinate courts do not have the power of judicial review of

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76 164 – 165.

77 On the independence of judiciary see M.P. Singh, *Securing the Independence of the Judiciary: The Indian Experience*.



legislation and of issuing writs but they have the power to interpret and apply and enforce the Constitution as interpreted by the High Courts or the Supreme Court. Ever since the inception of the Constitution the Supreme Court and the HCs have exercised their powers for the enforcement of FRs by devising appropriate procedures and remedies.

In spite of such elaborate and effective arrangements the Constitution has not yet made adequate progress in the realization of its goal of social transformation. Of course it could educate and train people in democratic processes and give them the confidence of being citizens of an independent country in which they could decide their fate as they wished, but by and large social and economic arrangements did not change on expected lines. There could be any number of reasons for that, but let us confine to constitutional issues within the domain of law.

The first and foremost reason that I see as a student of law was lack of understanding of the transformative nature of the Constitution on the part of our courts both at the level of the High Courts and the Supreme Court in the first two formative decades of the life of the Constitution. Unlike the legislatures and the executives created under the Constitution comprising persons who had participated in the national struggle and in the making of the Constitution, the members of the judiciary including the Supreme Court came from the existing judiciary used to serving a colonial state and its laws based presumably on

common law principles protective of property rights. As the judges were expected to remain insulated from the politics in the country, they may have ignored, if not seen with disdain, the political and social developments in the country. Most of them came from families which had little exposure to social realities in the country and were educated in England and its Bars or in metropolis or Presidency Towns of Bombay, Madras or Calcutta. Perhaps in their zeal to keep judiciary insulated from any kind of political influence, the Constitution makers, unlike the makers of many post WW II constitutions which provided for a separate court exclusively for constitutional matters,<sup>78</sup> they made the Supreme Court part of the judiciary dealing with all other matters too on the lines other former British colonies including Unites States, Australia and Canada. The judges in countries which have exclusive constitutional courts are appointed on different considerations by a different procedure and for a definite period without a life term. Experience worldwide proves that such courts are much more effective in enforcing the social and economic rights than the traditional courts consisting of judges with security of tenure for life or until the age of retirement.<sup>79</sup> This was not conceived and done by our Constitution makers and, therefore, our judges in the Supreme Court are also appointed on similar lines as the judges in the High Courts except

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78 See, e.g., the Constitutional Court in Germany and other European countries. A recent example of such a court in a common law jurisdiction is the Constitutional Court of South Africa.

79 Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, 2008).

that a jurist may be appointed to the Supreme Court, which has not yet happened.

If the Constitution makers had given enough thought to the aspect that a transformative constitution or constitution that aims at social revolution would require a different judiciary for the interpretation and application of the constitution, perhaps the results would have been different. If, for example, an Ambedkar or Gobind Ballabh Pant or Sir B.N. Rau or any of the several other prominent lawyers in CA or outside had been appointed the first Chief Justice of India, the results would have been tremendously different because these were the persons who knew the object and purpose of the Constitution and its various provisions and would have given them that meaning and effect.<sup>80</sup>

Consequently, when the Constitution came for interpretation and application before the judges at the High Courts and in appeal or otherwise at the Supreme Court in matters that aimed at bringing the social and economic transformation envisaged and incorporated in it by its makers, they invalidated them on pre-Constitution principles or notions of law without realizing that the Constitution was intended to change that law and legal position. Therefore, *zamindari* abolition and land reforms laws of different States, which were made after a long demand and struggle and were definitely an important and extensive socio-economic

measure in a predominantly agricultural society, were declared unconstitutional by the High Courts and also by the Supreme Court.<sup>81</sup> Similarly when for similar reasons appropriate measures were taken against the industries or land was acquired for public purpose, the courts invalidated those laws or measures too.<sup>82</sup> Even reservation in educational institutions and state jobs for the socially and educationally backward classes of SCs and STs was not seen sympathetically by the Courts. This led to the successive amendments, some of them with far-reaching consequences.<sup>83</sup> The process continued on issues such as acquisition of property, land reforms, nationalization of industries and banks and abolition of Privy Purses which the Supreme Court invalidated and the Parliament overturned them through successive amendments of the Constitution.<sup>84</sup> After the initial failure to challenge the

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81 See, e.g., *Kameswar Singh v. State of Bihar* AIR 1951 Pat. 91; *State of Bihar v. Kameswar Singh* AIR 1952 SC 252; *Dwarkadas Srinivas v. Solapur Spg. And Wvg. Co. Ltd.* AIR 1954 SC 119; *Saghir Ahmed v. State of U.P.* AIR 1954 SC 728; and a number of other cases.

82 Consequently drastic amendments had to be made in the Constitution within a year of its making, which amendments were, however, upheld by the Supreme Court in *Shankari Prasad v. Union of India* AIR 1951 SC 455.

83 For example, The Constitution (First Amendment) Act, 1951; The Constitution (Fourth Amendment) Act, 1955; The Constitution (Seventeenth Amendment) Act, 1964; The Constitution (Twenty fifth Amendment) Act, 1971; The Constitution (Twenty Ninth Amendment) Act, 1972; The Constitution (Thirty Fourth Amendment) Act, 1974; The Constitution (Thirty Ninth Amendment) Act, 1975; The Constitution (Fortieth Amendment) Act, 1976; The Constitution (Forty Second Amendment) Act, 1976; The Constitution (Forty Third Amendment) Act, 1977; The Constitution (Forty Fourth Amendment) Act, 1978.

84 See the previous note and *Madhav Rao Scindia v. Union of India* AIR 1971 SC 530.

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80 Submissions made before the Swaran Singh Committee by Prof. P.K. Tripathi (1976) 2 SCC (Jour) 29 at p.41.



amendments, some hope for the success of such challenge was created in another property rights case<sup>85</sup> and finally again in a property rights case the Court denied Parliament the power to abridge the FRs in future which led to wide ranging amendments to nullify the effect of that decision.<sup>86</sup> But a few years later in another challenge on property right the Court laid down the general proposition that the basic structure of the Constitution was beyond the power of amendment provided in the Constitution which lead to direct conflict between the Court and the executive in the appointment of the next Chief Justice in defiance of an unbroken convention since the commencement of the Constitution. It is surmised that one of the reasons for such supersession could be blocking the appointments to the Supreme Court of some of the judges who could be the kind of judges for whom the then executive was propagating for some time – the so-called committed judges.<sup>87</sup> The new Chief Justice had the judicial record of being sympathetic to government's economic policies *vis-a-vis* the Constitution<sup>88</sup> with whom the executive could succeed in making some appointments to the Supreme Court whose vision or understanding of the Constitution coincided with that of the government.<sup>89</sup> During such a situation on the

85 Sajjan Singh v. State of Rajasthan AIR 1965 SC 845.

86 I.C. Golaknath and Ors. v. State of Punjab and Anrs. AIR 1967 SC 1643.

87 See, e.g., P.P. Rao, A Rare Judge, 5 Journal of Indian Law and Society, 157 (2014).

88 See for e.g. A.N. Ray, J who gave minority opinions in Madhav Rao Scindia v. Union of India AIR 1971 SC 530; RC Cooper v. Union of India AIR 1970 SC 564 and; Keshavnanda Bharati v. State of Kerala AIR 1973 SC 1461.

89 See generally discussions from Granville Austin, Working a Democratic Constitution p. 278 onwards.

one hand political campaign was started for the removal of the then Prime Minister and on the other hand her election to Lok Sabha (lower house of Parliament) was invalidated by one of the High Courts against which the Supreme Court gave only a qualified stay leading to the declaration of Emergency (internal). During the Emergency while almost all opposition leaders, including members of Parliament, were behind the bars the Constitution went through various amendments, including the notorious 39th and 42nd Amendments nullifying respectively the effect of the High Court judgment against the Prime Minister, drastic curtailment of the power of judicial review and nullification of restrictions on the power of amendment.

#### *ii. Beginning of the new era:*

These events and background led the Court to reconsider and redefine its role under the Constitution. Therefore, realizing the perils of unlimited power of amendments in the hands of Parliament in the shape of one person law in the 39th Amendment, it confirmed the limitations on the power of amendment. Going by its past record of not being a big defender of civil liberties it declined to examine the legality of detention of opposition leaders,<sup>90</sup> it gave a ground breaking judgment on equality for the weakest and the most excluded sections of the society (SCs & STs) through an unprecedented interpretation to the Constitution during the Emergency.<sup>91</sup> As the Emergency was lifted in early 1977 and fresh elections were held leading to the defeat of the then Prime Minister

90 ADM Jabalpur v. Shivkant Shukla AIR 1976 SC 1207.

91 State of Kerala v. N.M. Thomas AIR 1976 SC 490.

and her party, the new coalition government restored the pre-Emergency position of the Constitution and courts, subject to a few exceptions. Besides it removed the right to property from amongst the FRs and moved a part of it to another location.<sup>92</sup> But irrespective of such restoration the Court acquired a new kind of consciousness and understanding of its obligations under the Constitution and started giving fresh look and meaning to FRs, particularly to the rights to equality and life and liberty somewhat shaming the government for having done pretty little on social and economic front. Simultaneously it opened the doors of the Court to the disempowered and weak or any genuine person or organization on their behalf for obliging the government to perform their obligations towards persons whom the Constitution treats with special care. This led to the introduction of public interest or social action litigation which, as Baxi says, converted the Supreme Court of India into the Supreme Court for Indians.<sup>93</sup>

While on the one hand Court's initial interpretation of the Constitution did not match its makers' expectations and understanding, on the other hand the governments also did not do enough for bringing the socio-economic transformation of the society which was expected through it. Apart from some states initially pursuing the policy of reservation for the weaker or excluded sections of the

92 See, art. 300-A.

93 Upendra Baxi (1985), "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," Third World Legal Studies: Vol. 4, Article 6.

society,<sup>94</sup> which was later implemented by the Centre too,<sup>95</sup> and enacting *zamindari* abolition and land reforms laws,<sup>96</sup> the Centre also did not do much except by way of nationalization of industries and acquisition of private property for public purpose. Even the Civil Rights Act making the practice of untouchability an offence could be enacted only in 1955 and laws such as Equal Remuneration Act, 1976 and Bonded Labour System Act, 1976 could be enacted only during the Emergency.

Pursuing its new interpretation of equality, the Court's major contribution has been its recognition as part of the basic structure of the Constitution and as absence of arbitrariness ensuring judicial review of any law or administrative action in respect of any issue affecting any right of the individual with the possibility of developing into a general principle of reasonableness of constitutional order like the principle of proportionality in European constitutions. Finally, the concept of "equal protection of laws" has also been extended to requiring positive state action for the realization of equality as also expressly provided in Article 38 (2). This approach is also supportive of state actions under Articles 15(4) & (5) as well as 16 (4), (4-A) & (4-B) providing for special provisions and reservation in public

94 As for e.g in Mysore and Madras.

95 See Resolution of the Government of India in the Ministry of Home Affairs, dated September 13, 1950; Office Memorandum No. 2/11/55-RPS, dated May 7, 1955, the Government of India modified sub-paragraphs (3) and (4) of paragraph 5 of the Supplementary Instructions dated January 28, 1952

96 The Zamindari Abolition and land reforms legislations were enacted in almost all the states soon after independence.



employment and educational institutions.<sup>97</sup>

Through its ingenuity the Court has made a somewhat dormant Article 21, which seemed to have given no fundamental right in the absence of the possibility of a law being tested under it, has contributed most towards the goals set by the Constitution. It reads:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Often relying upon the statement of Field, J of the US Supreme Court in *Munn v. Illinois*<sup>98</sup> to the effect that “[b]y the term ‘life’, as here used, something more is meant than mere animal existence”, the Supreme Court through Justice Bhagwati in *Francis Coralie Mullin v. UT of Delhi*<sup>99</sup> stated:

We think that right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

The judge conceded that “the magnitude and content of the components of this right

would depend upon the extent of the economic development of the country”, but emphasized that “it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self”.<sup>100</sup>

Following this statement, on the question of bondage and rehabilitation of some labourers, in *Bandhua Mukti Morcha v. Union of India*<sup>101</sup> the Judge held:

It is the fundamental right of everyone in this country...to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no state...has the right to take any action which will deprive a person of the enjoyment of these basic essentials.<sup>102</sup>

97 See, particularly, *Pramati Educational and Cultural Trust and Ors. v. Union of India and Ors.* AIR 2014 SC 2114.

98 24 L Ed 77: 94 US 113 (1877).

99 (1981) 1 SCC 608 at 619. The statement has been cited and restated in a number of subsequent decisions.

100 Ibid.

101 AIR 1984 SC 802.

102 Also see *Vikaram Deo Singh Tomar v. State of Bihar*, AIR 1988 SC 1782.

The Court has endorsed this statement in a petition seeking ban on injurious drugs<sup>103</sup> and again in a petition seeking human conditions in a care home for females.<sup>104</sup> Similarly the court has favourably entertained a petition under Article 21 for appropriate relief against the leakage of oleum gas from a chemical plant resulting in loss of lives and injury to health.<sup>105</sup> The right to appropriate relief against the ill-effects of X-ray radiation on the employees of a State corporation – Bharat Electronics Ltd. – has also been recognized under Article 21.<sup>106</sup>

Further, in a case of the effect of exposure to asbestos on the health of workers the Court held the right to health and medical aid to protect the health and vigour of a worker while in service or after retirement is a fundamental right under Article 21 read with DPs in Articles 39(e), 41, 43, 48-A and all related articles and fundamental human rights to make the life of workman meaningful and purposeful with dignity of person.<sup>107</sup> Sewage workers employed by the government contractors are also entitled to humane work conditions and to compensation in case of injury or death.<sup>108</sup> Failure on the part of a government hospital to

provide timely medical treatment to a person in need of such treatment has been declared a violation of his right under Article 21.<sup>109</sup> Courts have also ordered the government to pay for the life saving treatment of a child whose parents were incapable to pay for such treatment.<sup>110</sup>

For some time the Court took the stand that the right to life in Article 21 did not include the right to livelihood.<sup>111</sup> But after some ambiguity on the issue,<sup>112</sup> the court held that the right to livelihood is included in the right to life “because no person can live without the means of living, that is, the means of livelihood”.<sup>113</sup> Ensuring livelihood to women the court has also invalidated some of the laws which prohibited women in participating in some of the livelihood activities.<sup>114</sup> Court has yet to recognize a general right to employment in Article 21.<sup>115</sup> The right of agriculturalists to cultivation is part of their fundamental right to livelihood.<sup>116</sup> Further, upholding the right of the people in hill areas for a suitable approach road the court held that the right to life in Article 21 “embraces not only

103 Vincent Panikurlangara v. Union of India, AIR 1987 SC 990, 994-95

104 VikaramDeo Singh Tomar v. State of Bihar, AIR 1988 SC 1782.

105 M.C. Mehta v. Union of India, AIR 1987 SC 1086

106 M.K.Sharma v. Bharat Electronics Ltd., AIR 1987 SC 1792.

107 Consumer Education & Research Centre v. Union of India, AIR 1995 SC 922; Kirloskar Bros. Ltd. v. ESI Corpn.(1996) 2 SCC 682; Kalyaneshwari v. Union of India, (2011) 3 SCC 287.

108 Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage and Allied Workers, (2011) 3 SCC 568.

109 Paschim Banga Khet Mazdoor Samity v. State of W.B, AIR 1996 SC 2426.

110 Mohd. Ahmed (Minor) v. Union of India W.P. (C) 7279/2013 (Delhi High Court-April 17, 2014).

111 Sant Ram, re, AIR 1960 SC 932; A.V.Nachane v. Union of India, (1982) 1 SCC 205.

112 Port of Bombay v. Dilipkumar Raghavendranath Nadkarni, (1983) 1 SCC 124

113 Olga Tellis v. Bombay Municipal Corp., AIR 1989 SC 180; DTC v. Mazdoor Congress, AIR 1991 SC 101.

114 Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1; State of Maharashtra v. Indian Hotel & Restaurants Assn., (2013) 8 SCC 519; Charu Khurana v. Union of India, (2015) 1 SCC 192.

115 State of Karnataka v. Umadevi, AIR 2006 SC 1806.

116 Dalmia Cement (Bharat) Ltd. v. Union of India, (1996) 10 SCC 104.



physical existence of life but also the quality of life and for residents of hilly areas, access to road is access to life itself".<sup>117</sup> Treating clean environment an essential aspect of life it has observed that it may have precedence over the economic interests of the society.<sup>118</sup> Again, the Court has held that the right to life includes the right to "a reasonable accommodation to live in"<sup>119</sup> and right to shelter,<sup>120</sup> including the necessary infrastructure to live with human dignity.<sup>121</sup> It also includes the right of the individual to water and duty of the State to provide clean drinking water to its citizens.<sup>122</sup> Without very specifically holding that the right to food is included in Article 21 the Court has issued directions to the States to ensure that nobody dies of starvation.<sup>123</sup>

### iii. Access to courts:

[The procedures which the Supreme Court has developed include any means by which it can be approached including a letter or post card written to it or to any of its judges or even the suo-motu proceedings by the Court based on newspaper or other reliable information. Similarly, among the remedies, it may give any

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117 *State of H.P. v. Umed Ram Sharma* AIR 1986 SC 847.

118 *M.C.Mehta v. Union of India*, (2004) 12 SCC 118.

119 *Shantistar Builders v. Narayan KhimalalTotame*, AIR 1990 SC 630.

120 *GauriShanker v. Union of India*, AIR 1995 SC 55.

121 *Chameli Singh v. State of U.P.* AIR 1996 SC 1051.

122 *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664; *A.P Pollution Control Board v. Prof. M.V.Naidu*, (2001) 2 SCC 62.

123 *PUCL v. Union of India*, (C) 196 of 2001, Order Dated 17.09.2001; *PUCL v. Union of India*, (2013) 2 SCC 688.

order or direction for the enforcement of FRs including the payment of compensation or restoration of status quo ante. These powers may equally be exercised by the subordinate courts subject to the limitation that they cannot issue prerogative writs and invalidate legislation or decide a case that "involves a substantial question of law as to the interpretation of ... [the] Constitution the determination of which is necessary for the disposal of the case".<sup>124]</sup>

Another remarkable developments since the late 1970s has been the kind of access to courts and judicial procedures and remedies the Court has created. Among them the most remarkable is the relaxation in the requirement of standing or *locus standi* for approaching the courts through public interest litigation (PIL) or social action litigation (SAL). Through PIL any public spirited person may espouse the cause of others for the enforcement of any legal right. Justifying such litigation the Court has said that "any member of the public having *sufficient interest* can maintain an action for the judicial redress for public injury arising from breach of public duty or from violation of some provisions of the Constitution or the law and seek enforcement of such public duty and observance of such Constitutional or legal provision."<sup>125</sup> Specifically in the context of FRs, it observed:

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124 Consti., Art. 228. Also see, Sections 113 and 395 of Civil Procedure Code and Criminal Procedure Code that restrain which restrain these courts from deciding the constitutional validity of legislation and for details, M.P. Singh, *Situating the Constitution in the District Courts*, 8 *DJA Journal*, 47 ff (2012).

125 *S.P Gupta v. Union of India*, (1981) Supp. SCC 87, 218

Where a person or a class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantageous position, any member of the public acting bona fide can move the court for relief under Article 32... so that the fundamental rights may become meaningful not only for the rich and the well to do who have the means to approach the court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress.<sup>126</sup>

As several of the DPs are also read as FRs this procedure covers them too as well as many other issues if they can somehow be associated with any FR. Following this liberal approach the Court has allowed various public spirited persons, lawyers, NGOs and social and political organizations to bring petitions on behalf of persons suffering from environment pollution and starvation, bonded labourers, tribals, children and women in protected homes, hutment and pavement dwellers, street hawkers, victims of gas leak, pollution, etc.<sup>127</sup> Starting with the issues of poor and weak

<sup>126</sup> *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161, 185.

<sup>127</sup> Among numerous writings on the subject see, U. Baxi, *Taking suffering Seriously: social Action Litigation in the Supreme Court of India*, 8 & 9 *Delhi L. Rev.* 91 (1979 – 80) and among several writings of P. Singh, *Protecting the Rights of Disadvantaged Groups through Public Interest Litigation*, in M. P. Singh et al (eds), *Human Rights and Basic Needs: Theory and Practice*, 305 (Universal Law Publishing Co., Delhi, 2008).

this procedure has also been extended to improving the functioning of the government, controlling corruption and malpractices of the government officials including Union and State ministers, if these activities are somehow associated with the violation of any of the FRs but even without the requirement of FRs for approaching the High Courts.

Again, in granting remedies the Supreme Court and following it the High Courts have been quite liberal and innovative. Apart from the traditional powers of injunction and declaration, they have exercised the special powers given to them in the Constitution. They issue writs or directions or any other remedy such as restoration of status quo ante, grant of compensation, imposition of exemplary costs or costs for litigation and consequential inconvenience or loss. It has also held that the remedy with the Supreme Court in Article 32 and with the High Courts in Article 226 is a public law remedy and therefore in cases in which private law provides no remedy, they may provide a remedy. Thus a victim of state action could claim compensation for the loss of life which could not be claimed under the private law because of the common law bar of sovereign immunity.<sup>128</sup> In case FRs can be claimed against private persons the remedy of compensation may be granted against private persons too.<sup>129</sup> As Article 32 does not provide any specific procedure or remedies for the

<sup>128</sup> *Nilbati Behera v. State of Orissa*, AIR 1993 SC 1960.

<sup>129</sup> *Bodhisattva Gautam v. Shhubhra Chakraborty*, (1996) 1 SCC 490; *M.C.Mehta v. Kamal Nath*, AIR 2000 SC 1997.



enforcement of FRs the Court exercises the power to forge new remedies and fashion new strategies designed to enforce FRs. The Court has observed that procedure being merely a handmaiden of justice; it should not stand in the way of access to justice.<sup>130</sup> It is in the exercise of such wide powers that the Supreme Court and also the High Courts issue remedies such as of continuous mandamus to monitor the progress in the realization of rights and may take support of any state or private body or organization for that purpose. The Court also uses the dialogical method for arriving at a correct decision and forging an appropriate remedy in the light of the experience and difficulties felt by different parties to an issue of rights. These procedures and remedies may not fit into the existing categories of judicial process either in the common law or civil law systems; they have paved the way towards the understanding and realization of social rights of the people.<sup>131</sup>

Although the process of social and economic transformation has gained a lot from PIL during the nineteen eighties, the process of gain started slowing down in the next decade when it started diversifying in different directions political, economic and others not directly related to social transformation.<sup>132</sup>

130 M.C.Mehta v. Union of India, AIR 1987 SC 1086.

131 For a critical analysis of judicial process and remedies developed through it see, M. Khosla, n. 9 above.

132 S. Shankar, *Scaling Justice: India's Supreme Court, Anti-Terror Laws and Social Rights*, 177 (OUP, 2009) cited in S. Krishnaswami & M. Khosla, *Social Justice and the Supreme Court*, in M. Suresh & S. Narrain, *The Shifting Scales of Justice*, 110 (Orient Black Swan, Hyderabad, 2014).

However, it is argued that in view of increasing judicial enforcement of social rights all over the world the courts must adopt the most suitable strategies for the realization of social and economic rights of which PIL is one which has definitely brought an ideological shift favouring social transformation.<sup>133</sup>

#### *iv. Court induced legislative and administrative measures:*

In the face of lead taken by the courts in the transformatory goal of the Constitution the governments at the Centre and the States could no longer go to the people for mandate with the excuse of the judiciary blocking their way in the realization of that goal. They had to do what they had failed to do in this respect until then. Accordingly apart from taking other economic policy issues since mid-1980s and finally introducing the New Economic Policy in 1991, the Central government followed by State governments started conceiving and implementing social and economic policies that along with improving the national economy will also directly and immediately help in realizing the constitutional goal of ensuring social and economic justice to all as expected by the Constitution and incorporated in the Preamble as the foremost assurance to the citizens. Without entering into all the policies and programs for the advancement of the

133 See, e.g., several essays included in Suresh & Narain cited in the previous note. Also see, U. Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 8 & 9 Del. L. R., 91 (1979 – 80) & M. Khosla, *The Indian Constitution*, 124 (OUP, 2012).

economy or social life in general of the country, but in view of the primary pressing goals set by the Constitution of removing poverty and providing social justice to all, take up a few legislations and administrative schemes which the Centre has introduced. Prominent among them are the following:

### **1. Recognition and implementation of the right to food:**

Although the right to food like many other rights is not specified in the Constitution, life could not be conceived or sustained without food.<sup>134</sup> Therefore the Court found it included in the right to life as the right to “adequate nutrition”.<sup>135</sup> Following that two public spirited persons wrote to the Chief Justice of India that in two districts of Orissa people were starving and in order to ward off hunger they were being subjected to all kinds of exploitation and even being compelled to sell their children. Converting the letter into a writ petition the Court issued notices to the State of Orissa and got an enquiry conducted. Although no immediate relief could be given in view of State’s assurance to the Court, nobody disputed that state was under an obligation to prevent hunger and destitution.<sup>136</sup> As the situation did not improve even after the directions of the Court, the Indian Council of Legal Aid filed another petition in 1996 alleging that despite Court’s directions, another petition was filed in the

Court but also the Centre referred the matter to the National Human Rights Commission to examine the complaints. Stating that “The reading of Article 21 together with Articles 39(a) and 47, places the issue of food security in the correct perspective, thus making the Right to Food a guaranteed Fundamental Right which is enforceable by virtue of the constitutional remedy provided under Article 32 of the Constitution” the Commission found fault not with the availability or adequacy of food but its administration by the State.<sup>137</sup>

Later in the *People’s Union for Civil Liberties v. Union of India*<sup>138</sup> and six states having starvation conditions, recognizing the right to food the Court observed: “what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide to them.”<sup>139</sup> It further directed: “By way of interim order, we direct the States to see that all the PDS [Public Distribution Scheme] shops, if closed, are reopened and start functioning within one week from today and regular supplies made.”<sup>140</sup> Later the petition became an all India matter in which

134 Consti. Art. 47.

135 See, Francis Coralie Mullin v. Union Territory of Delhi, AIR 1981 SC 746, 753.

136 Kishen Patnaik v. State of Orissa, (1989) 1 SCC 258.

137 Case No. 37/3/97-LD (<http://nhrc.nic.in/impdirections.htm>)

138 *People’s Union for Civil Liberties (PUCL) v. Union of India*, W.P. (Civil) 196 of 2001.

139 In *People’s Union for Civil Liberties (PUCL) v. Union of India*, W.P. (Civil) 196 of 2001, order dated July 23, 2001. Available at “<http://www.righttofoodindia.org/orders/interimorders.html#box16>” (Assessed on April 14, 2015)

140 Ibid.



the Union of India, all the States and the Union Territories were made parties for the purpose of devising an all India scheme suitable for every state and region for the purpose of ensuring adequate food for everyone within the country. Later relying on Articles 21 and 47 it issued detailed directions to the respondents to ensure adequate nutrition to every citizen in the country. It also asked them to implement the midday cooked meals scheme in all the state and state aided schools. The petition is still pending in the Court for the realisation of the right to food.<sup>141</sup>

Taking note of the foregoing Court orders and directions, NHRC order, international opinion and pressure and suggestions from experts and human rights campaigners, Parliament has finally enacted the National Food Security Act, 2013 which ensures the right to subsidized food grains to approximately two-third of India's population covering 75% of rural and 50% of the urban people.<sup>142</sup> The Act enables its beneficiaries to purchase 5 kilograms per eligible person per month of cereals at heavily subsidized rates; provides special support to pregnant women and lactating mothers, children upto the age of fourteen years

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141 PUCL v. Union of India, 2003(9) SCALE 835. For other orders see., (2013) 2 SCC 688, (2013) 2 SCC 684, (2013) 2 SCC 682, (2013) 2 SCC 663, (2012) 12 SCC 357, (2011) 14 SCC 559, (2011) 14 SCC 556, (2011) 14 SCC 393, (2011) 14 SCC 331, (2010) 14 SCC 611, (2010) 14 SCC 613, (2010) 15 SCC 147, (2009) 14 SCC 392, (2007) 1 SCC 719, (2007) 1 SCC 728, (2004) 1 SCC 104, (2004) 1 SCC 108.

142 The new Government at the Centre which assumed power in May 2014 is planning to reduce the percentage of the population covered under the Act to 40. But so far it has not been done.

and malnourished children. In case of non-availability of food grains the Act provides for cash allowance to be handed over to the senior most adult woman in the family. It also provides for elaborate administrative arrangements at the Central, State and local levels for the effective implementation of the law.

Prior to this law, with a view to enhancing enrolment, retention and attendance in schools and simultaneously improving nutritional levels among children, the National Programme of Nutritional Support to Primary Education (NP-NSPE) was launched as a Centrally Sponsored Scheme in 1995. In 2001 Mid Day Meal Scheme became a cooked Mid Day Meal Scheme under which every child in every Government and Government aided primary school must be served a cooked mid-day meal with a minimum content of 300 calories of energy and 8-12 gram protein per day for a minimum of 200 days. The Scheme was further extended in 2002 to cover not only children studying in government, government aided and local body schools, but also children studying in Education Guarantee Scheme (EGS) and Alternative & Innovative Education (AIE) centres. From time to time the scheme has been revised to improve the quality of content and service of meals. In October 2007, the Scheme was extended to cover children of upper primary classes with improved norms for meals and their service.

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 also makes special

provision for food security insofar as no irrigated multi-crop land may be acquired except as a demonstrable last resort subject to the condition that an equivalent cultivable wasteland shall be developed for agricultural purposes or an amount equivalent to the value of the land acquired shall be deposited with the appropriate government for investment in agriculture for enhancing food-security. It may be hoped that these provisions in the Act will ensure availability of food on a sustainable basis.

## 2. Realisation of the right to education:

The right to education has been central to all demands for a bill of rights in India from the earliest times, i.e. since the first formal demand in 1895. But realizing the ground realities of the time the Constitution makers made it only a negative fundamental right to the extent that nobody shall be denied admission to state educational institutions on certain grounds.<sup>143</sup> The availability of education as a matter of right was shifted to DPs and that too in a limited way. Among them Article 41 provides that “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right ... to education” and Article 45 provided that “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.” Article 46 also provides that “The State shall promote with special care the educational and economic interests of the weaker sections of

<sup>143</sup> Art. 29 (2).

the people”. In 1978 one of the High Courts held that the right to freedom of speech and expression in Article 19 included the right to education also.<sup>144</sup> The decision could not be taken seriously and was even overruled by the Supreme Court.<sup>145</sup> Following *Francis Coralie Mullin* that the right to life in Article 21 also included the right to “facilities for reading, writing and expressing oneself in diverse forms”, a decade later the Court recognized the right of every child to free education until it completed the age of fourteen years. Beyond that the right to education was subject to limits of economic capacity and development of the state.<sup>146</sup> To place the right on sound footing in 2002 Article 21-A was added to FRs which reads: “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.” By the same amendment, Article 45 has been reworded, which now reads, “The state shall endeavour to provide early childhood care and education for all children until they complete the age of six years.” The same amendment also imposes a fundamental duty on every citizen “who is a parent or guardian to provide opportunities for education to his child or ... ward between the age of six and fourteen years.”<sup>147</sup>

After long deliberations on the implementation of Article 21-A, Parliament enacted the

<sup>144</sup> *Anand Vardhan Chandel v. University of Delhi*, AIR 1978 Del 308.

<sup>145</sup> *University of Delhi v. Anand Vardha Chandel*, (2000) 10 SCC 648. Also see, M.P. Singh, *Constitutional Right to Vidya or Privilege for Avidya*, 8 *JBCI* 251 (1981).

<sup>146</sup> *Unni Krishnan v. State of A.P.*, (1993) 1 SCC 645.

<sup>147</sup> Art. 51-A (k), Constitution of India.



Right of Children to Free and Compulsory Education Act, 2009 which after administrative arrangements and court litigation finally came into force from April 2012.<sup>148</sup> The Act makes free and compulsory education a fundamental right of every child in the age group of 6 to 14. It provides for the quality and standards of schools, teachers, curriculum, evaluation, access and duties and responsibilities of all concerned. Its main features include free and compulsory education to all children in the age group of 6 to 14 in a neighbourhood school till completion of elementary education; provision for 25 percent seats for weaker sections and economically disadvantaged groups in the admission in private schools; all schools are required to meet all specified norms and standards within three years to avoid cancellation of their recognition; pupil-teacher ratio is fixed at 30:1; mandates improvement in quality of education; sharing of financial burden between the Central and State Governments; constitution of National Commission for Elementary Education to monitor all aspects of elementary education including its quality; and prohibition of physical punishment and mental harassment, screening procedures for admission of children, charging of capitation fee, private tuition by teachers and running of schools without recognition.

Well before the Act of 2009 the Central Government had introduced an administrative scheme called *Sarva Siksha Abhiyan* (SSA) in 2000 – 2001 for achieving universalization of elementary education in a time bound manner,

<sup>148</sup> See, cases cited in n. 76 above.

as was being conceived through Article 21-A. It was implemented in partnership with the State Governments to cover the entire country and addresses the needs of 192 million children in 1.1 million habitations. The programme seeks to open new schools in those habitations which do not have schooling facilities and strengthens existing school infrastructure through provision of additional class rooms, toilets, drinking water, maintenance grant and school improvement grants. Existing schools with inadequate teacher strength are provided with additional teachers, while the capacity of existing teachers is being strengthened by extensive training, grants for developing teaching-learning materials and strengthening of the academic support structure at a cluster, block and district level. SSA seeks to provide quality elementary education including life skills with a special focus on the education of girls and children with special needs. SSA also seeks to provide computer education to bridge the digital divide.

The recent available data on elementary education shows a positive trend, as though with slight variation in different parts of the country it is seen that more than 96 per cent of all children in the age group of 6 to 14 years have been in the schools during 2009-2014.<sup>149</sup> The number of non-enrolled students was 3.3 per cent in 2014. The number of students keeps growing in private schools compared to state schools. The quality of education has also

<sup>149</sup> ASER (Annual Survey on Education Report) prepared by a NGO 'Pratham' for the Government of India in rural areas, 2014.

shown slight improvement in 2013 compared to earlier years. It is better in private schools compared to state schools. The teachers' attendance in the state schools stands at 85 per cent but the number of students in these schools has decreased. The difference between the enrolment of girls and boys is also getting narrower, and most of the girls at primary level are also in the school as indicated by girls to boys enrolment ratio of 0.93 in 2013-14.<sup>150</sup> More and more schools both private and state are meeting the requirements of RTE Act, 2009 in respect of teacher student ratio, sanitation facilities, libraries, etc. even though the exact standards are yet to be achieved.<sup>151</sup>

The government is also spending a good percentage of its budget on education. One of the reports of the government shows that in the year 2012 – 13, 10.70 per cent of the total budget estimates was allocated to education of which nearly three fourths was contributed by the State Governments and nearly one fourth was contributed by the Central Government.<sup>152</sup> Out of the budgeted amount 50.36 per cent was spent on elementary education alone.<sup>153</sup> These figures give somewhat satisfactory

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150 'Analytical Tables 2013-14, Elementary Education in India: Progress towards UEE', National University of Educational Planning and Administration, 2014, p. 5 (Data in the report was based on the data received uptill 30th September 2013 under the District Information System for Education initiative of Government of India). Available at, "<http://www.dise.in/Downloads/Publications/Documents/AnalyticalTable-2013-14.pdf>" (Accessed March 22, 2015).

151 Ibid. ASER, 2014, p. 83.

152 'Analysis of Budgeted Expenditure on Education 2010-11 to 2012-13', Government of India, Ministry of Human Resource Development, 2014, p. 1.

153 Id., p.3.

account of the concern of the government for the realization of the right to education.

