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THE CONSTITUTION OF INDIA: SYMBOL OF UNITY IN DIVERSITY

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I. INTRODUCTION

[649] The Constitution of India 1950, though apparently a representative of Euro-American ideas of a liberal constitution, is founded on the age old Indian traditions built in the course of its over four thousand years of history and on the experiences gained by the people of India in the course of colonial rule in modern times. Though its form may resemble the constitutional documents produced by the colonial rulers for governing the country, its spirit is native. It is the creation of the people of India who, being dissatisfied with the then existing constitutional arrangements, wanted to make a fresh start. For this reason they fought for freedom from colonial rule and for a home made constitution. Making of the Constitution after the satisfaction of these conditions ensured its autochthony. The working of the Constitution during the last five and a half decades has further established its nativity and autochthony. Had not that been the case, the Constitution would have long ago met the same fate as its contemporaries in several countries. Not only has it escaped that fate but also it has slowly emerged as an example for many similar societies as India. If any single lesson has to be learnt from this example, it must be the lesson of autochthony and nativity, i.e., the constitution must be a product of the people who have to work it and not of any one else. Constitutions that are thrust upon the people from outside or from within, or are simply imported shall remain non-starters. Even the best possible constitution that could be conceived by human mind would fail if it did not have its origin, not simply in form but also in substance, in the people to be governed by it. The form and substance of the Constitution of India are as the people of India envisaged them to be.

The modern constitutions have acquired a structural pattern, which the Constitution of India also follows. It has a Preamble, 395 Articles divided into XXII Parts and twelve Schedules. It had its predecessor in the Government of India Act 1935 and **[650]** similar prior Acts. It may have adopted some of the formal structures and provisions from such Acts, but that does not automatically bring it into their category. Those Acts were creations of the British Parliament much against the wishes of the people of India. It is against them that the people fought for independence from the British rule for the right to make their own constitution as they wished it to be. The Constitution is the outcome of that long struggle which was based on certain values inherited and learnt by the people through their long history enriched from developments in other parts of the world. Those who read the Constitution without that history – that is, as a document looking like any other Western constitution – miss its essence. In the following pages we are not going to enter into the history and the values that may have worked in the making and working of the Constitution but they shall be silently operating in our presentation.

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II. AIMS AND OBJECTIVES

Historically, the constitution making process had started far back in the nineteenth century[1] but the process of making the present Indian Constitution is traced back to the Cabinet Mission's Plan of 16 May 1946 which recommended a basic form of the constitution and the creation of a Constituent Assembly to work out that form.[2] Accordingly, the Constituent Assembly was formed which first met on 9 December 1946. On 13 December 1946 Pandit Jawaharlal Nehru moved the Objective Resolution in the Assembly which laid down the broad goals of the constitution of India that the Assembly had to draft.[3] The Objective Resolution and not the Cabinet Mission's Plan became the guiding principle for the Assembly in the making of the Constitution. Finally, the Assembly incorporated the Resolution with suitable modifications as the Preamble of the Constitution. The Preamble lays down the main aims and objectives of the Constitution.

[651] The Preamble expressly states that the Constitution of India is the product of "WE THE PEOPLE OF INDIA" who adopted, enacted and gave to themselves this Constitution on 26 November 1949. The people "resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC". Thus, India is a sovereign country with a socialist, secular, democratic and republican polity. The words 'socialist' and 'secular' were introduced by an amendment in 1976. India's sovereignty, secularism, democracy and republican form of government have been recognized as basic features of the Constitution and as such beyond the power of amendment.[4] No such recognition has yet been given to socialism and the courts have held that the privatization and liberalization of the economy of the country is not inconsistent with the socialism expressed in the Preamble.[5]

The Preamble also expresses the resolve of the people "to secure to all its citizens:

> JUSTICE, social, economic and political;
> LIBERY of thought, expression, belief, faith and worship;
> EQUALITY of status and opportunity;
> and to promote among them all
> FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation".

The word 'integrity' was also introduced by the amendment in 1976.

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[1] See the Constitution of India Bill 1895 in B Shiva Rao (ed.), *The Framing of India's Constitution: Select Documents* (New Delhi, 1966), vol. I, 5. The background and account of the making of the Constitution can be found in this five-volume work edited by Shiva Rao.

[2] For the Cabinet Mission's Plan, see id. at 208.

[3] Id., vol. II, 3.

[4] See, e.g., *Kihoto Holohan v Zachilhu*, AIR 1993 SC 412; *Shri Raghunathrao Ganpatrao v Union of India*, AIR 1993 SC 1267; *S R Bommai v Union of India*, AIR 1994 SC 1918.

[5] *Delhi Science Forum v Union of India*, AIR 1996 SC 1356; *State of Punjab v Devans Modern Brewaries Ltd.* [2003] 4 LRI 647; M P Singh, 'Constitutionality of Market Economy' (1996) 18 *Delhi Law Review* 272. See also *Balco Employees Union v Union of India* AIR 2001 SC 350; *Centre for Public Interest Litigation v Union of India* AIR 2003 SC 3277.

All these goals of the Constitution have been comprehensively incorporated into its provisions. It is worth noting that unlike the Preamble of the statutes the Preamble of the Constitution is part of it and can be invoked just like any other provision for direct application. Therefore, any change in the Preamble may also be the subject matter of litigation on the ground of violation of basic structure of the Constitution.[6]

III. FUNDAMENTAL RIGHTS, DIRECTIVE PRINCIPLES AND FUNDAMENTAL DUTIES

The *trilogy*[7] of fundamental rights (FRs), directive principles of state policy (DPs) and fundamental duties (FDs) is the bedrock of the Indian Constitution. Granville Austin calls them as 'the conscience of the Constitution.'[8] The FDs, which were introduced in 1976, take the Constitution closer to the Indian tradition of *dharma* (duty).[9] It is notable that though the FRs and DPs appear in separate parts of the Constitution, the leaders of the independent movement drew no distinction between the positive and negative obligations of the state.[10] The Assembly separated them on the ground of justiciability.[11] The FRs and DPs were not just formally introduced into the Constitution. **[652]** 'They had their roots deep in the struggle for independence' of the country.[12] The leaders of the struggle were not satisfied with the British model of implied rights, which was supported by Dicey's rule of law approach of unwritten rights protected by courts. They wanted specific guarantees in view of their experience with the British rule and the fears of the minorities.[13]

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[6] See *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461.

[7] We call it 'trilogy' because *together* they constitute the vision of a particular type of society which the Constitution envisages for India; a society which affords an equal opportunity to all its people for an all-round development, and in which citizens bear responsibilities towards nation and society as such. This interrelation among the three constituents is manifested more clearly in the judicial decisions, especially in the last two decades, as the judiciary has relied on one of these to interpret the contents of the other or even of the rest of the Constitution.

[8] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966), 50 (hereinafter Austin, *Cornerstone of a Nation*). The FDs had not yet been introduced, which came into picture in 1976.

[9] See P V Kane, *History of Dharmasastra* (Poona: Bhandarkar Oriental Research Institute, 1962), vol. V:2, 1665. See also M P Singh, 'Human Rights in the Indian Tradition – Alternatives in the Understanding and Realization of the Human Rights Regime' (2003) 63 *Zeitschrift fuer auslaendisches oeffentliches Recht und Voelkerrecht* [*Heidelberg Journal of International Law*] 551-584.

[10] Austin, *Cornerstone of a Nation*, above n 8, 52.

[11] The FRs are judicially enforceable whereas the DPs are unenforceable in the courts. See, article 37, Constitution of India. For the relevance of this difference, see M P Singh, 'The Statics and the Dynamics of the Fundamental Rights and the Directive Principles – A Human Rights Perspective' (2003) 5 *Supreme Court Cases (Journal)* 1 [hereinafter Singh, 'Statics and Dynamics'].

[12] Austin, *Cornerstone of a Nation*, above n 8, 50. Shiva Rao also notes that 'the inclusion of a set of fundamental rights in India's Constitution had its genesis in the forces that operated in the national struggle during British rule.' B Shiva Rao (ed.), *The Framing of India's Constitution: A Study* (New Delhi: Indian Institute of Public Administration, 1968), 170. One can find explicit manifestation of a demand for both positive and negative rights as early as in the Constitution of India Bill of 1885.

[13] Austin, *Cornerstone of a Nation*, above n 8, 58-9. See also M Ramaswamy, *Fundamental Rights* (New Delhi: Indian Council of World Affairs, 1946), 1-7, 45-6.

A. *Fundamental rights*

Part III of the Constitution entitled 'Fundamental Rights' comprises Articles 12 to 35 which lay down various rights, their limitations and remedies for their enforcement. Article 13 ensures the fundamentality of the rights by expressly laying down that any law made before or after the commencement of the Constitution shall be void to the extent of its inconsistency with any of the fundamental rights. Executive actions are not expressly mentioned because the executive cannot deprive any one of one's rights without the authority of law.[14] The holder of the fundamental rights cannot waive them.[15] Nor can the fundamental rights be curtailed by an amendment of the Constitution if such curtailment is against the basic structure of the Constitution.[16] Some of the FRs are available only to citizens[17] while others are available to citizens as well as non-citizens,[18] including juristic persons. Notably, some of the FRs are expressly conferred on groups of people or community. [19]

[653] Traditionally, FRs are conceived as regulating relations between state and individuals.[20] This 'state-centric' notion of rights[21] has undergone changes in recent years, both under municipal and international law. The Constitution of India takes care of this change. Not all FRs are guaranteed specifically against the state and some of them are expressly guaranteed against

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[14] See *Kharak Singh v State of UP*, AIR 1963 SC 1295; *Bennett Coleman & Co. v Union of India*, AIR 1973 SC 106; *Bijoe Emmanuel v State of Kerala*, AIR 1987 SC 748.

[15] *Basheshar Nath v CIT*, AIR 1959 SC 149; *Nar Singh Pal v Union of India* AIR 2000 SC 1401.

[16] *The judiciary is the 'sole' and 'final' judge of what constitutes basic structure of the Constitution*. Over a period of time various provisions have been given the higher pedestal of basic structure or basic features of the Constitution, e.g., independence of judiciary, judicial review, rule of law, secularism, democracy, free and fair elections, harmony between FRs and DPs, right to equality, and right to life and personal liberty. It should further be noted that *the content of basic structure is still not final in the sense that more provisions could be added to this list*. See also Mahendra P Singh (ed.), *Shukla's Constitution of India*, 10th edn. (Lucknow: Eastern Book Co., 2001), 884-97 [hereinafter Singh, *Constitution of India*]; M P Jain, 'The Supreme Court and Fundamental Rights' in S K Verma and Kusum (eds.), *Fifty Years of the Supreme Court of India – Its Grasp and Reach* (New Delhi: Oxford University Press, 2000), 1, 8-13.

[17] See, for example, article 15(2) [right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them to access and use of public places, etc.]; article 15(4) [special provision for advancement of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes]; article 16 [equality of opportunity in matters of public employment]; article 19 [rights regarding six freedoms]; article 29 [protection of interests of minorities].

[18] See, for example, article 14 [right to equality]; article 15(1) [right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them]; article 20 [protection in respect of conviction of offences]; article 21 [protection of life and personal liberty]; article 22 [protection against arrest and detention]; article 25 [freedom of conscience and right to profess, practice and propagate religion].

[19] See, e.g., articles 26, 29 and 30.

[20] This view was possibly based upon the assumption that in a society only state has the power and resources both to violate rights as well as promote people's rights.

[21] Though it could be suggested, by making a reference to various provisions in the International Bill of Rights, that the scope of human rights was never restricted to mere states. For example, a reference could be made to the Preamble to the Universal Declaration of Human Rights, which mandates 'every individual and every organ of the society' to promote respect for human rights. See also Clapham who argues that the European Convention of Human Rights and some UN Conventions cover the protection of human rights against the actions of private bodies and individuals; Andrew Clapham, *Human Rights in Private Sphere* (Oxford: Clarendon Press, 1993), 91-101. But the fact remains that the structure was, and is, predominantly state-focal.

non-state bodies.[22] Even the 'state' is liberally defined in Article 12 to include 'the Government and Parliament of India and the Government and the legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India.' The expression 'other authorities' has been expansively interpreted, and any agency or instrumentality of the state will fall within its ambit.[23] In the application of this test to a corporation, it is immaterial whether the corporation is created by or under a statute.[24]

It is doubted whether the definition of 'state' could meet the challenges posed by continued shrinking of state's role and pervasive corporatisation of its activities. Dealing with this question inconclusively in *M C Mehta v Union of India*,[25] the Court has ruled that even private actors would be subject to the mandate of FRs and DPs,[26] from which it could be argued that the definition of state has the potential to deal with such transfer of functions from state to private enterprises.[27] For the removal of any doubts, the National Commission to Review the Working of the Constitution (NCRWC) has recommended for the insertion of an explanation in Article 12 providing that 'other authorities shall include *any person* in relation to such of its functions which are of a *public nature*'.[28] The judiciary is not included in the definition of 'state' in Article 12 but the courts have held that it falls within the ambit of the definition while performing non-judicial functions – i.e., legislative and administrative functions – but not in **[654]** the discharge of its judicial functions.[29] While it is true that the judiciary may not be in a position of violating FRs, [30] it is interesting to note that some constitutions and laws specifically bind the judiciary by the discipline of FRs.[31]

From amongst the FRs the right to property was deleted in 1978 and was partly placed elsewhere in the Constitution.[32] Now the Constitution contains the following FRs.

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[22] Austin cites three provisions, i.e., articles 15(2), 17 and 23 which have been 'designed to protect the individual against the action of other private citizen'. Austin, *Cornerstone of a Nation*, above n 8, 51. However, it is reasonable to suggest that the protection of even articles 24 and 29(1) could be invoked against private individuals. See also Vijayashri Sripati, 'Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)' (1998) 14 *American University International Law Review* 413, 447-48.

[23] See *Ajay Hasia v Khalid Mujib*, AIR 1981 SC 487; *Pradeep Kumar v Indian Institute of Chemical Biology* (2002) 5 SCC 111.

[24] *Som Prakash Rekhi v Union of India*, AIR 1981 SC 212.

[25] (1987) 1 SCC 395.

[26] See *Kirloskar Brothers Ltd. v ESIC* (1996) 2 SCC 682, 688; *Air India Statutory Corporation v United Labour Union* (1997) 9 SCC 377, 409.

[27] Singh, *Constitution of India*, above n 16, 28-9.

[28] The Report of the National Commission to Review the Working of the Constitution (2002), vol. I, para 3.5, available at http//lawmin.nic.in/ncrwc/finalreport.htm (accessed on 1 April 2003). [Emphasis added]

[29] *Prem Chand Garg v Excise Commissioner* AIR 1963 SC 996; *Naresh S Mirajkar v State of Maharashtra* AIR 1967 SC 1. See also generally Singh, *Constitution of India*, above n 16, 26-8.

[30] *Cf.* Seervai who gives an excellent account of those situations where the judiciary could violate FRs. H M Seervai, *Constitutional Law of India*, 4th edn. (New Delhi: Universal Book Traders, 1999), vol. 1, 389-99.

[31] See, e.g., article 1(3) Basic Law for Federal Republic of Germany; article 8(1) of the Constitution of the Republic of South Africa 1996; Section 6(3)/(4) of the UK Human Rights Act 1998. See also Surya Deva, 'Concept of "State" in the Era of Liberalisation and Withering State – An Analysis' in Dr. D S Prakasa Rao (ed.), *Constitutional Jurisprudence and Environmental Justice*: *A Festschrift Volume in the Honour of Professor A Lakshminath* (Visakhapatnam: Pratyusha Publishing Ltd., 2002), 175,185-87.

[32] See section 5, the Constitution (Forty-fourth) Amendment Act, 1978, and article 300-A.

1. Right to equality [Articles 14-18]

Article 14 prohibits the state from denying 'to any person equality before the law or the equal protection of the laws'. This seemingly general and negative guarantee of equality has been strengthened and made a potent weapon for social revolution as well as fighting injustice by subsequent provisions, which not only envisage its application to specific situations but also mandate state to take positive steps to rectify existing inequalities. The guiding principle of equality is the same, as everywhere else that like should be treated alike and that unlike should be treated differently. For this reason Article 14 permits reasonable classification, which requires an intelligible differentia between persons covered and excluded by a law and a rational relation of such differentiation to the object of the law.[33] Though a classification need not be scientifically or mathematically perfect,[34] the classification should be done in good faith and for a lawful object. The court has invalidated several laws under Article 14[35] because the classification was without a difference,[36] or the basis of classification had no nexus to the object of the law,[37] or the law established special courts for trial of certain cases or types of cases without any reasonable classification or guidelines,[38] or the law singled out a person for giving a special or discriminatory treatment.[39]

[655] The reasonable classification doctrine, however, does not exhaust the application of Article 14. In *E P Royappa v State of Tamil Nadu* the Court said: 'Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness.'[40] Later in *Maneka Gandhi v Union of India* it said that 'Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.'[41] Therefore, allegation of discrimination vis-à-vis others is no longer sine qua non for attracting Article 14[42] and the Court would strike down any arbitrary executive or legislative action unconstitutional as ipso facto violating Article 14.[43]

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[33] The test was clearly laid down by Justice Das in *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75.

[34] *Kedar Nath Bajoria v State of West Bengal* AIR 1953 SC 404.

[35] See, for an analysis of such cases, Singh, *Constitution of India* above n 16, 42-53.

[36] *K Kunhikoman v State of Kerala* AIR 1962 SC 723.

[37] *P Rajendram v State of Madras* AIR 1968 SC 1012.

[38] *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75; *Northern India Caterers Ltd. v State of Punjab* AIR 1967 SC 1581. Compare *Kathi Raning Rawat v State of Saurashtra* AIR 1966 SC 123; *Kedar Nath Bajoria v State of West Bengal* AIR 1953 SC 404.

[39] *Ameernnisa Begum v Mehboob Begum* AIR 1952 SC 91; *Ram Prasad v State of Bihar* AIR 1953 SC 215. Contra *Chiranjit Lal Chowdhury v Union of India* AIR 1951 SC 41.

[40] (1974) 4 SCC 3, 38.