### 3. Ensuring the right to housing:

Like food, housing is also not expressly mentioned in the Constitution, but relying again on *Francis Coralie Mullin, in Shantistar Builders v. Naarayan Totame*<sup>154</sup> the Court held that the right to life includes the right to 'a reasonable accommodation to live in' and again in *Gauri Shankar v. Union of India*<sup>155</sup> it reinforced it by including the necessary infrastructure in the shelter to live with human dignity.<sup>156</sup> In spite of these pronouncements, large number of people, especially in big cities, can be seen without any kind of house or shelter. Families, generations after generation spend their lives on pavements or in slums like the ones Lapierre has sketched in the *City of Joy*. Most of these people come to the cities from the rural areas in search of livelihood and continue to stay there in the absence of anything to fall back at the native place. Therefore, they settle down wherever they find a place to do so, including the pavements. Of course such settlements cause inconvenience to city dwellers and visitors in a number of ways and they would like them to be removed away from their homes or from the pavements or other public places such as parks. Though in *Olga Tellis v. Bombay Municipal Corpn.*<sup>157</sup> the Court did not recognize a right to settle down on the pavements, it recognized such settlements concomitant to

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154 (1990) 1 SCC 520, 527.

155 (1994) 6 SCC 309.

156 Chameli Singh v. Sate of U.P., (1996) 2 SCC 549.

157 (1985) 3 SCC 545.



the right to livelihood recognized in Article 21. Therefore, removal of such persons from the pavements or public land required adequate notice as part of natural justice. Later in *Ahmedabad Municipal Corp v Nawab Khan*,<sup>158</sup> the Court also drew a distinction between long and short term settlers and accorded higher rights to the former. In *Olga Tellis* the Court gave directions to provide alternative site to the pavement dwellers. Therefore as a matter of policy the government or the local authority provides alternative accommodation to the homeless before they are removed from their home or from unauthorized occupations of public land. But in one of the cases the Court made a damaging remark withdrawing that support and even insinuating criminality to squatters.<sup>159</sup> It observed:

Establishment or creating of slums, it seems, appears to be good business and is well organized. The number of slums has multiplied in the last few years by geometrical proportion. Large areas of public land, in this way, are usurped for private use free of cost. ...The promise of free land, at the taxpayers' cost, in place of a *jhuggi*, is a proposal which attracts more land grabbers. Rewarding encroaches on public land with free alternate site is like giving a reward to a pickpocket.<sup>160</sup>

Court's ambivalence in this regard has diluted whatever right the earlier decisions had recognized. A few housing schemes for the

158 AIR 1997 SC 152

159 *Almitra Patel v. Union of India*, (2000) 2 SCC 679.

160 *Id.*, at 685.

poor, including night shelters for homeless,<sup>161</sup> have been pursued by the Central or State governments, though no legislative move has yet been taken or is in sight.<sup>162</sup> Among these schemes *Indira Awaas Yojana* (IAY) was launched in May 1985 and is being implemented as an independent scheme since 1 January 1996. IAY aims at helping rural people below the poverty-line (BPL) belonging to SCs/STs, freed bonded labourers and non-SC/ST categories in construction of dwelling units and upgradation of existing unserviceable *kutcha* houses by providing assistance in the form of full grant.

A Sub-Mission under Jawaharlal Nehru National Urban Renewal Mission (JNNURM), Integrated Housing and Slum Development Programme (IHSDP) administered by Ministry of Housing and Urban Poverty Alleviation (MHUPA) was envisaged and brought into effect in 1993–94. The major components of the scheme are housing, shelter up-gradation, sanitation, roads, drains, footpaths, social amenities like construction of Primary Health Centers, Anganwadi buildings etc.

161 *In Court on its Own Motion v. Govt. of NCT & Others*, MANU/DE/2987/2011 the High Court of Delhi relying upon a scheme of Delhi Government for the purpose of establishing not only temporary but permanent shelter homes for every one hundred thousand segment of population ordered for the construction of such shelters with requisite facilities ensuring dignity to homeless people within the territorial limits of Delhi; also see The Delhi High Court pulls up govt. for 'inhuman condition' of night shelters, *Indian Express* (March 27, 2014)

162 For a critical review on the right to food and housing see, B.B. Pande, Re-orienting the 'Rights' Discourse to Basic Human Needs, in M.P. Singh et al (eds), n. 69 above at 149.

*Rajeev Awas Yojana* (RAY) a scheme for the slum dwellers and urban poor on the lines of IAY for the rural poor has been sanctioned by the Government of India for 2013-2022. The scheme provides for affordable housing through partnership and the scheme for interest subsidy for urban housing would be dovetailed into the RAY which would extend support under JNNURM to States that are willing to assign property rights. As in 2014 around INR 8.68 billion have been released by the government as first installment for the Rajiv Awas Yojana.<sup>163</sup> RAY is having proportional support from Central Government as fifty percent contribution for towns having more than 0.5 million population and seventy five percent for towns with less than 0.5 million population, also up to eighty percent Central contribution is envisaged under the scheme for North –Eastern and Special Category States.<sup>164</sup>

Another scheme, *Rajiv Rinn Yojana* (RRY), effective from October 1, 2013 envisages the provision for a subsidy of 5% on interest charged on the admissible loan amount to economically weaker sections (EWS) having annual income as in 2014 below INR 0.1 million and low income group (LIG) having annual income as in 2014 between INR 0.1 to 0.2 million segments to enable them to buy or construct a new house.

#### **4. Ensuring health care:**

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163 Annual Report 2013-14, at p. 23, Ministry of Housing & Urban Poverty Alleviation, Government of India.

164 Id.

Again, following *Francis Coralie Mullin*, in a series of cases briefly alluded to above, the Court has found that the right to live with human dignity includes the right to good health. In *Consumer Education and Research Centre v. Union of India*<sup>165</sup>, the Court explicitly held that “the right to health ... is an integral facet of meaningful right to life” and added that the right to health and medical care is a fundamental right under Article 21. This recognition of the right to health has established a framework for addressing health concerns within the rubric of public interest litigation which has resulted in establishing that the state is obliged to ensure the creation of conditions necessary for good health, including provision for basic curative and preventive health services and the assurance of healthy living and working conditions.

Thus emphasizing the preservation of life as one of the paramount duties of the state in *Parmanand Katara v. Union of India*<sup>166</sup>, the Court directed the availability of access to curative health services. The case concerned the availability of emergency medical treatment for a seriously injured man at a local hospital. The hospital doctors refused to provide the man with emergency aid and sent him to another hospital twenty kilometers away. He died of his injury on way to the other hospital. The Court was asked whether the injured citizens have a constitutional right to instantaneous medical treatment under Article 21. It held that Article 21 obliges the state to take every

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165 (1995) 3 SCC 42.

166 (1995) 3 SCC 248.



possible measure to preserve life. Provision for medical services in need was necessary for the preservation of life, the Court added. It also asked the state to remove legal impediments imposed on doctors and hospitals for providing emergency medical aid.

Another significant decision which strengthened the recognition of the 'right to health' was *Indian Medical Association v. V.P. Shantha*<sup>167</sup>. In that case the Court ruled that the provision of medical service (whether diagnosis or treatment) in return for monetary consideration amounted to 'service' for the purpose of the Consumer Protection Act, 1986. Consequently medical practitioners could be held liable under the Act for deficiency in service in addition to negligence. The decision has gone a long way towards protecting the interests of patients. However, medical services offered free of cost were considered to be beyond the purview of the said Act. The courts have, however, awarded compensation even against government hospitals for medical negligence resulting in the death of a person.<sup>168</sup>

In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*,<sup>169</sup> the Court again addressed the adequacy and availability of medical treatment for individuals in need of medical assistance. In this case, a man fell from a train and suffered serious head trauma. He was brought to a number of state hospitals,

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167 AIR 1996 SC 550

168 *R. Shanmugakani v. The Govt. of Tamil Nadu*, WP (MD) No. 13867 of 2011, decided on 08.08.2014 (Madras High Court).

169 (1996) SC 2426.

including primary health centres and specialist clinics, for treatment of his injuries. Seven state hospitals were unable to provide emergency treatment for his injuries because of non-availability of bed and trauma and neurological services. The issue before the Court was whether the lack of adequate medical facilities for emergency treatment constituted a denial of the fundamental right to life. The Court found that it is the primary duty of a welfare state to ensure that medical facilities are adequate and available for treatment. It also required the state to ensure that primary health centres are equipped to provide immediate stabilizing treatment for serious injuries and emergencies. In addition, the Court ordered the state to increase the number of specialist and regional clinics around the country to treat serious injuries and to create a centralized communication system among state hospitals so that patients could be transported immediately to the facilities where space is available. It also recognized and emphasized upon the need of substantial expenditure to ensure adequate medical facilities and held that a state could not escape its constitutional obligation on account of financial constraints. Courts have actually ordered the government to pay for the life-saving treatment of a child whose parents were incapable of paying for such treatment.<sup>170</sup>

In another case the Court also addressed the quality and safety of the nation's blood

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170 *Mohd. Ahmed (Minor) v. Union of India*, W.P.(C) 7279/2013, decided on 17 April, 2014 (Delhi High Court).

banks.<sup>171</sup> In the then status of state and commercial blood banks the Court saw a serious threat to health. Donors were paid for their blood regardless of their health status. Besides, most state blood banks were not conducting tests on the blood for transmissible infections, and commercial blood banks were not ensuring that healthy individuals donated blood. The Court banned commercial blood banks and instituted a state licensing scheme for all blood banks. The government was also required to enact legislation for regulating the collection, processing, storage, distribution, and transportation of blood, and the overall quality of blood banks. Following the Court decision the Drugs Controller General of India made draft rules to further amend the existing law in the Drugs & Cosmetics Act, 1940 for improving the blood banking system in the country. In 2002, Government of India announced the National Blood Policy which includes ensuring availability of safe and adequate quantity of blood, blood components and products; taking blood from voluntary donors without payment; prohibition on sale of blood for profit; and addressing issues concerning training of technical personnel, research, and development.<sup>172</sup>

Addressing further the issues concerning AIDS the Court has held that people with sexually transmitted diseases, such as HIV, can be punished for concealing this information

171 *Common Cause v. Union of India and Ors.*, Writ Petition (Civil) 91 of 1992; DOD-04.01.1996

172 See National Blood Policy, 2002 ([http://www.who.int/bloodsafety/transfusion\\_services/IndiaNationalBloodPolicy2007.pdf?ua=1](http://www.who.int/bloodsafety/transfusion_services/IndiaNationalBloodPolicy2007.pdf?ua=1))

from their spouses or fiancés.<sup>173</sup> In the same case it also held that a private hospital was justified in disclosing confidential information regarding a man's medical status to his fiancée and that the woman's right to good health took precedence over the man's right to privacy. It also emphasized on the need of treating HIV or AIDS infected persons with dignity and giving them suitable employment too.

Again in *Bandhua Mukti Morcha v. Union of India*,<sup>174</sup> examining the unhealthy conditions in which quarry workers and their families lived and worked, the Court addressed the types of social conditions necessary for the enjoyment of health. It directed the state to provide workers with clean drinking water and sanitarian and medical facilities to protect their health.

Issues of health have also been closely related with environment and therefore several environmental issue such as provision for clean residential conditions in a municipal area or relocation of industry or use of pollution free fuel in vehicles are all environmental issues closely related to health on which the courts have taken health friendly decisions and given appropriate directions to municipal and other public authorities.<sup>175</sup>

Among the legislative and administrative

173 *'X' v. Hospital 'Z'*, (1998) 8 SCC 296.

174 (1984) 3 SCC 161.

175 See, e.g., *M.C. Mehta v. Union of India*, AIR 2002 SC 1696; See also *Balram Prasad v. Kunal Saha* (2014) 1 SCC 384; *Occupational Health and Safety Association v. Union of India* AIR 2014 SC 1469; *Sahara House v. Union of India* (2014) 14 SCC 532.



measures for securing the right to health, no law secures it yet notionally. Only a few administrative measures have been taken which include the National Rural Health Mission (2005-12) which seeks to provide effective healthcare to rural population throughout the country with special focus on 18 states, which have weak public health indicators and/or weak infrastructure. Its key components include provision for a female health activist in each village; a village health plan prepared through a local team headed by the Health & Sanitation Committee of the Panchayat; strengthening of the rural hospital for effective curative care made accountable to the community through Indian Public Health Standards (IPHS); and integration of vertical Health & Family Welfare Programmes and Funds for optimal utilization of funds and infrastructure and strengthening delivery of primary healthcare. It seeks to improve access of rural people, especially poor women and children, to equitable, affordable, accountable and effective primary healthcare.

A similar plan for the urban population – National Urban Health Mission – aims to improve the health status of the urban population in general, but particularly of the poor and other disadvantaged sections, by facilitating equitable access to quality health care through a revamped public health system, partnerships, community based mechanism with the active involvement of the elected local bodies. It aims at improving the efficiency of public health system in the cities by strengthening, revamping and rationalizing existing government primary urban health

structure and designated referral facilities; promotion of access to improved health care at household level through community based groups; strengthening public health through innovative preventive and promotional action; increased access to health care through creation of revolving fund; prioritizing the most vulnerable amongst the poor and ensuring quality health care services.

For ensuring safe child birth and prevention of mortality of mother and child at birth the Central government introduced the National Maternity Benefits Scheme (NMBS) in 1995 which was later modified into *Janani Suraksha Yojana* (JSY) in 2005. JSY ensures safe motherhood intervention under the National Rural Health Mission (NHM). It promotes institutional delivery among poor pregnant women. The scheme extends to all states and Union Territories, with a special focus on Low Performing States.

Effective June 1, 2011 the Government of India has also launched *Janani Shishu Suraksha Karyakaram (JSSK)* to evolve a consensus on the part of all States to provide completely free and cashless services to pregnant women including normal deliveries and caesarean operations and care and treatment of sick new born up to 30 days after birth in Government health institutions in both rural & urban areas.

*Nirmal Bharat Abhiyan* (NBA) previously called *Total Sanitation Campaign* (TSC) being a *Community-led Total Sanitation* (CLTS) programme was initiated by Government of India in 1999. As Census 2011 data shows

out of total 246,692,667 households in 2011, 53.1% households do not have any type of Latrine facility.

## 5. Ensuring right to livelihood:

The right to livelihood is very much part of DPs in Articles 39 (a) and 41 which respectively require the state to direct its policy towards securing that “the citizens, men and women equally, have the right to an adequate means of livelihood” and to make within the limits of its economic capacity and development, “effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want.” But until recently no effective legislative or administrative measures were taken for the realization of this right.<sup>176</sup> Only through its interpretation of Article 21, as noted above, the Court from mid 1980s started pronouncing that the right to life included the right to livelihood “because no person can live without the means of living, that is, the means of livelihood”<sup>177</sup>; for the agriculturists cultivation is part of their FR to livelihood<sup>178</sup>; and for earning their living the people in hill areas have the right for a suitable approach road because the right to life in Article 21 “embraces not only physical

existence of life but also the quality of life and for residents of hill areas, access to road is access to life itself.”<sup>179</sup> Recognizing hawking on public streets, a right protected under Article 19 (1) (g) as a means of livelihood, the Court has repeatedly held that the right could be subjected only to reasonable restrictions imposed by law in the interest of others using the public streets.<sup>180</sup> Ordering the strict observance and implementation of Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 the Court has raised the amount of compensation for the death of any worker in the process of cleaning sewers even though it has also ordered for making it a crime to employ anyone in such cleaning without observing all safety measures.<sup>181</sup> The Court has recognized dancing as profession and a means of livelihood for dancing girls as well as a business for those who maintain places for dancing and a ban on such dancing in small restaurants and bars while permitting it in multi-starred hotels violates Article 19 (1) (g) and deprives a person of her means of livelihood.<sup>182</sup>

176 The Bonded Labour System (abolition) Act, 1976 only abolished the system of bonded labour but did not make any provision for the rehabilitation or livelihood for the persons released from bondage.

177 *Olga Tellis v. Bombay Municipal Corpn*, AIR 1986 SC 180, 193.

178 *Dalmia Cement (Bharat) Ltd. v. Union of India*, (1996) 10 SCC 104 & *Charan Singh v. State of Punjab*, (1997) 1 SCC 151.

179 (1986) 2 SCC 68.

180 See, e.g., *Sodan Singh v. New Delhi Municipal Committee*, (1989) 4 SCC 155 & (1998) 2 SCC 727; *Sarojini Nagar Market Shop Keepers Assn. v. NDMC*, (2000) 10 SCC 341 & *Gainda Ram v. MCD*, (2010) 10 SCC 715, *Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai*, (2009) 17 SCC 151 & (2014) 1 SCC 490.

181 *Safai Karamchari Andolan v. Union of India*, 2014 Stpl (web) 206 decided on 27.3.2014.

182 *State of Maharashtra v. Indian Hotel & Restaurants Assn.*, (2013) 8 SCC 519. Thanks to Pande for drawing my attention towards this case. Also note, *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1; *Charu Khurana v. Union of India* (2015) 1 SCC 192.



The Court decisions, which have limited effect on reality, have induced a few legislative and administrative measures during the last few years.<sup>183</sup> They include the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MNREGA) which aims at guaranteeing the 'right to work' and ensuring livelihood security in rural areas by providing at least 100 days— raised to 150 days for STs in 2014 – of guaranteed wage employment in a financial year to every household whose adult members volunteer to do unskilled manual work. During its existence of over eight years the law has received diverse reports, but the overall assessment is that it has helped in improving the life of rural poor by making them aware of their claims and asking for minimum or better wages for work they do for others either in agriculture or any other sector. The MNREGA outcome data 2013-14 (Dec.-13) shows that 38,126,455 households were provided employment out of 43,759,203 households that demanded employment in total.<sup>184</sup>

The other relevant legislation in this regard is Unorganised Sector Workers' Social Security Act, 2008 which provides for constitution of

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183 Apart from the writings of Nobel Prize winning economists such as Joseph Stiglitz and Amartya Sen, factual and fictional writings such as P. Sainath, *Everybody Loves a Good Harvest* (Penguin India, 1996); H. Mander, *Ash in the Belly* (Penguin India, 2012) & R. Mistry, *A Fine Balance* (Faber & Faber, 1996) and involvement of some grassroots workers such as Aruna Roy and Harsh Mander in the policy making has influenced these steps.

184 "Mahatma Gandhi National Rural Employment Guarantee Act, 2005 Report To The People - 2nd February 2014" at p. 35, Ministry of Rural Development Department of Rural Development, Government of India, New Delhi 2014.

National Social Security Board at the Central level which shall recommend formulation of social security schemes for life and disability cover, health and maternity benefits, old age protection, and any other benefit as may be determined by the Government for unorganized workers as well as schemes relating to provident fund, employment injury benefits, housing, educational schemes for children, skill upgradation, funeral assistance and old-age homes by the State Governments. Further, it envisages constitution of a National Social Security Board to recommend to the Central Government suitable schemes for different sections of unorganized workers; monitoring the implementation of schemes and advising the Central Government on matters arising out of the administration of the Act and for the setting up of constitution of Workers' Facilitation Centre to (i) disseminate information on social security schemes available to them, and (ii) facilitate the workers to obtain registration from district administration and enrolment of unorganized workers.

Dealing with another vulnerable section of the society is the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 which recognizes the right of STs and forest dwellers to hold and live on the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood and enjoy their community rights even in cases where such right could not be recorded.<sup>185</sup>

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185 Section 3(1), Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

Addressing the issue of livelihood of the street vendors and hawkers Parliament passed the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014. The Act protects the livelihood rights of street vendors and regulates street vending through demarcation of vending zones and by laying down conditions for and restrictions on street vending.

The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, prohibits manual scavenging as well as manual cleaning of sewers septic tanks and provides for the rehabilitation of those who were employed in these activities will be trained in alternative livelihood skills on payment of a suitable stipend of not less than Rs. 3000, grant of concessional loan for taking up an alternative occupation on a sustainable basis, scholarships for their children, one-time cash assistance, allotment of a residential plot and financial assistance for house construction or ready-built house with financial assistance and such other legal and programmatic assistance as notified by the Central or State Government, for the rehabilitation of the manual scavengers.<sup>186</sup>

Besides these laws an administrative scheme called Prime Minister's *Rozgar Yojana* (PMRY) was launched by the Government of India in 1993 provides for self-employment opportunities to the unemployed youth and women from low income families by granting them loans for starting gainful activities. Another

scheme called *Swadhar Yojna* for women in difficulty provides for a home-based holistic and integrated approach through provision for primary need of shelter, food, clothing and care of the marginalized women living in difficult circumstances who are without any social and economic support; to rehabilitate them socially and economically through education, awareness, skill up-gradation and personality development through behavioural training etc; to arrange for specific clinical, legal and other support for women/girls in need of those interventions by linking and networking with other organizations in both government & non-government sectors on case to case basis and; to provide such other services as will be required for the support and rehabilitation to such women in distress. Again, the National Social Assistance Scheme (NSAS) or National Social Assistance Programme (NSAP) 1995 is another welfare program of the Government of India administered by the Ministry of Rural Development. The programme is being implemented in rural as well as urban areas. It comprises old age pension scheme for below poverty line (BPL) persons aged 60 years or above of monthly pension of Rs. 200/- up to 79 years of age and Rs.500/- thereafter; under the Widow Pension Scheme widows above 40 are entitled to a monthly pension of Rs. 200; under National Disability Pension Scheme persons above 18 with severe and multiple disabilities are entitled to a monthly pension of Rs. 200; under National Family Benefit Scheme a BPL household is entitled to lump sum amount of Rs. 10,000 on the death of primary breadwinner aged between 18 and 64

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<sup>186</sup> Section 13, The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013



years; and under the Annapurna scheme 10 kg of food grains per month are provided free of cost to those senior citizens who, though eligible, have remained uncovered under the above schemes.

By merging the two erstwhile wage employment programmes – National Rural Employment programme (NREP) and Rural Landless Employment Guarantee Programme (RLEGP) the *Jawahar Rozgar Yojana* (JRY) was started with effect from April, 1, 1989 on 80:20 cost-sharing basis between the Centre and the States. The main objective of the yojana was additional gainful employment for the unemployed and under-employed persons in rural areas. The other objective was the creation of sustained employment by strengthening rural economic infrastructure and assets in favour of rural poor for their direct and continuing benefits. Since April 1, 1999 this JRY was replaced by *Jawahar Gram Samridhi Yojna* (JGSMY). Later from September 25, 2001, JGSMY was merged with *Sampoorna Grameen Rozgar Yojna* (SGRY).

With all administrative drawbacks in the implementation of these schemes they have given some relief to a large number of people in need of social security to ward off starvation and destitution. India has a very long road to walk before it will be able to ensure “inherent dignity” or social justice to every individual within its territory.

The foregoing account of legislative and administrative measures is confined to steps

taken by the Central government. As many of these issues fall within the concurrent jurisdiction of the Centre and the States different states have also taken their own measures in support of these rights. However, all taken into account much more is required to be done.

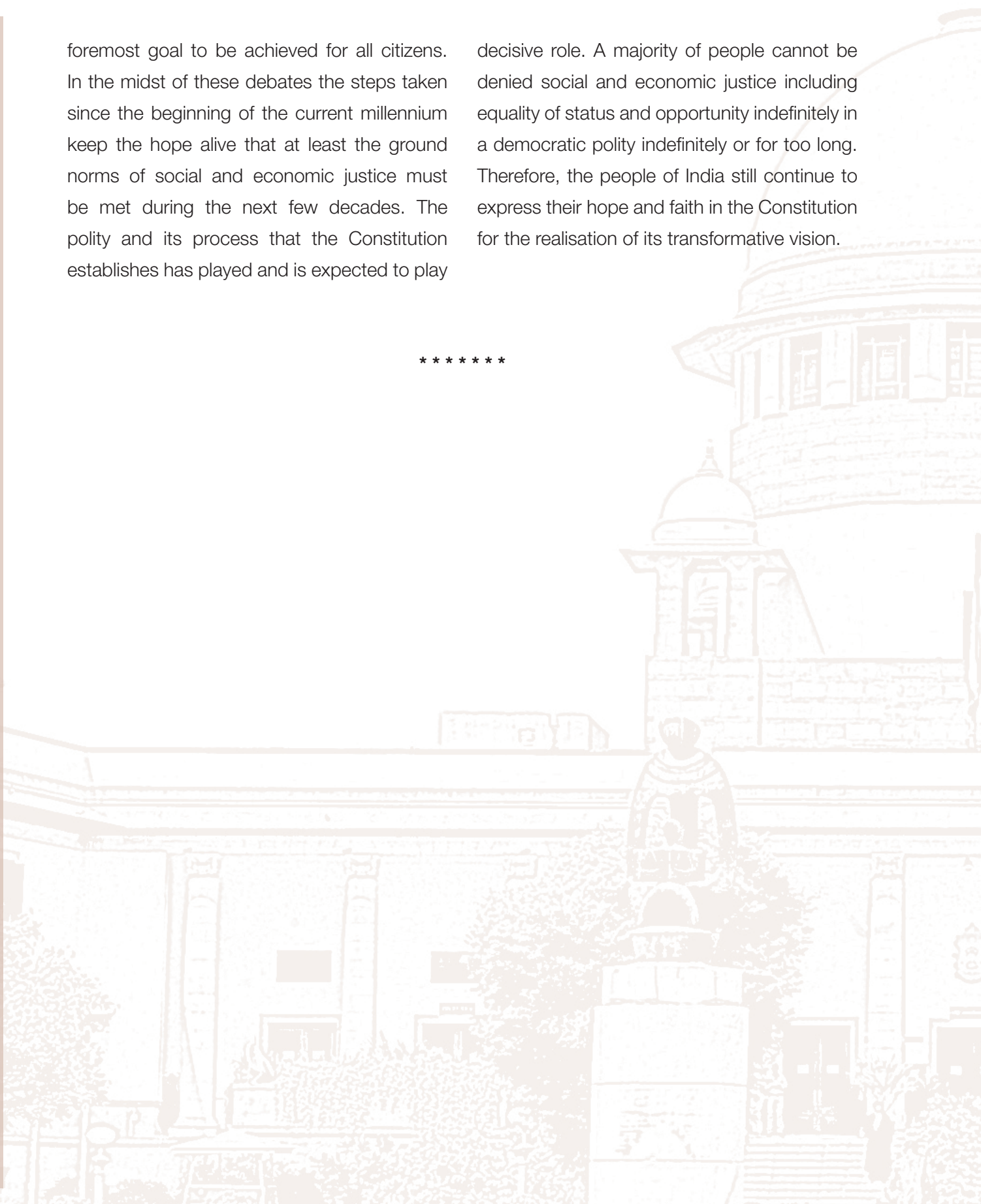
## **Conclusion:**

The Constitution of India has now been in operation for over sixty-seven years. During these sixty-seven years it may have failed to transform the Indian society and state to the extent and exactly on the lines which its makers may have envisioned, but it has maintained and strengthened all the institutions and processes it had initially established and conceived. The social transformation which it aimed at may have not been exactly on the expected lines and as fast as it should have been, but the foregoing description of its journey during these sixty-seven years keeps the hope alive in its institutions and goals. In view of the enormous problems of a developing polity, economy and society coupled with vast disparities and distinctions, the process may have been much slower than what could be expected, but it has successively moved in expected direction. The social and economic disparities are still reprehensible especially in terms of unmet basic needs and entitlements. Ideological debates continue on the kind of economic policies that should be pursued for the realisation of social and economic justice which the Constitution has promised as the

foremost goal to be achieved for all citizens. In the midst of these debates the steps taken since the beginning of the current millennium keep the hope alive that at least the ground norms of social and economic justice must be met during the next few decades. The polity and its process that the Constitution establishes has played and is expected to play

decisive role. A majority of people cannot be denied social and economic justice including equality of status and opportunity indefinitely in a democratic polity indefinitely or for too long. Therefore, the people of India still continue to express their hope and faith in the Constitution for the realisation of its transformative vision.

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# Access to Justice and Legal Services in the Constitutional Framework of India

Prof. (Dr.) Ranbir Singh\*

“Justice is doing for others what we would want done for ourselves.”

*Gary Haugen, International Justice Mission*

“Access to Justice” connotes primary rights of humans granted by the common law and persists till ceased or stopped under any statutory or constitutional provision drafted after consideration by the legislature under due process of law. The concept of “access to justice” and “rule of law” was rooted up in the twelfth century during the reign of Henry II in England. The King Henry II gave his consent for formulating system of writs for facilitating access of King’s Court for each and every litigants from all classes of the society<sup>1</sup>. But the Magna Carta, which was the result of rebellion due to abuses of “King’s Justice” by King John, became the pioneering source

of Constitutionalism in Britain. Magna Carta emphasized over the phenomena that the King is not above the law which represents that rule of law is supreme<sup>2</sup>.

The term “access” is self-explanatory and leads towards right to move for remedy. “Access” is not a concept but reflects the ancient principle of Roman law i.e. “*ubi jus ibi remedium*” which says where there is a right, there is a remedy. It is on the other way, visualized as “the right to get ones due”. The other term “Justice” is toppled term to “Justice” which persist in invisible format but its presence or absence is felt everywhere. A number of Jurist since ancient period to till date have tried to enunciate variety of theories over Justice, but still the research for getting in consensus is on.

However, a common understanding of this word is read as being synonymous with Right. Whatever is Right is just, and vice versa. A king has to be righteous, for if he discharges his duties to the best of his abilities, then he is just.

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1 Biancalana, J. (1988). For Want of Justice: Legal Reforms of Henry II. *Columbia Law Review*, 88(3), 433-536. doi:10.2307/1122686

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2 Mcllwain, C. (1914). Due Process of Law in Magna Carta. *Columbia Law Review*, 14(1), 27-51. doi:10.2307/1111001

As a corollary, a person who is unlawful, and has no regard for civilized conduct is unjust. His actions are unjustified and he will have to account for all the wrong that he has done to people. This psychological expectation from the State is embedded within each denizen to punish every person who is at the wrong pedestal, and to bring him to Justice, is what they are indoctrinated into. To them, the State is the supreme custodian of their rights, and whenever the sanctity of this right is threatened, it is the duty of the state to intervene and restore normalcy. It is entirely in this light that the theory of justice found its origin.

The builder of Modern India, Jawaharlal Nehru was a crusader, when it came to the inclusion of the Fundamental Rights which were embodied from the American Constitution. Furthermore, it was not sufficient that the individual's rights have been assorted into Part III of the Constitution, their very enforceability was endowed into the hands of the Apex Tribunals of the country as the guardian Templars of the Holy Cross which was manifested in the form of Article 32 and 226 of the Constitution. It was however found insufficient, and therefore a categorical observation was made that in order to live up to the expectations of the citizens of this country, it was quintessential that the role of the State was to find its guidance from the very Constitution. It was in this light that the Directive Principles of State Policy were incorporated from the Irish Constitution which mandated the role of the state, but owing to the severe resource deficit that the independent India

was faced, and the towering and colossal task of nation building that lay ahead, it was decided that these guidelines should not be mandatory, but should express in its entirety the intention of the Constitution framers. The Directive Principles of State Policy were therefore kept non-justifiable, i.e. they could not be enforced in the Court of Law<sup>3</sup>.

However, even after sixty five years of Independence, when the country still is representative of an India within an India, one which is progressing at a rapid double digit growth rate, in stark contrast to another which also houses the largest Below Poverty Line population of the world, both in terms of percentage as well as in absolute terms, it is but obvious that the Access to Justice is yet a distant dream to be achieved. With specific reference to the underprivileged sections of the society, there has been more than one reason to fret over:

- a. Poor Implementation of Strategies
- b. Heavy Dependence on Erratic Monsoon, with no back up plans.
- c. Exploitation at the hands of the Have's.
- d. Stagnation or Rapid decrement of Resources.

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<sup>3</sup> Background: Access to Justice and Legal Aid Services with special reference to specific justice needs of the underprivileged people: Speaking Threads accessible at <http://speakingthreads.org/2015/11/06/background-access-to-justice-and-legal-aid-services-with-special-reference-to-specific-justice-needs-of-the-underprivileged-people/>



- e. Focus on Immediate Relief rather than choosing Self Reliance.

There may be a host of contributing factors for this despicable situation; however what is also worth observing is that there is a strong sense of conditioning that has been a resultant vector of this continuous oppression.

### **“Right to Access to Courts as a Component of Access to Justice”**

Access to justice is often considered as a parallel term to “Access to Courts. In various pronouncement, the Hon’ble Supreme Court of India has held that Article 21 of the Constitution includes the “Right to Access of the Court” through writ jurisdiction of the courts which is a legal tool in the hand of citizens of India. Article 32 of the Constitution of India extends the power of the Supreme Court to entertain writs for protection of fundamental rights. In *Keshav Singh Re*<sup>4</sup>, Supreme Court observed and traced “The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the court in that behalf.” *Kesavananda Bharti v. State of Kerala*<sup>5</sup> identified “judicial review” is a tool which is a part of the basic structure of the Constitution of India. It was reaffirmed by the bench of Seven Judges in *L. Chandra Kumar v. Union of India*<sup>6</sup>. It would clearly indicate that the power of judicial review of the Indian

4 AIR 1965 SC 745.  
5 1973 (4) SCC 225.  
6 (1997) 3 SCC 261.

courts are permanent in nature and cannot be taken away by the constitutional amendment, thus any such amendment would be treated as unconstitutional and under the purview of constitutional court for striking down.

### **“Right to Free Legal Aid as a Component of Access to Justice”**

Article 39A of Constitution of India confirms the “Right to Free Legal Aid”. However, during consideration of “Judicial Activism” which pioneered by “causa celebre of *Hussainara Khatoon*”<sup>7</sup> and resulted in establishing of “National Legal Services Authority” instrumented through the “Legal Services Authority Act of 1987”<sup>8</sup> was the starting point of assisting poor and ignorant of laws from the side of judiciary known as “Right to Free Legal Aid”. It brought the gap short between socially established rich peoples and the poor or illiterate citizens. Before implantation of this statute, poor was far away from the justice due to costly affair of legal battles. Setting up of National Legal Service Authority under the aegis of Supreme Court Justices has become a milestone opening up path for poor people at their court without paying hefty penny for fighting legal conflictions.

Furthermore, the effect that the setting up of National, State and District Legal Services Committee has had on people, has been

7 1979 AIR 1369, 1979 SCR (3) 532  
8 Legal Services Authorities act, 1987, Government of India. (No. 39 of 1987)

immense. The skeletal provisions enunciated in the Criminal Procedure Code and the Code of Civil Procedure was revived by flesh and blood as soon as the Seventies witnessed a great upsurge in the number of cases filed by the destitute, the poor, the impoverished and the seemingly grotesque underdogs of the society. It was a combination of the Legislative Will, the Judicial Activism and the Executive Commitment which forged an alliance to become the World's largest free legal Aid Service Provider.

Such a gigantic institutional change was not only specific to infrastructural changes, but was also contemplative of the stance taken by the Supreme Court in taking stringent steps to ensure that Justice is actually done, and not merely be seem to be done. Statistics from the National Crime Records Bureau suggest an alarming number of almost 85% of the total prisoners to be under trials that have been incarcerated and are waiting for their fate to unfold on them<sup>9</sup>. *Casus Classicus* such as Rudul Shah or *Sunil Batra v. Delhi Administration* brought in revolutionary changes in the manner in which under trial prisoners were to be kept. The guidelines that were formulated by the Apex Court were in accordance with the International Treaties and other covenants on the right to the protection of Right and Dignity of the Under Trials and the Prisoners.

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9 Singh, Ranbir. Access to justice and Legal Aid Services with special reference to specific justice needs of the underprivileged people. SARC Law accessible at <http://www.saarcclaw.org/uploads-saarc/publications-images/1019-FILE.pdf>

Under the *Causa Celebre* of Delhi Development Working Women's Forum v. Union of India, the Supreme Court of India held that there should be setting up of "Criminal Injuries Compensation Board" (C.I.C.B.) for compensating tribal women who were raped for losing their dignity. Supreme Court of India also directed National Commission of Women to act as a body of enforcing powers under its recommendations.

It was according to such momentous decisions that people's faith in the Legal System is still intact. Implementation of "Legal Services Authorities Act, 1987" has become a powerful weapon to ensure right to legal aid in India. Section 12 of the Act states that "Legal aid will be available both on the means test as well as the merits test". Legal Aid hitherto extends its supports to litigants with special requirements including custodial persons, children, women, litigants under SC/ST legislation, working forces etc. The Legal aid is being facilitated on district and taluka level. It also extends its services at every High Courts and the Supreme Court of India. The primary and foremost work of the Legal Aid committees include legal representation of underprivileged people, counselling and advice to such peoples.