[41] (1978) 1 SCC 248, 284. See further *R D Shetty v International Airport Authority* AIR 1979 SC 1628; *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487. See also, for detailed analysis of the principle of reasonableness, M P Singh, 'The Constitutional Principle of Reasonableness' (1987) 3 *Supreme Court Cases (Journal)* 31; Singh, *Constitution of India*, above n 16, 63-69.

[42] *A L Kalra v Project &Equipment Corporation* (1984) 3 SCC 316, 328.

[43] See, for example, *Mithu v State of Punjab* AIR 1983 SC 473; *Central Inland Water Corporation v B N Ganguly* (1986) 3 SCC 156; *DTC v DTC Mazdoor Congress* AIR 1991 SC 101; *Common Cause v Union of India* (1996) 6

In sum, right to equality has now become a general principle of constitutional jurisprudence, and any state action which is not 'just, fair and reasonable' violates Article 14.

Another notable development in Article 14 is that its 'equal protection of the laws' clause, which was considered a replica of the 14th Amendment of the US Constitution, has acquired a positive content. It is interpreted as an obligation of the state to take necessary action for removing the existing inequalities. A non-action of the state for the removal of existing inequalities can violate Article 14 as much as an action creating inequalities. Therefore, actions of the state for the removal of existing inequalities, which the Indian society is full of, cannot be challenged under Article 14. On the contrary their neglect or perpetuation can be challenged.[44]

The right to equality is further elaborated in Articles 15-18, to deal with specific Indian situations. Article 15 prohibits the state from making any discrimination against any citizen on grounds 'only' of religion, race, caste, sex, place of birth or any of them in its affairs, or in matters of employment.[45] Such prohibition also applies to private persons in respect of places open for the use of public. Special provisions may, however, be made for women and children.[46] Special provisions may also be made for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes (SCs) and the Scheduled Tribes (STs). Equality of opportunity and **[656]** prohibition against discrimination on grounds of religion, race, caste, sex, descent, place of birth or residence in matters of state employment is provided in Article 16. Any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of State, is not adequately represented in the services under the State', may also be made. Reservation in promotions, maintenance of seniority in promotion and filling up of reserved but unfilled carried forward vacancies is also provided for the SCs and the STs.

Special provisions for backward classes have been a matter of intense political and legal controversies, some of which have been settled in course of time.[47] After a different view initially,[48] it is now well settled that the provisions for special treatment to backward classes are not exceptions but only a facet of equality.[49] It has also been accepted that 'caste' may be the criterion to identify backward classes, for caste is often representative of a social class.[50]

SCC 530; *Shivsagar Tiwari v Union of India* (1996) 6 SCC 558. See also, for judicial application of Article 14 to cases related to administrative process and conferment of benefits by the government, Jain, above n 16, 37-43.

[44] See Singh, *Constitution of India*, above n 16, 38; *St. Stephan's College v University of Delhi*, AIR 1992 SC 1630, 1662; *Indira Sawhney v Union of India*, AIR 2000 SC 498.

[45] Article 15(1) and article 16(1)/(2), respectively. Article 16(2) adds two more grounds (descent and residence) on which state is prohibited from discrimination. The Parliament can, however, make a law laying down requirement of residence regarding a class or classes of employment under Article 16(3).

[46] Article 15(3). See also *Yusuf Abdul Aziz v State of Bombay* AIR 1954 SC 321; *Government of Andhra Pradesh v P B Vijay Kumar* AIR 1995 SC 1648.

[47] See, for detailed discussion, Singh, *Constitution of India*, above n 16, 75-96. See, for analysis of *Mandal Commission* case, Jain, above n 16, 52-57.

[48] *M R Balaji v State of Mysore* AIR 1963 SC 649; *Devadson v Union of India* AIR 1964 SC 179.

[49] *State of Kerala v N M Thomas* AIR 1976 SC 490; *Indra Sawhney v Union of India* AIR 1993 SC 477.

[50] *P Rajendran v State of Madras* AIR 1968 SC 1012; *Indra Sawhney v Union of India* AIR 1993 SC 477. Earlier in *M R Balaji v State of Mysore* AIR 1963 SC 649 the Court was not inclined to give caste much say in determination of backwardness.

Economic backwardness or poverty *alone* cannot be the basis for backwardness. To ensure percolation of benefits of special provisions to the most backward among backwards, creamy layer is excluded from the backward classes. As the policy of reservation need to be balanced with other social policy objectives,[51] barring any extraordinary situation, total reservation in a year should not exceed 50 per cent.[52] Although reservation in promotions is permissible for SCs and STs, it cannot be done for other backward classes.[53]. Despite the policy of reservations having made some difference in the position of backward classes, doubts are expressed about its efficacy and about its misuse for political gains.[54] Critics argue that the government should initiate other positive steps instead of continuing with the reservation policy, especially in view of increasing privatisation of jobs.[55] Supporters of affirmative action epitomised by reservation, on the other hand, argue that even private sector should be subject to the mandate of FRs requiring affirmative action.

Article 17, which prohibits untouchability – a practice of not coming in touch with some people for reasons of pollution and purity – and makes its practice a punishable offence, is another manifestation of equality principle. In pursuance of Article 17 Parliament enacted the Protection of Civil Rights Act, 1955. Further, Article 18 prohibits conferment of any title except military and academic titles. Conferment of *Bharat* **[657]** *Ratna*, *Padma Vibhushan*, *Padma Bhushan* and *Padam Shri* does not violate Article 18 as they do not constitute 'title' within its meaning and are not suffixes or prefixes to the names of the recipient.[56]

2. Right to freedom [Articles 19-22]

In this group of rights while the freedoms under Article 19 are available only to citizens, freedoms under other provisions are available to all persons. Article 19 confers six freedoms on the citizens: freedom of speech and expression; right to assemble peacefully and without arms; right to form associations or unions; right to move freely throughout the territory of India; right to reside and settle in any part of the territory of India; and right to practise any profession, or to carry on any occupation, trade or business.[57] The judiciary has, however, extended the scope of Article 19 much beyond these explicit FRs by reading various FRs into it.[58] Till now the courts have, inter alia, recognised the right to freedom of press including volume of contents as well as

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[51] See, for example, article 335 which provides that claims of the SCs/STs should be taken into consideration 'consistently with the maintenance of efficiency of administration'.

[52] It should be noted that in *State of Kerala v N M Thomas* AIR 1976 SC 490 the Supreme Court seems to suggest that the state could make reservation up to any extent.

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

[54] See, for example, Rajeev Dhavan, 'Reservation for All?' *The Hindu*, available at <http://www.thehindu.com/2003/06/13/stories/2003061300361000.htm> (13 June 2003); S S Gill, 'Diluting Mandal' *The Hindu*, available at <http://www.thehindu.com/2003/06/24/stories/2003062400731000.htm> (24 June 2003).

[55] See Neera Chandhoke, 'Justifying Affirmative Action' *The Hindu*, available at <http://www.thehindu.com/2003/06/04/stories/2003060401071000.htm> (6 June 2003).

[56] *Balaji Raghavan v Union of India* AIR 1996 SC 770.

[57] Originally article 19 conferred seven freedoms but the right to 'acquire, hold and dispose of property' was omitted from the list by the Constitution (44th Amendment) Act 1978 and made a constitutional right under Article 300-A.

[58] See generally Jain, above n 16, 43-51.

circulation,[59] right to commercial advertisement,[60] right to know including right to receive and impart information,[61] right to peaceful demonstrations,[62] right to take out processions,[63] and the right to carry on trade or business on street pavements.[64] None of these rights is, however, absolute and the state may by law impose 'reasonable restrictions' on them. The restrictions can, however, be imposed only on specified grounds given in clauses (2) to (6) of Article 19, which are different for different rights, such as sovereignty and integrity of India, security of state, public order, and morality.[65] The judiciary finally determines the question whether a restriction relates to the relevant ground and whether it is reasonable.[66] The burden of proving the reasonableness of a restriction lies on the state.[67]

[658] Article 20 affords three rights:[68] protection against *ex post facto* laws,[69] double jeopardy[70] and self-incrimination.[71] Article 21 lays down that 'no person shall be deprived of his life or personal liberty except according to the procedure established by law.' Though framed in negative terms, this provision has proved most fertile in the evolution of FRs.[72] 'Life' in this article has been interpreted to mean more than mere physical existence;[73] it 'includes right to live with human dignity and all that goes along with it'.[74] Ever-widening horizon of Article 21 is illustrated by the fact that the Court has, inter alia, read into it the right to health,[75] livelihood,[76]

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[59] *Express Newspapers (P) Ltd. v Union of India* AIR 1958 SC 578; *Sakal Papers (P) Ltd. v Union of India* AIR 1962 SC 305; *Bennett Coleman & Co. v Union of India* AIR 1973 SC 106.

[60] *Tata Press Ltd. v MTNL* AIR 1995 SC 2438, overruling *Hamdard Dawakhana v Union of India* AIR 1060 SC 554.

[61] *Secretary, Ministry of Information & Broadcasting v Cricket Association of Bengal* (1995) 2 SCC 161. See also the Freedom of Information Act 2002, and *Union of India v Association for Democratic Reforms*, AIR 2002 SC 2112; *People's Union for Civil Liberties (PUCL) v Union of India*, AIR 2003 SC 2363.

[62] *Kameshwar Singh v State of Bihar* AIR 1962 SC 1116. See also *CPI (M) v Bharat Kumar* AIR 1998 SC 184; *T K Rangarajan v State of Tamil Nadu* AIR 2003 SC 3032.

[63] *Babulal Parate v State of Maharashtra* AIR 1961 SC 884.

[64] *Sodan Singh v NDMC*, AIR 1989 SC 1988.

[65] See, for discussion in the Constituent Assembly on putting limitations on FRs generally, Austin, *Cornerstone of a Nation*, above n 8, 68-74.

[66] See generally, Singh, *Constitution of India*, above n 16, 103-05, 113-22, 138-51.

[67] *Mohd. Faruk v State of M P* AIR 1970 SC 93.

[68] See, for details, Singh, *Constitution of India*, above n 16, 151-64.

[69] *Hathisingh Manufacturing Co. v Union of India* AIR 1960 SC 923; *S D Babubhai v State of Gujarat* AIR 1991 SC 2173; *Kedar Nath Bajoria v State of West Bengal* AIR 1953 SC 404.

[70] *Maqbool Hussain v State of Bombay* AIR 1953 SC 325. See also section 300 of the Code of Criminal Procedure 1973, the scope of which is even wider than article 20.

[71] *Nandini Sathpathy v P L Dani* AIR 1978 SC 1025. See also section 342 of the Code of Criminal Procedure 1973.

[72] See generally Jain, above n 16, 22-37, 51-52.

[73] See, for the evolution of such an interpretation, *Kharak Singh v State of UP* AIR 1963 SC 1295; *Sunil Batra v Delhi Administration* (1978) 4 SCC 494; *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180; *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746; *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Consumer Education & Research Centre v Union of India* (1995) 3 SCC 42; *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490; *Visakha v State of Rajasthan* AIR 1997 SC 3011. In some of these cases the Court has relied upon the observation of Justice Field in *Munn v Illinois* 94 US 113.

[74] *Francis Coralie v Union Territory of Delhi*, AIR 1981 SC 746, 753 (*per* Justice Bhagwati).

[75] *Parmanand Kataria v* Union of India AIR 1989 SC 2039; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.

free and compulsory education up to the age of 14 years,[77] unpolluted environment,[78] shelter,[79] clean drinking water,[80] privacy,[81] legal aid,[82] speedy trial,[83] and various rights of under-trials, convicts and prisoners.[84] It is important to notice that in a majority of cases the judiciary relied upon DPs for such extension. The judiciary has also invoked Article 21 to give direction to government on matters affecting lives of general public,[85] or to invalidate **[659]** state actions,[86] or to grant compensation for violation of FRs.[87] Another innovative use of this provision has been in reaching violation of right to life and personal liberty by even private persons, both natural and juristic,[88] which is important and welcome in view of growing privatisation of state activities.

Lastly, Article 22 grants certain rights against arrest and detention. An arrested person cannot be detained without being informed, as soon as possible, of the grounds of arrest and (s)he has the right to consult and be represented by a lawyer of his/her choice.[89] Moreover, every arrested person must be produced before a magistrate within 24 hours of the arrest and no detention beyond 24 hours is permissible without the authority of the court. These protections have been further strengthened by the detailed guidelines, to be followed during arrest and detention, laid down by the Supreme Court.[90] Later part of Article 22 – clauses (4) to (7) –, unfortunately,

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[76] *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180; *DTC Corporation v DTC Mazdoor Congress* AIR 1991 SC 101.

[77] *Unni Krishnan v State of AP* (1993) 1 SCC 645.

[78] See, for example, *Indian Council for Enviro Legal Action v Union of India* (1996) 3 SCC 212; *M C Mehta v Union of India* (1996) 6 SCC 750; *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647; *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664.

[79] *Gauri Shankar v Union of India* (1994) 6 SCC 349.

[80] *A P Pollution Control Board II v M V Nayudu* (2001) 2 SCC 62.

[81] *Kharak Singh v State of UP* AIR 1963 SC 1295; *Govind v State of MP* AIR 1975 SC 1378; *R Raj Gopal v State of Tamil Nadu* (1994) 6 SCC 632; *PUCL v Union of India* AIR 1997 SC 568; *'X' v Hospital Z* (1998) 8 SCC 296.

[82] *M H Hoskot v State of Maharashtra* AIR 1978 SC 1548; *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1369; *Khatri v State of Bihar* AIR 1981 SC 928; *Suk Das v Union Territory of Arunachal Pradesh* AIR 1986 SC 991.

[83] *Hussainara Khatoon (I) to (VI) v Home Secretary, Bihar* (1980) 1 SCC 81, 91, 93, 98, 108 and 115; *Kadra Pahadiya v State of Bihar* AIR 1982 SC 1167; *Common Cause v Union of India* (1996) 4 SCC 33 and (1996) 6 SCC 775; *Rajdeo Sharma v State of Bihar* (1998) 7 SCC 507 and (1999) 7 SCC 604.

[84] *Sunil Batra v Delhi Administration* AIR 1978 SC 1675; *Prem Shankar v Delhi Administration* AIR 1980 SC 1535; *Munna v State of UP* AIR 1982 SC 806; *Sheela Barse v Union of India* AIR 1986 SC 1773.

[85] See, for example, *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Upendra Baxi v State of UP* (1983) 2 SCC 308 and (1986) 4 SCC 106; *Visakha v State of Rajasthan* AIR 1997 SC 3011; *D K Basu v State of West Bengal* AIR 1997 SC 610.

[86] See, for example, *Kharak Singh v State of UP* AIR 1963 SC 1295; *Mithu v State of Punjab* AIR 1983 SC 473.

[87] *Rudul Sah v State of Bihar* (1983) 4 SCC 141; *Bhim Singh v State of J & K* (1985) 4 SCC 677; *Nilabati Behra v State of Orissa* (1993) 2 SCC 746.

[88] See, for example, *M C Mehta v Union of India* (1987) 1 SCC 395; *Consumer Education & Research Centre* v.*Union of India* (1995) 3 SCC 42; *Kirloskar Brothers Ltd.* v *ESIC* (1996) 2 SCC 682; *Bodhisattwa Gautam v Subra Chakraborty* AIR 1996 SC 922; *Vishaka v State of Rajasthan* AIR 1997 SC 3011; *'X' v Hospital 'Z'* (1998) 8 SCC 296; *M C Mehta v Kamal Nath* AIR 2000 SC 1997.

[89] See also section 303 of the Code of Criminal Procedure 1973.

[90] *Joginder Kumar v State of UP* AIR 1994 SC 1349; *D K Basu v State of West Bengal* AIR 1997 SC 610.

recognizes the existence of preventive detention but tries to balance it with individual liberty.[91] At a time when many states are enacting special preemptive or preventive laws to deal with growing threat of terrorism or disruption, these provisions seem to justify their existence in the Constitution.

3. Right against exploitation [Articles 23-24]

The constitutional intent of establishing an egalitarian society is further manifested in the provisions under this head which are directed against protecting liberties of vulnerable persons or persons placed in special circumstances. The former provision prohibits trafficking in human beings, *begar* (involuntary and unpaid work) and other similar form of forced labour, and makes any contravention of this mandate a punishable offence.[92] Non-payment of minimum wages would constitute *begar*, for the compulsion may be either a result of physical force or of legal provisions or of want, hunger and poverty.[93] Even though convicted prisoners undergoing rigorous imprisonment may be compelled to work, they must be paid equitable wages otherwise it would **[660]** amount to forced labour.[94] Article 24 mandates that 'no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment'. Though the Child Labour (Prohibition and Regulation) Act 1986 and the judicial directions[95] have supplemented this provision, the child labour is still widely prevalent.

4. Right to freedom of religion [Articles 25-28]

In a country of immensely diverse religions and religious beliefs and practices, it was a necessary and uphill task for the Constitution Makers to formulate provisions on religious freedom. The Constitution guarantees the freedom of conscience and right freely to profess, practice and propagate religion to every person. But it is subject to *public order, morality, health and other provisions of Part III*.[96] Moreover, state can regulate any economic, financial, political or other secular activity associated with the religious practice and make laws for social welfare and reform.[97] In doing so, the Constitution tries to ensure that the religious freedom is not misused to perpetuate social evils and to defeat other equally vital constitutional objectives.[98] Besides the individual freedom of religion in Article 25, Article 26 confers on the religious denominations the right to establish and maintain institutions for religious and charitable purposes; to manage

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[91] For example, detention for longer than three months is prohibited unless recommended by the Advisory Board. Moreover, the authority making the order shall communicate the grounds of the order and shall afford an earliest opportunity of making a representation against the order. See, for detailed analysis, Singh, *Constitution of India*, above n 16, 186-201.

[92] The Parliament has enacted the Immoral Traffic (Prevention) Act 1956 and the Bonded Labour System (Abolition) Act 1976. See also *Gaurav Jain v Union of India* AIR 1997 SC 3021; *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.

[93] *PUDR v Union of India* (1982) 3 SCC 235 (*Asiad Workers'* case). See generally Jain, above n 16, 17-21.

[94] *State of Gujarat v Hon'ble High Court of Gujarat* (1998) 7 SCC 392. See, for a critical analysis of this decision, Surya Deva, 'Juxtaposing Prisoners' Wages and Compensation to Victims: A Critique' (2001) 107 *Criminal Law Journal* 28 (Jour.).