### **Public Interest Litigation as a Component of Access to Justice for the Marginalized**

Public Interest Litigation is another tool or weapon in our constitutional courts for



safeguarding constitutional rights of each and every citizens of India. The use of this potent weapon has been extended to every public spirited citizen who has been aggrieved of the wrong being perpetrated to bring it to the cognizance of the Court. To that effect, even a letter addressed to the Chief Justice of the High Court or the Supreme Court will be entertained as a Public Interest Litigation. Various educational and social groups including teachers, advocates, non-governmental organizations and publicly motivated citizens are taking lead to ring the bell at the doorstep of the courts for seeking justice under public interest.

A most prominent example is that of M.C. Mehta v. Union of India whereby hosts of Factories which were posing a serious risk to the Yamuna had to either relocate or were asked to shut down. Furthermore, in the case of Olga Telis, the right to slum dwellers was upheld by the Supreme Court by stating that the Right to Shelter forms an integral part of the Right to Life with Dignity, and it is the right to a dignified Life which has to be restored and upheld by the Courts in this Country.

Under the pronouncement of Hon'ble Supreme Court of India in Bihar Legal Support Society v. The Chief Justice of India & Ors.<sup>10</sup>, the court observed that :

“The weaker sections of Indian society have been deprived of justice for long years; they have had no access to justice on account of their poverty, ignorance and illiteracy. ....The

<sup>10</sup> 1987 AIR 38, 1987 SCR (1) 295

majority of the people of our country are subjected to this denial of ‘access to justice’ and overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings..... The strategy of public interest litigation has been evolved by this Court with a view to bringing justice within the easy reach of the poor and disadvantaged sections of the community.”

### **Legal Aid as a major component in providing Access to Justice**

Lord Denning observed that Legal Aid is a system where government is bound to fund for delivering justice to each and every community by removing financial hurdles among citizens. Legal Aid is a balanced tools imparting social value for guaranteeing constitutional right protection through legal aid services. Lord Denning said that “The greatest revolution in the law since the post-second World has been the evolution of the mechanism of the system for legal aid. It means that in many cases the lawyers’ fees and expenses are paid for by the state: and not by the party concerned. It is a subject of such importance that I venture to look at the law about costs-as it was-as such it is-and as it should be.”<sup>11</sup>

<sup>11</sup> What Next in the Law: Lord Denning, London Butterworths, 1982.

The fortieth para of the Charter of Magna Carta states that

*“To no one will we sell, to no one will we deny or delay right or justice.”*

To evolve at an all-encompassing and pan inclusive definition of Legal Aid is a major problem, as the problems for which legal services are required for are numerous. An attempt, however, has been made by considering Section 2(1)(c) of the “Legal Services Authority Act, 1987” specifies that “Legal Service” includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter; To provide free and competent legal services to the weaker section of the society was the basic object of enacting the aforesaid Act. Justice - social, economic and political, is our constitutional pledge enshrined in the preamble of our Constitution. The incorporation of Article 39-A in the Directive Principles of State Policy in the year 1976, enjoined upon the State to ensure justice on the basis of equal opportunity by providing free legal aid”.

Legal Aid is a right conferred under the Article 39-A “At thereby being a Directive Principles of state Policy” however, it must not be messed up with not included in fundamental rights. The law of Legal Aid, in view of right to representation and the right to speedy trial ensured under the very right to life and liberty is now being considered as constitutional rights. The court under its obligation has the duty facilitating, promoting and ensuring

the preservation of this right at each and every level. Legal aid is not considered as a charity but it is a constitutional rights of each and every citizen for which government is bound to expedite under welfare state. The problems of human law and justice, guided by the constitutional goals to the solution of disparities, agonies, despairs, and handicaps of the weaker, yet larger brackets of Bharat’s humanity<sup>12</sup> is the prime object of the dogma of “equal justice for all”. Thus, legal aid attempts confirming constitutional pledge is contented in its letter and spirit and equal justice is made available to the subdued and weaker sections of the society.<sup>13</sup>

Justice Krishna Iyer considered Legal Aid as a Catalyst enabling the aggrieved masses to re-contend responsibility of the state. However, Justice P.N. Bhagwati considered legal aid as “equal justice in action”. But, the Constitution of India not being a skin of sheep but a bundle of commitment clauses which have to be decoded for better and peaceful life of the Indian people<sup>14</sup> which has to be taken care by the judiciary at each and every stage. The judicature on one side, while establishing the law on legal aid have only considered it on the basis of encyclopedic view. Time to time our courts have reiterated about the status of legal aid as considered under the Fundamental Rights under Article 21 and also under Article

12 Report on National Juridicare: equal justice – social justice, 1977, Government of India.

13 Chopra R C, Legal Aid Movement in India-Its Development and Present Status, <http://causelists.nic.in/nalsa/>

14 Report on National Juridicare: equal justice – social justice, 1977, Government of India



14 and Article 22(1)<sup>15</sup>. The apex court has held access to justice as a human right, thus, imparting life and meaning to law. Under his vision statement on Second Generation Reforms in Legal Education, Hon'ble Law Minister for the Government of India visualized a threefold policy framework as *Expansion, Inclusion and Excellence* was underscored and conceptualized.

- (a) “*Expansion* will focus on a multi-disciplinary approach encouraged across the board to enable more students to access affordable and quality legal education. An efficient justice system plays a vital role in our economic development – reducing pendency’s alone can add about 2% to our GDP – and it is our legal education system that will provide the manpower to fuel this required efficiency.”
- (b) “*Inclusion* will focus on creating a system by which a first generation lawyer from a backward and poverty stricken class can rub shoulders with the best of the best at the national level by way of establishment of a National Law Library that can also be accessed by all citizens online.”
- (c) “*Excellence* will focus on identifying and nurturing talent by providing every opportunity to every individual wishing to be a student of law: An opportunity for

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15 *Hussainara v. Home Secretary, State of Bihar*, AIR 1979 SC 1377., *Khatri v. State of Bihar*, AIR 1981 SC 928, *Suk Das v. Union Territory of Arunachal Pradesh*, AIR 1986 SC 99, *Kishore v. State of Himanchal Pradesh*, AIR 1990 SC 2140.

students to specialize in various aspects of the law during their education itself in order to create a pool of talent based on domain expertise and core competence. A continuous focus on social responsibility and a strong professional ethic during every step of the educational process – every practitioner should have an unfailing commitment to the integrity and working of the legal system – reinvigorate the oversight mechanism for professional misconduct in order for it to take swift action, including debaring those that violate professional ethics and standards of the profession.”

The Law Commission of India in its 184th Report has elucidated and underscored the need for drastic remedial steps to be taken in order to bring transformation in the way Legal Education has been perceived and implemented, including revamping changes to the core structure of implementation in Legal Education. It was also for the very first time that it was realized that a mere declaration to that effect will not suffice, what was needed was also a series of concerted actions taken by The Bench, the Bar, the Legal Academia and the Legislators in order to do their part to instill and inculcate the spirit of Social Engineering into the next Generation of Lawyers.

## **Challenges to the Access to Justice in India**

Indian democracy as a biggest in the world, also face several challenges in the form of

access to justice. The Ratio of judges with its population and explosion of dockets over judicial officers give contradictory views over judicial process and justice delivery system in lieu of judicial efficiency. India being a country having dissimilarity in its socio and economic conditions, legal profession has greater responsibility to facilitate justice irrespective of financial or geographical status of its population. "The professional obligation of the Bar behooves it to help the poor in a country of poverty."<sup>16</sup> The "Expert Committee on Legal Aid rightly" pointed out "access to the Courts would be illusory unless representation of the under-privileged by counsel is recognized as a professional mandate."<sup>17</sup>

In United States, the rules pertaining to *pro bono verito* services has been recognized as a non-mandatory obligation, amongst the lawyers, vide Rule 6.1 which declares that every lawyer has a professional responsibility to provide legal services to those unable to pay, but this responsibility is only aspirational not legally binding. It then states that "[a] lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year," and in fulfilling this responsibility should provide legal services at no fee or a substantially reduced fee to any of a wide variety of recipients, including persons of limited means, or should engage

16 V.R.K. Iyer, Social Mission Of Law 131 (1976). See Also V.R.K. Iyer, Law, Society And Collective Consciousness 68, 86 (1982); Menon, Lawyer In The Adjudicative Process." An Appraisal Of Section 30 Of Advocates Act, 1961, 8 J.B. Council Of India 105, 107(1981); Anand, General Principles Of Legal Ethics 204-05 (1965).  
17 Supra Note 51.

in action for enhancing the status of law, legal system and obviously legal profession.<sup>18</sup>

In one of the articles penned by Mr. Bloch and Mr. Iqbal Ishaar<sup>19</sup>, it has been espoused by the learned authors that the nature of obligation that has been imposed on the lawyers practicing in India is purely moral as per the Bar Council of India rules continue to require the members of the profession only to bear in mind in the practice of law that "within the limits of an advocate's economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an advocate owes to society."<sup>20</sup> This obligation of advocates to render legal aid is only moral, and, in the absence of machinery put in place by which an advocate could be made to discharge this obligation, it is easily possible for advocates who are so minded to evade their *pro bono* obligations. More conscientious members of the profession have been providing assistance and representation on a purely voluntary basis to clients with limited or no means, often without assignment by any legal aid organization. However, these individual efforts are said to suffer from an air of charity,

18 The comment to ABA Model Rule 6.1 says that "States, however, may decide to choose a higher or lower number of hours of annual *pro bono* service." MODEL RULES OF PROF'L CONDUCT R. 6.1. The New York version of Rule 6.1 includes the following: "Every lawyer should aspire to: (1) provide at least 20 hours of *pro bono* each year to poor persons; and (2) contribute financially to organizations that provide legal services to poor persons." N.Y. RULES OF PROF'L CONDUCT § 1200.45(d) (2010) (emphasis added).

19 Legal Aid, Public Service And Clinical Legal Education: Future Directions From India And The United States, [Vol. 12:92] Michigan Law Review.

20 Rule 39.B of the Bar Council of India, under authority of the Indian Advocates Act, 1961 (quoted in the Expert Committee Report, supra note 8, at 176).



and the legal profession as a whole has been castigated for not undertaking a public legal aid and advice program in an organized manner”.<sup>21</sup>

The author is unable to take this argument in its entirety for the BCI Regulations have been designed on a pragmatic basis. Should proper incentives for cases pertaining to Legal Aid matters were to be adopted there would be a competent representation of clients. In India, there are three categories of lawyers at all levels which deal with cases pertaining to Legal Aid matters. The first category belongs to those lawyers who take up such cases as part of their social responsibility, and promise to give adequate representation to their clients who are usually indigents. These lawyers have a very good practice, and do so as part of their community responsibility. However, there have been instances during the work being carried out in Tihar Jail Complex wherein the poor indigents who are incarcerated hold visiting cards of some very influential lawyers, however they have not seen their clients for the past four years, to quantify the least, leaving the destitute to linger on the faint light of hope.

The second category of lawyers who take up such matters are those whose practice is not able to earn them a proper living, the idea therefore is to thrive on the remuneration paid by the Legal Services Authority and earn it on a case to case basis. Discrediting the very argument of their competency, the

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21 Desai, *Role And Structure Of Legal Profession*, 8 J.B. Council Of India 112 (1981); V.R.K. Iyer, *Law Versus Justice* 167 (1981).

sheer number of cases undertaken by them becomes so huge, that redressal of their clients apathy, and the very notion of his adequate representation falls into grave jeopardy.

The last class of lawyers is comprised of those who actually work for the benefit of the client and to secure to him the values that have been pithily surmised in the constitution, a right to which he has proprietorship is denied to him by all quarters. Needless to admit any argument that such lawyers are very few in number, owing to the insurmountable number of litigants that cluster around the doorsteps to justice. If a change has to be made then it has to be such, hence with sufficient so that adequate stimulant may be facilitated for cases where legal aid is taken up as the obligation of the State. Rule 8(9) of NALSA (Free and Competent Legal Services) Regulation, 2010 states that “the amount stipulated payable per month to Lawyers who are called Retainer Lawyers or solely committed to the cause of fighting Legal Aid cases, is a mere sum of Rs. 5000 p.m. for District Legal Services, Rs. 7500 p.m. for State Legal Services, and Rs. 10,000 p.m. for Supreme Court Legal Services”.<sup>22</sup> This amount is payable to those lawyers who are exclusively empaneled for the purposes of Legal Aid Work and due to the over burden of cases have to deal with those cases solely. There is an urgent requirement of incentivizing legal aid work and to promote it amongst the advocates refraining to enter in the legal profession due to financial problems.

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22 Vide Regulation 8(9) of NALSA (Free and Competent Legal Services) Regulation, 2010.

## Recognition of the Instrumental Role to be played by the Law Schools in India

Currently twenty One law schools have been set up in India. The law students play a very vital role assisting thousands of poor citizens as a client. However this legal aid assistance through legal aid clinic set up in various law schools in India is very less in number but surely extend their support to a number of incomparable services. A number of legal problems are being provided by the clinic students in law schools such as “avoiding homelessness, avoiding or reducing time in prison, obtaining disability benefits, securing the right to remain in the United States, obtaining safety from a threatening spouse.”<sup>23</sup> They reflect a reality that many “elite” law faculties in the United States now have significant contingents of “impractical” scholars, who are “disdainful of the practice of law.” This also holds true for Law Schools in India where the law schools have over emphasized on theoretical knowledge which is devoid of any practical application whatsoever.

On the other part of social benefits, clinical courses extend professionals as well as ethical skills of the students of law schools viz.:“provision of competent representation; promotion of justice, fairness, and morality; continuing improvement of the profession; and professional self-development.”<sup>24</sup> The clinical

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23 Philip G. Schrag & Michael Meltsner, Reflections on Clinical Legal Education 5 (1998).

24 American Bar Association Section on Legal Education and Admissions to the Bar, Legal Education and Professional Development - An Educational

legal aid programme educates online real-time skills to the students along with aiding the persons those in actual have need of such legal help. The biggest misconception till date is that Clinical Legal Education or Pro Bono Verito Services is a subject of academic importance only. What legal luminaries fail to observe is that it is not a subject during the last years of a law school curriculum, but it is a value system that has to be ingrained into every single individual from the moment a fresher enters into a law school.

“Little attention is paid to synthesis, either of bodies of substantive law or lawyering techniques that might help the student understand how the law lives and the lawyer’s role in bringing it to life. Law schools generally do not do a good job of teaching students how to gather and digest facts that are not neatly packaged; identify the range of solutions, legal and non-legal, that might apply; determine what the limitations of a given forum might be and determine how best to work within that forum; counsel a client; and negotiate with an opponent”.<sup>25</sup>

It is therefore significant to provide for an all-inclusive model of education which is based on social values and which is reflective of the term “Social Engineer”. The humungous role that can be played by law students in this regard has been exhibited by a few National Law Universities. The pioneering work of the Legal

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Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 207-21 (1992).

25 David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977).



Aid Committee of the NLU Delhi made use of Section 32 of the Advocates Act to appear before the Court of Law and secured release of over 10 prisoners incarcerated in the prisons across India. Another significant contribution has been made by the National University of Juridical Sciences which has commenced its project called Shadhinota which is aimed at integrating all the legal aid cells in the Country and to effectuate a corpus system of free legal aid services by law school students and teachers. It is to this effect that the role played by the law schools has to be given due consideration and recognition, as it will solve dual purpose, it would bring Justice to the doorsteps of the impoverished litigant, while enabling a student to learn and be the practical lawyer, well conversed with the intricacies of the system, and more importantly sensitized with the pain and agony of the pauper, who has to reel under tremendous emotional, physical and financial trauma to fight that one case of his life.

Furthermore, by taking part in the Alternative Methods of Dispute Resolution such as Mediation, Conciliation and Nyaya Panchayats, the students can ensure an expedient and speedy disposal of cases.

Most members of the Indian legal community - law teachers, the bar, the bench, legal aid experts agreed that "law schools should play an active role in the country's fledgling legal aid movement, believing that isolation or exclusion of law schools from legal aid programs would be self-defeating for legal aid, legal education and

the legal profession."<sup>26</sup> "Legal aid is a national necessity and a constitutional imperative in India";<sup>27</sup> massive poverty and illiteracy make the task gigantic. The nature of legal aid programs has determined the shape and activity of law school clinics; the educational benefits of clinical activity are merged with, incidental to, and not more important than the mission of contributing to the national cause of legal aid service. Thus, the view is shared widely in India by political leaders, legal educators and many lawyers and judges that law students can and should take a leading role in providing legal aid and assistance to the poor.

## **Solutions to the Challenges posed in Access to Justice**

It can be unequivocally contested that in order to ensure that access to justice is not a mere myth, or a semantic jargon, what needs to be done is a collaborative effort of the Bar, the Bench, the Legal Academia and the Law Students in order to promote facilitate and propagate the cause for clinical legal education, and legal aid work so that Justice

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26 Resolutions Of The 12th All India Law Teachers Conference, 2 Delhi L. Rev. 291 (1973) (Resolution No. li); Jethmalani, Objectives Of Legal Education, In Legal Education In India 52, 56-57 (S. Agrawala Ed. 1973) (The Views Of Mr. Jethmalani, The Then Chairman Of The Bar Council Of India); Expert Committee Report, Supra Note 8, At 155-64; Juridicare Report, Supra Note 8, At 66-74; Sangal, Legal Services Clinic: Director's Report, 1975-76, 4 & 5 Delhi L. Rev. 193, 195 N.2 (1975-76) [Hereinafter 1975-76 Delhi Report] (Statement Of The Then Prime Minister Of India While Inaugurating The Indian Council For Legal Aid And Advice In 1975 And The Resolution Of The 1975 National Seminar On Legal Aid And Advice).

27 Supra Note 28.

can also be manifestly done. As Justice Holmes has surmised, what Law is to Lawyers, Legal Education is to Law Students. It is therefore very pertinent that there has to be a change in the way Legal Education is imparted. It is not only the role of the teachers to further this cause, but it also vests a great deal in students. Contrary to its western counterparts, Legal Education in India was not regarded as priciest of professions as the gestation period was long. With the advent of 21st century, this trend has reversed, where students choose law not as a matter of chance but as their very choice. However, much needs to be done.

Another point which is very pertinent to the ongoing debate is the attitude of Law Students who take up Pro Bono Legal Services. The students could be categorized into three denominations when it comes to opting for Legal Aid Programmes. Category A comprises of those students who wish to enter into corporate law jobs and therefore Legal Aid to them is futile, as it has no academic credentials attached to it. Category B comprises of those students who wish to take up Legal Aid Work because it earns them brownie points when applying for an LLM Degree in any of the Law Schools abroad, for due regard is paid to those students who have had some experience in such sectors, The final category is comprised of those students who are committed to the cause, and work for the betterment of the society rather than looking up to it as a means of upgrading their resume. However, another implicit quandary is that due opportunity is

not given to the students who are willing to participate because of their seniority.

Students in first and second year of Five Year Programme rarely get a chance to participate in Legal Aid Activities, although they are inducted as members of the legal aid committee of their respective colleges.

In order to counter this problem, one has to see the very conception of what all is included within the ambit of Pro Bono Verito Services. *Pro Bono Verito Services* includes and is not restricted to Mediation, Conciliation, Negotiation, Client Counseling, Legal Drafting, Drafting for Policies, Prison Advocacy Programs, Legal Literacy, Legal Awareness, Organizing Legal Aid Camps, Working with Civil Societies that provide for Legal Aid, Assisting Lawyers and Firms that take up Legal Aid Work, to name a few<sup>28</sup>.

A proper segregation of work can be done with respect to pro bono verito work, whereby students in the first year can work on legal empowerment, capacity building of other individuals in rural, semi urban, and urban sectors by spreading legal awareness. Whereas other specialized category of work such as ADR and Client Counseling can be taken up by students of second and third year. In such a way, every student can actively

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28 Ahuja, Sanjeev K. (2017). Poor to getn free of cost legal aid, govt urges lawyers to office pro bono service. The Hindustan Time. New Delhi Accessible at <http://www.hindustantimes.com/india-news/poor-to-get-free-of-cost-legal-aid-govt-urges-lawyers-to-offer-pro-bono-service/story-Szq2i16wd8eo9L8s789jRL.html>



participate in the way Pro Bono Work has to be accomplished. Furthermore, in addition to this division, stress should be given on including academic credit so that the students who take it up are incentivized.

## Being Tech Savvy

Although it has been noted for some time now, the utility of the Internet for providing legal information - and as far as other possibilities are concerned - one only has to visit the web pages of a number of CLCs to realize that many of them contain little more than basic contact details. Such a trend is universal. The details that are mentioned in any of the cells be it the Website of the Apex Court, i.e. Supreme Court or the Nalsa or State Legal Service Authorities is only constrained to the names of the Honorable Members who are spear heading these offices and discharging the duties, and their permanent addresses, to which a poor indigent has no use. What is important is therefore, the mechanism which has to be provided for in the form of a flow chart, or any other method which is easy to comprehend and is bereft of unnecessary complications.

In Indian perspective, the same trend has been noticed in all the established law schools that have developed their own E- Research Cells. However there is a two pronged complication. A litigant, assuming that he is computer illiterate, would not know how to browse through the University's individual

Website Id and pick out relevant material that could help him build his case as he does not understand the finer intricacies of the subjects involved. A lawyer, on the other hand would not browse through individual research materials, as replete as they might be, on these individual websites, thereby heavily constricting the scope of his research. The problem therefore is not the unavailability of research solutions, the problem is the unavailability of a common platform wherein all such solutions could be classified according to Subjects, which can either be searched just like a Google search engine or be a click and open feature.

As far as it regards the literate section of the society, features can be provided for by using Social Networking websites such as Drupal, YouTube, Facebook etc. so that a basic legal awareness could be carried out to them at their doorsteps. Social Networking Sites have proved to have catalyzed socio- politico – cultural revolutions that have shaken roots in countries like Syria, Egypt, Tunisia, Libya, Sudan, Greece, United States, Ukraine, and England to name a few. With estimates totaling over a Hundred Million internet users who belong to India by the end of 2011, with roughly 43.5 Million users accessing Facebook<sup>29</sup>, the prospective of Facebook and other social networking websites emerge as potent tools of information dissemination.<sup>30</sup>

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29 Estimates taken from Internetworldstats.com, accessed on 21st February, 2012.

30 Estimates taken from socialbaker.com, accessed on 21st February, 2012.

## Major Tool in the Shape of Section 32 of the Advocates Act, 1961

To the extent of representing any of those persons that are specified in Section 12 of the Legal Services Act, 1987, section 32 of the Advocates Act, 1961 is of primordial significance for students who are willing to represent their clients in a court of law. The most important benefit that this section provides for is that it identifies any person who can represent in any case or matter, the only prerequisite being that such person has to take leave to appear from the Magistrate and upon his permission can he represent his client.<sup>31</sup>

A pertinent instance of manifesting this right endowed in the hands of every student is the recent Tihar Advocacy Project which has been carried out by the Students of the National Law University, Delhi whereby bail is secured for all those incarcerated under trials who have been imprisoned for an offence for which they have already spent more than half period of the total maximum imprisonment term for which they have been accused of an offence. By invoking Section 436 – A of the Code of Criminal Procedure, 1973, upon the discretion of the Magistrate, without going into the merits of the case, if an under trial has spent more than half of the total imprisonment term for which he

31 Section 32 of the Advocates Act, 1961 Power of court to permit appearances in particular cases.- Notwithstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case.

was accused of, he is bound to be released on bail with or without sureties.

However, what is also of significance is the limit to which this right can be extended. A ground breaking potent weapon that the Indian Judiciary had evolved was the inception of Public Interest Litigation in India that has liberalized the rule of *locus standi* to a considerable level. Under the banner of Public Interest (or Social Action) Litigation (PIL) and the enforcement of fundamental rights under the Constitution, the courts have sought to rebalance the distribution of legal resources, increase access to justice for the disadvantaged, and imbue formal legal guarantees with substantive and positive content. “Originally aimed at combatting inhumane prison conditions”<sup>32</sup> and the horrors of bonded labor,<sup>33</sup> public interest actions have now established the right to a speedy trial,<sup>34</sup> the right to legal aid,<sup>35</sup> the right to a livelihood,<sup>36</sup> a right against pollution,<sup>37</sup> a right to be protected from industrial hazards,<sup>38</sup>

32 *Sunil Batra v. Delhi Administration*, (1978) A.I.R. 1978 S.C. 1675, *Upendra Baxi v. State of Uttar Pradesh* (1983) 2 S.C.C. 308.

33 *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473; *Bandhua Mukti Morcha v. Union of India*, (1984) 3 S.C.C. 161; A.I.R. 1984 S.C. 802.

34 *M.H. Hoskot v. State of Maharashtra*, (1978) 3 S.C.C. 544, A.I.R. 1978 S.C. 1548; *Hussainara Khatoon v. Home Secretary, State of Bihar*, A.I.R. 1979 S.C. 1360; 1369; 1377.

35 *Suk Das v. Union Territory of Arunachal Pradesh*, (1986) 4 S.C.C. 401; *Sheela Barse v. Union of India*, A.I.R. 1983 S.C. 378.

36 *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 S.C.C. 545.

37 *Rural Litigation and Entitlement, Kendra, Dehradun v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652.

38 *M.C. Mehta v. Union of India*, (1986) 2 S.C.C. 176.



and the right to human dignity.”<sup>39</sup>

Justice Krishna Iyer surmised this proposition in the following manner:

*“Test litigations, representative actions, pro bono publico and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral, procedural shortcomings... Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualization of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker.”<sup>40</sup>*

What is envisioned is an amalgam of this power that can be read with section 32 of the Advocates Act, whereby a student can act as a public spirited citizen, and therefore he shall not be restricted to putting up appearances only at the trial stage, he can also file writ petitions which shall be treated as PIL, wherein and whereby he can argue before the Hon’ble

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<sup>39</sup> Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 2 S.C.R. 516

<sup>40</sup> Mumbai Kangar Sabhha v. Abdulbhai, A.I.R. 1976 S.C. 1455.

High Courts and the Supreme Court.

## **Law Firms participating in Pro Bono**

A number of law firms have participated as signatory with “Law Firm Pro Bono Challenge”. It is an initiative of American Bar Association which was launched in 1993. Currently it is working under the aegis of “Pro Bono Institute” situated at Georgetown University Law Center. It encourages the signatory law firms to assist poor or financially deficient persons under policy atleast 3 to 5 per cent of the billable hours.<sup>41</sup>

All State Bar Association in United States offer “Annual Awards” to the law firms for recognizing their work in pro bono activities (Rhode 2005). The award information is visualized on the webpage of award winning law firms. A number of advocates are required by the state interested to perform pro bono hours. If the same trajectory can be followed in India, then Law Firms and not just lawyers can realize that they owe a responsibility to the people in India. It would further be an incentive for the law students who take up placements with such law firms.

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<sup>41</sup> Robert Granfield, The Meaning of Pro Bono: Institutional Variations in Professional Obligations among Lawyers, Law & Society Review, Volume 41, Number 1 (2007).

## Conclusion

What is therefore envisioned is a common platform whereby the law schools can help raise Legal Awareness in schools and colleges. Other students can also help in various legal aid programmes be it client counseling, mediation, negotiation, prison reforms, legal drafting, policy making, or assisting firms or lawyers in their pro bono verito matters. The endeavor is to bring together all the flag bearers of Legal Insignia to move towards a collaborative cohesive unison so that justice may be secured for those who dream of it.

The framework should strive to achieve the following three A's.

*Awareness:* Empowering people by letting them become aware of their rights and powers and the way to secure those rights to themselves.

*Assertion:* Assist and facilitate those people to assert those Rights as a matter of "Right" rather than a conferment or a bestowal of some benefaction.

*Adequate Arrangements:* Once Objective 1 and 2 are secured, the State shall make adequate arrangements so that these rights are rightfully given to those who assert them.

Let Access to Justice not be an experiment for a law school to try its hands on, let it be a full fledge realization of every law school to do its part for the betterment of our country, let it be a motivating force for every student to strive and live upto the ethos of Justice for all, let it be a calling for every lawyer to facilitate and promote the young legal minds by their able guidance so that the very tenets of professional ethics and civic responsibility are not constricted to a mere rule book.

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# The Doctrine of the Invisible Constitution: A Relook at the Basic Structure Doctrine in the Context of Unenumerated Fundamental Rights

Parag P. Tripathi\* & Neelima Tripathi\*\*

## I. INTRODUCTION TO THE INVISIBLE CONSTITUTION

1. The ability to write marks a watershed in the development of the human race. It requires the development of language as a method of communication of thoughts, of a grammar to go with it and a medium to write on. Over the time, writing has been used as an instrument to bring clarity and certainty in dealing with contractual relations. Therefore, when a codification of Rule of Law was attempted with the Magna Carta written on a parchment, the concept of a written Constitution took root. The first well known example being the US Constitution which continues to serve with distinction one of the most powerful Rule of Law democracies of the world.
2. We will in this Article be dealing with the aspect of the Invisible Constitution in the context of Indian Constitutional jurisprudence focusing on the earlier

watershed years from the 1970s to about 1990. The focus shall be on aspects of far reaching Constitutional jurisprudence which commenced with the epochal *Kesavananda Bharati*<sup>1</sup>, the case which 'created' the concept of a Basic Structure of the Constitution, as being not amenable to any Constitutional amendment (notwithstanding Article 368), and the aftermath thereof. This was the 'Basic Structure' moment of Indian Constitutionalism. To quote Prof. Upendra Baxi<sup>2</sup>:

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1 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

2 See Upendra Baxi, 'The Constitutional Quicksands of *Kesavananda Bharati* and the Twenty-fifth Amendment' in *FUNDAMENTAL RIGHTS CASE: THE CRITICS SPEAK!*, Eastern Book Company (1975) p. 130.

*“For a long time to come, the Indian Judiciary, constitutional scholarship and above all the Indian polity are likely to be consumed by the magnificent obsessions created by the eleven opinions of the Supreme Court in the historic Kesavananda Bharati’s Case. The many varied and profound questions it raises – the place of judicial review in a democratic society being the principal among them – will have to be answered with the chill of reason rather than with the passion of a moment.”*

3. From 1970s onwards, there is broadly a period of about two decades or so which saw extraordinary intellectual output of great innovative skill engineered by the Indian Supreme Court in the context of the tension between the Political Executive and the Judiciary and later on between the Parliament itself and the Judiciary. The National Emergency which was announced by a Presidential Proclamation under Article 359 of the Constitution on June 26, 1975, and which was eventually lifted on March 21, 1977 suspended or rather eclipsed the trinity of Articles 14 (Equality before Law), Article 19 (Fundamental Freedoms) and Article 21 (Protection of Life & personal Liberty), which in a sense was the core of the Indian Constitution.

This is a period which commenced with the *Golaknath judgment*<sup>3</sup> (1967) still being good law, wherein the Supreme Court in effect declared that a Constitutional amendment

<sup>3</sup> Golaknath v. State of Punjab, AIR 1967 SC 1643.

ought to be treated as no more or no less than a statutory law, and therefore, must pass the muster of all Constitutional provisions including that of the fundamental rights. The intellectual vulnerability of this interpretation stood exposed by the Telang Memorial Lectures of 1971 delivered by a leading critic.<sup>4</sup> The Parliament responded to the *Golaknath* judgment by amending Article 368 of the Constitution by the 24th Constitutional Amendment.<sup>5</sup>

4. Subsequently when the issue was raised, the Supreme Court revisited its view and overruling *Golaknath*, held that Constitutional amendment is different compared to a mere statutory provision, but went on to add that it is nonetheless subservient to a brooding omnipresence called the ‘Basic Structure’ which

<sup>4</sup> Dr. P.K. Tripathi, SOME INSIGHTS INTO FUNDAMENTAL RIGHTS, Kashinath Trimbak Telang Endowment Lectures, N M Tripathi Publication Private Limited (1972).

<sup>5</sup> Article 368 which originally was a part of the Constitution read as follows: “*Procedure for amendment of the Constitution- An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.*”

After the 24th Constitution Amendment, 1971, the amended Article 368 read as follows:

*“Power of Parliament to amend the Constitution and procedure therefor- Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.”*



was beyond the pale of Constitutional amendment. So the anti-majoritarian function of the Court which comes into play when a Court strikes down a legislative measure was raised to another level, not witnessed anywhere else in any other Constitutional polity. What constituted the Basic Structure was to be determined by the Apex Court on a case by case basis, a state of affairs which was again unique to India. That is not to say that the Basic Structure construct is something which is totally alien to the Constitution because that ultimately depends on jurisprudential innovation. However, the Basic Structure doctrine remains a high moment of the Indian Apex Court seizing a “heroic mantle of history”<sup>6</sup> and developing a concept which has stood the test of time in India. Mr. Anil B. Divan who was then a junior member of the legal team in the *Kesavananda Bharati* case tells us that the moment was seized in a substantial part by the gifted oratory of Mr. Nani Palkhiwala, the lead counsel for the Petitioners.<sup>7</sup>

5. What the Supreme Court did in *Kesavananda Bharati* was to convert the vulnerable *Golaknath* argument into an argument at a different plane by accepting

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6 Laurence H. Tribe, 'THE INVISIBLE CONSTITUTION' Oxford University Press, 17 (2008).

7 Anil B. Divan, ON THE FRONT FOOT- WRITINGS OF ANIL DIVAN ON COURTS, PRESS AND PERSONALITIES, Universal Law Publishing Co., (2013) p. 243; Also See Generally, T.R. Andhyarujina, THE KESAVANANDA BHARATI CASE: THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT, Universal Law Publishing Co., (2011).

that there is a vital distinction between a Constitutional amendment and an ordinary law. This distinction was that while the Constitution as an Apex Law is akin to the Kelsonian 'grundnorm' and the other is a statutory enactment which traces its source to the 'grundnorm'.

6. For this, the Supreme Court relied copiously on the 1971 Kashinath Trimbak Lectures, though without noticing the source.<sup>8</sup> The Supreme Court however retained the flavour of *Golaknath* by making the tests of Articles 14, 19 and 21 to apply to Constitutional amendment by elevating the core of these articles into the Basic Structure Doctrine which in turn was placed beyond the pale of Constitutional amendmentary process. So in a sense there was intellectual repackaging of a vulnerable Constitutional argument in *Golaknath* into an innovative and vigorous argument based on the construct of the Basic Structure. That this Basic Structure was not there anywhere in the Visible Constitution and was certainly not there even within the trivially Invisible Constitution is obvious. No wonder, critiques have called it not merely law making but a Constitutional amendment in the guise of Constitutional interpretation. That having been said, it in no manner detracts from the sheer innovation and intellectual prowess of the idea, which in a way had come to age.

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8 *supra* note 4.

## II. The Invisible Constitution: An American Perspective

7. Prof. Laurence H. Tribe<sup>9</sup> in his influential book 'The Invisible Constitution'<sup>10</sup> points out that whilst certain aspects of the written text of the Constitution may be quite clear, there will be other provisions where the written text may not be the whole story. To interpolate his ideas in the Indian context, we can say that there are certain provisions of the Indian Constitution (as with all written Constitutions) which convey their meaning with near absolute certainty. For instance, Article 84(b) of the Constitution requires that to be qualified to contest a Parliamentary election, a person should be "not less than 25 years of age". The problem arises when the entire text is not so visible in the explicit expression, as for instance, in Article 19(1) (a) which refers to "freedom of speech and expression". But, it may not require a great intellectual acuity to conclude that it would encompass within its sphere, 'Freedom of Press' as well. In that sense, it would fall within the invisible zone because 'Freedom of Press' is not expressly mentioned in Article 19(1)(g) itself. Prof. Tribe calls it "the trivially invisible zone". However, the edges of this trivially invisible zone can often get blurred. The problem arises when one clearly goes beyond even the edges of the trivially invisible zone and proceeds to interpret and tease out unenumerated fundamental rights and unenumerated

constitutional limitations on the State and its Instrumentalities. Often, such attempts by the Superior Courts and by the Apex Court are praised as the Court's "heroic seizing the mantle" of history.<sup>11</sup> Some interesting examples of this seizing the heroic moment in the Indian Constitutional jurisprudence are the landmark judgments on Basic Structure,<sup>12</sup> the counterintuitive and in the face of text, context and Constituent Assembly Debates the incorporation of Due Process in Article 21,<sup>13</sup> and the judge made construct of the Collegium system of judicial appointments.<sup>14</sup> The United States Constitutional jurisprudence also had such moments of the Courts seizing the "mantle of history" in the celebrated cases of *Marbury v. Madison*,<sup>15</sup> where Chief Justice John Marshal while allowing the Federal Government to succeed in defending the particular litigation before the Court enunciated the principle of Judicial Review, something which was definitely beyond the outer edges of the Invisible Constitution, and much later in the school desegregation case of *Cooper v. Aaron*<sup>16</sup>, where the Supreme Court held that its earlier landmark ruling in *Brown*

9 Carl M. Loeb University Professor and Professor of Constitution Law at Harvard Law School.

10 Laurence H. Tribe, 'THE INVISIBLE CONSTITUTION' Oxford University Press, 17 (2008).

11 See generally *supra*.

12 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

13 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

14 *S.P. Gupta v. Union of India*, (1981) Supp SCC 87; *Supreme Court Advocates on Record Association v. Union of India*, (1993) 4 SCC 441; *Special Reference No. 1 of 1998, In re*, (1998) 7 SCC 739; *Supreme Court Advocates on Record Association v. Union of India*, (2016) 5 SCC 1.

15 *Marbury v. Madison*, 5 U.S. 137 (1803).

16 *Cooper v. Aaron*, 358 U.S. 1 (1958).



v. Board of Education<sup>17</sup> was itself the supreme law of the land. Article VI of the American Constitution accords the status of the “supreme law of the land” only to the Constitution of United States and laws made in pursuance thereof and to the treaties made under the authority of United States. This status at least in the visible Constitution of the United States is not accorded to judgments of the Supreme Court.

### III. The Indian Exposition of Basic Structure: Beyond the pale of the Invisible Constitution

8. In the Indian Constitutional jurisprudence *Kesavananda Bharati* was important because it read an express limitation under Article 368 of the Constitution providing for the power of the Parliament to amend the Constitution.

In the context of parliamentary amendments to the Constitution affecting Constitutional and more importantly fundamental rights, the Supreme Court in *Kesavananda Bharati* read an invisible and inherent limitation in the Amending authority of the Parliament, namely, “provided that no such amendment can affect or alter the Basic Structure of the Constitution.” This is obviously not there in the visible Constitution, nor can it be said with any amount

of persuasiveness to be within the trivially invisible zone. It is clearly an unenumerated provision, apparently deliberately so, of the Constitution, and was never either raised or discussed in the Constituent Assembly. The fetter was created pursuant to a judgment which seemed to decide the controversy on a 6:1:6 basis, that is only 6 Justices seemed to accept the Basic Structure doctrine and the other 6 Justices rejected it with Justice H.R. Khanna not deciding the issue. Then came the jurisprudentially astute move of the then Chief Justice S.M. Sikri, to pronounce an operative order which seemed to show the majority on the question of Basic Structure doctrine as being at least 9.<sup>18</sup>

We have called this the “Basic Structure” moment in the Constitutional Jurisprudence of India.

9. Likewise, there was a “Due Process moment” in the Indian Jurisprudence when a 7 Judge Bench in *Maneka Gandhi*<sup>19</sup> on a moot question the Union of India speaking through the Attorney General pointed out that it would issue the passport to the Petitioner, proceeded to deal with the question on merits and overruled the earlier 5 Judge Bench in *A.K. Gopalan case*<sup>20</sup> reading the concept of substantive due process into Article 21.

17 *Brown v. Board of Education*, 347 U.S. 483 (1954).

18 H.M. Seervai, *CONSTITUTIONAL LAW OF INDIA*, Universal Law Publishing Co., 4th Edition, 1996, p. 3113.

19 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

20 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

## IV. The Due Process Moment

10. The principal judgment prior to *Maneka Gandhi* which dealt with the issue of “due process” was the celebrated *A.K. Gopalan* case. At the time when the Indian Constitution was being drafted, one of the great founders (often not given his due credit in the drafting of the Constitution) of the Indian Constitution, Sir B.N. Rau visited the United States and had discussions, inter alia with the Judges of the American Supreme Court and in particular Justice Felix Frankfurter. He was personally cautioned by Justice Frankfurter not to include the slippery slope of “due process” in Article 21 and to substitute with the proposed expression by the comparatively non-obtrusive expression “except according to procedure established by law”. H.M. Seervai in his *Constitutional Law of India*<sup>21</sup> deals this aspect:

*“11.5 Although the Draft Constitution contained Art. 15, it did not in the first instance, contain any Article corresponding to Art. 22 of the Constitution. When the proposal to delete “due process” suggested by the Drafting Committee was debated in the Constituent Assembly on 6 Dec. 1948 and then on 13 Dec. 1948, there was strong opposition to the proposal; nevertheless the Drafting Committee’s suggestion was accepted by the Constituent Assembly. However, the Assembly’s vote did not finally settle the matter, for dissatisfaction with the deletion of “due process” continued inside and outside the Assembly. On 15 Sept. 1949, Dr. Ambedkar moved that a new Article*

*15A (which, as amended, corresponds to Art. 22 of our Constitution) be adopted. Speaking on the motion, he said:*

*“We are, therefore, now, by introducing Art. 15A, making, if I may say so, compensation for what was done then in passing article 15. In other words, we are providing for the substance of the law of “due process” by the introduction of Art. 15A. Article 15A merely lifts from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilized country follows as principles of international justice. It is to be found in the Cr.P.C. and, therefore, probably it might be said that we are really not making any very fundamental change. But we are, as I contend, making a fundamental change because what we are doing by the introduction of Art. 15A is to put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate these two provisions, because they are now introduced in our Constitution itself. It is quite true that the enthusiasts for personal liberty are probably not content with the provisions of clause (1) and (2). They probably want something more by way of further safeguards against the inroads of the executive and the legislature upon the personal liberty of the citizen. I personally think that while I sympathise with them that probably this article might have been expanded to include some further safeguards, I am quite satisfied that the provisions contained are sufficient against illegal or arbitrary arrests.*

*Article 15A, with certain amendments, was*

<sup>21</sup> *supra* note 18, p. 970.



*passed as it now stands in Art. 22 of our Constitution.”*

11. The challenge in *A.K. Gopalan* was to the validity of the Preventive Detention Act, 1950 and the issue was whether the procedure provided under a law depriving an individual's life or liberty would be saved by Article 21 or whether the procedure should additionally meet the test of being "fair and reasonable". In that background, a well reasoned three pronged argument was put forth by the distinguished lawyer M.K. Nambiar, the Senior Advocate appearing on behalf of the Petitioner:-

- (a) The word "law" in Article 21 does not merely mean any enactment of a legislature, but also includes the principles of natural justice;
- (b) The reasonableness of any law providing for preventive detention ought to be adjudicated on the touchstone of Article 19; and
- (c) The expression "procedure established by law" includes the American concept of "procedural due process".

12. The Supreme Court by a majority of 4:1 (Fazl Ali J, dissenting) rejected these submissions and concluded that the word "law" used in Article 21 could not be read as including the principles of natural justice. The Court further pointed out the term "personal liberty" in Article 21 in itself

was comprehensive in nature and the said provision should therefore be read as excluding the freedoms dealt with in Article 19. Further Articles 20 to 22 constituted an exhaustive code and embodied the entire Constitutional protection in relation to life and liberty of an individual and was not controlled by the provisions of Article 19.

13. The argument of "due process" under Article 21 was similarly rejected by the Supreme Court holding that as follows:-

- (a) The word "due" was absent in Article 21;
- (b) The draft Constitution included the expression "due process of law", but this was subsequently removed and the expression "procedure established by law" was adopted instead. This went on to indicate that the Constituent Assembly was not desirous of introducing into India the concept of "procedural due process".
- (c) The American principle of "procedural due process" also included the doctrine of "police power" to restrict the scope of this concept.
- (d) Therefore, if the concept of "procedural due process" were to be imported into India, then the concept of "police power" would also have to be similarly brought in.

14. Therefore, all that was now required for the State to deprive an individual of his life and liberty was to enact a law which should lay

down a procedure and which procedure should be followed by the Executive while depriving a person of his life or personal liberty. The approach of the Court thus meant that Article 21 was to operate as a check only on the executive power of the State which could not act in the absence of any legislative enactment.

15. The majority in *A.K. Gopalan* seems to have been considerably influenced by the Constituent Assembly debates of 08.12.1948 and 13.12.1948 when the proposal of the Drafting Committee to delete the expression “due process” was mooted. The Draft Article 15 as originally passed by the Constituent Assembly provided that “no person shall be deprived of his life or liberty without due process of law...”. The Drafting Committee suggested two principal changes to Article 15. Firstly, the inclusion of the term “personal” before the word “liberty” was suggested. The reason provided for this amendment was that otherwise liberty could be construed to include all the freedoms which were already dealt with by Article 13 (the present Article 19). These deliberations in the Constituent Assembly Debates in respect of this change weighed deeply with Justice Patanjali Sastri who stated that the “acceptance of this suggestion shows that whatever may be the generally accepted connotation of the expression ‘personal liberty’ it was used in Article 21 in a sense which excludes the freedom dealt with in Article 19” and also with Justice

Mukherjea who opined that “If the views of the Drafting Committee were accepted by the Constituent Assembly, the intention obviously was to exclude the contents of Article 19 from the concept of ‘personal liberty’ as used in Article 21”. Secondly, substituting the expression “due process of law” by the expression “procedure established by law” was also suggested since it was more specific, unambiguous and operated at a different level.

16. However, Justice Fazl Ali in his dissent held that the phrase “procedure established by law” in Article 21 included within itself the concept of “procedural due process” meaning thereby that an individual could not be condemned unheard and also that Article 19(1)(d) did control Articles 21 and 22 because the right to freedom of movement was an essential requisite of personal liberty and therefore the reasonableness of a law providing for preventive detention should be justifiable under Article 19(5).

17. It was much later that this “cry in the wilderness” speech of Justice Fazl Ali became the mainstream Constitutional law with the imprimatur placed on it by the 7 Judge Bench in *Maneka Gandhi*.

18. There is an interesting contemporary view from 1965,<sup>22</sup> when the *A.K. Gopalan* view held the field:

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22 Dr. P.K. Tripathi, ‘Protection of Personal Liberty under the Constitution of India’ Agra University Extension Lectures, 1965, published in SPOTLIGHTS ON CONSTITUTIONAL INTERPRETATION (1972).



*“One more point must be mentioned... Though, the expression “personal liberty” in article 21 undoubtedly includes freedom from arbitrary or illegal detention, it is important to remember that it includes more. It includes all those unnumerable aspects of personal liberty which it is impossible exhaustively to enumerate. The right to go to bed when one likes, to eat, dress or walk the way one likes, to speak the language one likes, in short, to do or not to do anything the way one likes. Some of these aspects of liberty, the more important ones, have been singled out for specific treatment in article 19. But the list is by no means exhaustive. And, none of these liberties can be restrained without legal authority. Any executive order compelling a person to do anything against his wishes must be supported by law or it is struck down by article 21.*

...

*To conclude, it will be amply clear from what has been said before that the Constitution of India protects effectively, both in theory and in actual operation, the liberty of the individual. In fact, due to the provision of article 32 which confers a fundamental right on every person to approach the Supreme Court directly for the enforcement of civil liberties, the remedy provided in the Indian Constitution is more direct and effective than that under any other Constitution in the world. Of this Indians can justifiably feel proud. “*

19. Over the time, several unenumerated rights have been culled out from Article 21,

particularly as the expression “Personal Liberty” has been held to be an expression of widest amplitude.<sup>23</sup> These rights include the right to go abroad, now the right to privacy, right against solitary confinement, right to legal heirs, right to speedy trial, right against handcuffing, right against delayed execution of a convict facing death sentence, right against custodial violence, right against public hanging, et alia. The interesting recent judgment is that of the National Legal Services Authority vs. Union of India,<sup>24</sup> which dealt with gender identity and the rights of the transgender (TG) community, which was again held relatable to Article 21, as Article 21 contained within it the right to live a life with dignity and that this right was an essential part of the Right to Life and would accrue to all persons on account of their being human beings. It would therefore cover personal autonomy and self-determination. Dealing with this aspect, the Supreme Court held<sup>25</sup>:-

*“It is now very well-recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that (sic is) intricate and advances modern reality. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the*

23 See Generally, Durga Das Basu, Shorter Constitution of India; 14th Edition (2009) Pp. 371-373.

24 National Legal Services Authority vs. Union of India, (2014) 5 SCC 438.

25 *ibid*; Kindly see the concurring judgment of Dr. A.K. Sikri, J at Para 128 [Page 566].

democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy.”

## V. The Anti-majoritarian critique of judicial review and unenumerated fundamental rights

20. Way back in a 1975 article published in the Stanford Law Review, Prof. Thomas C. Grey etched out what is called the “Unwritten Constitution of the United States”.<sup>26</sup> He referred to the “Pure Interpretive Model” which required the need for fidelity to the Constitutional text while exercising judicial review, and the ‘no go area’ of judicial review viz., Constitutional doctrines based on sources other than explicit commands of the written Constitution. A great exponent of that view, though often in dissent was Mr. Justice Black of the US Supreme Court (1937-1971). Prof. Robert Bork, former Solicitor General of the United States, and a leading propounder of the “Pure Interpretive Model” of Constitutional interpretation by Courts was bluntly direct in propounding his view<sup>27</sup>:-

*“The choice of “fundamental values” by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be*

*preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.”*

Prof. John Ely likewise criticized the 1973 decision on the right to abortion<sup>28</sup>. While concluding in his now famous article<sup>29</sup> that the decisions on abortion cases were founded on a right of privacy which was read into Constitutional text by no imaginable article on construction or interpretation. In a somewhat scathing attack, he goes on:-

*“A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.”*

A later proponent of a refined version of Interpretive Law, namely, Originalism or Textualism was Late Justice Antonin Scalia.<sup>30</sup>

21. Prof. Bickel was following on the doctrinal approach of Prof. James Bradley Thayer that judicial review “may in a larger sense have tendency over time seriously to weaken the democratic process”. This Thayer doctrine was seen in full flow in India

<sup>28</sup> Roe v. Wade, 410 U.S. 113 (1973).

<sup>29</sup> John Ely, ‘The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 949 (1973).

<sup>30</sup> See *Generally*, Lawrence Beer (ed.), Constitutionalism in Asia: Asian Views of the American Influence.

<sup>26</sup> Thomas C. Grey, ‘Do We Have an Unwritten Constitution’ 27(3) Stanford Law Review 703 (1975).

<sup>27</sup> Robert Bork, ‘Neutral Principles and Some First Amendment Problems’ 47 Ind. L.J., 1, 8 (1971).



at two levels, firstly, in the fundamental right to property cases from 1950 to 1970 where the Supreme Court set aside repeatedly the various legislations in bringing about social reforms on the ground that it violated fundamental rights of property. This led to the Parliament coming out with a series of Constitutional amendments to undo “the damage” as it were. At the end of the day, the property owners lost their day against social reforms notwithstanding the Courts’ protection due to the series of Constitutional amendments and the eventual repeal of the fundamental rights to property itself, namely Article 19(1)(f) through the 44th Amendment. This was the negative play of the Thayer doctrine.

22. The positive play of the Thayer doctrine was seen during Emergency when the political detainees did succeed in obtaining orders of protection of their life and liberty from several of the High Courts in the country, but which decisions were eventually overturned in *ADM, Jabalpur v. Shivkant Shukla*,<sup>31</sup> where the Supreme Court refused to issue habeas corpus during the continuance of the Proclamation of Emergency, when the Presidential Declaration under Article 359 suspended the enforcement of fundamental rights under Articles 14, 19 and 21.

To quote an interesting observation<sup>32</sup>:

<sup>31</sup> *ADM, Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

<sup>32</sup> Dr. P.K. Tripathi, ‘Perspectives on the American Constitutional Influence on the Constitution of India’ University of California Press (1979) p. 96.

*“That the power to strike down a constitutional amendment on the ground that it affects or injures the “basic structure” of the Constitution flows from the text of Article 368 is, with due respect, at best a “benevolent illusion” of the type referred to by the late Professor Alexander Bickel in the context of Justice Black’s insistence that the text of the First Amendment is absolute. Such illusions help people to imagine that they rule themselves. To quote Bickel’s thoughtful words:*

*But it is very dangerous. To begin with, the illusion is a two-edged sword, which can be turned very sharply against the Court... What is even more ominous, the illusion may even engulf its maker and breed, and it has occasionally done, free ranging “activist” government by the judiciary. Such government is incompatible on principle with democratic institutions and in practice it will not be tolerated. This way lie crisis such as the Court-packing fight of 1937, in which the Court, if it persists, must ultimately be the loser. The truth is that the illusion of judicial impotence and automation may, when fostered, be first acquired by the people and last, with the accompanying feel of omnipotence, by the judges themselves. But it is also first lost by the people and last by the judges. One day the judges may abandon it too late.*

*In Bickel’s words, again, no court, like the Supreme Courts of the United States and India, should “tell itself or the world that it draws decisions from a text that is incapable*

of yielding them. That obscures the actual process of decision, for the country, and for the judges themselves, if they fall in with the illusion. That also ignores the ground rule that “the integrity of the Court’s principled process should remain unimpaired, since the Court does not involve itself in compromises and expedient actions.”

“Yet, no sooner did the Court step aside than the Thayer doctrine began to operate in the reverse, as it were and democratic forces began to rally around the fundamental rights of the individual. The upshot of it all was that the opposition, which had laid divided and ineffective and spurned by the electorate ever since the commencement of the Constitution, was united and galvanized into a single party, under the name of the Janata Party, and in an unprecedented response from the people secured an absolute majority in the House of People, or the lower house of Parliament, relegating the Congress Party for the first time in the history of the Constitution to the opposition benches. The Congress Party lost practically all the seats to the House from the nine North-Indian states supposed to be the bulwark of its strength and Prime Minister Indira Gandhi was herself defeated in her constituency by a convincing margin of over fifty thousand votes. One is tempted to say, in retrospect, that the philosophy of judicial restraint and tolerance of the democratic processes commended itself to the Supreme Court several years too late. It may not be too rash to surmise, too, that if the Court had once again persisted in assuming to itself the mantle of the Constitution makers,

as in *Golak Nath* and other cases, and if it persuaded itself to bypass the barrier of the constitutional inhibition in Article 359 to enforce the fundamental right by issuing the writ in the recent habeas corpus cases, the democratic process would not have sprung into action as it did.”<sup>33</sup>

23. In an interesting article, Professor M.P. Singh<sup>34</sup> makes the following preambulatory statement, representing a new away from the mainstream thought:

“Amidst strong reactions against the decision of the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*, this paper argues that the Court has done all that is expected to do under the Constitution and the law established under it. The respondents, especially the Union of India, have unsuccessfully asked it to do what the Constitution does not expect it to do. The remedy against Section 377 lies with the people through their Parliament, and not in the Courts.

*I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no Court to save*

<sup>33</sup> *ibid*, p. 98.

<sup>34</sup> M.P. Singh, ‘Constitutionality of Section 377, Indian Penal Code- A Case of Misplaced Hope in Court’, 6 NUJS L. Rev 4 (2013) 569.



it— Judge Learned Hand, *The Spirit of Liberty*”<sup>35</sup>

24. Before concluding, we must note an excellent enunciation of judicial review in action, in a plurality of opinions of the Indian Apex Court in the *privacy judgment*<sup>36</sup> where the Apex Court overruling two Constitution Benches of six<sup>37</sup> and eight<sup>38</sup> Justices respectively held the right of privacy as a part of the expanse of the rights under Article 21 of the Constitution. However, the judgment which captures the ‘privacy moment’ commands a separate, fuller treatment elsewhere and at another point in time.

25. In Prof. Mark Tushnet’s analysis of the anatomy of judicial review,<sup>39</sup> the weak form of judicial review relates to a reading down of the text of the law, whereas the strong form is relatable to the ultimate striking down of a legislative enactment as unconstitutional. The Basic Structure doctrine really does not fit into this dichotomy and rather transcends it. The doctrine is really in the nature of an exercise

of constituent law making, which may be called “Constituent Review” as distinct from mere judicial review *stricto sensu*, which stops at striking down a law, but cannot as normally understood, extend to adjudging the validity of a Constitutional amendment.

## VI. Some Concluding Thoughts

26. To conclude therefore, the Indian Constitutional experience, including the development of the concept of Basic Structure clearly cannot be traced to the written text. It cannot also be traced to the Invisible Constitution of India, at least as understood by Prof. Tribe in his seminal work. It is based on the Justices taking a view of what the Constitution ought to be, a precept unknown to Constitutional jurisprudence in the judicial system of the Anglo-Saxon tradition, and it represents an Indian perspective of Constitutional law going way beyond the traditional theories of the interpretative model, the Originalist doctrine or indeed the doctrine of judicial review, and even judicial activism as understood in the Western jurisprudential thought.

27. With the doctrine of Basic Structure in place, the judgments of the Supreme Court have converted the Indian Constitution to an exciting and challenging “work in progress”. To give another example in the sphere of judicial appointments, commencing with

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35 Judge Learned Hand, The ‘Spirit of Liberty’ Speech presented during the annual ‘I am an American Day’ event (May 21, 1944).

36 Justice K.S. Puttaswamy & Anr. v. Union of India, Writ Petition (Civil) No. 494/2012 dated 24.08.2017.

37 Kharak Singh v. State of U.P., AIR 1963 SC 1295.

38 M.P. Sharma & Ors. v. Satish Chandra & Ors., AIR 1954 SC 300.

39 Mark Tushnet, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW, Princeton University Press (2008); Also See M.P. Singh, Book Review- Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law, (2009) 3 Indian Journal of Constitutional Law 198.

the *S.P. Gupta's case*<sup>40</sup> (1981) and followed by the judgments in *SCAORA I*<sup>41</sup> (1993), the *Presidential Reference (1998)*<sup>42</sup> and the *SCAORA II (2015)*<sup>43</sup>, the Supreme Court laid down the principle as a part of the Basic Structure doctrine that to maintain the independence of the judiciary, it was necessary to insulate judicial appointments from any interference by the Executive, so much so that India today is the only country where the Judiciary appoints its own. It is undoubtedly true that this was certainly not the idea in the mind of the Constituent Assembly, and can certainly not be read as emanating from any of the Constitutional debates. The idea of Justices appointing themselves through a Collegium has had its fair share of criticism but in view of the strong judicial edifice of the Basic Structure doctrine, which is in many ways a welcome one, has now become a seemingly permanent feature of the Indian Constitution. The Parliament and the Political Executive is finding it difficult to dislodge this near permanent feature. The latest failed attempt in this regard originated by a unanimous Parliament passing the *NJAC Amendment* (the 99th Constitutional Amendment and the NJAC Act, 2014) which failed judicial scrutiny by a 4:1 verdict in the celebrated *SCAORA II*

*case*<sup>44</sup>.

28. We therefore find that in India, once “the mantle of history” was seized in the *Kesavananda Bharati* judgment, the mantle has remained with the judiciary in general and with the Apex Court in particular. It has survived various attempts to dislodge it, starting from the aborted attempt at the review of the judgment itself,<sup>45</sup> the 42nd Amendment (which was substantially repealed by the 44th Amendment in 1978) and the latest one in the NJAC experiment resulting in the *SCAORA II* verdict.

For a follower of Constitutional jurisprudence, it is a rich area of debate and divergence and stimulating new thinking. In many ways, it is a case of Constitutional amendment of far reaching impact brought about by classic judicial articulation of high values of rule of law in democracy and by minimizing if not shutting out totally the role and inter play of the legislative and the executive wings of the State in this very important aspect of the creation and the functioning of the judicial institution.

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40 *S.P. Gupta v. Union of India*, (1981) Supp SCC 87.

41 *Supreme Court Advocates on Record Association v. Union of India*, (1993) 4 SCC 441

42 *Special Reference No. 1 of 1998, In re*, (1998) 7 SCC 739.

43 *Supreme Court Advocates on Record Association v. Union of India*, (2016) 5 SCC 1.

44 *Supreme Court Advocates on Record Association v. Union of India*, (2016) 5 SCC 1.

45 Anil B. Divan, *ON THE FRONT FOOT- WRITINGS OF ANIL DIVAN ON COURTS, PRESS AND PERSONALITIES*, Universal Law Publishing Co., (2013) p. 243, 247.



# Impact of GST Laws on the Federal Structure of the Indian Constitution

Arvind P. Datar\*

## Introduction:

The Government of India introduced the Goods and Service Tax (“GST”) after a long wait of nearly 16 years. It was in 2000 that the discussion to introduce GST in the country was first mooted. The new tax required a complete overhaul of not only several indirect tax legislations but also required several amendments to the Constitution of India as well. Finally, the GST was announced with great fanfare at the midnight session of Parliament on July 1, 2017. Arguably, this was one of the largest tax reforms attempted in human history. The new GST is an amalgam of several Union and State levies and was announced as “one nation, one tax”. The present article is confined to the constitutional aspects of the new tax and does not deal with the statutory provisions of the Central or State GST enactments.

## 2. A long constitutional journey<sup>1</sup>:

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1 Ref: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=148240>.

In 2000, the then Prime Minister<sup>2</sup> initiated discussions on GST by setting up an empowered committee. Thereafter, in 2003, the Kelkar Task Force on indirect taxes suggested a comprehensive GST based on the principles of Value Added Tax (“VAT”). A proposal to introduce a national level GST by April 1, 2010 was mooted in the Budget speech for the financial year 2006-07.

Since the proposal involved restructuring of not only indirect taxes levied by the Centre but also the States, the responsibility of preparing a Design and Road Map for the implementation of GST was assigned to an Empowered Committee of State Finance Ministers. Based on the inputs from the Government of India and all the States, the Empowered Committee released its First Discussion Paper on GST in November, 2009.

In order to take the GST related work further, a Joint Working Group consisting of officers from Central as well as State Governments was constituted in September, 2009. Thereafter,

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2 Shri Atal Bihari Vajpayee.

to implement the GST, the Constitution (One Hundred and Fifteenth Amendment) Bill, was introduced in the Lok Sabha in March, 2011 and referred to a Standing Committee of Parliament for further examination.

Meanwhile, in pursuance of the decision taken at a meeting<sup>3</sup> between the Union Finance Minister and the Empowered Committee of State Finance Ministers, a “Committee on GST Design” consisting of officials of the Government of India, State Governments and the Empowered Committee was constituted. This Committee made a detailed examination on the GST design including the Constitution (One Hundred and Fifteenth Amendment) Bill and submitted its report in January, 2013. Based on this Report, the Empowered Committee recommended certain changes in the Bill at their meeting at Bhubaneswar in January, 2013. The Parliamentary Standing Committee submitted its Report in August, 2013 to the Lok Sabha. The recommendations of the Empowered Committee and the recommendations of the Parliamentary Standing Committee were examined by the Ministry in consultation with the Legislative Department. Most of the recommendations made by the Empowered Committee and the Parliamentary Standing Committee were accepted and the draft amendment bill was suitably revised. The final draft incorporating the above changes was sent to the Empowered Committee for consideration in September, 2013. The Empowered Committee, once

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3 8th November, 2012

again, made certain recommendations on the Bill held in November, 2013. After incorporating certain recommendations of the Empowered Committee, the revised draft Constitution (One Hundred and Fifteenth Amendment) Bill was introduced in the Lok Sabha on March, 2011 but this Bill lapsed with the dissolution of the 15th Lok Sabha. In June, 2014, a draft Bill was sent to the Empowered Committee after the approval of the new Government<sup>4</sup>. The Cabinet, on 17th December, 2014, approved the proposal for introduction of a Bill in Parliament for amending the Constitution of India to facilitate the introduction of GST in the country. The Constitution (One Hundred and Twenty Second Amendment) Bill, 2014 was introduced in the Lok Sabha on 19th December, 2014 and was finally passed on 6th May, 2015. It was then referred to the Select Committee of Rajya Sabha, which submitted its report on 22nd July, 2015. The Bill was passed by Rajya Sabha on 3rd August, 2016, and the amended Bill was passed by the Lok Sabha on 8th August, 2016. The Bill, after ratification<sup>5</sup> by the States<sup>6</sup> received the assent

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4 16th Lok Sabha

5 Article 368(2) of the Constitution of India.

6 Assam (12th August), Bihar (16th August), Jharkhand (17th August), Himachal Pradesh (22nd August), Chhattisgarh (22nd August), Gujarat, (23rd August), Madhya Pradesh (24th August), Delhi (24th August), Nagaland (26th August), Maharashtra (29th August), Haryana (29th August), Telangana (30th August), Sikkim (30th August), Mizoram (30th August), Goa (31st August), Odisha (1st September), Puducherry (2nd September), Rajasthan (2nd September), Andhra Pradesh (8th September), Arunachal Pradesh (8th September), Meghalaya (9th September), Punjab (12th September), Tripura (26th September).



of the President of India<sup>7</sup> on 8th September, 2016. The Constitutional (One Hundred and First Amendment), Act 2016 was notified in the Gazette of India on the same date. This amendment not only inserted several new articles but amended several other provisions which are referred to later. The stage was now set to introduce the GST.

### **3. GST Model:**

India adopted a dual system of GST i.e. the Central Goods and Service Tax (“CGST”) and the State Goods and Service Tax (“SGST”). Apart from India, Canada and Australia are the only two countries which have adopted the dual system of GST. A total of 16 Union and State taxes have been subsumed in the GST. The new tax regime also prescribed multiple rates on different products which created confusion and there was difficulty in complying with various procedures. There is now a proposal to reduce the multiple rates to fewer rates by a process of rationalisation and to simplify the procedural provisions.

The new GST is primarily an amalgamation of certain Union and State levies. Mainly, there is a merger of central excise and service tax levied by the Union with VAT levied by the States. Earlier central excise duty was levied on manufacture of goods under Entry 84 of List – I of Schedule VII, whereas sales tax was levied on sale or purchase of goods under Entry 54 of List – II of Schedule VII. Both these

levies have now been replaced by a levy on the “supply of goods”. Therefore, the levies on manufacture and on sale are now replaced by a levy on supply of goods. The service tax continues as a supply of services. The net result is that the new levy is on the “supply of goods and services”.

### **4. Constitutional amendments and distribution of taxing power:**

The imposition of GST required major constitutional changes which were incorporated by the Constitution (101st Amendment) Act, 2016. As India had adopted the federal model for the Constitution, the power to levy taxes was distributed amongst Parliament and the States in Schedule VII of the Constitution. The distribution of taxing powers is substantially similar to that which prevailed under the Government of India Act, 1935. Entries 82 to 92C of List I of Schedule VII empowers Parliament to levy taxes on various subjects mentioned therein. For example, income tax, central excise, customs duty are in the Union list i.e. List I. On the other hand, agricultural income tax, sales tax or VAT, excise duty on potable alcohol and so on are in the State List (List II). Entries 46 to 62 in the State List give the States the power to levy taxes on the subjects mentioned therein. Significantly, no tax is mentioned in List III which is the Concurrent List. This has led to the constitutional principle that there can be no overlapping of taxes: a tax must either be

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<sup>7</sup> Pranab Mukherjee.

within the legislative competence of the States or of the Centre<sup>8</sup>.

GST is an exception to this rule and is levied both by the Centre and the States. Interestingly, no amendment was made to Schedule VII to insert a new entry to levy GST. It would have been possible to insert a new entry in List III which would enable both Parliament and the States to levy GST subject to certain limitations. However, the absence of GST in List III does not in any manner affect its constitutional validity.

The constitutional amendments have conferred sufficient power and legislative competence to both Parliament and the States to levy GST. Before proceeding further, it would be useful to set out a summary of the amendments that have been made to the Constitution and these can be subdivided as follows:

(i) **Articles inserted:** 246A, 269A, 279A, 366 (12A), 366 (26A).

(ii) **Articles amended:** 248, 249, 250, 268, 270, 271, 286, 366, 368, Schedule VI, Schedule VII, List I, Entry 84; List II, Entries 5, 4 and 62.

(iii) **Articles omitted:** 268A, Schedule VII, List I, Entries 92 & 92C; Schedule VII, List II, Entries 52, 55.

Article 246A is the most important article which enables Parliament and the State legislatures to make laws with respect to the goods and services tax imposed by the Union and the respective States. Article 246A (2) confers exclusive power on Parliament to make laws with respect to GST that takes place in the course of inter-state trade or commerce. Theoretically, nothing prevents each state to make its own law with regard to GST. At present, however, Parliament has enacted the Central Goods and Services Tax Act, 2017 and each State Government has enacted their respective goods and services tax act for that State. Thus, Maharashtra has the Maharashtra Goods and Services Tax Act, 2017 and West Bengal has the West Bengal Goods and Services Tax Act 2017. Fortunately, almost all State laws relating to GST are identical thereby avoiding inconsistent provisions amongst different States.

Thus, there is a complete demarcation of powers between the Union and the States *vis-à-vis* levy of GST. Parliament is vested with the right to make laws with respect to GST or any matter enumerated in the State List if the Council of States declares, by a resolution supported by not less than two thirds of the members present and voting, if it is necessary or expedient in national interest<sup>9</sup>. Parliament is also empowered to make laws in respect of GST during the period when a proclamation of emergency is in operation<sup>10</sup>.

8 Godfrey Phillips India Ltd. v. State of Uttar Pradesh, (2005) 2 SCC 515: AIR 2005 SC 1103.

9 Article 249.

10 Article 250.



*Goods and Services tax, services defined:* Article 366(12A) defines “Goods and Service Tax”<sup>11</sup> to mean “any tax on supply of goods or services or both except taxes on the supply of alcoholic liquor for human consumption”. The term “goods” refers to include all materials, commodities and articles<sup>12</sup>. Under Article 366(26A) “services” has been defined to mean “anything other than goods”<sup>13</sup>. The definitions in the statutory provisions are so wide that virtually every transaction involving consideration is now taxable unless specifically exempt. The statutory provisions by which the GST is levied by the Centre and the States is discussed in the next sub-heading.

## **5. GST- Co-operative Federalism:**

The levy of GST would not have been possible without the cooperation of the State Legislatures. The States have voluntarily given up their power to levy VAT on goods. However, in most States, the maximum revenue is generated by the levy of VAT on petroleum products and on alcohol for human consumption. The constitutional amendment reserves the right of the States to continue to levy Sales Tax (VAT) on these commodities. This has been achieved by substituting Entry 54 of List II. Similarly, a substantial revenue for the Centre is generated by excise duty on petroleum products and Entry 84 of List I

has been substituted whereby excise duty on petroleum products will continue to be levied by the Centre. In effect, a major portion of the revenue of the States will continue to be collected in the manner prior to the constitutional amendment. However, the States cannot levy VAT on sale of petroleum products or potable alcohol sold in inter-state transactions.

Although GST is claimed to be “one nation, one tax”, it is really a levy made possible by numerous enactments. Broadly speaking the Central Goods and Services Tax Act, 2017 and individual State GST Acts levy this tax on *intra-state supply of goods and services*. The levy is split equally and an invoice for a local sale where GST is 18% will show a CGST levy of 9% and SGST levy of 9%. For *inter-state supply of goods and services*, the levy is under the Integrated Goods and Services Tax Act, 2017 (IGST). This levy is akin to the erstwhile central sales tax insofar as goods are concerned. As service tax was a central levy, there was no question of inter-state levy. It is important to note that IGST is also levied on import and export of goods and the levy of GST is an addition to the levy of basic customs duty. The provisions of IGST lead to complex questions relating to location of supply and recipient and also may lead to issues of extraterritorial operation. For Union Territories, there is the Union Territory Goods and Services Tax Act, 2017.

Apart from all the above, section 18 of the Constitution (101st Amendment) Act, 2016 enables an additional levy to compensate

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11 Article 366 (12A).