[95] *M C Mehta v Union of India* (1996) 6 SCC 756; *Bandhua Mukti Morcha v Union of India* AIR 1997 SC 2218.

[96] Article 25(1).

[97] Article 25(2)

[98] See, for example, *Manohar Joshi v Nitin B R Patil* (1996) 1 SCC 169; *Ramesh Yeshwant Prabhoo (Dr) v Prabhakar K Kunte* (1996) 1 SCC 130; *Church of God (Full Gospel) in India v K K R Majestic Colony Welfare Association* (2000) 7 SCC 282.

own affairs in matters of religion; to own and acquire and to manage moveable and immovable property. Further, the Constitution prohibits the state from imposing any tax the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.[99] It also prohibits religious instruction in any educational institution wholly maintained out of state funds and commands that no person attending educational institution recognised or aided by the state shall be required to take part in any religious instruction imparted in that institution.[100]

5. Cultural and educational rights [Articles 29-30]

The Constitution makes special provisions to protect cultural and educational interests of minorities or other distinct group of citizens. Any section of citizens having a **[661]** distinct language, script or culture of its own has a right to conserve the same.[101] Secondly, 'no citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them'.[102] The effect of this provision, which in a way only strengthens and extends the equality principle contained in Articles 14 and 15(1),[103] is that even an educational institution run by a minority community, if maintained or aided by state, cannot deny admission to children of other communities. Initially the Court held that such a minority institution could reserve up to 50 per cent of the total seats for the members of that minority community.[104] Later it has left the percentage to be determined by the state in which the minority institution is situated.[105] But the reasonableness of the percentage is subject to judicial scrutiny.

Thirdly, all religious or linguistic minorities have the 'right to *establish and administer* educational institutions of their choice'.[106] Until recently the Court has very liberally interpreted this right giving almost an absolute right to the minorities to establish an educational institution either to teach religion or to give secular education or to teach its own language or any other language and to teach any courses or curricula. The only condition is that for seeking recognition or affiliation from the state, the institution must satisfy the academic requirement for such recognition or affiliation. Similarly, in the matters of administration the minority institutions are completely free but as educational institutions they have to be protected from misadministration and therefore to ensure good administration in the interest of the minority institution, the state may make necessary regulations. Moreover, in the matter of admissions the state aided minority institutions are subject to the requirement stated above.[107] Lastly, while granting aid to educational institutions, state shall not discriminate on the ground that it is under the

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[99] Article 27. See also *Commissioner, Hindu Religious Endowments v L T Swamiar* AIR 1954 SC 282.

[100] Article 28(1)/(3). See the speech of Dr Ambedkar for rationale behind such provision; 7 *Constituent Assembly Debates* [hereinafter *CADs*] 883-34.

[101] Article 29(1).

[102] Article 29(2).

[103] For, difference in scope of articles 15(1) and 29(2), Singh, *Constitution of India*, above n 16, 224.

[104] *St. Stephens College v University of Delhi* AIR 1992 SC 1630.

[105] *TMA Pai Foundation v State of Karnataka* (2002) 8 SCC 481.

[106] Article 30(1) [emphasis added].

[107] *St. Stephens College v University of Delhi* AIR 1992 SC 1630. See generally Singh, *Constitution of India*, above n 16, 226-34.

management of a religious or linguistic minority.[108] Thus, the minorities are entitled not only to establish and administer educational institutions of their choice, but they are also entitled to equal financial aid from the state.

6. Right to legal remedies [Article 32]

There is no right without a remedy is a well-known legal maxim. The Constitution of India takes special care of providing an effective legal remedy as one of the FRs. Article 32 gives the right to approach the Supreme Court directly for the enforcement of any of the FRs. The Court has interpreted and enforced this right liberally in providing access to the Court by relaxing several formalities and technicalities and by moulding **[662]** suitable remedy including preventive action, restitution and compensation.[109] Article 32 empowers the Court 'to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the' FRs.[110] Article 32 along with other relevant provisions – such as the power of the Court to 'pass such decrees or make such orders as is necessary for doing complete justice in any cause or matter pending before it';[111] binding force of its decisions on all courts in India;[112] and the requirement that all civil and judicial authorities within the territory of India are constitutionally obliged to act in aid of the Court[113] – has proved very effective and efficacious. Besides the Supreme Court, the High Courts also have the power to enforce the FRs as well as other legal rights.[114]

The most notable aspect of FRs is that they are progressively expanding in the best traditions of human rights anywhere in the world and are constantly acquiring a positive content requiring affirmative action in the context of the Indian society where large masses of people are not yet able to get their minimum necessities of life satisfied.

B. *Directive principles*

Part IV of the Constitution containing Articles 36-51 deals with DPs. As mentioned earlier, DPs signify the belief of the Constitution Makers in the interdependence of civil and political rights on the one hand and the socio-economic rights on the other.[115] Article 38 signifies the essence of the DPs by declaring that the state shall not only strive to promote the welfare of the people by securing a social order in which justice – social, economic and political – shall inform all the institutions of the national life, but also try to minimise the inequalities in income. Some other DPs are: right to adequate means of livelihood; distribution of ownership and control of material

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[108] Article 30(2).

[109] See *Daryao v State of UP* AIR 1961 SC 1457, 1461; *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802, 813-14; *Rudul Shah v State of Bihar* AIR 1983 SC 1086.

[110] Article 32(2).

[111] Article 142. See also generally Singh, *Constitution of India*, above n 16, 280-82. It must be noted that the High Courts have no such special power.

[112] Article 141.

[113] Article 144.

[114] Article 226(1).

[115] See Rao, above n 12, 319. He also outlines the historical roots of socio-economic obligations of state in Indian context, Id., 319-20. See also Austin, *Cornerstone of a Nation*, above n 8, 76-77.

resources of the community so as to subserve the common good; operation of the economic system in a way that it does not result in the concentration of wealth and means of production to the common detriment; equal pay for equal work; equal justice and free legal aid; organisation of village panchayats as units of self-government; right to work and public assistance to needy; maternity relief; living wages and just conditions of work; early childhood care and education for all children up to 6 years of age; promotion of educational and economic interests of SCs, STs, and other weaker sections of society; improvement of public health; protection of environment; and promotion of international peace and security.

[663] Though the DPs are not justiciable, they are 'nevertheless *fundamental in the governance* of the country and it *shall* be the duty of the state to apply these principles in making laws'.[116] But if the DPs are so fundamental to the central objective of the Constitution, then why they are not made enforceable in a court of law and 'whether there is any gain, on balance, from introducing these paragraphs of generalities into a Constitution'.[117] In fact, some members of the Assembly had demanded a justiciable status for the DPs but finally agreed for a compromise because justiciability might not have been appropriate for them.[118] It could be argued that there is a difference in the *nature* of enforciability enjoyed by FRs and DPs; the FRs are enforceable in the court whereas the DPs are enforceable by the electorates.[119] Mere lack of justiciability should not be a ground for discrediting their importance vis-à-vis the FRs or otherwise.[120]

After initial deviation,[121] the Supreme Court accepted that between FRs and DPs, neither is superior or inferior; they are complementary of each other and that the former are a means to achieve the goals indicated in the latter.[122] The issue was put beyond any controversy in *Minerva Mills Ltd. v Union of India* where the Court held that the 'harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution'.[123] Since then the Court has invoked the DPs not only to uphold the validity of legislative measures directed towards socio-economic welfare[124] but also to derive the contents of FRs.[125] The right to life and personal liberty under Article 21 has been the most significant

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[116] Article 37. [Emphasis added]

[117] K C Wheare, *Modern Constitutions*, 69, as quoted by Austin, *Cornerstone of a Nation*, above n 8, 114.

[118] See Austin, *Cornerstone of a Nation*, above n 8, 78-79. See also Rao, above n 12, 321-22. In fact, unenforceable nature of DPs remained a constant source of criticism at various drafting stages; Rao, above n 12, 324-26, 328-29.

[119] Ambedkar observed: '[The DPs become] justifiable for another reason. … [Persons in power] may not have to answer for their breach in a court of law. But [persons in power] will certainly have to answer for them before the electorate at election time.' VII *CADs* 41-42.

[120] See Singh, 'Statics and Dynamics', above n 11.

[121] *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

[122] *C B Boarding & Lodging v State of Mysore* AIR 1970 SC 2042; *Kesvananda Bharti v State of Kerala* AIR 1973 SC 1461; *Minerva Mills Ltd. v Union of India* AIR 1980 SC 1789; *Unni Krishnan v State of AP* (1993) 1 SCC 645. See also Rajiv Dhavan, 'Republic of India: The Constitution as the Situs of Struggle: India's Constitution Forty Years On' in Lawrence W Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Seattle: University of Washington Press, 1992), 373, 382-83, 405 and 413-16.

[123] AIR 1980 SC 1789, 1806.

[124] See, for example, *State of Bombay v F N Balsara* AIR 1951 SC 318; *State of Bihar v Kameshwar Singh* AIR 1952 SC 352; *Mohd. Hanif Qureshi v State of Bihar* AIR 1958 SC 731; *Orient Weaving Mills v Union of India* AIR 1963 SC 98.