12 Article 366 (12).

13 Article 366 (26A).

the States for loss of revenue on account of implementation of GST. This levy can be made for a period of 5 years. In pursuance of this power, Parliament has enacted the Goods and Services Tax (Compensation to States) Act, 2017. Section 8 of this Act levies a cess on specified intra-state and inter-state supplies of goods and services. The schedule to the Act levies this cess on pan masala, tobacco products, coal, aerated waters and specified motor vehicles. This cess is levied in addition to the other kinds of GSTs.

## 6. GST Council:

Article 279A establishes Goods and Service Tax Council (“GST Council”) within sixty days from the date of its commencement. This was established on 15th September, 2016.<sup>14</sup> The GST Council comprises of the Union Finance Minister, the Union Finance Minister of State in charge of Revenue or Finance, and the Finance Minister or any other Minister of each State. The Union Finance Minister acts as the Chairperson of the GST Council and the members shall, amongst themselves, appoint a Vice-Chairperson. The composition of GST Council is laudable as there is equal participation from the Centre and the States to make policy decisions on tax. It is a matter of immense pride that the GST Council has responded to the difficulties faced by industries with promptness and unanimity.

<sup>14</sup> Notification: S.O.2957 (E).

## 7. Functions of the GST Council:

The function of the GST Council is, inter alia, to make recommendations to the Union and the States on taxes, cesses and surcharges levied by the Union, the States and the local bodies which has to be subsumed under GST; goods and services that may be subjected to, or exempted from the GST; the model GST Law, principles of levy, apportionment of GST levied on inter-state supplies,<sup>15</sup> principles that govern the place of supply; the threshold limit of turnover below which goods and services may be exempted from GST; the rates including floor rates with bands of GST; any special rate(s) for a specified period, to raise additional resources during any natural calamity or disaster; special provision with respect to certain States<sup>16</sup> and any other matter as the GST Council may deem fit.

Every decision of the GST Council shall be taken by a majority of not less than three-fourths of the weighted votes of the members present and voting. The vote of Union Government shall have a weightage of one-third of the total votes cast and the votes of all the State Governments taken together shall have a weightage of two thirds of total votes cast.<sup>17</sup>

<sup>15</sup> Article 269A.

<sup>16</sup> Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand.

<sup>17</sup> Article 279A(9).



## **8. Dispute Resolution – Articles 279A and 131:**

Disputes between the Government of India and one or more States or between the Government of India and any State or States on one side, and one or more other States on the other side or between two or more States arising out of the recommendations of the GST Council shall be adjudicated by a mechanism to be established by the GST Council.<sup>18</sup> Article 131 confers original jurisdiction on the Supreme Court to decide disputes between States or between the Government of India and any State or States. However, Article 131 starts with the expression “Subject the provisions of this Constitution.....” and, therefore, the mechanism contemplated by Article 279A (11) is a valid provision. Consequently, all disputes relating to GST that may arise in terms of Article 279A (11) will not be decided by the Supreme Court; to this extent, the original jurisdiction of the Supreme Court is curtailed.

## **9. Amendments to GST Council:**

Any variation, addition or repeal of any provisions pertaining to the functions of the GST Council, the constituency of the GST Council, the voting structure of the GST Council, or any other provisions under Article 297A will have to go through the rigmarole of ratification by legislatures of not less than one-half of the total States of India<sup>19</sup>. This is perhaps

<sup>18</sup> Article 279A(11).

<sup>19</sup> Article 368(2)(a).

to ensure that the integrity and permanence of the Council is maintained.

## **10. Other Constitutional issues:**

(i) *Omission of entry tax:* Entry 52 of List II of Schedule VII levied the controversial entry tax which was equivalent to octroi and resulted in extensive litigation. With the levy of GST, the entry tax has been abolished and this is expected to promote the free flow of goods not only from one State to another but also between local areas within the States.

(ii) *Entertainment tax:* Entry 62 of List II of Schedule VII enabled the levy of entertainment tax on entertainments, amusements, betting and gambling has now been amended to enable panchayats, municipalities, Regional or District Council to levy taxes on entertainments and amusements. The words betting and gambling have been omitted. This tax can now be levied only by the bodies mentioned in the amended provisions.

(iii) *Residuary power curtailed:* Article 248, which conferred exclusive residuary power to make any law with respect to matters not mentioned in Lists II and III has now been made subject to Article 246A.

## **11. Conclusion:**

The enactment of GST has resulted in major changes in the federal structure of the Constitution. The strict division of taxing

powers between the Union and the States is now removed permitting the simultaneous levy of GST by both the Centre and the States. At the same time, GST does not eliminate the taxing powers of the States completely. To do so, would destroy the federal structure which has been held to be part of the basic features of the Constitution<sup>20</sup>. The States continue to have powers of taxation with regard to petroleum products and potable alcohol thus saving a substantial portion of their revenue. As mentioned above, each State is entitled to pass

its own GST and, technically, there is nothing in Article 246A which prevents one State from taking a deviant path which may threaten the unified structure of the GST edifice. The extent to which Article 279A can resolve a dispute arising on this account remains to be tested.

In fine, the GST regime has been implemented without damaging the federal structure of the Constitution. The States have agreed to part with their taxing powers in the hope that the new levy will be in the national interest.

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20 S.R. Bommai v. Union of India,(1994) 3SCC 1; AIR 1994 SC 1918



# Judicial Perspective of Harmony between Fundamental Rights and Directive Principles of State Policies in India for Protecting Democratic Norms

Mohan Parasaran\*

The fundamental rights found in Part III of our Constitution and the directive principles of state policy found in Part IV of our Constitution reflect a delicate balance between individual liberties on the one hand and larger socialistic goals on the other hand and the need of the polity at large to strike a balance between these two goals. While fundamental rights have been made enforceable and judicial review of legislative actions as well as executive actions have been made subject to fundamental rights, on the other hand the directive principles of state policy have been framed as a set of obligations enjoined upon the state but by virtue of Article 37 it has been expressly made not enforceable by the Courts. The only other Constitution which has a similar set of directives is the Irish Constitution from which our Part IV was heavily inspired.

The Constitution enjoins the state to promote the educational and economic interests of

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\*Senior Advocate and Former Solicitor General of India

the scheduled castes, scheduled Tribes and other weaker sections of the people found in Article 46 which is a directive principle of state policy. Article 15, as it stood in the original Constitution, did not contain a provision to enable the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes, though Article 16(4) empowered the State to make any provision for the reservation of appointments posts or appointments in government service in favour of a backward class of citizens in services under the State. In one of its earliest cases, the Hon'ble Supreme Court in **State of Madras vs. Champakam Dorairajan** [AIR 1951 SC 226, dated 9.4.1951], held that the State could not discriminate on the ground of caste or religion in respect of admission to an educational institution since Article 15 (as it then stood) and Article 29(2) clearly prohibited denial of admission to an educational institution on the basis of caste. This is one of the earliest instances of the

directive principles being invoked wherein caste-based reservation for admission of students to engineering and medical colleges was sought to be justified by the government on the touchstone of directive principles. The Court expressly held that directive principles must conform to the chapter on fundamental rights and cannot run contrary to it. The enabling provision found in Article 15(4) was inserted *vide* the Constitution (First Amendment) Act, 1951 w.e.f 18.6.1951, mainly to neutralize the judgment in Champakam Dorairajan's case.

Therefore while the directive principles were seen as guides to legislation and state action, the fundamental rights became the limitations or the outline for such state action which could not be transgressed and justified on the premise that they are in furtherance of directive principles.

It must also be remembered that our understanding of interpretation of fundamental rights has undergone a sea change from the initial years. One of the earliest cases of seminal importance heard by the Supreme Court after the Constitution came into force was the case of **A.K. Gopalan vs. State of Madras** [1950 AIR 27], wherein a communist leader detained under the provisions of the Prevention of Detention Act with a view, as it was said, to prevent him from acting in any manner prejudicial to the security of state and the maintenance of public order. Gopalan argued that the fundamental rights contained in Article 19 were denied to him as the law of preventive detention did not prescribe a

fair procedure. His argument was that the provisions of Article 19 relating to various personal freedoms should be read into Article 21, guaranteeing the right to life, and Article 22, enabling the State to make laws providing for preventing detention; Articles 19 and 21 should be read as implementing each other and that the law of preventive detention should pass the test of reasonable restriction under Article 19(5). The Supreme Court rejected this argument and held that the rights specified in Article 19 of the Constitution, by their very nature, were freedoms of a person assumed to be in full possession of his personal liberty, and that both punitive and preventive detentions were outside the range of Article 19, and that Articles 19 and 21 were to be read separately. Hence, the Court held that the validity of a law providing for preventive detention could not be judged on the touchstone of Article 19(5) which enabled Parliament to impose reasonable restrictions. The Court, albeit wrong in its approach, was clear on its stand. Interestingly, the dissent by Fazl Ali J. in this case went on to become the law later. Fazl Ali J., disagreeing with the majority, had observed that it cannot be said that Articles 19, 20, 21 and 22 do not to some extent overlap each other. Preventive detention which is dealt with in Article 22 also amounts to deprivation of personal liberty which is referred to in Article 21 and is also a violation of the right to movement in Article 19(1) (d). This view came to become the law sixteen years later in the Banks Nationalisation Case (**R.C. Cooper v. Union of India**, AIR 1970 SC 564) where the Court overruled the Gopalan approach and held that a law providing for



acquisition of property must also satisfy the requirements of Article 31. While clarifying the law, J.C. Shah, J. clearly held as follows:

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

This position of law came to be further consolidated in **Maneka Gandhi v. Union of India**, (1978) 1 SCC 248 where it was reiterated that:

*“If a person’s fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned.” There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India [(1970) 2 SCC 298 : (1971) 1 SCR 512] the minority view (in Gopalan) must be regarded as correct and the majority view must be held to have been overruled.”*

More recently, in **Justice K S Puttaswamy (Retd.) vs. Union of India**, 2017 (10) SCALE 1, a 9 Judge Bench of the Supreme Court held that privacy is a fundamental right falling

under Article 21. Justice D. Y. Chandrachud observed as follows:

*“... the evolution of Article 21, since the decision in Cooper indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or water tight compartments. In consequence, Article 14 has been held to animate the content of Article 21. Second, the expression ‘procedure established by law’ in Article 21 does not connote a formalistic requirement of a mere presence of procedure in enacted law. ... The mere fact that the law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. ... The law is open to substantive challenge on the ground that it violates the fundamental right.”*

Justice Chandrachud further observed that:

*“The recognition of privacy as a fundamental constitutional value is part of India’s commitment to a global human rights regime. Article 51 of the Constitution, which forms part of the Directive Principles, requires the State to endeavour to “foster respect for international law and treaty obligations in the dealings of organised peoples with one another.” ... India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation.”*

Therefore, with the development of understanding of fundamental rights itself, its relationship with directive principles has also evolved over the years.

The locus classicus on this issue is the case of **Minerva Mills Ltd vs. Union of India** 1980 AIR 1789 wherein the Supreme Court was required to decide upon the validity of section 4 of the Constitution 42<sup>nd</sup> Amendment Act 1976 which amended Article 31C as follows:

*“Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing [all or any of the principles laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the fundamental rights conferred by article 14, article 19 or article 31...”* The portion underlined above was substituted by way of amendment for *“the principles specified in clause (b) or clause (c) of Article 39”*.

The Constitution bench by a majority of 4 to 1 held a part of the amendment to be unconstitutional and observed that:

*“The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin’s observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important*

*than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution. ... just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms. ... The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.”*

The Court further went on to hold that if article 31C as amended by the 42<sup>nd</sup> amendment is allowed to stand, it will confer an unrestricted license on the legislature and the executives, both at the Centre and in the States, to destroy democracy and establish an authoritarian regime. In his partly dissenting judgement, Justice Bhagwati however, held the amended



article 31C to be valid, while observing that it is not correct to say that under our constitutional scheme, Fundamental Rights are superior to Directive Principles or that Directive Principles must yield to Fundamental Rights. He observed that if a law is enacted for the purpose of giving effect to a directive principle and it imposes a restriction on a fundamental right, it would be difficult to condemn such restriction as unreasonable or not in public interest.

Subsequently, in **Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.**, (1983) 1 SCC 147, the Supreme Court held that Article 14 goes out where Article 31C comes in, and explained the observations of Bhagwati J. in *Minerva Mills*' case as follows:

*“it appears to us, he was at great pains to point out that the broad egalitarian principle of social and economic justice for all was implicit in every directive principle and, therefore, a law designed to promote a directive principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would most certainly advance the broader egalitarian principle and the desirable constitutional goal of social and economic justice for all. If the law was aimed at the broader egalitarianism of the directive principles. Article 31-C protected the law from needless, unending and rancorous debate on the question whether the law contravened Article 14's concept of equality before the law. That is how we understand Bhagwati, J.'s observations.”*

It is interesting to note that there has been

some shift over the years in the interpretive model of the Supreme Court over this issue. While initially the Supreme Court had clearly held that the directive principles are subordinate to fundamental rights, and must succumb to it in case of any conflict, it was later developed to suggest that they are both equally important and valuable for the balance in the Constitution to exist and yet later it started being used as a marker for reasonable state action if such action is in furtherance of directive principles. For instance, as Gautam Bhatia rightly points out in his article *Directive Principles of State Policy: an Analytical Approach* that the directive principles started being used as a marker for reasonableness to test governmental action and that any government policy aimed at advancing a directive principle cannot but be in public interest raising a presumption of reasonableness. He cites an example of the Right to Education Cases of 2012 wherein the Right of Children to Free and Compulsory Education Act was being tested by the court for the constitutionality and the 25% reservation for the economically weaker sections was found to be reasonable under article 19(6) for suppressing the right under article 19(g) because it was found to be in furtherance of directive principles. But this approach can also be found in some of the earlier cases as well. For instance, in **State of Bihar vs. Kameshwar Singh** [AIR 1951 SC 252], wherein the Supreme Court, relying upon the directive principles incorporated in Article 39(b), held that certain zamindari abolition laws have been passed for a public purpose within the meaning of Article 31(2) and that state

ownership of control over land was a necessary preliminary step towards the implementation of directive principles that it could not but be a public purpose. The issue relating to the perceived dichotomy between fundamental rights and directive principles has come up in sharp debate with respect to enforcement of socio-economic rights especially since it was perceived that directive principles embodied positive obligations or duties upon the state which were unenforceable whereas the fundamental rights primarily imposed a negative obligation on the state to not take away the rights conferred and recognised by part III of the Constitution. However our Indian Supreme Court has jurisprudentially overcome this dichotomy and rightly recognised that most fundamental rights give rise to both negative and positive obligations upon the state and therefore various directive principles have been progressively read into fundamental rights. For instance the Hon'ble Supreme Court in the case of **Unnikrishnan vs. State of A. P.** (1993) 1 SCC 645 identified the right to free primary education up to the age of 14 as fundamental right, which was later inserted into the Constitution as Article 21A. In fact, Justice B.P. Jeevan Reddy had observed that it is well-established by decisions of this court that the provisions of part III and IV are supplementary and a means to achieve the goal indicated in Part IV of the Constitution. It was also held that fundamental rights must be construed in light of directive principles.

Therefore, it is seen that by using the directive principles of state policy, the Indian

Supreme Court has been able to overcome jurisprudential obstacles which are often posed when faced with the argument of enforcement of positive obligations on the state particularly in the context of socio-economic rights. Such rights have been argued must be best left to be fulfilled by political means and not through courts raising the arguments of democracy and legitimacy that it is best left to the elected representatives of the state to decide where the resources must be expended. However, the Supreme Court has relied upon directive principles of state policy to overcome this argument and held that irrespective of political parties in power the directive principles contained in Part IV of the Constitution embody the aspirations of the nation. The court has traced a democratic norm located within the directive principles of state policy and drawn legitimacy for its decisions on socio-economic rights. In **Bandhua Mukti Morcha v. Union of India** (1984) 3 SCC 161, the Supreme Court, dealing with individuals living in bondage, observed that:

*“...This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clause (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work*



and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and nor State-neither the Central Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials.”

In **Paschim Banga Khet Mazdoor Samity v. State of W.B.**, (1996) 4 SCC 37, the right to emergency medical care as the core of the right to health was read into Article 21 which was found to be in furtherance of the directive principles contained in Article 47 which deals with public health. The concept of minimum core is useful in contextualizing the role of courts amidst the debate of justiciability of socio-economic rights as it carves out an immediate and determinate goal for an otherwise progressively realisable right. Lack of financial resources cannot be a justification for delaying fulfilment of basic obligations on the state. In **Shantistar Builders v. Narayan Khimalal Totame**, (1990) 1 SCC 520, the Supreme Court held that a reasonable residence is an indispensable necessity for fulfilment of the constitutional goal in the matter of development of man and should be taken as included in 'life' in Article 21. This obligation was extended in **Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan**, (1997) 11 SCC 121 wherein the court had held that it is the duty of the State to provide shelter to the poor and indigent weaker sections of the society in fulfilment of the constitutional objectives contained in Articles 38, 39 and 46.

In **Jindal Stainless Ltd v. State of Haryana**, [AIR 2016 SC 5617] wherein a 9 Judge Bench of the Supreme Court upheld the validity of levy of entry tax, Justice Ramana observed the following in the context of taxation as a facet of exercise of State sovereignty and how levy of taxes to generate revenue is relevant to achieve objectives in furtherance of directive principles:

*“Our constitutional history shows that we at one point had rigorously defended individualistic rights [for ex. Right to Property]. Slowly we have moved towards community rights by invoking Directive Principles of State Policy as a tool to judicially interpret Part III of the Constitution. ... The States in the modern era are not strictly confined to political activities and law making functions. They function in a welfare society. Such working of States was visualized by our framers also, who were aware of responsibilities a State must shoulder and discharge. This is the very reason for existence of Directive Principles of State Policy and which sets normative and positive standards for the Government. When the State is burdened with such normative goals as its primary responsibility, such activities are inevitably dependent on availability of monetary resources. ...”*

Therefore, it is my understanding from a survey of decisions of the Hon'ble Supreme Court that there is increasing tolerance towards state action when it is in furtherance of directive principles of state policy and increasingly such actions have been found to be reasonable

restrictions on fundamental rights unless they are so palpably abhorrent that they cannot be sustained by any means.

The Supreme Court also constituted a 'social justice' bench in 2014 to hear issues where a "proactive role" is required in order to meet Constitutional goals. These include - release of surplus food grains lying in stocks for the use of people living in the drought affected areas; to frame a fresh scheme for public distribution of food grains; to take steps to prevent untimely death of the women and children for want of nutritious food; providing hygienic mid-day meal besides issues relating to children; to provide night shelter to destitute and homeless; to provide medical facilities to all citizens irrespective of their economic conditions; to provide hygienic drinking water; to provide safety and secured living conditions for the fair gender who are forced into prostitution, etc. Some of the judgments pronounced by the Social Justice Bench include:

a. **Environment and Consumer Protection Foundation vs. Union of India** [W.P. 659/2007 dt. 11.8.2017] – The Court constituted a committee to study reports on the condition of widows in Vrindavan, while observing that *"It is to give voice these hapless widows that it became necessary for this Court to intervene as a part of its constitutional duty and for reasons of social justice to issue appropriate directions."*

b. **Swaraj Abhiyan v. Union of India** [W.P.

857/2015 dt. 21.7.2017] – The Court directed the State Governments and Union Territories to effectively implement the provisions of the National Food Security Act in letter and spirit.

c. **Inhuman Conditions in 1382 Prisons, In re** (2016) 3 SCC 700 – The Court directed sincere and effective implementation of prison reforms, while observing that *"even though Article 21 of the Constitution requires a life of dignity for all persons, little appears to have changed on the ground as far as prisoners are concerned"*.

d. **Swaraj Abhiyan v. Union of India**, (2016) 7 SCC 498 – The Court, while considering drought or drought-like conditions prevailing in the country and implementation of social security measures, observed that *"We would like to draw attention to Article 47 of the Constitution which provides that one of the primary duties of the State is to raise the level of nutrition and the standard of living of the people. Although Article 47 is not enforceable being a directive principle, there is considerable moral force and authority in this provision to persuade the State Governments and the Government of India to attempt at ensuring that the people, particularly those in drought-affected areas, are provided adequate foodgrains and a cooking medium for the preparation of their meals."*

Though the directive principles remain unenforceable on paper, the Supreme Court's proactive approach has virtually made them enforceable. Sometimes this approach of the



Court draws criticism from certain quarters, on the ground it has ventured into policy-making. The recent judgments with regard to ban on sale of liquor on highways [**State of T.N. v. K. Balu**, (2017) 2 SCC 281] and ban on sale of crackers in the NCR region [**Arjun Gopal v. Union of India**, dt. 9.10.2017] were criticized for “overreaching”. However, as regards the former, the Court was only implementing the policy of the Government while taking into account accidental deaths on the roads. As regards the latter, the Court acted on direct evidence of deterioration of air quality at alarming levels every year during Diwali on account of burning of firecrackers.

As the jurisprudence as to the interplay of fundamental rights and directive principles continues to evolve, one must not lose sight of the fact that ultimately, a balance has to be struck between the two. In my view, the doctrine of proportionality can be a useful test to balance fundamental rights and directive principles if at all a conflict arises while adjudicating legislative action and the proportionality test has been extended to test legislation by the Indian Supreme Court in the case of **Modern Dental College v. State of Madhya Pradesh**, 2016 (7) SCC 353. The Hon’ble Supreme Court while explaining the doctrine of proportionality has emphasised that when the Court is called upon to decide whether a statutory provision or rule amounts to unreasonable restriction or not, the exercise that is required to be undertaken is the balancing of fundamental rights on the one hand and the restrictions imposed on the other. In **Modern**

**Dental College’s** case, a succinct explanation of the doctrine of proportionality was provided (*per* Sikri, J.):

“60. ...Thus, while examining as to whether the impugned provisions of the statute and rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as “doctrine of proportionality”. Jurisprudentially, “proportionality” can be defined as the set of rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub-components of proportionality which need to be satisfied [Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge University Press 2012)], a limitation of a constitutional right will be constitutionally permissible if:

- (i) it is designated for a proper purpose;
- (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;
- (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally

*(iv) there needs to be a proper relation (“proportionality stricto sensu” or “balancing”) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right...*

*63 ... To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the*

*purpose, and such measures are necessary.”*

Therefore, likewise the doctrine of proportionality as a tool for interpretation can be effectively deployed to test state action, legislative or otherwise in resolving any apparent conflict between directive principles of state policy and fundamental rights and harmonise them since it cannot be denied that a large population of our country is still struggling to meet their basic needs and therefore if the State undertakes certain measures for their welfare, larger public interest must also be taken into account as a factor to test its validity against Part III of the Constitution.

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# Fragments from a Manuscript

Shyam Divan\*

It often falls on archeologists and historians to reconstruct civilizations and their cultures from a shard of pottery or the remnants of parchment. In contrast, the tools of law require us to sift through the dross and distill the ratio of a decision. We lawyers are trained to ignore distractions of what might have happened in court and focus on the eventual outcome and the principle laid. Nevertheless, at times of repose we often drift into imagining the theatre that played out in the courtroom when great cases were heard.

Offered here are a few fragments of what happened in court during *Kesavananda Bharati*,<sup>1</sup> arguably the most significant decision by the Indian Supreme Court. These manuscripts may hold your interest because they draw on the personal records of two stalwarts who attended the hearings and later wrote on the landmark case.

In *Kesavananda Bharati*, the petitioners assailed the 24th, 25th, 26th and 29th

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\*Senior Advocate

1 *His Holiness Kesavananda Bharati Sripadagalveru v. State of Kerala*, 1973 Supp SCR 1; (1973) 4 SCC 225; AIR 1973 SC 1461.

amendments to the Constitution. The thrust of the petitioner's case was to protect the fundamental right to property, guaranteed under Article 19(1)(f) of the Constitution. The respondents led by H.M. Seervai, Advocate General of Maharashtra, contended that fundamental rights were amenable to amendments and could be abrogated.

My father, Anil B. Divan<sup>2</sup> maintained hand written notes of the hearings<sup>3</sup> that began at 11 a.m. on Tuesday, October 31, 1972. Nani A. Palkhivala<sup>4</sup> opened the case for the petitioners and argued for 30 days. He was followed on January 8, 1973 by C.K. Daphtary, M.C. Chagla, Soli J. Sorabjee and other counsel who concluded their submissions on the same

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2 Referred to as "ABD" in the documents excerpted here.

3 Apart from these notes, Mr. Anil B. Divan has written about *Kesavananda Bharati* in "Nani Palkhivala – Some Personal Glimpses – The Fundamental Rights Case" and "H.M. Seervai – Random Memories and Recollections" in Anil Divan, *On the Front Foot : Writings on Courts, Press and Personalities* at pages 275 and 286 (2nd Ed., 2017, Universal). Mr. Divan appeared on the side of the petitioners for sugar factories in Maharashtra and writes that till 10 days before the commencement of the case, Palkhivala was undecided whether he would accept the brief and M.C. Chagla was to lead the arguments.

4 Referred to as "NAP" in some of the documents excerpted here.

day. On Tuesday January 9, 1973 Seervai commenced his submissions and soon articulated two basic postulates of democracy: (1) faith in human beings, and (2) faith in human reason. Assisting Seervai was my senior, Tehmtan R. Andhyarujina who maintained a daily diary of the hearings. T.R. Andhyarujina drew on this diary and other primary sources from the records of the Supreme Court to capture the twists and turns in the case.<sup>5</sup>

The Supreme Court Bench of 13 Judges was presided over by Chief Justice S. M. Sikri.<sup>6</sup> The Chief Justice was to retire on April 25, 1973, raising a deadline for deliberations and judgment.

On the 30th day of the proceedings, this is how Palkhivala concluded his arguments before the winter recess:<sup>7</sup>

**Thursday, December 21, 1972**

**30th hearing**

**3:40 pm**

NAP : *In another twenty minutes I will have done. I will end as I began on the question of approach, with a few well chosen and well*

*phrased words of a distinguished lawyer. I would however request your Lordships not to read the name of the author.*

*[NAP is given cyclostyled bunch he hands over to Court master.]*

*I again request your Lordships not to read the name because if you do, you will not believe your eyes.*

*The name is H.M. Seervai.*

*--- Laughter ---*

*[Reads articles]*

*--- Three interruptions by Seervai ---*

Seervai : *[After] Articles written – Member of Parliament [in] Select Committee told [me] that certain clauses [were] dropped because of [the] articles.*

NAP: *Thank you.*

Seervai : *I will fully explain the articles.*

NAP : *You will do so at length when your turn comes.*

Hegde J. : *Shows that judges and lawyers should not write articles.*

Chandrachud J. : *Mr. Palkhivala have you not committed breach of copyright?*

*--- Laughter ---*

5 T. R. Andhyarujina, *The Kesavananda Bharati Case : The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* (2011, Universal).

6 The other justices on the Bench were J.M. Shelat, K. S. Hegde, A.N. Grover, A.N. Ray, P. Jagannathan Reddy, D.G. Palekar, H. R. Khanna, K. K. Mathew, M.H. Beg, S.N. Dwivedi, A.K. Mukherjea and Y. V. Chandrachud.

7 Hand written manuscript of hearing maintained by Anil B. Divan.

The punch in Palkhivala's closing submission is revealed on a reading of Seervai's passionate defence of the right to property, in a series of three articles that appeared in the Times of India seventeen years before *Kesavananda* was argued.



## **Fundamental rights**

### **I – A Basic Issue <sup>8</sup>**

**By H.M. Seervai**

*“Is it too much to hope that the Prime Minister who is never afraid to admit a mistake, will realize that his bill rests upon a demonstrably wrong interpretation of the Supreme Court Judgment,<sup>9</sup> and that the cause which the Supreme Court has vindicated is also his own cause – because of freedom and justice for the inhabitants of India? He will abandon article (2A) (proposed to be added in article 31) since it provides for an unjust deprivation of property.”*

## **Fundamental rights**

### **II – No Compensation for Shareholders**

**By H.M. Seervai <sup>10</sup>**

#### **ANXIOUS THOUGHT**

*Is it not time that we rekindled the inspiration which led to the enactment of fundamental right? The Prime Minister and the distinguished Statesmen and Lawyers who framed our Constitution did not enact Article 19(f) and*

<sup>8</sup> Excerpt from *Times of India* – Bombay Edition dated February 14, 1955 at page 6 Columns 7-8. Cyclostyled copy of article tendered by Palkhivala to the Supreme Court. Page 1222, Vol. IV, Papers of Anil B. Divan.

<sup>9</sup> Seervai was referring to Prime Minister Nehru and the *Sholapur Mills* case, reported as *Chiranjit Lal Chowdhuri v. Union of India & Ors.* (1950) SCR 869.

<sup>10</sup> Excerpt from *Times of India* – Bombay Edition dated February 15, 1955 at page 6 Columns 7-8. Cyclostyled copy of article tendered by Palkhivala to the Supreme Court. Page 1230, Vol. IV, Papers of Anil B. Divan.

*(g) and Article 31 without the most anxious thought. They found in the Constitutions of great Democracies that acquisition of property was on the basis of just compensation. The Constitution of India, like those of these democracies, was also designed to secure basic human freedoms; equality before the law, freedom of person, of speech, or association and of religion. It was realised that for all practical purposes these freedoms would come to nothing if the freedom to carry on a business, trade, profession or calling, the freedom to acquire, hold and dispose of property and the freedom from deprivation of property was not also secured.*

\* \* \*

#### **SOCIAL WELFARE**

*When, therefore, we are told that fundamental rights prevent Social Welfare Legislation, we can answer: we dispute the fact. The State has taken over Joint Stock Companies, Railways, Telephone systems, Air Transport, on the payment of just compensation and so promoted social welfare. But even if the guarantee of Fundamental Rights prevents or retards “Social Welfare” Legislation we must maintain that there is no higher social welfare than the bringing up free and upright people living under Constitution which puts it beyond anybody’s power to take an Indian’s life by taking the means whereby he lives; as long as the means are not immoral. It would be a strange paradox if “Social Welfare” legislation*

which is designed to increase the material wealth of the people was accompanied by legislation rendering that wealth insecure when earned. It would be a still stranger paradox to fight Communist tyranny by borrowing the Communist's own weapon of confiscation and suspension of Constitutional Guarantee "in the national interest."

If the effect of the amendments on the economic and moral life of the country will be grave, the effect on the young democracy of India will be disastrous since the Constitution will have been treated as an ordinary law to be changed at the will of the party in power. If today freedom from unjust deprivation of property and business can be brushed aside in "the national interest", the freedom of speech and association could also be brushed aside, if the Government of tomorrow thought that "national interest" required a strong Government whose dictates must be unquestioningly obeyed.

On 26th January, 1950, we lifted up our heads because our Constitution decreed that all Governments in India were to work within the framework of fundamental human freedoms. Must we, five years later, lower our heads by saying that there are no fundamental freedoms; that the Constitution did not mean what it said when it guaranteed fundamental rights, that there is nothing fundamental except the Government of the day?

On the third day of his submissions, Seervai was momentarily distracted by the lingering

effect of Palkhivala's closing flourish:<sup>11</sup>

**Thursday, January 11, 1973**

**34th hearing (Dictated by A.B.D.)**

Seervai : It is submitted that there is intrinsic evidence in the provisions of Part III itself that our Constitution in Part III does not adopt the theory that fundamental rights are natural rights or that they are moral rights which every human being at all times ought to have simply because of the fact that as opposed to other beings he is rational and moral.

(Seervai developed this submission by saying that freedom of speech and expression, right to form associations, etc. are strong emotive words.)

According to my submission there are no natural rights in an organized society as such.

I do not want to mix up moral arguments and emotional appeals with legal arguments.

In due course I will meet "the drama performed by Mr. Palkhivala in the

---

<sup>11</sup> This excerpt is from typed notes prepared by Anil B. Divan. The typed notes are based on separate handwritten notes recorded in court.



*last 20 minutes of his submission”  
(This statement was made by Mr.  
Seervai at 12:13 p.m.)*

*Hegde J.: It is not proper to use words  
regarding Counsel. There will be  
no end to it.*

*Seervai : I withdraw the words.*

*[Seervai continues his arguments]*

*My reasons for supporting the  
above submission are as under:*

*1. The language of Art. 13(2)  
shows that these rights are  
conferred by the people of India  
and they were such rights as  
the people thought fit to give in  
the organised society or State  
which they were creating.*

*These rights did not belong  
to people of India before 26th  
January, 1950 and could not  
have been claimed by them.*

In the course of Seervai's arguments on February 6, 1973 Justice Beg was admitted to hospital and the hearing resumed in the following week. Andhyarujina recounts:

*Justice Beg again became sick for the  
second time and was absent on the 5th March.  
On the 6th March, the Chief Justice again  
called a conference in his chamber to consider*

*the situation caused by Justice Beg's indefinite  
illness. At this conference the Chief Justice  
stated that the Court would be adjourned for  
the rest of the week and would reassemble  
on Monday the 12th March if Justice Beg was  
advised that he could resume his appearance  
on the bench by his doctors. If, however, he  
was not so advised, the court would resume  
the very next day with 12 judges without Justice  
Beg. There was no protest by any Counsel to  
this. However, on the next day i.e. 7th March  
the bench was notified for hearing on Monday  
the 12th March and resumed with Justice Beg  
on the bench on that day.<sup>12</sup>*

Attorney General Niren De and Solicitor General Lal Narain Sinha followed Seervai and concluded their submissions on March 14, 1973 leaving four days for the petitioners to rejoin.

Mid-way through Palkhivala's rejoinder Justice Beg fell ill again and the Chief Justice called a second chamber meeting with Judges and counsels present. The tense exchange is captured in these minutes: <sup>13</sup>

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<sup>12</sup> T. R. Andhyarujina, *The Kesavananda Bharati Case : The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* page 33 (2011, Universal).

<sup>13</sup> Typed record of minutes prepared by Anil B. Divan. Also see T. R. Andhyarujina, *The Kesavananda Bharati Case : The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* page 34-36 (2011, Universal).

**Thursday, March 22, 1973**

**Minutes of The Meeting in Chambers**

**(Dictated by A.B.D.)**

*Present: C.J. and all other Judges except Beg J. and Dwivedi J.*

*C.J. : Started by saying that Beg J. was taken ill and removed to hospital. His blood pressure was high and there was possibility of heart trouble.*

*In any event, there will be no hearing today in view of the fact that Dwivedi J. was indisposed due to diarrhea but he will be able to sit tomorrow.*

*C.J. : stated that Beg J. is advised rest in hospital for one week and thereafter further rest for three weeks at home and he read from the medical opinion.*

*C.J. : stated that the consensus among his colleagues was that the matter should go on with 12 judges from tomorrow i.e. Friday, March 23, 1973.*

*Palkhivala : stated that he takes it that the sitting will be both on Friday and Saturday.*

*Attorney General : states that if Their [Niren De] Lordships have decided to continue there is nothing to say but it is his submission that Mr. Palkhivala should be asked to submit his written submissions only so that Beg J. can consider them and a bench of thirteen can decide.*

*Attorney General : states that he had curtailed his arguments and so had the Solicitor General.*

*Palkhivala : states that he is astonished that a suggestion is made that he should have no right to reply. He points out that the time taken on the petitioner side was 31 days plus 4 days for his reply making 35 days. The time taken by the other side is also 35 days.*

*He further points out that on March 6, 1973, it was decided in Chambers that if Beg J. was advised rest beyond March 12, 1973, the matter would continue with 12 Judges.*

*Daphtary : Last time it was agreed that if Beg J. could not attend, 12 Judges will continue.*

*Attorney General : says that if Palkhivala is to be permitted an oral argument and Beg J. is not to participate, he is instructed to state that there*



is no further point in his clients the Union of India continuing to participate.

*Advocate General of Maharashtra : I join in the [Seervai] view expressed by the Attorney General. There is no point in our participating in the case further. I had to submit written arguments and there was no time for me on certain important points. There is no reason why written arguments cannot be submitted by the other side.*

*Hegde J. : This is not the place where this sort of thing is done. This is like a boycott. We may next be told that if we do not decide in a particular way somebody will not participate.*

*Chandrachud J.: Mr. Attorney, your participation now involves listening to the reply.*

*A.B.D. : Reminded the court of the decision taken on March 6, 1973, to the effect that the matter would go on with 12 Judges if Justice Beg was indisposed. At that time neither the Attorney General nor the Advocate General of Maharashtra made any demur and the suggestion was also made that what was said should be minuted. At that time Hegde J. stated that the decision was made and there would be no further meeting in the Chambers.*

*C.J. : Informed the parties that they will consider the matter and intimate them.*

*After about an hour Court Master informed the parties that the matter is posted tomorrow at 10-30 am for Orders and further hearing.*

On March 23, 1973 the bench assembled in court without Justice Beg “in a tense atmosphere”.<sup>14</sup> Before the Chief Justice could state his decision, Palkhivala diffused the tension by requesting that the hearing may be treated as closed and that he would file written submissions.

*Today, My Lords, is the 67th day of the hearing of the case and tomorrow is scheduled to be the last day. This case, My Lords, is beyond question one of the most momentous in world history and probably the most important in the history of democracy and, My Lords, it would be a thousand pities if the real legal issues arising in the case get clouded or sidetracked by pettiness, bitterness or acrimony. I have, My Lords, therefore, been thinking over the matter arising out of the unfortunate illness of the Hon’ble Mr. Justice Beg. If my learned friends are anxious that the Hon’ble Mr. Justice Beg should participate in the judgment, let me make it abundantly clear that the Petitioner*

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<sup>14</sup> T. R. Andhyarujina, *The Kesavananda Bharati Case : The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* page 36 (2011, Universal).

*is no less eager that every single one of your Lordships, including the Hon'ble Mr. Justice Beg, should participate in the judgment.*

*It has been suggested that the Hon'ble Mr. Justice Beg may feel better and may be able to take part in the formulation of the judgment. If, My Lords, this is the possibility, I would be as happy as anyone else in this Court room if the Hon'ble Mr. Justice Beg can take part in the Judgment. If this has to happen, My Lords, question is whether I should continue with my oral arguments or request your Lordships to treat the oral arguments as closed and ask*

*for liberty to put in my brief points of reply in writing say by tomorrow evening or Sunday morning.* <sup>15</sup>

Justice Beg recovered from his illness and the judgments of the court were delivered on April 24, 1973. Chief Justice Sikri retired on April 25, 1973. The government superseded the three seniormost judges of the Supreme Court -- Justices Shelat, Hegde and Grover by appointing Justice A.N. Ray as Chief Justice of India. The three superseded judges who had decided *Kesavananda Bharati* against the government promptly resigned.

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15 T. R. Andhyarujina, *The Kesavananda Bharati Case : The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* page 37 (2011, Universal).



IN THE SUPREME COURT OF INDIA

JURISDICTION \_\_\_\_\_

Book 22

Petition/Appeal No. \_\_\_\_\_ of 19 \_\_\_\_\_

In the matter of

28<sup>th</sup> Hearing Tuesday 19<sup>th</sup> / 12 / 72 \_\_\_\_\_ Appellant

-Vs-

29<sup>th</sup> Hearing Wed. 20<sup>th</sup> / 12 / 72 \_\_\_\_\_  
30<sup>th</sup> Hearing Thursday 21<sup>st</sup> / 12 / 72 \_\_\_\_\_ Respondent

For whom \_\_\_\_\_  
*JBDwan*

Notes \_\_\_\_\_

3, Parliament Street,  
4th Floor Jeevan Vihar,  
NEW DELHI-1.

M/s. J. B. DADACHANJI & CO.  
Advocates, Supreme Court



3/40pm NRP  
In another twenty minutes I will have done. I will end  
as I began on the question of approach, with a few  
well chosen and well phrased words of a distinguished  
lawyer. I would however request your lordships not to  
read the name of the author.

NRP a given cyclostyled bundle, he handed  
over to Court master.

I again request your lordships not to  
read the name. because if you do, you will not  
believe your eyes.

The name is H. M. Seemai

re Laughlin -  
reads article

Three interruptions by Seemai

Seemai Article written - member of Parl. + Select Com.  
told him that certain clause dropped ∴ of his articles -

NRP Thank you.

Seemai - I will fully explain the article -

NRP - You will do so at length when your turn  
comes.

After at Keppel, shows that judge + lawyer should not  
write articles.

Chandrasekhar, Mr Palkhivala - you have your  
committed beach of copyright  
Laughlin



SUMMARY OF ARGUMENTS  
OF THE ADVOCATE GENERAL  
OF MAHARASHTRA

Thursday, January 11th, 1973;

34th Hearing.

(Dictated by A.B.D.)

Mr. Seervai's arguments continue.

Seervai first answered certain questions which arose on the previous day.

1. The reference in the Berubari case was to Willoughby, Vol. I,  
Page 62.

The Berubari case reference is (1960) 3 S.C.R. 252 at 281, 282.

It is correct as pointed out by the C.J. that the original passage of Willoughby does not deal with the Preamble in connection with inherent and/or implied limitations, but the case referred to viz.

197 U.S. 11 Jacobson Vs. Massachusetts  
 supports me and I will cite it later.

2. Reads Notification dated 26th January, 1950 which was tendered



16

Seervai: I will deal with it fully later  
on.

Seervai thereafter deals with  
his first submission.

He cites (1967) 2 S.C.R. at 789  
(Subbarao, C.J.) and made his  
submission in the following words:

Submission

"It is submitted that there is  
intrinsic evidence in the provisions  
of Part III itself that our Constitu-  
tion in Part III does not adopt the  
theory that fundamental rights are  
natural rights or that they are  
moral rights which every human being  
at all times ought to have simply  
because of the fact that as opposed  
to other beings he is rational and  
moral".

Natural  
Rights

(Seervai developed this submission  
by saying that freedom of speech and  
expression, right to form associations,  
etc. are strong emotive words.)

①

According to my submission there are  
no natural rights in an organised  
society as such.

34th hearing, Thursday, January 11, 1973, These excerpts are from typed notes prepared by Anil B. Divan.  
The typed notes are based on separate hand written notes recorded in court.



I do not want to mix up moral arguments and emotional appeals with legal arguments.

In due course I will meet "the drama performed by Mr. Palkhivala in the last 20 minutes of his submission (this statement was made by Mr. Seervai at 12:13 P.M.).

Hegde, J. It is not proper to use words regarding Counsel. There will be no end to it.

Seervai: I withdraw the words.

Seervai: (continues his arguments).

My reasons for supporting the above submission are as under:-

1. The language of Art. 13(2) shows that these rights were conferred by the people of India under the Constitution and they were such rights as the people thought fit to give in the organised society or State which they were creating.

These rights did not belong to the people of India before 26th January, 1950 and could not have been claimed by them.



Thursday, March 22, 1973.

MINUTES OF THE MEETING IN CHAMBERS

(Dictated by A.B.D.)

- Present: C.J. and all other Judges except Beg J and Dwivedi J.
- C.J. - Started by saying that Beg J. was taken ill and removed to hospital. His ~~blood~~<sup>blood</sup> pressure was high and there was possibility of heart trouble. In any event, there will be no hearing today in view of the fact that Dwivedi J. was indisposed due to diarrhoea but he will be able to sit tomorrow.
- C.J. - stated that Beg J. is advised rest in hospital for one week and thereafter further rest for three weeks at home and he read from the medical opinion.
- C.J. - stated that the consensus among his colleagues was that the matter should go on with 12 judges from tomorrow i.e. Friday, March 23, 1973.
- Palkhivala -stated that he takes it that the sitting will be both on ~~Friday~~<sup>Friday</sup> and Saturday.
- Attorney General - states that if Their Lordships have decided to continue there is nothing to say but it is his submission that Mr. Palkhivala should be asked to submit his written submissions only so that Beg J. can consider them and a bench of thirteen can decide.

Contd....2/2



- Attorney General - states that he had curtailed his arguments and so had the Solicitor General.
- Palkhivala - states that he is astonished that a suggestion is made that he should have no right to reply. He points out that the time taken on the petitioners side was 31 days plus 4 days for his reply making 35 days. The time taken by the other side is also 35 days. He further points out that on March 6, 1973, it was decided in Chambers that if Beg J. was advised rest beyond March 12, 1973, the matter would continue with 12 Judges.
- Daphtary: - Last time it was agreed that if Beg J could not attend, 12 Judges will continue.
- Attorney General - says that if Palkhivala is to be permitted an oral argument <sup>and</sup> then Beg J. is not to participate, <sup>he is</sup> I am instructed to state that there is no further point in his clients the Union of India continuing to participate.
- Advocate General of Maharashtra - I join in the view expressed by the Attorney General. There is no point in our participating in the case further. I had to submit <sup>written</sup> ~~written~~ arguments and there was no time for me on certain important points. There is no reason why written arguments cannot be submitted by the other side.

Contd.....P/3



Hegde J. - There is not the place where this sort of thing is done. This is like a boycott. We may next be told that if we do not decide in a particular way somebody will not participate.

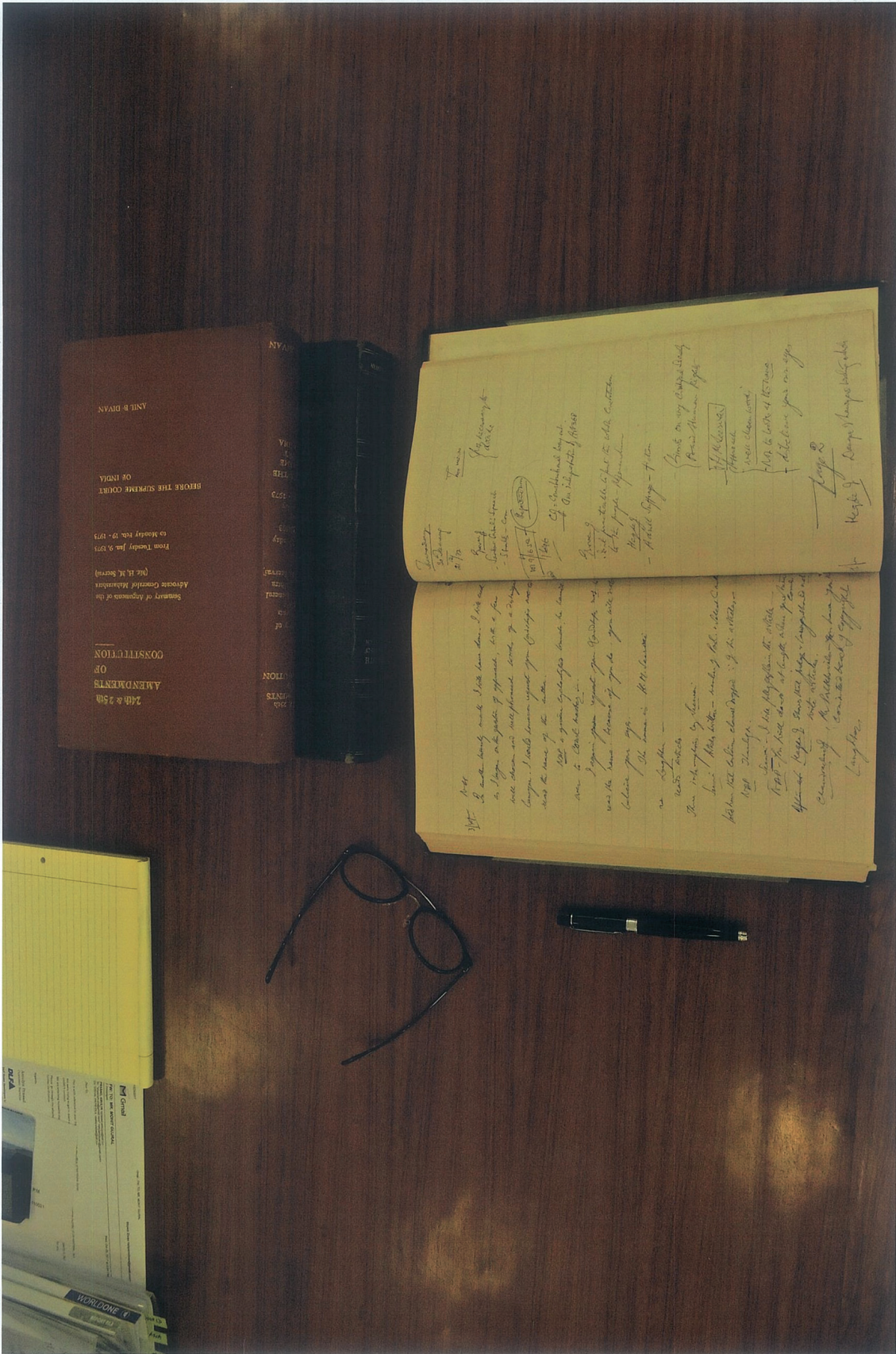
Chandrachud J. Mr. Attorney. Your participation now involves listening to the reply.

A.B.D. - Reminded the court of the decision taken on March 6, 1973, to the effect that the matter would go on with 12 Judges if Justice Beg was indisposed. At that time neither the Attorney General nor the Advocate General of Maharashtra had made any demur and the suggestion was also made that what was said should be minuted. At that time Hegde J. stated that the decision was made and there would be no further meeting in the Chambers.

C.J. - informed the parties that they will consider the matter and intimate them.

After about an hour Court Master informed the parties that the matter is posted tomorrow at 10-30 A.M. for Orders and further hearing.







3/10/73

2/10/73

As another lawyer would write down. I will see to begin on the matter of affidavit, with a few well drawn and well phrased words of a 20 page length. I would however request you (Gadgil's name) send the name of the matter.

N.P. is given cyclotopes book, to hand over to Govt works :-

Request you request you Gadgil's name and the name because if you do - you will not believe you says.

2/10/73

Thursday  
30/12/72

21/12

Group  
- Jambhale's friend  
- S. S. - Am

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Prof. Asanary & Decree

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CG = Constitution bench out.  
On interpretation of Art 368

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will be practicable to put the whole Constitution to the people - Respondent

Group 9

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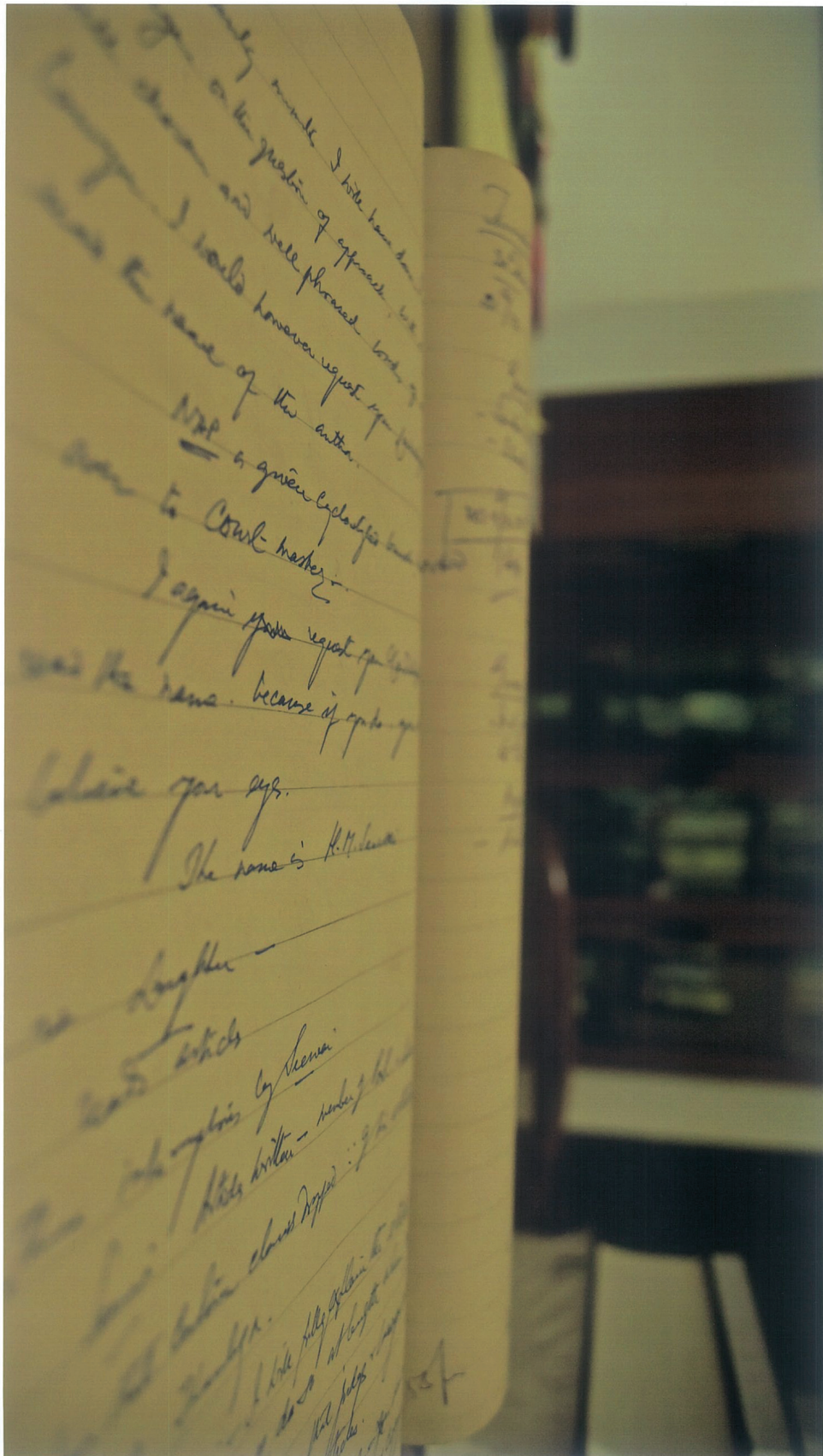
Tuesday  
9, 1973  
to  
Monday  
10 - 1973

RE THE  
SCHEME  
COURT  
INDIA

12. DIVAN

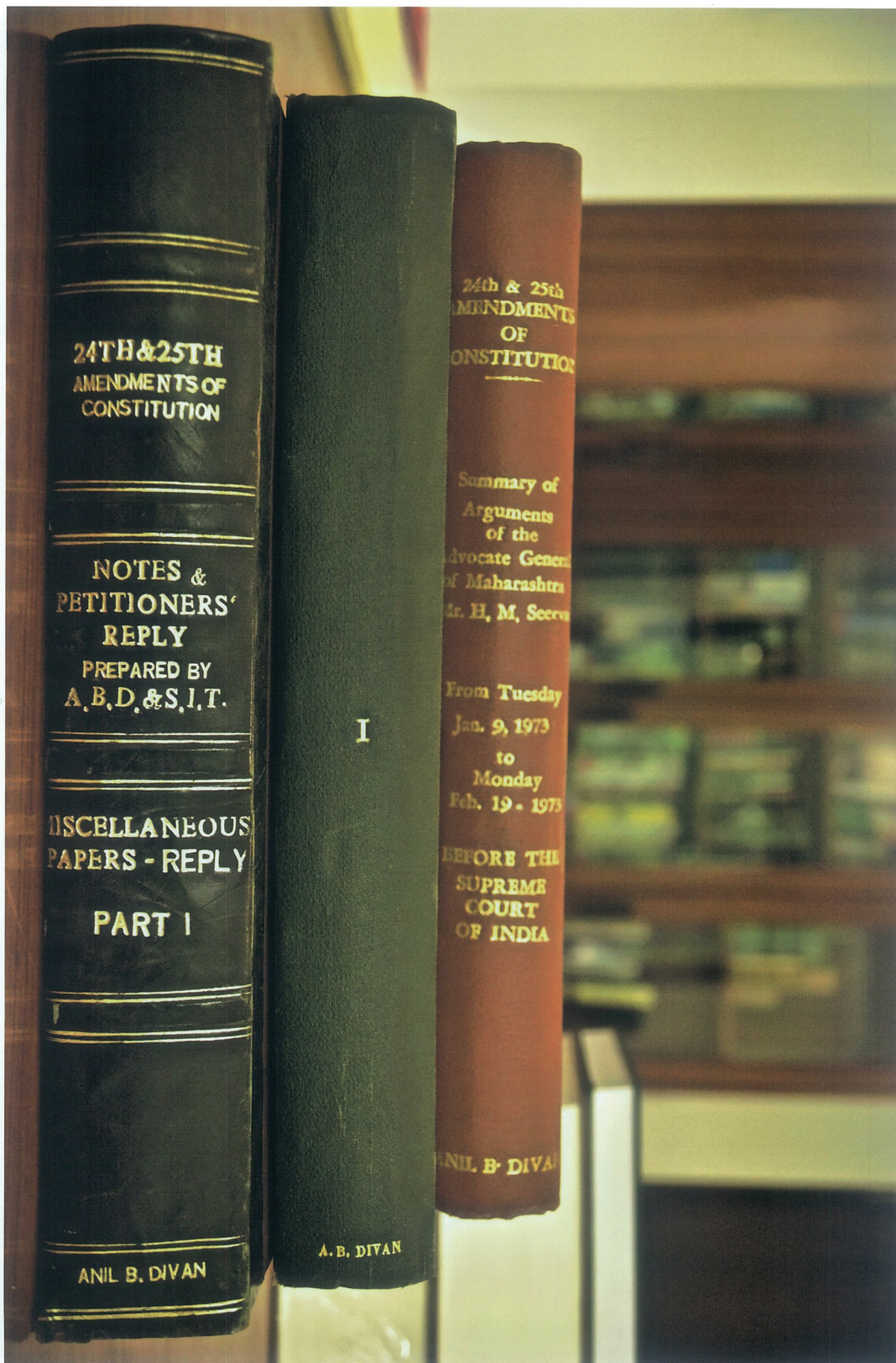
General Photographs





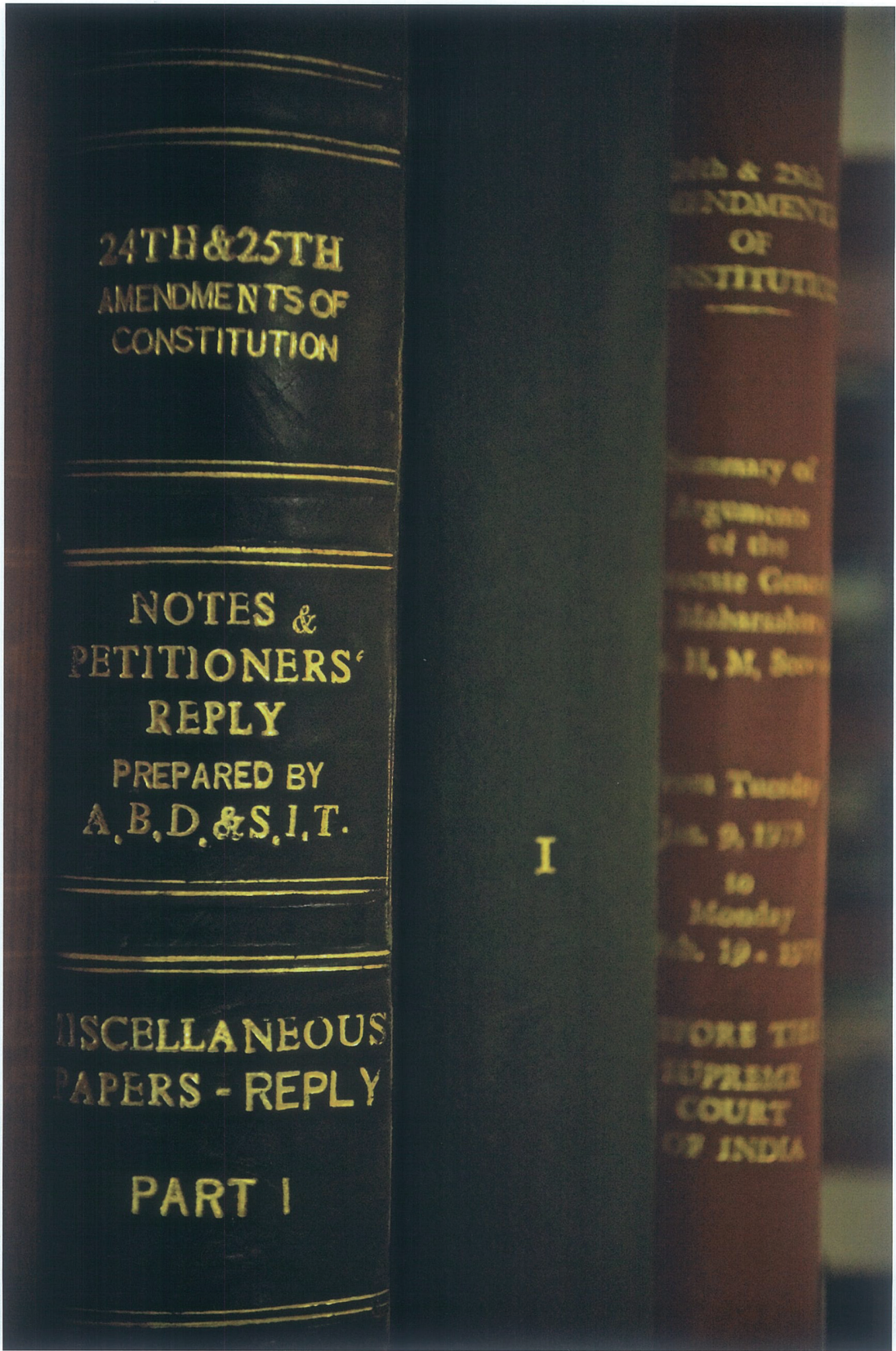
General Photographs





General Photographs





24TH & 25TH  
AMENDMENTS OF  
CONSTITUTION

NOTES &  
PETITIONERS'  
REPLY  
PREPARED BY  
A. B. D. & S. I. T.

MISCELLANEOUS  
PAPERS - REPLY  
PART I

24th & 25th  
AMENDMENTS  
OF  
CONSTITUTION

Summary of  
Arguments of  
the  
Advocate General  
H. M. Sanyal

from Tuesday  
Jan. 9, 1973  
to  
Monday  
Feb. 19, 1973

BEFORE THE  
SUPREME  
COURT  
OF INDIA

I







# Anti Defection Law in India, a Study of Emerging Problems and Issues

Atmaram N.S Nadkarni\*

Anti-Defection in some of the States, especially Goa, Nagaland, Bihar, Karnataka, Arunachal Pradesh and recently Uttarakhand, make an interesting case study for a student of Constitutional law.

No sooner that the Anti-Defection law was passed, by way of the 52nd Amendment to the Constitution of India, it was met with severe oppositions on logic, on the grounds that it impinged on the right to free speech of legislators. The Supreme Court had the occasion to lay down the law on the 10th schedule on a PIL filed in the famed ***Kihoto Hollohon vs Zachillhu and Others reported in (1992) Supp. 2 SCC 651***. This PIL had challenged the constitutional validity of the law, but the Supreme Court upheld the constitutional validity of 10th schedule and held that the law does neither impinge upon the freedom of speech and expression nor subverts the democratic rights of elected members, and further held that the law does not violate any rights of free speech or basic

structure of the parliamentary democracy.

Essentially Articles 102 (2) and 191 (2) of the Constitution of India broadly mentions that an elected member would attract disqualification, if such member voluntarily offers up his membership of a political party; if he votes or withdraws from voting in such House contrary to any direction issued by his party or anyone authorized to try and do so, without obtaining prior permission.

The provisions were with relevance to mergers of political parties. Importantly, it was seen that in the 1985 Act, a 'defection' by 1/3rd of the elected members of a political party was considered a merger and finally the 91st Constitutional Amendment Act, 2003, brought about a change wherein at present at least two-thirds of the members of a party have to be in favour of a "merger" for it to have validity in the eyes of the law. There is no disqualification to be incurred when a legislature party decides to merge with another party and such decision is supported by not less than 2/3rd of its members.

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\*Senior Advocate, former Advocate General of Goa, and Additional Solicitor General, Supreme Court of India.

Similarly, in yet another judgement wherein the Hon'ble Supreme Court had another occasion to decide as regards the 10th schedule was in the case of **Ravi Naik vs Union Of India (1994) Supp. 2 SCC 641**, wherein the question before the Supreme Court was as to whether, if only the resignation constitutes "voluntarily giving up" of membership of a political party, and the Supreme Court held that there is a wider meaning of the words "voluntarily giving up membership" and that inferences can be also drawn from the conduct of the members.

Thereafter, the Supreme Court in **G. Vishwanathan v. Hon'ble Speaker Tamil Nadu Legislative Assembly, Madras and Anr reported in 1996 (2) SCC 353** while dealing with the issue of whether in a given situation, if a member once expelled from one party and subsequently he joins another party after being expelled, would it then be considered as having voluntarily given up his membership, to which the Supreme Court decidedly held that where a member is expelled, he is treated as an unattached member in the house but he continues to be a member of the old party as per the Tenth Schedule. However, if such member joins a new party after being expelled, he would be said to have voluntarily given up membership of his old party.

In more recent Judgements arising out of Arunachal Pradesh in the matter of **Nabam Rebia and Bamang Felix vs Deputy Speaker And Ors , 2016 (8) SCC 1** and Uttarakhand in the matter of **Union Of India vs Harish Chandra Singh Rawat and Another 2016 (16) SCC 744**, the Hon'ble Supreme Court had yet further occasions to

pronounce its verdict on the 10th schedule to the Constitution of India.

I would first take, for analysis, and to discuss the emerging problems and issues, in the Goa case which arose in the early nineties immediately after enactment of the 10th schedule to the Constitution by the Parliament which was added by the 52nd amendment on and from 1st March, 1985.

The provisions as to disqualification on ground of defection, powers of the speaker in adjudicating the matter, exemption and decisions on disqualifications are all matters which have been provided for therein. In the 10th schedule as was enacted, Clause 7 thereof provided for bar of jurisdiction of Courts, which came to be declared invalid, for want of ratification in accordance with the proviso to Clause 2 of Article 368 as per majority opinion in **Kihoto Hollohan vs Zachillhu and Others** (Supra).

Despite this anti-defection law finding its place in the Constitution of India, in the nature of the 10th Schedule, ingenuities have seen no bounds in the countries polity trying to get over the rigours of this law. While the kind of problems that have emerged are manifold, but the basic issues are basically the "impartial role of the Speaker", in rendering a correct decision in accordance with law, and the consequential role of the "Governor of the State" have all come in for heavy criticism. And perhaps it would not be out of place to state that in very many cases the criticism against the Speaker as well as the Governor having failed at times to uphold the dignity and majesty of their august office is not completely unjustified.



Goa, a tiny territory in India was liberated from Portuguese rule on December 19, 1961. The Supreme Court of India has judicially held that the 'Liberation' of Goa is a 'Conquest' by the Indian Army. Goa, Daman and Diu were formed and included as a 'Union Territory' in the Indian Constitutional System. We had then a Lt. Governor who was aided and advised by his Council of Ministers headed by the Chief Minister. Unlike the 'State', the administration of a Union Territory is done as a Centrally Administrated Area and decisions are taken by the Lt. Governor upon the aid and advice of the Council of Ministers headed by the Chief Minister. The Lt. Governor is essentially the representative of the Central Government whose powers differ from the mere ceremonial role assigned to the Governor of a 'State'. Goa was conferred statehood on 30th may 1987.

The 10th Schedule was essentially intended to provide good, stable and effective governance so that it was not manipulated by endangering its stability by politicians who came to be called 'Aayarams' and 'Gayarams'. Most of these matters which went up to the Supreme Court were from the smaller States of the Northeast or Goa which made a significant contribution to the law of defection under the Constitution of India on account of the unstable governance caused by frequent political defections.

It is a matter of record that till 1990, the Government's in Goa were stable and have thereafter been under some sort of a spell whereby defectors formed unstable governments causing what we may call "progressive deterioration" in the State.

In 1990 Goa had a defection caused by the splitting of a National Party (at the state level) whereby the Speaker himself defected in order to become the Chief Minister and this passage was made smooth by installing a *pro tem* Chief Minister for a period of 15 days. The Speaker who became the Chief Minister ultimately came to be disqualified by an Order passed by a Member of the Legislative Assembly. The Order came to be finally upheld by the superior Constitutional courts. Immediately thereafter, Goa experienced another spell of defections. The two noted Judgements of *Ravi Naik* and *Kilhoto Hollohon* have laid down important pronouncements of Law, one on the point of defection and split and another on the question of the power of Review by the Speaker. Probably in a lighter vein, one may not be incorrect in stating that had these defections not taken place, the Apex Court may not have had the opportunity to lay down such important judgements.

In October 2000 there were defections again by which the Members of the Legislature split and joined another party and a new Government was formed. Between October 2000 and until January 2005, there were also some splits or some crossovers or merger of parties which took place in the State. At this time the Anti-Defection Law came to be amended whereby the one-third split was done away with and it was provided that only the merger of a party would be recognised. Goan politicians had an answer to this also. In February 2005 while bringing down the Government some MLA's resigned and the Goan voters had them return to power.

Of late, in Arunachal Pradesh as well as in the State of Uttarakhand, there were similar problems reported. The role of the Speaker was also questioned in both these matters. Ultimately, the matters landed before the Hon'ble Supreme Court and by two different judgments delivered by the Constitution bench, the matters came to be resolved and the final verdict was pronounced, laying down certain parameters.

All these Judgments of the Hon'ble Supreme Court including ***Kihoto Hollohon, Ravi Naik, G. Viswanathan V, Nabam Rebia and Bamang Felix, Harish Chandra Singh Rawat*** lay down important legal interpretations as regards various provisions of the constitution of India. Especially dealing with the function, role, of the elected representatives. The major emerging problem and issues arising therefrom, bring the whole polity as well as certain other important aspects of governance into question. Allegations are made, sometimes irresponsibly and *mala fides* are alleged on parties and grounds. Ultimately, as it does turn out that the basic issue which has surfaced in all these decided cases is the prime role of a speaker who could have resolved the matter at his level in case of, even handed ruling in accordance with the provisions of law.

Two other important decision dealing with Defections are ***Balchandra L Jarkiholi & Ors. vs B.S.Yeddiyurappa & Ors reported in 2011 (2) SCC 1***, pertaining to State of Karnataka, and ***Dr. Mahachandra Prasad Singh vs Chairman, Bihar Legislative 2004 (8) SCC 747***, pertaining to state of Bihar.

It is of utmost importance that when a person

occupies high position the same carries with it several responsibilities, at times sacrifices and at times even need to practice physical aloofness. The Speaker is the only person who is allowed to resign from his party once he is elected as a Speaker. This is provided for in the 10th schedule so as to maintain complete impartiality in his performance and duties as a Speaker.

In ***Kihoto Hollohon***, Hon'ble Mr. Justice Venkatachaliah, former CJI, (as his lordship then was) has had the occasion to write a few paragraphs about the august office of the Speaker. An erudite Judgment which considers several aspects of the matter including vesting of the power in a person who could be politically inclined and loaded in favour of a political party but the Constitution Bench in his judgment expected the person occupying the post of speaker to rise above himself and in all other things, to deliver a verdict, as is expected of a Judge while adjudicating a matter. Quoting from Justice Venkatachaliah's majority judgement :

"119. ...The Speakers/Chairmen hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and to take far reaching decisions in the functioning of Parliamentary democracy. Vestiture of power of adjudicate questions under the Tenth Schedule in such a constitutional functionaries should not be considered exceptionable.

130. ...

(8). ...The tenure of the Speaker who is the authority in the Tenth Schedule to decide



*this dispute is dependent on the continuous support of the majority in the House and, therefore, he (the Speaker) does not satisfy the requirement of such an independent adjudicatory authority; and his choice as the sole arbiter in the matter violates an essential attribute of the basic feature.*

*180. ...The Speaker's office is undoubtedly high and has considerable aura with the attribute of impartiality. This aura of the office was even greater when the Constitution was framed and yet the framers of the Constitution did not choose to vest the authority of adjudicating disputes as to disqualification of members to the Speaker; and provision was made in Articles 103 and 192 for decision of such disputes by the President/Governor in accordance with the opinion of the Election Commission. To reason is not far to seek."*

For a student of Constitutional Law, it is interesting to make a thesis on these defections in all these State vis-à-vis the Constitutional paradox. If a careful analysis is made, a student of Constitutional Law or Political Science would not find it difficult to conclude that the Governments in all these States gain stability or face instability depending upon several things including the role of the Speaker, role of the Governor and at times as is alleged, the political dispensation at the Central level. This is essentially because the total number of MLA's in these States, are hardly in the number of between 40 to 80 and I do not think there is any scope of increasing this number.