[125] See the cases cited above in notes 73-88. See also Jain, above n 16, 65-76.

beneficiary of this trend; it has almost become a residuary FR encompassing each and every aspect of dignified and meaningful life. This trend of integration of FRs and DPs, in a way, indicates that the executive and legislature have not always taken their mandatory obligations under Part IV seriously, and the judiciary has to remind them again and again about their constitutional mandate.[126] But the positive outcome is that the government **[664]** has not resisted such integration and has, in fact, amended the Constitution to acknowledge such integration by making right to education, to all children between the age of 6 to 14, a FR.[127] It can be expected that more DPs would cross the bridge in near future, though the impact of such crossing over on realisation of rights is still unclear. The implementation of people's rights, whether FRs or DPs, continues to be a matter of concern. In view of that the NCRWC has recommended for establishing a body which can review the level of implementation of DPs.[128] It is hoped that the cumulative effect of adopting an integrated approach towards the FRs and DPs as well as better coordination between the three wings of the government would help in the realisation of constitutional goals at a much faster pace.

C. *Fundamental duties*

Though the Constitution (42nd Amendment) Act 1976 is widely considered infamous for initiating various deplorable steps, it deserves it credit for the introduction of Article 51-A in the Constitution laying down FDs. As mentioned earlier, the amendment also brings the Constitution closer to the Indian tradition of duty (*dharma*).[129]

The FDs include the duty to abide by the Constitution and respect its ideals and institutions, the national flag and the national anthem; to uphold and protect the sovereignty, unity and integrity of India; to defend the country and render national service when called upon to do so; to promote harmony and the spirit of brotherhood; to renounce practices derogatory to the dignity of women; to protect and improve the national environment; to safeguard public property; and to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of achievement. The NCRWC in its report recommended for inclusion of two more duties in Article 51A: a duty to foster a spirit of family values and responsible parenthood in the matter of education and general well-being of children; and the duty of industrial organsiations to provide education to children of their employees.[130] The Constitution has, in fact, been amended to impose a constitutional obligation on

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[126] For example, Article 45 originally had provided that that state shall provide 'free and compulsory' education to all children up to the age of 14 years 'within a period of ten years from the commencement of the Constitution'. Failure of state to do so even after 42 years lead to the judicial recognition of right to education as a FR in *Mohini Jain v State of Karnataka* (1992) 3 SCC 666 and *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645. See also the obligation to enact the Uniform Civil Code under Article 44 and the Supreme Court judgments in *Mohd Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945 and *Sarla Mudgal v Union of India* AIR 1995 SC 1531.

[127] The Constitution (86th Amendment) Act 2002 inserted Article 21A in the Constitution and also made appropriate modifications in corresponding DP under Article 45.

[128] Above n 28, paras 3.35.2 and 3.35.3. The Commission has also suggested insertion of certain new principles and a change in the heading of Part IV. It has recommended for the insertion of the term 'Action' in the heading of Part IV so as to read as 'Directive Principles of State Policy and Action'. Id., para 3.26.3.

[129] See above n 9.

[130] Above n 28, para 3.40.4.

parents/guardians to provide opportunities for education of children between 6 to 14 years of age.[131]

The FDs are not legally binding unless made so by law.[132] In that case, their observance is voluntary. In some cases, however, the Supreme Court has referred to FDs. For **[665]** example, the Court made a reference to the duty 'to renounce practices derogatory to the dignity of women' for laying down guidelines against sexual harassment of women at the work place.[133] It also referred to the duty to show respect to national anthem and national flag,[134] and the duty 'to protect and improve the natural environment'.[135] But these are too few and isolated instances to give adequate space to FDs in the trilogy. FDs need to be properly brought in focus on the lines suggested by the NCRWC and the Justice Verma Committee.[136] The Supreme Court has also directed the central government to enact a law for the enforcement of FDs in pursuance of the Verma Committee's recommendations.[137]

IV. EXECUTIVE AND LEGISLATURE: COMPOSITION, STRUCTURE, POWERS AND INTERRELATION

A. *Making a Choice: Parliamentary form of government*

One important task for the Founding Fathers was to make a decision about the nature of the government, i.e., the exact nature and composition of the executive and legislature, and the interrelation between the two. After thorough discussion on different forms of governments, particularly the parliamentary and presidential forms, the Constitution Makers decided to adopt a parliamentary form of government. The political background in India and the practice and traditions evolved during the British rule inevitably influenced this decision of the Assembly.[138] Thus, rejecting all suggestions of presidential form of government or fixed tenure for ministers, the Assembly accepted the principle of parliamentary executive, collectively responsible to the Lower House of the legislature at the Central as well as state levels.[139] The adoption of the

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[131] The Constitution (86th Amendment) Act 2002, inserting Article 51A(*k*).

[132] *Surya Narain v Union of India* AIR 1982 SC 1.

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

[134] *Bijoi Emmanuel v State of Kerala*, AIR 1987 SC 1

[135] *Banwasi Seva Ashram v State of UP*, AIR 1987 SC 374.

[136] Above n 28, para 3.40.3. See also the report of the Justice Verma Committee on Operationalisation of Fundamental Duties of Citizens.

[137] See 'SC for enforcing citizens' duties', available at http://www.thehindu.com/2003/08/13/stories/2003081302801300.htm (accessed on 13 August 2003).

[138] Rao, above n 12, 334. The fact of Indians' familiarity and inclination to the parliamentary form of government is also manifested from the following observation of Shri K M Munshi, one of the prominent members of the Assembly:

> We must not forget a very important fact that during the last one hundred years Indian public life has largely drawn upon the tradition of the British constitutional law. Most of us, and during the last several generations before us, public men in India, have looked up to the British model as the best. … Our constitutional traditions have become parliamentary. VII *CADs* 984-85.

[139] IV *CADs* 921.

parliamentary executive diluted the doctrine of separation of powers[140] and preferred accountability to stability of the government.

[666] B. *Composition, structure and powers of executive*

Like any other parliamentary form of government, the executive in India consists of a titular head of the state and executive, the President of India, and the real executive, the Council of Ministers headed by the Prime Minister (PM). The President is elected for five years[141] by an electoral college consisting of elected members of both Houses of Parliament and the elected members of the Legislative Assemblies of the States.[142] All executive powers of the Union are formally vested in the President who exercises them through the Council of Ministers.[143] The President appoints the PM and on his/her advice the other ministers.[144] In the appointment of PM the President must keep in mind that (s)he must have the confidence of the Lower House of Parliament, i.e., the *Lok Sabha*. The appointment of PM presents no difficulty if one political party has a clear majority in the House. Delicate problems, however, arise when no single party commands the majority support. In that case the President has to exercise his/her discretion guided by the established conventions.[145] Normally the PM is appointed from amongst the members of *Lok Sabha* but a member of the Upper House of Parlaiament, i.e., the *Rajya Sabha* or even a non-member can also be appointed.[146] If a non-member is appointed as PM or minister, (s)he must, however, become a member of either House within a period of six months.[147] The PM and other ministers hold their office during the pleasure of the President, which in the case of PM means until (s)he carries the confidence of *Lok Sabha* and in the case of other ministers until they carry the confidence of PM.[148]

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[140] Article 50 lays down that the state shall ensure separation of executive from judiciary. See also *Ram Jawaya Kapoor v State of Punjab* AIR 1955 SC 549, 556; *Asif Hamid v State of J & K* AIR 1989 SC 1899, 1906.

[141] Article 56.

[142] Article 54.

[143] Article 53.

[144] Article 75. It is worth mention that during drafting of the Constitution the framers had proposed to insert an Instrument of Instructions in the Constitution to guide the President in the performance of his/her functions including of appointing the PM. Para 2 of the Instrument had enjoined the President "to appoint a person who has been found by him most likely to command a stable majority in Parliament as the Prime Minister". The Founding Fathers, however, dropped the idea of inserting an Instrument of Instructions in the Constitution at the last stage. See Rao, above n 12, 84-6.

[145] As the Constitution does not require that a person must prove his/her majority in *Lok Sabha* before being appointed as PM, the President has to make decision on the basis of expectations. (S)he can ask for documentary or other type of proof from the 'potential PM' that such person is expected to command the confidence of the House. Ordinarily, the President may invite the leader of the largest party/coalition to head the government but (s)he is not bound, either by the Constitution or convention, to do so if (s)he thinks that such party may not command the majority support. See, for a historical analysis of the President's power, A G Noorani, *Constitutional Questions in India – The President. Parliament and the States* (Oxford University Press, 2000), 104-14.

[146] See *S P Anand* v. *H D Deve Gowda* (1996) 6 SCC 734. The Court also held that it is not an established convention, either in the UK or India, that the PM must be from the Lower House only.

[147] *Ibid.* Also see *B R Kapoor v State of Tamil Nadu* (2001) 7 SCC 231 and S *R Chaudhary v State of Punjab* (2001) 7 SCC 126.