In all these matters whether in 1992, 1994, 2004, 2011 or 2016, the Governor played an extremely crucial role. Indeed, in one of

the cases, the Chief Minister had passed his Official Budget and moments thereafter the then Governor had dismissed the Government. Could a Government that has just passed the Financial Bill be dismissed by the Governor? Does the Governor enjoy such powers? Similarly in 2005, yet another Government had secured the Vote of Confidence and this was officially communicated by the Speaker to the Governor. Yet the Governor dismissed the Government.

Could the Governor have dismissed the Government in the face of the Report of the Speaker when he had secured a Vote of Confidence in the House? Did the Governor exercise his powers Constitutionally? Should the Governor, if he was not satisfied with the Vote of Confidence, have asked the Chief Minister to secure yet another Vote of Confidence? These matters are food for deep thought to a student of Constitutional Law.

There are great shortcomings in the Law of Defection—the power to adjudicate in matters of defection is left to the Speaker. Since 1986, has the Speaker fallen short of the Jurisprudential Standards expected in matters of adjudication? Once the Constitution entrusts the Speaker with this power and the Speaker passes such Orders, to what extent can the Governor of the State ignore such Orders? Experience has shown and history has proved that whenever the Government is threatened by defection or loss or support, the Speaker is faced with a Disqualification Motion filed by his own party and then, in some matters, it is seen that *ad interim* reliefs are granted so as to affect the count of votes. Despite these examples in the State and the State having shown to the entire

nation, that such shortcomings are writ large in the 10th Schedule and in the Constitution, should the Parliament not address itself and consider to remedy this situation? Or has our Parliamentary system not matured enough to effectively remedy situations through the making of laws when faced with defectors and placed in such a predicament?

The happenings in these states in Goa as well as north east have proved much beyond doubt and with glaring examples that the Constitution has certain areas which need to be addressed, given the fact that the Government under the Constitution is intended to last for a term of five years or at least until it has support on the Floor of the House. Our Constitution does not intend governance of a State to be done by forming or convening Governments in the corridors of the Raj Bhavan. Bommai's case and all other Rulings clearly militate against such attempts. After all, we have what we call the "Rule of Law" and not the "Rule of Man"!

The governance of a State is required to be carried out in accordance with the Constitution. The happenings of events since 1990, have demonstrated that in such matters, the intended Constitutional provisions have fallen short or lack in their efficacy when read with the 10th Schedule of the Constitution and the powers of the Governor, under the Constitution and these emerging problems and issues, have not yet been addressed. The Hon'ble

Supreme Court in all these judgments while laying down various parameters have decided and addressed matters which have arisen before it, but a judgment of the constitutional court cannot encompass what a parliament can do by exercising its amending powers.

This is a significant contribution by the State if one looks at the matter in its entirety in a very positive way as a readymade example to bring in Constitutional reforms and amendments to remedy the defects and eliminate loopholes so that the greed for power and money, if not completely wiped out, is at least reduced and controlled to a great extent, reaffirming the principles of ethics intended by the framers of the Constitution.

Perhaps the Governors or Speakers may have felt that they were doing the right thing. But surely as a mature democracy, the federation and federal structure of Indian polity cannot leave matters to the wisdom of one or two individuals. In our country to ensure the 'Rule of Law' only through judicial decisions by laying down norms and dictums through constitutional benches cannot be called governance.

It is essentially for parliament to lay down the norms, parameters as well as the rules of the Game, the experiences in all these states is a good enough example to remedy the emerging issues arising out of various cases of anti-defection under our Constitution.

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# The Supreme Court on the Constitutional Position of the President of India: An Analysis

Dr. Lokendra Malik\*

## 1. Prefatory

The issue pertaining to the constitutional position and powers of the President of India has always been quite wrangled in the country ever since the commencement of the Constitution. Generally it is assumed that the position of the President of India is analogous to that of the British Monarch who is a constitutional head of the British Government and like the Monarch the President of India is also a constitutional head of the Union Government who is obliged to act on the advice of the Council of Ministers headed by the Prime Minister as per the mandate of Article 74(1) of the Constitution. As such, a school of constitutional scholars opines that the President of India is a rubber stamp and has no say power in the decision-making process of the Union Government. It is said that whatever is recommended to him by the Union Cabinet headed by the Prime Minister, he is bound to act on the same. However, there is another view also. Some constitutional pundits in the country hold a different view and opine that the President of India is not a replica of the British Monarch and he is not a rubber stamp at all. They state that

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in certain areas the President of India can act on his own discretion either by rejecting the advice of the Council of Ministers or without receiving any such advice. The author also holds this view. The matter relating to the constitutional powers and position of the President of India has come into light on various occasions particularly during the President's elections and formation of the Governments in the Centre, but it was never decided by the Supreme Court directly till 1974 in the *Samsher Singh case*.<sup>1</sup> The first President Dr Rajendra Prasad and the first Prime Minister Pandit Jawaharlal Nehru likewise dealt with this issue on the question of Hindu Code Bill in early 1950s.

In the present paper the author presents an analysis of different cases decided by the Supreme Court which either directly or indirectly dealt with the constitutional position of the President of India. This is an exercise to present the juristic contribution of the Supreme Court on this issue as the law declared by the Supreme Court of India is law of the land. Up to a large extent, the Court has given a quietus to the controversy after making observations

1 *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831.

on this issue in a number of judgments.

## **2. We, the People of India, adopted the Parliamentary form of Government on the lines of Westminster system**

On 26th November 1949, the Founding Fathers gave us a written Constitution with independent Judiciary for protecting the Fundamental Rights of the people and interpreting the Constitution as well as the statutes. In this Constitution, they established the Parliamentary form of Government on the lines of the Westminster system in which the Head of State, that is the British Monarch, is a constitutional head of the Government and the real powers are exercised by the Cabinet headed by the Prime Minister<sup>2</sup> who is responsible to the House of Commons, the popular chamber of British Parliament. The President of India is a creation of the Constitution and derives all his powers and functions from the Constitution and is required to act within the four corners of the Constitution as mandated under Articles 53 and 74 of the Constitution. He exercises his powers and functions on the aid and advice of the Council of Ministers with the Prime Minister at its head and in practice the decisions taken by the Council of Ministers are binding on the President.<sup>3</sup> He can only ask the Council of Ministers to reconsider its decisions once but thereafter he is bound to accept the reconsidered decisions of the Council of Ministers.<sup>4</sup> However, no time limit

2 Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549.

3 Article 74(1) of the Constitution of India.

4 42nd and 44th Constitutional Amendment Acts, 1976

is prescribed in the Constitution during which the President has to act on the advice of the Council of Ministers and it gives some space to the President to delay the decisions of the Government.

The Supreme Court has observed that the President of India is always bound to have a Council of Ministers even if the Lok Sabha is dissolved and he cannot exercise his powers and functions without the aid and advice of the Council of Ministers.<sup>5</sup> The logic behind this theory is that the Constitution has envisaged the Parliamentary form of Government in the country<sup>6</sup> and in that system the Council of Ministers headed by the Prime Minister is collectively responsible to the Lok Sabha<sup>7</sup>, the popular chamber of Parliament, and only the Lok Sabha has power to make or unmake the Governments. The Council of Ministers gets a periodical mandate from the people who are sovereign and the President does not receive any such mandate to rule the country. Therefore, the President of India is not responsible to the Parliament. The acts and omissions committed by the elected Government are liable to be discussed and scrutinized by the Parliament and not by the President. The President is not master of the Prime Minister or other ministers. Until and unless the Government ceases to hold the majority support in the Lok Sabha, the President cannot disturb it. It is the Parliament

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5 U. N. R. Rao v. Indira Gandhi, AIR 1971 SC 1002.

6 Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549; Samsher Singh v. State of Punjab, (1974) 2 SCC 831.

7 Article 75(3) of the Constitution.



which supplies oxygen to the Council of Ministers to run the administration as per the constitutional provisions. The President does not get any mandate from the people to run the administration. The founding fathers had rejected the American Presidential form of Government. The President has a limited role in our constitutional scheme and he has to act within the four corners of the Constitution. The moment he violates the Constitution, he becomes liable for impeachment by the Parliament.

### **3. The Indian Government is constitutionally controlled**

The Union Government is constitutionally controlled and is bound to work as per the constitutional norms and principles. The Supreme Court and the High Courts are competent to exercise the power of judicial review for testing the validity of Government's actions- legislative or executive. The Constitution accords a dignified and crucial position to the Judiciary. Judicial review in India is based on the assumption that the Constitution is the supreme law of the land, and all governmental organs, which owe their origin to the Constitution and derive their powers from its provisions, must function within the framework of the Constitution, and must not do anything which is inconsistent with the provisions of the Constitution.<sup>8</sup> In the process of judicial review, if the constitutional

8 M. P. Singh, V. N. Shukla's Constitution of India, 11th Edition, 2008, Eastern Book Company, Lucknow, at A-54.

courts find that the Government has taken any action in violation of the Constitution, the same can be declared unconstitutional and can be set aside accordingly. There are many such examples where the courts have declared laws invalid and unconstitutional in their writ and other jurisdiction. Articles 32 and 226 of the Constitution are the important tools for exercising the power of judicial review, which the Supreme Court has held as a part of the basic structure of the Constitution, not to be abrogated even by the Parliament by way of amendment under Article 368 of the Constitution.<sup>9</sup> The independent judiciary encourages the Government to act responsibly and constitutionally.

The power of judicial review is in full swing in our country and the Government carries on the administration carefully to avoid any judicial scrutiny. All organs of the Government such as the Executive, the Legislature and the Judiciary are required to act within the four corners of the Constitution and in case any one of them violates the provisions of the Constitution, that act may be declared unconstitutional by the writ courts exercising the power of judicial review under Articles 32 and 226, respectively. Although the President of India holds immunity from judicial proceedings under Article 361 of the Constitution, the validity of the Presidential actions is also subject to judicial scrutiny.<sup>10</sup> The President cannot be made a party to the legal

9 Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461; Indra Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299; S. R. Bommai v. Union of India, (1994) 3 SCC 1.

10 Rameshwar Prasad v. Union of India, (2006) 2 SCC 1.

proceedings, yet the Government would have to shield the President's action in the court of law. Article 361 of the Constitution does not empower the President to go beyond the Constitution. In fact, as mentioned earlier, if the President violates the Constitution, he may be impeached by the Parliament under Article 61 of the Constitution.<sup>11</sup> In this way, the Government is fully constitutionally controlled and has to act within the constitutional boundaries. The President is also empowered to encourage the Government to run the administration as per the constitutional provisions. He can seek any information relating to the Union Government from the Prime Minister and the latter is obliged to supply the same.<sup>12</sup> In fact, as per his oath of office, the President is duty bound to preserve, protect, and defend the Constitution and the laws.<sup>13</sup>

#### **4. The Law declared by the Supreme Court is binding on all courts**

Article 141 of the Constitution stipulates that the law declared by the Supreme Court shall be binding on all courts within the territory of India while Article 142 is a great tool in the hands of the Supreme Court for doing complete justice between the parties in matters pending before it and Article 142 cannot be diluted even by a legislation. Under Article 141 of the Constitution, the Supreme Court not only

declares the law but during the interpretation process of the Constitution and the laws, sometimes it also makes the law that is generally called the judge-made law in the jurisprudential sense. The law declared by the Supreme Court becomes the law of the land and the judgments of the Supreme Court constitute the source of law. Nonetheless, the Supreme Court is not bound by its own judgment and can overrule its previous judgments as and when required. Some striking cases of the judge-made law are found in our Constitutional Law and the doctrine of basic structure propounded by the Supreme Court in the *Kesavananda Bharathi v. State of Kerala*<sup>14</sup> is one of the finest examples of the judge-made law in our country which has protected the constitutional identity and dignity. Up to a large extent, the Supreme Court has contributed a lot that has been admired on the global level. Many countries have imported the Basic Structure Doctrine from our country.

As stated above, the law declared by the Supreme Court is binding on all courts and is to be obeyed by all authorities, civil as well as judicial as per the mandate of Article 144 of the Constitution. Since the commencement of the Constitution, the Supreme Court and different High Courts have delivered a number of judgments relating to the issue of constitutional powers, functions and position of the President of India, and some of them have ultimately become the law of the land such as *Samsher Singh case*,<sup>15</sup> decided by a Constitution Bench

11 S. R. Bommai v. Union of India (1994) 3 SCC 1.

12 Article 78 of the Constitution of India.

13 Article 60 of the Constitution of India.

14 AIR 1973 SC 1461.

15 Samsher Singh v. State of Punjab, (1974) 2 SCC 831.



of seven judges unanimously. Presently, it can be noted that the *Samsher Singh judgment* is the best authority on the matter relating to the constitutional position of the President of India and is being followed by the courts of law regularly since its inception. The *Samsher Singh* ruling has given a quietus to the controversy up to a large extent.

This is a matter of fact that right or wrong, whatever judgment is pronounced by the Supreme Court, that is binding on all courts and become the law of the land though there is no guarantee that the judgments of the Supreme Court may not be wrong. Whenever a researcher examines and analyzes the judgments of the Supreme Court, a number of discrepancies may be found. Even the Supreme Court overrules its judgments frequently. Recently, the Supreme Court has overruled the ADM, Jabalpur judgment in the Right to Privacy judgment. The matter pertaining to the constitutional position of the President has also seen many ups and downs in the judicial circle and different kind of interpretations have been received on this issue from time to time. Let us go through some of the judicial verdicts on this issue.

## 5. Landmark cases

### 5.1 Ram Jawaya Kapur judgment

In *Rai Sahib Ram Jawaya Kapur v. State of Punjab*,<sup>16</sup> the Supreme Court of India observed that the Constitution of India has adopted the

<sup>16</sup> AIR 1955 SC 549.

British Parliamentary Government system and the President of India is only a formal or constitutional head of the Union Government and the real executive powers are vested in the Ministers or the Cabinet headed by the Prime Minister. This case was based on a petition filed under Article 32 of the Constitution preferred by six persons, who purported to carry on the business of preparing, printing and publishing and selling text books for different classes in the schools of Punjab, particularly for primary and middle classes, under the name and style "Uttar Chand Kapur and Sons". It was alleged that the Education Department of the Government of Punjab had in pursuance of their so-called policy of nationalization of text books, issued a series of notifications since 1950 regarding the printing, publication and sale of these books which had not only placed unwarranted restrictions upon the rights of the petitioners to carry on their business but had practically ousted them and other fellow traders from the business altogether. Though the case was not directly related to the constitutional powers and position of the President of India, during the course of judgment, the Court narrated the nature of the governing system of the country and stated that the President of India is only a constitutional head of the Union Government who has to exercise his powers and functions on the aid and advice of the Council of Ministers headed by the Prime Minister. In fact, this was the first case when the Supreme Court spoke on the issue. During that time, the controversy regarding the constitutional position of the President of India was on peak as the then President Dr. Rajendra Prasad and the then

Prime Minister Pandit Jawaharlal Nehru had indulged in correspondence on the issue frequently.

Speaking on behalf of a Constitution Bench of the Supreme Court, the then Chief Justice Mukherjea observed in this case:

Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the Executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

In India, as in England, the Executive has to act subject to the control of the Legislature; but in what way is this control exercised by the Legislature? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President but under Article 74 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the Executive and the real executive powers are vested in the

Ministers of the Cabinet.<sup>17</sup>

After the commencement of the Constitution of India, the instant judgment was a noteworthy judicial pronouncement wherein the Supreme Court explained the contours of executive powers in relation to Union and States and furthermore threw some light on the constitutional position of the President of India and Governors of the States and held that both of them are the constitutional heads like the British Monarch and the real powers are to be exercised by the Council of Ministers which is collectively responsible to the Parliament and the State Legislative Assemblies respectively. During the initial days of the Constitution, this judgment set the controversy at rest up to some extent and it was widely cited in academic writings. Yet, rather, the debate relating to the constitutional position of the President erupted on different occasions.

It is submitted that the remarks of the Supreme Court in this judgment about the constitutional position of the President of India are constitutionally sound and justified, as per the letter and spirit of the Parliamentary Government system envisaged in the Constitution. The Founding Fathers had intended to make the President of India as a constitutional head of the Government and real powers are vested in the Council of Ministers headed by the Prime Minister on the lines of the British Monarch who is a titular head of the Government. The elected Government headed by the Prime Minister is collectively responsible

<sup>17</sup> Id. at 556.



to the House of the People.

## 5.2 R. C. Cooper judgment

In *R. C. Cooper v. Union of India*,<sup>18</sup> while delivering the majority judgment of the Supreme Court, Shah J., observed:

Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers. Whether in a given case the President may decline to be guided by the advice of his Council of Ministers is a matter which need not detain us. The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction: it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction.<sup>19</sup>

The instant judgment was identified with the Ordinance-making power of the President of India under Article 123 of the Constitution which was decided by an eleven-Judge Constitution Bench wherein the validity of the Banking Regulation Ordinance was challenged. In this case also the Supreme Court held that the President of India exercises all his powers including the Ordinance-making power on the advice of the Council of Ministers headed by the Prime Minister and the real powers are vested in the Council of Ministers. The satisfaction of the President is the satisfaction of the Council

of Ministers. It is not the personal satisfaction of the President. In other words, the President of India cannot bypass the Council of Ministers in issuing the ordinance. It is the Council of Ministers which has final word in these kind of matters. The judgment indicates that the President of India is a mouthpiece of the Council of Ministers. Up to a large extent the judgment is constitutionally correct but in this case the Supreme Court missed a good opportunity to examine the constitutional position of the President in detail and left some key questions open. The Court only made some brief remarks on the constitutional position of the President of India.

## 5.3 U. N. R. Rao judgment

*U. N. R. Rao v. Indira Gandhi*<sup>20</sup>, is a landmark judgment of the Supreme Court of India relating to the concept of the Parliamentary Government system in the country. In this judgment, the Supreme Court clearly observed that in the Indian constitutional scheme the President of India cannot act without the aid and advice of the Council of Ministers, even if the Lok Sabha is dissolved, and the President is always bound to have the Council of Ministers to aid and advise him in the exercise of his functions as mandated under Article 74(1) of the Constitution. In other words, the Court stated that the President cannot exercise his constitutional powers without the advice of the elected Government headed by the Prime Minister.

<sup>20</sup> (1971) 2 SCC 63: AIR 1971 SC 1002.

<sup>18</sup> AIR 1970 SC 564.

<sup>19</sup> Id. at 586, 587.

In this case, the appellant had applied for a writ of *quo warranto* and for a declaration that the respondent, that is, Mrs Indira Gandhi, had no constitutional authority to hold the office of and to function as the Prime Minister. The Madras High Court had dismissed the petition and the appeal was filed before the Supreme Court with Certificate. The appellant argued that the moment the Lok Sabha was dissolved by the President under Article 85(2) of the Constitution, the Council of Ministers ceased to hold office. This argument was further sought to be reinforced by Article 75(3) of the Constitution which provides that the Council of Ministers shall be collectively responsible to the Lok Sabha. How the Council of Ministers could be responsible to the Lok Sabha when the latter had been dissolved, the appellant contended strongly. The appellant also contended that the President of India could run the Government with the help of advisers to maintain the continuity as he is authorized for doing so under Article 53(1) of the Constitution where he can exercise the executive power either directly or through officers subordinate to him.

A five-Judge Constitution Bench of the Supreme Court unanimously held that Articles 74 and 75 of the Constitution establish the Parliamentary form of Government in the country and the President of India is only a formal or constitutional head of the Union Government who has to act on the aid and advice of the Council of Ministers with the Prime Minister at the head in the exercise of his powers and functions as per the mandate

of Article 74(1) of the Constitution and the President is always bound to have a Council of Ministers even if the Lok Sabha is not in existence, that is, it is dissolved. The Supreme Court clearly stated that the President of India cannot exercise the executive powers without the advice of the Council of Ministers and if he does so, it will be unconstitutional and will be liable to be set aside by the court of law. Delivering the unanimous judgment of the Supreme Court, Chief Justice Sikri observed:

Article 52 provides that there shall be a President of India and Article 53(1) vests the executive power of the Union in the President and provides that it shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. The last five words are important in as much as they control the President's action under Article 53(1). *Any exercise of the executive power not in accordance with the Constitution will be liable to be set aside.* There is no doubt that the President of India is a person who has to be elected in accordance with the relevant provisions of the Constitution but even so he is bound by the provisions of the Constitution.<sup>21</sup>

Further, C. J. Sikri went on to add:

It will be noticed that Article 74(1) is mandatory in form. We are unable to agree with the appellant that in the context the word "shall" should be read as "may". Article 52 is mandatory. In other words 'there shall be

<sup>21</sup> Id. at 66.



a President of India'. So is Article 74(1). The Constituent Assembly did not choose the Presidential system of Government. If we were to give effect to this contention of the appellant we would be changing the whole concept of the Executive. It would mean that the President need not have a Prime Minister and Ministers to aid and advise in the exercise of his functions. As there would be no 'Council of Ministers' nobody would be responsible to the House of the People. With the aid of advisers he would be able to rule the country at least till he is impeached under Article 61.<sup>22</sup>

It seems to us that we must read the word "shall" as meaning "shall" and not "may". If Article 74(1) is read in this manner the rest of the provisions dealing with the Executive must be read in harmony with it. Indeed they fall into place. Under Article 75(1) the President appoints the Prime Minister and appoints the other Ministers on the advice of the Prime Minister, and under Article 75(2) they hold office during the pleasure of the President. The President has not said that it is his pleasure that the respondent shall not hold office.

Now comes the crucial clause three of Article 75. The appellant urges that the House of the People having been dissolved this clause cannot be complied with. According to him it follows from the provisions of this clause that it was contemplated that on the dissolution of the House of the People the Prime Minister and the other Ministers must resign or be dismissed by the President and the President

<sup>22</sup> Id. at 67.

must carry on the Government as best as he can with the aid of the services. As we have shown above, Article 74(1) is mandatory and, therefore the President cannot exercise the executive power without the aid and advice of the Council of Ministers. We must then harmonize the provisions of Article 75(3) with Article 74(1) and Article 75(2). Article 75(3) brings into existence what is usually called "Responsible Government". In other words, the Council of Ministers must enjoy the confidence of the House of the People. While the House of the People is not dissolved under Article 85(2) (b), Article 75(3) has full operation. But when it is dissolved the Council of Ministers cannot naturally enjoy the confidence of the House of the People. Nobody has said that the Council of Ministers does not enjoy the confidence of the House of the People when it is prorogued. In the context, therefore, this clause must be read as meaning that Article 75(3) only applies when the House of the People does not stand dissolved or prorogued. We are not concerned with the case where dissolution of the House of the People takes place under Article 83(2) on the expiration of the period of five years prescribed therein, for Parliament has provided for that contingency in Section 14 of the Representation of Peoples Act, 1951.<sup>23</sup>

The instant judgment of the Supreme Court has clearly established that our country is governed by the Parliamentary form of Government and not by the Presidential form of Government prevalent in the United States of America. In the Parliamentary Government

<sup>23</sup> Id. at 67-68.

framework which prevails in the United Kingdom, the head of the State is recognized as a titular head and the real powers are exercised by the Cabinet headed by the Prime Minister. Same pattern has likewise been adopted in India by the Constitution-makers and the President of India cannot exercise his constitutional powers without the aid and advice of the Council of Ministers headed by the Prime Minister. As stated earlier, the Supreme Court has categorically observed that the exercise of the executive powers by the President of India against the constitutional scheme is liable to be set aside by the courts of law. The President of India is always bound to have a Council of Ministers even if the Lok Sabha is dissolved. However, the researcher is of the view that circumstances may emerge when it may not be feasible for the President of India to receive the advice of the Council of Ministers as the latter could not be in existence or otherwise. In such circumstances, it is submitted that the President of India may run the administration himself until further notice for conducting free and fair elections and restoring the responsible Government in the country as per the mandate of his oath to preserve, protect and defend the Constitution and the law under Article 60 of the Constitution. After all, the President is the guardian of the Constitution.

The instant judgment is constitutionally unique and is delivered in accordance with the spirit of the Constitution, a Constitution which has envisaged the Parliamentary form of Government in the country under which the power centre is located in the Council of

Ministers headed by the Prime Minister, and collectively responsible to the Lok Sabha, the lower House of the Parliament. The President of India is just a ceremonial head of the Government who is bound to act on the ministerial advice. All decisions are taken by the elected Government and the President cannot intervene in the decision-making process of the Government. As per Article 141 of the Constitution, the judgment delivered by the Supreme Court becomes the law of the land and this judgment has also become the integral part of our governing system. In actual constitutional practice, the President of India always maintains a Council of Ministers even if the Lok Sabha is dissolved and he cannot act without the advice of the Council of Ministers.<sup>24</sup> This judgment strengthens the Parliamentary Government system in our country and does not leave any scope for the President to bypass the Council of Ministers. The President does not get any mandate from the people to run the administration. He has to play his own role within the constitutional framework.

## 5.4 Samsher Singh judgment

*Samsher Singh v. State of Punjab*<sup>25</sup> is a great authority on the matter pertaining to the constitutional position of the President of India and the Governors of the States. In this case, the issue was whether the President of India or the Governor of a State, as the case may be,

24 Neelam Sanjiva Reddy, *Without Fear or Favour: Reminiscences and Reflections of a President*, Allied Publishers, 1989.

25 (1974) 2 SCC 831.



exercises all executive powers on the aid and advice of the Council of Ministers or whether there are powers, which they can exercise on their own, that is, without receiving the aid and advice of the Council of Ministers. This case was decided by a Constitution Bench comprising seven Judges of the Supreme Court and this is a landmark judgment pertaining to the constitutional position of the President of India. This judgment has dealt with the issue in detail.

The facts giving rise to the case were: The services of two judicial officers of Punjab state were terminated by the Governor of Punjab. Consequently, they challenged the orders of termination on the ground that powers of removal of judicial officers under Article 234 of the Constitution are to be exercised by the Governor in his personal capacity and not on the aid and advice of the Council of Ministers headed by the Chief Minister. In support of their contentions, they relied on the Supreme Court's decision in *Sardari Lal v. Union of India*<sup>26</sup> wherein it was held that the satisfaction of the President or the Governor, in case of dismissal or removal of government servants from service, to dispense with the holding of enquiry in the public interest, should be his own satisfaction. As such, he is to exercise his powers individually and not on the aid and advice of the Council of Ministers. In this case the order was challenged on the basis that it was signed by the Joint Secretary and was an order in the name of the President of India and that the Joint Secretary could not exercise any such authority on behalf of the President and the President should decide the matter personally.

<sup>26</sup> AIR 1971 SC 1547.

Two opinions were handed down, one by Chief Justice A. N. Ray for himself and four of his colleagues and another concurring by Justices V. R. Krishna Iyer for himself and P. N. Bhagwati. Chief Justice Ray analyzed the various provisions of the Constitution and some previous decisions of the Court to show that the Constitution envisaged the Parliamentary form of Government in the country under which the President of India is a constitutional head of the Union Government and the Governor is the constitutional head of the State Government who act on the advice of the Council of Ministers except where the Governor is expressly required by the Constitution to act in his own discretion. The following propositions emerge from the judgment of Ray, C.J.:

Our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. Under this system the President is the constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Article 103 is an exception to the aid and advice of the Council of Ministers because it specifically provides that the President acts only according to the opinion of the Election Commission.<sup>27</sup>

Further Ray, C.J. presented the constitutional position of the President in these words:

<sup>27</sup> Id. at 840.

The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercise all his powers and functions. The decision of any Minister or officer under rules of business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor.<sup>28</sup>

It is worthwhile to state that in the instant case Justice V. R. Krishna Iyer delivered a separate but concurring judgment for himself and Justice P. N. Bhagwati. He delivered a well-documented opinion analyzing the decisions of the Court, the views of the Constituent Assembly members and some eminent jurists

<sup>28</sup> Ibid.

to reinforce the theory so cardinal to the Parliamentary form of Government that the President or the Governor, as the case may be, is the constitutional head, who has to exercise his powers on the aid and advice of the Council of Ministers except where the Constitution expressly requires the Governor to act in his discretion. Justice Krishna Iyer explained the nature of Indian Government system in these words:

Not the Potomac, but the Thames, fertilizes the flow of the Yamuna if we may adopt a riverine imagery.<sup>29</sup>

In his erudite judgment, Justice Krishna Iyer clearly observed that though the President of India is a constitutional head of the Union Government, it cannot be said that he is a cipher or a rubber stamp. The President is the highest constitutional functionary of the country and in certain areas he can make a difference by exercising his rights under Article 78 of the Constitution. Justice Krishna Iyer summed up the constitutional position of the President in these words:

We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various Articles, shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well known exceptional situations. Without being dogmatic or exhaustive, these

<sup>29</sup> Id. at 861.



situations relate to (a) the choice of Prime Minister (Chief Minister) restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the Head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory.<sup>30</sup>

The instant judgment of the Supreme Court has rightly set the age-old controversy regarding the constitutional position of the President of India at rest and held that the President of India is a constitutional head of the Union Government who has to act on the aid and advice of the Council of Ministers in the exercise of his powers and functions and the real powers are exercised by the Council of Ministers which is collectively responsible to the Lok Sabha under Article 75(3) of the Constitution. The Supreme Court also made it clear that the President of India is not a glorified cipher or a rubber stamp. He can express his views freely to the Prime Minister under Article 78 and can make difference in his own way.

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30 Id. at 885.

The *Sardari Lal*<sup>31</sup> ruling was rightly overruled by the Supreme Court since this ruling was against the very concept of the Parliamentary form of Government which does not allow the ceremonial head of state to act independently of the Cabinet headed by the Prime Minister. The *Sardari Lal* ruling was truly a constitutional blunder that might have disturbed the constitution system in the country.

The author submits that the instant judgment is impeccably appropriate from the constitutional law point of view and it has been delivered in accordance with the basic spirit of the Constitution which has envisaged the Parliamentary form of Government in the country which does not allow the head of state to exercise powers independently of the Cabinet headed by the Prime Minister. The judgment clearly lays down that even being the constitutional head of the Government the President of India is not a figurehead or a rubber stamp and in certain cases he can act independently of the advice of the Council of Ministers. But such situations are rare.

## 5.5 Sripati Ranjan judgment

In *Union of India v. Sripati Ranjan Biswas*,<sup>32</sup> the respondent was dismissed from service by the Collector of Customs. He had preferred an appeal to the President of India as provided for in the service rules. The Minister of Finance rejected his appeal without any reference to

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31 *Sardari Lal v. Union of India*, AIR 1971 SC 1547.

32 (1975) 4 SCC 699.

the President. The question was whether the Finance Minister could have himself decided the appeal or should the President have decided the matter personally because the rule in question provided that the appeal lay to the President. Dismissing the contention of the respondent the Supreme Court held:

In the history of the entire background of the constitutional development of our country, when the Constitution conclusively contemplates a Constitutional President it is not permissible nor is it even intended to invest upon the President a different role of a ruling Monarch. A reference to the President under any rule made under the Constitution must need to be the President as the constitutional head, as envisaged in the Constitution, acting with the aid and advice of the Council of Ministers.<sup>33</sup>

Thus, in the instant case also, the principle laid down in *Samsher Singh's case* was extended to a quasi-judicial function as well vested in the President by a statutory provision. The decisions taken by the Ministers are deemed to be the President's decisions.

## 5.6 Rajasthan Assembly dissolution judgment

In *State of Rajasthan v. Union of India*,<sup>34</sup> the Supreme Court observed:

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33 Id. at 702.  
34 (1977) 3 SCC 592.

The President in our Constitution is a constitutional head and is bound to act on the aid and advice of the Council of Ministers (Article 74). This was the position even before the amendment of Article 74(1) of the Constitution by the 42nd Amendment (See *Samsher Singh and Another v. State of Punjab*). The position has been made absolutely explicit by the amendment of Article 74(1) by the Constitution 42nd Amendment which says "there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice." What was judicially interpreted even under the unamended Article 74(1) has now been given parliamentary recognition by the Constitutional Amendment. There can, therefore, be no doubt that the decision under Article 356 of the Constitution which is made by the President is a decision of the Council of Ministers.<sup>35</sup>

The observations in the instant case are completely based on the *Samsher Singh ruling*<sup>36</sup> and appear to be perfectly correct to the researcher as well. This judgment was related to the application of Article 356 of the Constitution by the President where a State Government can be dismissed if it is not able to run the administration in accordance with the constitutional provisions. The report of the failure of the State Government is sent to the President by the Governor of the concerned State and in practice the decision to impose Article 356 is

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35 Id at 670.

36 *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831.



taken by the Council of Ministers. The President approves the decision formally in his name. The Court said that Article 356 is imposed on the satisfaction of the Council of Ministers, and not on the personal satisfaction of the President. The President is bound to act on the advice of the Council of Ministers in respect of Article 356. The President can just once return the matter to the Council of Ministers for its reconsideration but thereafter he is bound to act on the reconsidered advice of the Council of Ministers. The President has no personal say power in that matter. It is the Council of Ministers which has to take a final call and not the President if something goes wrong. The Council of Ministers is collectively responsible to the Lok Sabha and not to the President.

The author is of the view that the instant judgment is fully based on the *Samsher Singh* judgment and has been crafted as per the real working of our Government system. It agrees with the constitutional law point of view as the Council of Ministers headed by the Prime Minister is the real driving vehicle of the Government machinery and is responsible to the Parliament for all its omissions and commissions. In terms of use of Article 356 of the Constitution, the satisfaction is always of the Council of Ministers. Personal satisfaction of the President is completely alien to the Parliamentary Government system prevailing in our country. The President can only convince the Council of Ministers by giving his/her comments/remarks but ultimately the will of the Council of Ministers shall prevail over the President of India.

## 5.7 Maru Ram judgment

In *Maru Ram v. Union of India*,<sup>37</sup> speaking on behalf of a Constitution Bench of the Supreme Court Krishna Iyer J., observed:

The position is substantially the same regarding the President. It is not open either to the President or the Governor to take independent decision or direct release or refuse release of any one of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns. The President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and *only* on the advice of the Council of Ministers save in a narrow area of power. So, even without reference to Article 367(1) and Sections 3(8) (b) and 3(60) (b) of the General Clauses Act, 1897, that in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the Ministers. Article 74, after the 42nd Amendment silences speculation and obligates compliance..... The constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government.<sup>38</sup>

In this case also Justice V. R. Krishna Iyer reiterated his thesis propounded in the *Samsher Singh case*<sup>39</sup> and held that the

37 (1981) 1 SCC 107.

38 *Id.* at 146,147.

39 (1974) 2 SCC 831.

President or the Governor is the constitutional head of the Government. The judgment clearly sets out that the President of India is bound to act as per the advice of the Council of Ministers when he decides the mercy petitions under Article 72 of the Constitution. It is significant to state that in practice the mercy petitions are decided by the Home Minister and the President of India is bound to accept the Home Minister's recommendation. The President of India cannot allow mercy petition on his own discretion. He can only return the recommendation once to the Home Minister for his reconsideration, but thereafter he is bound to accept the reconsidered recommendation. Only one option is available to the President of India in case he does not agree with the advice, he can put that matter on hold for an indefinite period of time as no time limit is prescribed in the Constitution during which he has to act on the advice of the Ministers. It has been followed by some Presidents in the past which is not considered as a good practice. Thus, a Constitutional Amendment is required for a clear picture so that the litigations could be reduced. Therefore, the judgment is right from constitutional angle.

## 5.8 S. P. Gupta judgment

In *S. P. Gupta v. Union of India*<sup>40</sup>, the Supreme Court held:

It is clear from the constitutional scheme that under our Constitution the President is a

40 AIR 1982 SC 149.

constitutional head and is bound to act on the aid and advice of the Council of Ministers. This was the position even before the amendment of Clause (1) of Article 74 by the Constitution (42nd Amendment) Act 1976, but the position has been made absolutely explicit by the amendment and Article 74 Clause (1) as amended now reads as under:

There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions act in accordance with such advice.

What was judicially interpreted even under the unamended Article 74 Clause (1) has now been given Parliamentary recognition by the Constitutional Amendment.<sup>41</sup>

Like the previous judgment, this observation is also based on the *Samsher Singh* ruling and looks constitutionally correct to the researcher. The judgment was concerned with the appointment of the Supreme Court and High Court Judges. In case of Judges' appointment also, the President was bound to act on the ministerial advice. He cannot take a different view. Though, currently the situation has changed in the Second Judges' case<sup>42</sup> and the President of India is bound to accept the recommendation of the Supreme Court collegium headed by the Chief Justice when he appoints the Supreme Court and High Court Judges.

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41 Id. at 227.

42 Supreme Court Advocates on Record Association v. Union of India, (1993) 4 SCC 441.



## 5.9 Charan Singh appointment judgment

In *Harsharan Verma v. Charan Singh*,<sup>43</sup> the Supreme Court held:

We must, however, hasten to add that the High Court is right in its view that Shri Charan Singh's appointment as the Prime Minister could not be said to be conditional upon his seeking a mandate of the Lok Sabha. Our Constitution knows no such hybrid thing as a "Prime Minister subjected to a condition of defeasance". Conditions imposed by the President may create considerations of political morality or conventional propriety but not of constitutional validity. The High Court is also right that it was not necessary for Shri Charan Singh and his Ministers to take a fresh oath after being called upon by the President to continue in office as a caretaker Government. Thus, the continuation in office of Shri Charan Singh and his Ministers was not unconstitutional.<sup>44</sup>

In the instant case, the Supreme Court upheld the President's decision for appointing Chaudhary Charan Singh as Prime Minister in July 1979 and observed that it was the discretionary power of the President to appoint the Prime Minister. Before this judgment, the Delhi High Court in *Dinesh Chandra Pande v. Chaudhuri Charan Singh*<sup>45</sup> and the Calcutta High Court in *Madan Murari Verma v. Choudhuri Charan Singh*<sup>46</sup> had also upheld the appointment of Chaudhary Charan Singh

43 (1985) 1 SCC 162.

44 Id. at 162,163.

45 AIR 1980 Delhi 114.

46 AIR 1980 Cal. 95.

as Prime Minister by observing that this was covered under the discretionary power of the President. Even in *Samsher Singh v. State of Punjab*<sup>47</sup>, Justice Krishna Iyer had clearly observed that the President of India has a discretionary power to appoint the Prime Minister. But when a political party gets full majority in the Lok Sabha, no question of Presidential discretion arises. The problem arises when the hung House comes into existence and the President has to identify the suitable person who can command the majority support in the Lok Sabha. This situation has been faced by some of the Presidents such as Neelam Sanjiva Reddy, R. Venkataraman, Dr. Shankar Dayal Sharma and K. R. Narayanan.

## 5.10 R. K. Jain judgment

In *R. K. Jain v. Union of India*,<sup>48</sup> the Supreme Court held:

....Article 74(1) as amended by Section 11 of the Constitution 42nd Amendment Act, 1976 with effect from January 3, 1977 postulates that there shall be a Council of Ministers with the Prime Minister as the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. The proviso thereto added by Section 11 of the Constitution 44th Amendment Act, 1978 which came into effect from June 20, 1979 envisages that 'provided that the President may require the Council of Ministers to reconsider such

47 (1974) 2 SCC 831.

48 (1993) 4 SCC 119.

advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.” Clause (2) declares that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.<sup>49</sup>

Further the Court added:

The President exercises his executive power under Article 74 (1) through the Council of Ministers with the Prime Minister as its head who shall be collectively responsible to the House of People. The exercise of the power would be as per the rules of business for convenient transaction of the Government administration made under Article 77(3), viz., the Government of India (Transaction of Business) Rules, 1961 for short the ‘Business Rules’. The Prime Minister shall be duty bound under Article 78 to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation etc. The details whereof are not material. Article 77(1) prescribes that all executive actions of the Government of India shall be expressed to be taken in the name of the President and shall be authenticated in the manner specified in the Rules made by the President. The President issued business rules and has allocated diverse functions to the Council of Ministers, its committees and the officers subordinate to them.<sup>50</sup>

49 Id. at 142.

50 Id. at 143.

The instant judgment is also based on the *Samsher Singh ruling* and is constitutionally correct judgment. The judgment is self-explanatory and presents a clear picture of the constitutional position of the President specifying that the President of India is a constitutional head of the Union Government who is bound to act on the aid and advice of the Council of Ministers in the exercise of his functions and powers. The business of the Government of India is conducted by the Ministers empowered by the President under Article 77(3) of the Constitution. The President of India acts as a constitutional head, following the aid and advice of the Council of Ministers headed by the Prime Minister in the exercise of his constitutional powers and functions as per Article 74(1) of the Constitution.

### **5.11 S. R. Bommai judgment**

The judgment of the Supreme Court in *S. R. Bommai v. Union of India*,<sup>51</sup> is a landmark decision, decided by a Constitution Bench of nine Judges, which has prevented the misuse of Article 356 of the Constitution up to a large extent. It is well known that by the misuse of Article 356, so many State Governments were dismissed by the Central Government on political considerations from time to time and the name of the President of India was unnecessarily dragged into the controversy. In this case also the Supreme Court clearly observed that the President of India has to act on the aid and advice of the Council of Ministers

51 (1994) 3 SCC 1.



headed by the Prime Minister in the exercise of his powers and functions and he can once send the advice of the Council of Ministers back to the Cabinet for its reconsideration and thereafter he is bound to act on such reconsidered advice. The Supreme Court observed:

The President is clothed with several powers and functions by the Constitution. It is not necessary to detail them to expect to say that Article 356 is one of them. When Article 74 (1) speaks of the President acting “in the exercise of his functions”, it refers to those powers and functions. Besides the Constitution, several other enactments too confer and may hereinafter confer certain powers and functions upon the President. They too will be covered by Article 74(1). To wit, the President shall exercise those powers and discharge those functions only on the aid and advice of the Council of Ministers with the Prime Minister at its head.<sup>52</sup>

The instant ruling is a landmark one and has brought out major changes in the Indian constitutional system. Prior to this judgment, the State Governments were treated just like the Footballs by the Central Government and Article 356 was misused on political considerations on a large scale as and when the Central Government desired to do so particularly against the opposition led Governments. This judgment has acted as a break on that unfair constitutional practice and has brought out responsibility and has strengthened the

52 Id. at 239.

federalism in the country. It established that use of Article 356 of the Constitution is subject to judicial review. Previously people were confused about the term ‘President’s rule’ but this judgment has clearly held that Article 356 of the Constitution is imposed in any State on the satisfaction of the Council of Ministers, and not on the personal satisfaction of the President. The President of India is merely a constitutional head of the Union Government who is bound to act on the aid and advice of the Council of Ministers in the exercise of his functions including Article 356. The *Samsher Singh* ruling has again been endorsed in this judgment. The judgment is perfectly aligned towards the constitutional perspective and has been delivered as per the constitutional spirit and realities.

## 5.12 H. D. Deve Gowda judgment

In *S. P. Anand v. H. D. Deve Gowda*<sup>53</sup>, the Supreme Court held:

Now Article 74(1) envisages a Council of Ministers with the Prime Minister at the head to aid and advise the President, and the latter is expected to act in accordance with such advice but if he has any reservations he may require the Council of Ministers to reconsider such advice. Thus, the President has to act in accordance with the advice of the Council of Ministers as a body and not go by the advice of any single individual. Only a person, who, the

53 (1996) 6 SCC 734.

President thinks, commands the confidence of the Lok Sabha would be appointed the Prime Minister who in turn would choose the other Ministers. The Council of Ministers is made collectively responsible to the House of the People.<sup>54</sup>

In the above-mentioned judgment, the Supreme Court held that a person who is not a member of either House of the Parliament can also be appointed as Prime Minister by the President of India for a period of six months and during those six months that person will have to become the member of any House of the Parliament. This ruling also confirms the discretionary power of the President of India to appoint the Prime Minister subject to the Parliamentary approval. This ruling strengthens the concept of Parliamentary Government in the country and declares that the President of India is a constitutional head of the Union Government and is bound to act on the aid and advice of the Council of Ministers headed by the Prime Minister in the exercise of his powers and functions as per the mandate of Article 74(1) of the Constitution. The judgment is quite sound from constitutional law point of view.

### **5.13 Gujarat Lokayukta judgment**

In *State of Gujarat and Another v. Hon'ble Mr. Justice R. A. Mehta (Retd) and others*,<sup>55</sup>

<sup>54</sup> Id. at 743.

<sup>55</sup> Civil Appeal Nos. 8814-8815 of 2012, Supreme Court, Para no. 28.

the Supreme Court of India observed:

However, there is a marked distinction between the provisions of Articles 74 and 163 of the Constitution. The provisions of Article 74 of the Constitution, are not *pari materia* with the provisions of Article 163, as Article 74 provides that there shall be a Council of Ministers, with the Prime Minister at their head, to aid and advise the President, who shall, in the exercise of his functions, act in accordance with such advice as is rendered to him, provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice that is tendered, after such reconsideration. While Article 163 provides that there shall be a Council of Ministers with the Chief Minister at their head, to aid and advise the Governor, in the exercise of his functions, an exception has been carved out with respect to situations wherein, he is by, or under this Constitution, required to perform certain functions by exercising his own discretion.

In the instant case, the Supreme Court stated that the text of Article 74 of the Constitution does not provide any discretionary powers to the President of India which is available to the Governors of the States under Article 163 of the Constitution. The above-mentioned judgment is very important to understand the legal implications of the failure of Governor or the President for not following the ministerial advice. By implication the verdict indicates that if the President of India ignores the advice of



the Council of Ministers and takes any decision contrary to such advice, the Government can challenge the validity of the Presidential action in court of law as the exercise of executive power by the President contrary to the constitutional provisions is unconstitutional and liable to be set aside.<sup>56</sup> But there are authorities contrary to this view too which provide that no such challenge can ever be made against the President on the advice tendered by the Council of Ministers as per Article 74(2) of the Constitution.<sup>57</sup> But it is difficult to accept the latter view. If the President of India is allowed to bypass the advice of the Council of Ministers, it will eliminate the Parliamentary Government system as established by the Founding Fathers in the country and the President of India can emerge as a dictator. The President is not supposed to be the master of the Council of Ministers.

## 6. Concluding remarks

In view of the foregoing discussion of a number of judicial pronouncements, it is submitted that in almost all the cases the Supreme Court of India has clearly observed that the President of India is a Constitutional head of the Union Government and the real powers are exercised by the Council of Ministers headed by the Prime Minister as per the spirit and intendment of the concept of responsible Parliamentary Government based on the Westminster model prevalent in the

56 U. N. R. Rao v. Indira Gandhi, AIR 1971 SC 1002.

57 S. R. Bommai v. Union of India, (1994) 3 SCC 1.

United Kingdom. But the Supreme Court has also stated that the President of India is not a gloried cipher or a rubber stamp as Justice Krishna Iyer also mentioned in his concurring judgment in the *Samsher Singh's case*<sup>58</sup> as discussed earlier. And in certain areas the President of India can act on his own discretion.

As per *Samsher Singh* ruling, in matters pertaining to appointment of the Prime Minister in a hung House the President of India can act on his own discretion. If the Council of Ministers loses majority support in the Lok Sabha and does not leave office, the President of India can sack such Government. In dissolving Lok Sabha also, the President of India can act on his own discretion. The President of India can also ask the Prime Minister to supply him necessary information as per Article 78 of the Constitution on his own discretion. The President of India can also grant sanction of prosecution against the Prime Minister on his own discretion. The President of India can ask the Council of Ministers to reconsider its advice once but he is bound to act on the reconsidered advice of the Cabinet. However, no time limit is there in the Constitution during which he has to act on such advice. President Zail Singh exercised this option in Indian Post Office Bill matter in 1986. But the President is not bound to act on unconstitutional advice of the Council of Ministers.

In the abovementioned situation, the Supreme Court observes that the President of India is generally bound to act on the

58 (1974) 2 SCC 831.

advice of the Council of Ministers headed by the Prime Minister in the exercise of his powers and functions conferred upon him by the Constitution. The *Ram Jawaya Kapur* ruling clearly states that in terms of exercise of executive powers the President is bound to act on the advice of the elected Government. The *R. C. Cooper* verdict points out that in terms of issuing the Ordinance under Article 123 of the Constitution, the President of India is bound to act on the satisfaction of the Council of Ministers headed by the Prime Minister. The *U. N. R. Rao* judgment does not leave any space for the President of India to act independently of the advice of the Council of Ministers. It clearly holds that the President of India is always bound to have a Council of Ministers even if the Lok Sabha is dissolved. The verdict fully certifies that the Indian Government is a Parliamentary form of Government. The *Samsher Singh* case is the finest authority on the issue. This ruling clearly establishes that the President of India is a constitutional head of the Union Government who is generally obliged to act on the aid and advice of the Council of Ministers headed by the Prime Minister in the exercise of his powers and functions. But this judgment also makes it clear that the President of India is not a rubber stamp and in some cases he can act on his own discretion. The ruling has now become the law of the land.

*Sripati Ranjan, Rajasthan Assembly and Maru Ram* cases are also based on the legal reasoning of the *Samsher Singh* case. These cases do not leave much space for any doubt about the constitutional position

of the President. *S. P. Gupta* also follows *Samsher Singh* ruling. In *Charan Singh* case the Supreme Court observes that in the case of appointment of Prime Minister the President has discretion of own. *R. K. Jain* case and *S. R. Bommai* case are also based on the reasoning of the *Samsher Singh* case. While exercising his powers under Article 356 of the Constitution; the President of India has to act on the advice of the Council of Ministers headed by the Prime Minister. He can only once send the recommendation back to the Cabinet for its reconsideration. But thereafter he is bound to act on the reconsidered advice of the Cabinet. *H. D. Deve Gowda* and *Gujarat Lokayukta* cases are also based on the well-established legal reasoning of the *Samsher Singh* case.

In view of the above judicial approach, it is submitted that the judgments of the Supreme Court constitute the law of the land as per Article 141 of the Constitution and are to be followed by all authorities, civil as well as judicial under Article 144 of the Constitution. Now the *Samsher Singh's case*<sup>59</sup> has clearly established that the President of India is a constitutional head of the Union Government who is bound to act on the aid and advice of the Council of Ministers in the exercise of his functions. The *Sardari Lal case*<sup>60</sup> which had held otherwise was rightly overruled by the Supreme Court in this case. Justice Krishna Iyer was surprised to know the views of some jurists who stated that the President had a good number of

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59 Ibid.

60 AIR 1971 SC 1547.



discretionary powers which he can exercise without ministerial advice. In *Samsher Singh case*,<sup>61</sup> Justice Krishna Iyer observed:

It is surprising that extreme views have been propounded by responsible jurists on the law of our Constitution in the strategic sector of the President *vis-à-vis* his Cabinet and dangerous portents must therefore be forestalled by an authoritative statement of the constitutional position by the apex court. If, in that process, earlier ruling of this Court have to be overruled, we may not hesitate to do so. For, it is truer to our trust to be ultimately right, than to be consistently wrong, where the constitutional destiny of a developing nation is at stake.<sup>62</sup>

But the *Samsher Singh judgment*<sup>63</sup> also makes it clear that though the President of India is a constitutional head of the Union Government, he is not a rubber stamp. In some areas the President of India can act on his own discretion, that is, independently of the advice of the Council of Ministers. Those areas are: appointment of the Prime Minister, dismissal of the Government and dissolution of the Lok Sabha. As per Bagehot's theory, the President is also entitled to "encourage, consult and warn" the Government and this is an effective method through which he can counsel the Government. By and large, now the *Samsher Singh judgment* has become the law of the land on the matter relating to the constitutional position of the President and the controversy

has been set at rest by this ruling by holding that the President is a constitutional head of the Union Government who has to exercise his powers and functions on the aid and advice of the Council of Ministers. In almost all the cases, the Supreme Court has confirmed with the *Samsher Singh judgment*. But this is a judge-made law and its future depends upon the Supreme Court itself.

In view of the above judicial response about the constitutional position of the President of India, it is submitted that the President of India is a constitutional head of the Union Government who is generally bound to act on the aid and advice of the Council of Ministers headed by the Prime Minister in the exercise of his powers and functions as per the mandate of Article 74(1) of the Constitution, as amended by the 42nd and 44th Constitutional Amendment Acts. The advice of the Council of Ministers is sent to the President of India through the Prime Minister and the President has power under proviso to Article 74(1) of the Constitution to return such advice once for reconsideration but thereafter he is bound to accept the reconsidered advice of the Council of Ministers. The Supreme Court has also upheld this point in a number of cases. However, the President may delay the final decision of the Council of Ministers by putting that matter on hold for indefinite period of time as no time limit has been prescribed under Article 74(1) of the Constitution during which the President has to act on such advice. But it is a risky matter and it all depends on the personality of the individual and the political environment prevailing at

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61 (1974) 2 SCC 831.

62 *Id.* at 859.

63 *Ibid.*

that time. If the Council of Ministers holds a strong support of majority in the Lok Sabha, the President may face serious consequences if he disturbs the decision-making process of the Government as the Government may bring impeachment proceedings against him for violating the Constitution. But it is not an easy task and the President may also justify his action by taking the defence of his oath to preserve, protect and defend the Constitution and the law under Article 60 of the Constitution and it all depends on the House what view it takes in such a situation. If the Parliament removes the President, the President may also challenge the validity of his impeachment in the court of law and it depends on the court what view it takes.

Although, in a number of cases, the Supreme Court has clearly observed that the President of India is a constitutional head of the Union Government and is bound to act on the aid and advice of the Council of Ministers headed by the Prime Minister in the exercise of his powers and functions as per Article 74(1) of the Constitution, it is very difficult to

understand that the President is also bound to accept any illegal or unconstitutional advice of the Council of Ministers. The President of India is duty bound to preserve, protect and defend the Constitution and the law as per the mandate of his oath taken under Article 60 of the Constitution and if the President is satisfied that the advice of the Council of Ministers goes against the provisions of the Constitution and the law, he may refer that matter to the Council of Ministers for its reconsideration and if the Council of Ministers does not accept his views, he may also ask the Council of Ministers to refer that matter to the Supreme Court for taking its opinion under Article 143 of the Constitution and may act accordingly. In rare cases, when the President of India thinks that the Council of Ministers is taking illegal and unconstitutional decisions and is not listening to him, he may also dismiss such Council of Ministers, and may invite the opposition to form the Government and if no political party is able to form the Government, the President of India may dissolve the Lok Sabha and order fresh general elections but it is rarest of rare case.

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# The Sentinel's Toil

Gopal Sankaranarayanan\*

Writing in the *Illustrated Weekly* in the autumn of 1974, the late Nani Palkhivala lamented the state of the world's largest functioning democracy in its twenty-eighth year. "We have plentiful natural resources. We have vast skills and talents and abundance of enterprise. We have enough organizing capacity – otherwise we could not have fed, clothed and sheltered ten million refugees. All that we need is the emergence of dedicated men who can strike a chord in the hearts of our trusting, grateful millions and who can teach by the example of their lives the lessons which precept can never impart"<sup>1</sup>, he said.

While Palkhivala's hope was for individuals to be lodestars for the nation, little would he have imagined that the same institution of which he was such an integral part would play that important role. Over this four decade period, the Supreme Court has emerged as the recourse for all ills that befall the nation, at many times overwhelming an institution that was initially cast in what is perceived as a more

modest role. For a nation that has virtually been in perpetual crisis mode, lurching and stumbling from one pitfall to the next, it is but inevitable that all institutions and individuals will be called to aid.

In the same piece, Palkhivala also alludes to a forecast by an international agency about what the period 1980-1991 held in store for India. With remarkable prescience, the agency predicted that the decade to come would have the highest levels of general political violence with greater riots, armed attacks and assassinations than Africa and the Middle East would experience in the same period. This prophecy was faithfully fulfilled through Operation Bluestar, Mrs. Gandhi's killing, the massacre of Kashmiri Pandits, the series of casualties in Punjab and Rajiv Gandhi's death at the hands of the LTTE. We also had an extraordinary helping of unrest with Moradabad (1980), Nellie (1983), Bhiwandi (1984), Anti-Sikh riots (1984), Gujarat (1985), Meerut (1987), Bhagalpur (1989), Hyderabad (1990) and Mandal Commission (1990) culminating in the Bombay massacres of 1992.

As challenge after challenge has been thrown up for the nation, the courts have been

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\* Advocate, Supreme Court of India. Parts of this paper borrowed from an earlier publication by the author entitled "Man Damn Us", (2009) 9 SCC (J) 6.

1 Nani A. Palkhivala, "The Mess We are in", *The Illustrated Weekly of India*, August 11, 1974.

at the thick of it, sometimes by compulsion, but mostly by invitation. Their measures have been (for the most part) restrained, and informed by a balance that has been struck between law and justice. It is therefore strange that their actions alone are constantly held up to scrutiny by using phrases such as “judicial activism” and “judicial overreach”. For an executive that alternates between being emboldened by power or weakened by compromise, and a legislature that is rarely troubled to debate or deliberate, the judiciary stands as a stark contrast, constantly reminding, occasionally correcting.

### The genesis of the Court

It would be apposite to reflect on where the Supreme Court commenced its journey, and the station where it finds itself today. If we were to contemplate in a most conservative manner the role that the Constitution itself envisaged for the Supreme Court, it would show us eight individuals appointed by the President to discharge the adjudicatory role laid out for them in the Constitution. Virtually no other jurisdiction boasts of entire Chapters devoted to the establishment and functions of the courts<sup>2</sup>, but it is not in them that one will find the true extent of their power. It is where the limits of the executive (in a Parliamentary democracy, thereby also denoting the legislature) have been

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2 In the Constitution of India, 1950, Chapter IV of Part V deals with the Supreme Court, Chapter V of Part VI deals with the High Courts and Chapter VI of Part VI deals with the Subordinate Courts. Apart from these, Article 348 deals with the language of the Courts, the Second Schedule deals with the salaries and emoluments of Judges and the Third Schedule with the form of their oath of office.

laid down in the Constitution that the judiciary is most often called upon to play a part.

Article 32, for example, guarantees any person the right to move the Supreme Court to enforce the rights available in the Fundamental Rights chapter. Read with Article 13, which prohibits the ‘State’ from making any law inconsistent with these assured rights, it is clear that it is a virtual duty of the Supreme Court to ensure that the other two wings of Government do not encroach upon the Constitution’s basic undertaking to its subjects.<sup>3</sup> This power (of enforcing Part III rights) is also available to the High Courts by way of Article 226, which extends it “for any other purpose”. Articles 129 and 215 recognize that the Supreme Court and the High Courts are courts of record, and grant them the power to punish for contempt without limitation. Article 142, which is a maverick provision, the likes of which would

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3 But what happens when the Supreme Court itself breaches Part III comprising the fundamental rights? The judgments in *Naresh Shridhar Mirajkar v. State of Maharashtra*, (1966) 3 SCR 744, *A.R.Antulay v. R.S.Nayak*, (1988) 2 SCC 602 and *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388 would suggest that the judiciary, not being ‘State’ for the purposes of Part III, cannot be guilty of violating fundamental rights. This position could be questioned in light of the judgment of the Supreme Court in *Shaukat Hussain Guru v. State (NCT) Delhi*, decided on 15.04.2008. An earlier discussion by this author concerning this anomaly may be found in (2008) PL (Con) July 17. Consider also the decision of an international Arbitral Tribunal in *White Industries Australia Ltd., v. The Republic of India*, rendered on 20.11.2011 which deemed the Indian Republic responsible at international law for the (in)action of its courts. Also contrast the Indian approach with that of the United States, where the Court considers judicial action as ‘state action’ which, in a given case, would breach the guarantees of the Fourteenth Amendment. See particularly, the discussion in *Shelley v. Kraemer*, 334 US 1 (1948) at 14-18 and Justice Douglas’ concurring opinion in *Lombard v. State of Louisiana*, 373 US 267 (1963) at 278.



be hard to find<sup>4</sup>, allows the Court to pass any order or make any judgment in the interests of 'complete justice'. Finally, Article 141 ensures that the law as declared by the apex court would be the law for all courts across India. In effect, a judgment in exercise of judicial review would also have to be compulsorily followed by all other courts in the country as it would be laying down the law in consonance with the Constitutional scheme, rectifying or annulling any errors that would have been the result of the legislative process.

In the background of the Constitution itself, it seems a little strange that the question of judicial review is moot in India. It is possible that academics and jurists have bodily imported the discourse from abroad without paying heed to the latent distinctions, but at the very least, it must be accepted that both by virtue of being written, and being so detailed, the Indian Constitution explicitly empowers its courts to a much greater degree than those in the United States and England. In fact, it is in the context of a written constitution that Schwartz has said

“A constitution is naught but empty words if it cannot be enforced by the courts. It is judicial review that makes constitutional provisions more than mere maxims of political morality. In practice, there can be no constitution without judicial review. It provides the only adequate safeguard that has been invented against unconstitutional legislation. It is, in truth, the

4 Although both the procedural codes in India have provisions of a similar nature – Section 482 of the Code of Criminal Procedure, 1973 and Section 151 of the Civil Procedure Code, 1908.

*sine qua non* of the constitutional structure.<sup>5”</sup>

In interpreting this written Constitution, the Indian courts were not in any doubt as to the duties cast upon them from the very outset. In its inaugural year, the Supreme Court was faced with a challenge mounted against the Preventive Detention Act, 1950 on the ground that the 'procedure' envisaged in Article 21 ought to be likened to the 'due process' clause in the 5th Amendment to the American Constitution. M.K.Nambyar, arguing for the petitioner *A.K.Gopalan*<sup>6</sup> contended that procedural due process must necessarily be read into Article 21, and for that purpose submitted that Articles 19, 21 and 22 ought to be read as part of a composite whole. The Supreme Court however took a narrow view of the provision, and rejected the submission of the petitioner, with one of the judges even observing that the State was empowered, through validly enacted law, to punish a convict by boiling him in oil!<sup>7</sup>

The Court's position has been described as positivist and conservative<sup>8</sup>, and it could

5 Schwartz, *Constitutional Law: A Textbook*, (Macmillan: 1972), 3.

6 *A.K.Gopalan v. State of Madras*, AIR 1950 SC 27.

7 *Ibid*, Per Das J., at pp.28-39. This is an allusion to the poisoning of guests at the Bishop of Rochester's feast by his cook. An enraged Henry VIII decreed that hanging was too kind, and so, the unfortunate chef was boiled to death, a punishment that prevailed for that offence for 5 years.

8 The late Chief Justice of India, Subba Rao criticized the judgment by saying - "The preponderance of view among the jurists is that it is wrongly decided. It has in effect destroyed one of the greatest of the Fundamental Rights, i.e., personal liberty." Subba Rao, *Some Constitutional Problems*, (University of Bombay: 1970), 115.

be argued that the prevailing environment might have tempered the view of the Bench. India had recently attained independence, and an eminent Constituent Assembly had given the nation its Constitution. The same body, acting as the provisional Parliament (the first Parliamentary elections were to be held only in 1951) had enacted the legislation impugned in *Gopalan*. It might have weighed with the Supreme Court, as it did in *Sankari Prasad*<sup>9</sup> the following year, that if the same group of people were responsible for the Constitution and the Preventive Detention Act, they would not have created such an anomaly as had been presented by the petitioner. Some would opine that a young nation, slowly coming to terms with its independence would have found it very hard to deal with a fatal blow being dealt to one of its first legislative enactments.

These views would shortly be brought to nought by the Court's conduct in cases of open derogation of the Constitution. But, a small warning had been apparent in the *Gopalan* judgment itself, where it is noted:

“Statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not”<sup>10</sup>.

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9 *Sankari Prasad v. Union of India*, AIR 1951 SC 458 where the First Amendment to the Constitution was challenged vis-à-vis the insertion of Articles 31-A and 31-B.

10 *Supra* n.7 at Para 161.

The Court further observed that it had the power to declare any law unconstitutional because the first obligation it had under the oath taken by its judges was to the Constitution itself. On this view, the Court was unanimous, although Justice Fazl Ali dissented on the merits, observing that the true interpretation of Article 21 would mean “procedural due process”, which ought to be just, fair and reasonable, apart from being merely validly enacted. It would be nearly three decades before both Nambyar and Fazl Ali were vindicated by the Supreme Court's judgment in *Maneka Gandhi*<sup>11</sup>.

But lest one think that the Court fought shy of exercising its full powers of judicial review, one need only look at the interval between *Gopalan* and *Sankari Prasad*. The Court hastened to protect the right under Article 19(1)(a) from action by the States. In the cases of both *Romesh Thappar*<sup>12</sup> and *Brij Bhushan*<sup>13</sup>, it was swift to reject arguments that ‘security of state’ in Article 19(2) included ‘public order’ and that restrictions based on the latter were constitutionally valid. In Patna, the High Court had also declared certain agrarian reform laws unconstitutional in *Kameshwar v. State of Bihar*<sup>14</sup>. In Madras, the High Court quashed the communal G.O. and the same was sustained by the full bench of the Supreme Court<sup>15</sup>.

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11 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

12 AIR 1950 SC 124.

13 AIR 1950 SC 129.

14 AIR 1951 Pat 19.

15 *The State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.



These three exercises of judicial power were unexpected, not least by Prime Minister Nehru, who, in order to neutralize them, prevailed upon the provisional Parliament to pass the First Amendment to the Constitution. While the amendments to Articles 15, 19 and 31 were meant to remove the basis of the judgements, they resulted in a seismic shift in the Constitution's basic tenets of equality, liberty and property respectively.

Nehru's actions, though probably justified at the time, showed a lack of imagination, because with one fell blow, he created two mechanisms by which the supremacy of Parliament would be emphasized by those less scrupulous than him – (a) the power of the Constitutional Amendment to nullify the judgments of the highest court in the land, and (b) the Ninth Schedule, by which the very power of judicial review of legislative action (one accorded by the Constitution itself) would be excluded. In the years to come, these two instruments more than any other would be used by less responsible Governments to trammel the judiciary and muzzle the electorate. Reacting to this, the Courts have, through judicial innovation and creativity, attempted to restore its power of judicial review to the position originally envisaged. It is this struggle by the judiciary to maintain the delicate balance between the institutions that has been viewed by critics as one crossing certain imaginary boundaries.

## The “undemocratic” Court

The major criticism by those at odds with the Court is one of excess. The evolution of the “basic structure” norm in *Kesavananda Bharati*<sup>16</sup>, the “due process” principle in *Maneka*<sup>17</sup>, the “reasonableness” doctrine in *Royappa*<sup>18</sup>, the relaxation of locus standi and the invention of Public Interest Litigation<sup>19</sup> and the “collegium system” evolved in *SCAORA*<sup>20</sup> and *Special Reference*<sup>21</sup> were all deemed to be beyond the judicial ken. As an unelected Finance Minister ironically referred to it – “the tyranny of the unelected”. Such a view shows a complete ignorance of India's constitutional scheme.

In a Constitutional democracy such as ours, the actions of the Parliament can be granted no pre-eminence when it is only one of the three wheels that allow the Government to function. When it is repeatedly emphasized by critics that the judiciary is undemocratic because it is unelected, then that argument does grave harm to both the Constitution and the democratic system it has spawned. The

16 His Holiness *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

17 *Supra* n.11.

18 *E.P.Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3; Followed immediately thereafter in *Chhaganlal v. Greater Bombay Municipality*, (1974) 2 SCC 402, *Maneka Gandhi*, (1978) 1 SCC 248, *Ramana Dayaram Shetty v. International Airport Authority*, (1979) 3 SCC 489, *Kasturi Lal v. State of J & K*, (1980) 4 SCC 1 and *Ajay Hasia v. Khalid Mujib*, (1981) 1 SCC 722, all from the pen of Bhagwati, J.

19 *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 98 and *S.P.Gupta v. Union of India*, 1981 Supp. (1) SCC 87

20 *SCAORA v. Union of India*, (1993) 4 SCC 441

21 *Special Reference No.1 of 1998*, (1998) 7 SCC 739

presumption behind such a position is that the *people* express their opinions through the process of elections, and it is only there that the true spirit of democracy can be found. This of course overlooks the fact that the very Constitution which was given by “We, the People” allowed the very same unelected judiciary to exercise its power of review to strike down a legislative act.

In a lecture delivered by Justice H.R.Khanna, he records the fact that Justice Robert Jackson, when replying to some criticism of the judiciary’s role in the civil rights cases, stated that ordinarily, legislation whose basis in economic wisdom is uncertain, can be redressed by the process of the ballot box or the pressures of opinion. But, when the channels of opinion or of peaceful persuasion are corrupt or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event, he says, the Court by intervening restores the processes of democratic government and does not disrupt them.<sup>22</sup>

An over-emphasis on any one limb of Government (in this case the legislature) would subordinate the Constitution to the Parliament, which was clearly not the intention of the framers. As Annabelle Lever puts it in her response to Jeremy Waldron –

“Universal adult suffrage, therefore, is but

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22 H.R.Khanna, *Judiciary in India and Judicial Process – Tagore Law Lectures*, (Ajoy Law House: 1985), 38-39.

one of several democratic mechanisms for distributing and legitimizing power, and so cannot support the assumption that legislatures are *ipso facto* more democratic and legitimate than judiciaries.”<sup>23</sup>

It must be contemplated that if one were to accept the simplistic argument that majority rule alone grants legitimacy, then we would hark back to the fascist regimes of Hitler, Mussolini and Stalin when genocides and purges stood firm on the support it received from the electorate. Instead, the true test for a civilized democracy in the 21st century would be as to how it treats the weak, the disenfranchised and the unpopular, and whether these sections would have recourse against the oppression of the State. As Walter Lippmann had said –

“(Majority rule) may easily become an absurd tyranny if we regard it worshipfully, as though it were more than a political divide. We have lost all sense of its true meaning when we imagine that the opinion of fifty-one percent is in some high fashion the true opinions of the whole hundred percent, or indulge in the sophistry that the rule of the majority is based upon the ultimate equality of man.”<sup>24</sup>

Happily, our Constitution has taken care of such eventualities in according the Courts the power to decline to apply a statute that fails to ensure the rights provided by it. This is why

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23 Annabelle Lever, “Is Judicial Review Undemocratic?”, [2007] P.L.280 at p.288.

24 C.Rossiter and J.Lare, eds., *The Essential Lippmann*, (Random House: 1963), 13.



it is not only acceptable, but imperative and compulsory that the judiciary is unelected and independent, and thereby not beholden to any quarter in discharging the duties of its high office.

### **A note of concern**

While the Supreme Court has shown how it can withstand the buffets from enthusiastic legislators and public criticism, there remains a matter of grave importance which has cast a cloud on the judiciary. In recent years, the attack on the edifice has begun to come insidiously from within. As attempts to dilute the judicial role through legitimate means (legislative enactments and executive fiat) have often been found wanting, the focus has shifted to individual judges. Over the last decade, especially with the advent of the electronic media and social networks, certain sections of the legal fraternity have taken it upon themselves to spread invective and canard against members of the judiciary they find not to their liking, and to even seek judicial recourse on the basis of such propaganda. Such action primarily has three significant stages:

- a. To pore into the past conduct of a sitting judge and obtain half-baked anecdotal information, or to investigate the relatives of the judge and conjure up conflicts of interest.
- b. To share this information in the corridors

of the court, on Facebook and Twitter and gradually use the very same information when published as an annexure to a petition or complaint.

- c. To seek recusal of the judge concerned, while making inflammatory statements about the judiciary or by misinforming the judge concerned about the true factual scenario.

In my own experience, in just over the last 3 years, such situations have arisen with every single presiding judge of the Supreme Court, providing salacious material to those who do not have the interests of the institution at heart. While the Court has usually chosen to ignore these barbs, the state of affairs has now reached a stage where further magnanimity would do harm to its very foundations. The regularity of such assaults has reached alarming proportions, and a firm example needs to be set now. The fact that these assailants are a small cohort of recidivists ought to make the task easier to cleanse the system.

As the light dims our years and our words fade on these pages, we must hope and pray that this Court will continue to stand guard against ruin and ravage. It is the solemn duty of every lawyer who is a part of this great institution to be like knights of yore, with lances ready, to strike down the enemy. For it is here, at this hearth, that the people of India seek justice.

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SUPREME COURT OF INDIA