[148] *Ibid.*

The executive in the States is also constituted on the same principles as at the Centre with the difference that the titular head in the states – the Governor – is appointed and not elected. All executive powers of the State are vested in the Governor which (s)he **[667]** exercises through a Council of Ministers headed by the Chief Minister.[149] The President appoints the Governor and the Governor appoints the CM and on his/her advice other ministers.[150] The Governor holds the office for five years unless removed or resigns earlier.[151] The appointment and removal of the Governor is a contentious issue in the working of the Constitution.[152] The Central government has misused its powers on party considerations. Consequently, the Governor's office – which was sought to bring harmony,[153] work as lubricator[154] and linchpin of the constitutional apparatus of the States[155] and perform the role of a bridge between the Centre and State – is now related to bringing frictions, serving partisan ends, dismissal of State Governments for political expediency, performing the role of Centre's agent, etc.[156]

C. *Exercise of executive powers: Position of President/Governor vis-a-vis PM/CM and Council of Ministers*

Although, as mentioned above, the Constitution vests the executive power[157] of the Union in the President to be exercised by him/her directly or through officers subordinates to him/her,[158] it is exercised by the Council of Ministers. The Council of Ministers is the apex executive body which takes all major policy decisions, initiates or approves proposed legislations, recommends appointments, settles inter-departmental disputes, co-ordinates various activities of the government and reviews the implementation of policies. The Constitution does not contemplate any situation in which the President can function without the aid and advice of the Council of Ministers; the Council of Ministers continues to function even on dissolution of the *Lok Sabha*.[159] Explaining the position of the President in the Assembly, Dr. Ambedkar observed:

> *[T]he President occupies the same position as the King under the English Constitution.* He is head of the State but not of the executive. He represents the nation but does not rule the nation. … His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known. … **[668]** *The President of Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to*

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[149] Article 165 provides for the office of the Advocate General also, whose primary responsibility is to tender advice to the government on legal matters.

[150] Articles 155 and 164.

[151] Article 156.

[152] See M P Singh, 'Recall of Governor', *The Hindu*, July 31, 2001 op.1.

[153] VIII *CADs* 449 (*per* Smt. G Durga Bai).

[154] *Id*., 444-46 (*per* Dr. P K Sen).

[155] *Sarkaria Commission Report on Centre-State Relations* (1988), vol. I, 120.

[156] See generally Granville Austin, *Working a Democratic Constitution – The Indian Experience* (New Delhi: Oxford University Press, 1999), 574-76 [hereinafter Austin, *Working a Democratic Constitution*], and the material cited therein. See also Noorani, above n 145, 38-50.

[157] The term 'executive power' is not defined in the Constitution but is generally understood to indicate the residue of legislative and judicial functions. Maintenance of law and order, taking policy decisions regarding governance of the country and external affairs, and executing the laws are some of the basic functions performed by the executive.

[158] Article 53.

[159] *U N Rao v Indira Gandhi* AIR 1971 SC 1002.

> *their advice nor can do anything without their advice. … The President of the Union has no power to* [dismiss them so] *long as his Ministers command a majority in Parliament.*[160]

Article 74, which states this position, originally read: "There shall be a Council of Ministers with the Prime Minister at the head to aid and advice the President in the exercise of his functions." It was often argued, even by the first President of India Dr Rajendra Prasad,[161] that Article 74 imposed a duty on the Council of Ministers to advise the President but did not require the President to follow such advice. But the predominant opinion in this regard has been what is stated above. The Supreme Court has also upheld that position more than once.[162] An amendment of the Constitution in 1976 to the effect that "the President *shall*, in the exercise of his functions, act in accordance with such advice" has removed all doubts in this regard. As this amendment tilted the balance towards the Council of Ministers, another amendment in 1978 further added that the President *may* ask the Council of Ministers to reconsider any advice given by it, but is bound to follow the reconsidered advice.[163] The latter amendment resonates with what Nehru said in the Assembly: "At the same time we did not want to make the President just a mere figurehead like the French President. We did not give him any real power but we have made his position one of great authority and dignity".[164]

A few situations that by their very nature may require the President to act without the aid and advice of the Council of Ministers are: the appointment of PM, dismissal of a PM who refuses to resign after defeat in Parliament and dissolution of *Lok Sabha*. But even these areas are governed by well-established conventions and the Constitution has caused no untoward situation in this regard. An exception has also been created by the Court in respect of appointment of judges of the superior judiciary.[165] Similarly, while making a decision on disqualification of a member of the Parliament the President shall act on the advice of the Election Commission.[166]

Subject to the consideration that the Governor of a state is an appointee of the President and that (s)he has a few discretionary powers, his/her constitutional position is the same as that of the President.[167] In view of his/her appointment by the President and tenure at the latter's pleasure as well as his/her titular position, the Governor is expected **[669]** to exercise his/her discretionary

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[160] VII *CADs* 32. [Emphasis added]

[161] See, for a detailed account of this controversy, Austin, *Working a Democratic Constitution*, above n 156, 19-26.

[162] See, for example, *Shamsher Singh v State of Punjab* (1974) 2 SCC 831; *Ram Jawaya Kapur v State of Punjab*, AIR 1955 SC 549.

[163] Former President K R Narayanan on two occasions had sent back the advice of the Cabinet, for imposition of President rule under Article 356 in the states of UP and Bihar, for reconsideration. On both the occasions the Cabinet did not press for its decision and has respected the decision of the President.

[164] IV *CADs* 734.

[165] The Supreme Court in *S C Advocates on Record Association v Union of India* (1993) 4 SCC 441, 'in effect', ruled that regarding appointment of judges to the Supreme Court and the High Courts the President should act not on the advice of Council of Ministers but on the advice of a collegium of judges. See also articles 124(2A) and 217(3); Raghunath Patnaik, *Powers of the President and Governors in India* (New Delhi: Deep & Deep Publications, 1997), 126-28.

[166] Article 103.

[167] Dr Ambedkar said that "the position of the Governor is *exactly* the same as the position of the President"; VII *CADs* 1186. See also *Ram Jawaya Kapur v State of Punjab*, AIR 1955 SC 549, 556.

powers in consultation with the President. But for the first two reasons (s)he is sometimes made to act without or against the advice of the Council of Ministers even in other matters, which is a matter of concern. The Constitution Makers did not consider Governor as an agent of the Centre and it has been so held by the courts also.[168]

Despite such assertions about the position of the Governor, the Central government has often used him/her as puppet.[169] In view of serious dissatisfaction expressed against the interference by the Centre in the functioning of the Governor, several constitutionalists and official bodies appointed for the purpose of examining the Centre-State relations, have suggested that among others the President should appoint the Governor *only* after consulting the Chief Minister of the concerned State and his/her tenure of five years should normally be honoured.[170]

The executive power of the Centre and the States is coextensive with their respective legislative powers,[171] which implies that the executive power does not require the support of law for its exercise.[172] It should, however, be remembered that the executive cannot spend any money from public funds nor can it levy or collect any tax without the authority of law.[173] It can also not infringe any right of an individual without the authority of law.[174] Thus, the executive power is subject to legislative power in certain matters.

D. *Composition of legislature*

The Central legislature – Parliament – consists of the President and the two Houses to be known respectively as the Council of States and the House of the People.[175] The President does not participate in the legislative business except through summoning and addressing the houses, dissolving of the House of the People and giving assent to the Bills.[176] The Council of States (*Rajya Sabha*) has 250 members out of which 12 are nominated and the rest are elected by the Legislative Assemblies of the states.[177] Unlike the Senate in America and some other federal countries, the representation of states is **[670]** not equal in *Rajya Sabha*. The Council of States is

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[168] Addressing the Constituent Assembly on 31 May 1949, Shri T T Krishamachari said: "*I would at once, disclaim all ideals … that we in this House want the future Governor*, who is to be nominated by the President, *to be in any sense an agent of the Central Government*." VIII *CADs* 460. See also *Hargovind Pant v Dr. Raghukul Tilak*, AIR 1979 SC 1109, 1113.

[169] See generally Austin, *Working a Democratic Constitution*, above n 156, 574-593.

[170] Above n 28, para 8.14.2. Also see the recommendations of Sarkaria Commission, above n 155, 120-27.

[171] Articles 73 and 162.

[172] *Ram Jawaya Kapur v State of Punjab* (1955) 2 SCR 225. One implication of this co-extensive nature of legislative and executive power is that the executive may enter into any international agreement or treaty without any approval from the Parliament. See article 73(1)(*b*) read with article 253; *Maganbhai Ishwarbhai Patel v Union of India* AIR 1969 SC 783, 807. This has been a matter of some concern in recent time.

[173] Article 265.

[174] See, e.g., *State of M P v Thakur Bharat Singh*, AIR 1967 SC 1170; *Bennett Coleman & Co. v Union of India* AIR 1973 SC 106; *Bijoe Emmanuel v State of Kerala* AIR 1987 SC 748.

[175] Article 79.

[176] Articles 85-87, and 111. Article 123 also empowers the President to promulgate Ordinances during recess of Parliament. See, for legislative powers of the President, Patnaik, above n 165, 65-96.

[177] Article 80(1).

a permanent body; one-third of its members retire every second year.[178] The Vice President of India is the *ex officio* Chairman of the House.[179] The House of the People (*Lok Sabha*) consists of 552 members out of whom the people on the basis of universal adult franchise directly elect 550 from different territorial constituencies spread over all the states and Union Territories. Out of these 550 as many members as the proportion of their population in the country must be elected from amongst the members of the SCs and STs.[180] The President may also nominate up to two members belonging to the Anglo-Indian community if in his/her opinion that community is not adequately represented in the House.[181] The life of the House of the People, unless dissolved sooner or extended during an emergency, is five years from the date of its first meeting.[182] The House chooses two of its *members* to be Speaker and Deputy Speaker for the conduct of its business.[183]

On the lines of Central Parliament, the State Legislatures consist of the Governor and two Houses in a few big States and only one House in the rest.[184] The one House, which exists in all States, is called the Legislative Assembly while the other is called the Legislative Council. The people directly elect the members of the Assembly from the territorial constituencies spread all over the State. As in *Lok Sabha* so also in the state Assemblies seats in proportion to their population in the state must be reserved for the SCs and the STs.[185] The Governor may, if (s)he is of the opinion that the Anglo-Indian community is not adequately represented, nominate one member of that community to the Assembly. The members of the Council are elected by different categories of electorates, e.g., members of municipalities and other local authorities; graduates; teachers; members of Assembly. The Governor may also nominate a few members to the Council.[186] Unless sooner dissolved or extended during emergency, the life of the Assembly is five years.[187] The Legislative Council, wherever it exits, is a permanent body.[188] Every Legislative Assembly chooses two of its members to be Speaker and Deputy Speaker for the conduct of its business.[189]

Responsibility of the executive to the legislature is crux of the parliamentary democracy; legislative controls not only play an important role in keeping a check on the executive but also in protecting people's rights. As the executive powers, in reality, are exercised by the Council of

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[178] Article 83(1).
[179] Article 89(1).
[180] Article 330.
[181] Article 331 read with Article 81(1).
[182] Article 83.
[183] Article 93.
[184] Article 168.
[185] Article 332.
[186] Article 171(5).
[187] It must be noted that even the President can, on the aid and advice of the Union Cabinet, dissolve the Legislative Assembly if a proclamation under Article 356 (failure of constitutional machinery) is in force in a particular state. This power of the President has, however, been limited by the Supreme Court in *S R Bommai v Union of India* AIR 1994 SC 1918, where the Court ruled that the Assembly should only be dissolved on approval of the proclamation by the Parliament.
[188] Article 172.
[189] Article 178.

Ministers, the Council and not the President is **[671]** accountable to the House of People.[190] The most important tool for accountability is no confidence motion. On the passage of no-confidence motion, the ministry must resign and pave way for another ministry, which can command the confidence of the House.[191] This principle is not written in the Constitution but has always been practiced both at the Central as well as State levels.

In view of the instability of the government caused at the Central level between 1996 and 1999 by the practice of no-confidence motion, proposal was mooted for a constructive motion of no confidence as practiced in some other countries like Germany where a no-confidence motion is ineffective unless simultaneously a confidence motion in an alternative government is also moved and passed. The matter was discussed and debated in the media and otherwise, including by the NCRWC. But no agreement on any change in the present position could finally be reached. As a coalition government could effectively work its full term from 1999 to 2004, the current constitutional position is no more in dispute.

V. JUDICIARY

A. *Role, structure and reach of power*

The Founding Fathers envisaged 'the judiciary as a bastion of rights and justice'.[192] An *independent judiciary* armed with the power of judicial review was the constitutional device chosen to achieve these objectives. On its shoulders lies the responsibility to uphold the rule of law, to protect the rights of the people – especially of the minorities – women and weaker sections of the society, and to ensure that different governments and their organs functioned within the constitutional limitations. The judiciary is, therefore, the 'logical, primary custodian' of the Constitution.[193]

It has 'a single pyramidal structure with the lower or subordinate courts at the bottom, the High Courts in the middle, and the Supreme Court at the top'.[194] The Supreme Court, at the apex of the pyramid, consists of a Chief Justice of India (CJI) and twenty-five other judges, appointed by the President 'after consultation with such of the judges of the Supreme Court and of the High Courts in the states as the President may deem necessary'; the consultation with the CJI is mandatory while appointing a judge other than the CJI.[195] All the judges hold their offices until the age of sixty-five unless they resign or are removed from the office earlier.[196] The Supreme

[190] Article 75(3).

[191] In view of frequent use, or misuse, of no-confidence motion, the NCRWC has suggested that this should be replaced with a 'constructive vote of confidence'. Above n 28, para 4.33.3.

[192] Austin, *Cornerstone of a Nation*, above n 8, 175.

[193] Granville Austin, 'The Supreme Court and the Struggle for Custody of the Constitution' in Kirpal et al (eds.), *Supreme but not Infallible – Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2000), 13.

[194] M P Singh, 'Securing the Independence of the Judiciary – The Indian Experience' (2000) 10 *Indiana International & Comparative Law Review* 245, 251 (hereinafter Singh, 'The Indian Experience').

[195] Article 124(1)/(2). See also the judgments in the *Second Judges* and the *Third Judges* cases.

[196] Article 124(4).

Court has **[672]** very wide original, appellate and advisory jurisdictions.[197] It can also review its decisions, and make such order as is necessary for doing complete justice in any cause or matter before it.[198] The law declared by the Court is binding on all courts in India, and all civil and judicial authorities are required to act in its aid.[199]

The Constitution provides for a High Court for each state but the Parliament is empowered to establish a common High Court for two or more States.[200] The High Courts consist of 'a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint'.[201] The High Court judges, appointed by the President after consultation with the CJI, the Governor of the State and the Chief Justice of the High Court, hold office until the age of sixty-two years unless they resign or are removed from the office earlier.[202] The judges may be transferred from one High Court to another.[203] The High Courts have wide original and appellate jurisdiction, including the power of superintendence over all courts and tribunals within their territorial jurisdiction.[204] The subordinate judiciary, on the other hand, consists of a district court, headed by the district judge, and subordinate judicial courts. The district judges are appointed by the Governor of a state in consultation with the High Court of that state,[205] whereas the judicial officers below the rank of district judges are appointed by the Governor in accordance with the rules made after consultation with the State Public Service Commission and the High Court.[206] The Supreme Court in *All India Judges Association v Union of India*[207] issued extensive directions to the government to bring uniformity in the recruitment, designation, retirement age, service conditions and training of the judicial officers.

It is clear from the above that the extent and reach of the powers of Indian judiciary, especially of the Supreme Court, is a matter of pride for any democratic Constitution. The judiciary can test not only the validity of laws and executive actions but also of constitutional amendments. It has the final say on the interpretation of the Constitution and its orders, supported with the power to punish for contempt, can reach everyone throughout the territory of the country. Since its inception the Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also determination of public policies and establishment of rule of law and constitutionalism.[208] On many occasions the Court has even given directions to the other organs of the state to follow the constitutional mandate.

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[197] Articles 32, 131-136 and 143.

[198] Articles 137 and 142, respectively.

[199] Articles 141 and 144, respectively.

[200] Articles 214 and 231.

[201] Article 216.

[202] Article 217(1). See also the judgments in the *Second Judges* and the *Third Judges* cases.

[203] Article 222.

[204] Articles 225-227 and 235.

[205] Article 233(1).

[206] Article 234.

[207] AIR 1992 SC 165. See also *All India Judges Association v Union of India (II)* AIR 1993 SC 2493.

[208] See, for an analysis of some of the landmark judgments delivered by the Apex Court during those years, Gobind Das, 'The Supreme Court: An Overview' in Kirpal et al (eds.), *Supreme but not Infallible*, above n 193, 16-47.

[673] B. *The independence of the judiciary*

The independence of the judiciary is one of the undisputed basic feature of the Constitution. The framers of the Constitution did everything possible for ensuring the independence of the judiciary as is clear from the detailed debate as well as the provisions regarding the appointment, tenure, salaries, retirement age, and removal of the judges.[209] Special attention was paid to the procedure of appointment as 'an independent judiciary begins with who appoints what calibre of judges'.[210] However, the appointment and transfer of judges have always been under controversy and ultimately led to protracted litigation.[211] In *Union of India v Sankalchand H Seth*,[212] the Court held that the transfer of a judge from one High Court to another could take place only after consultation with the CJI, and that too in public interest and not as punishment. This was considered vital for securing the independence of the judiciary.

The issue of transfer again came up before the Court in *S P Gupta v Union of India*[213] (*First Judges* case) wherein the Court affirmed *Sankalchand* position on the power of transfer and reiterated that the independence of the judiciary was a basic feature of the Constitution. The Court ruled that there must be 'full and effective' consultation between all the constitutional functionaries on the question of appointment. The majority, however, rejected the suggestion that the CJI had any primacy over the matter; it rather gave primacy to the executive in appointing a person to the High Court or the Supreme Court. As this decision became a subject of sever criticism and basis of misuse of power by the government, the matter again came before the Court in *S C Advocates on Record Association v Union of India*[214] (*Second Judges* case) in which the Court overruled its decision in the *First Judges* case on the point of primacy. It held that the procedure for the appointment of the judges was an 'integrated participatory consultative process' in which 'all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision … so that the occasion of primacy does not arise'.[215] However, in case of a difference of opinion between different constitutional functionaries, the Court held that the opinion of the CJI had primacy. The proposal for the appointment of judges must be initiated by the Chief Justices of the respective courts, but only after consulting the two senior most judges of the concerned Court. While forming his/her opinion on the opinion of the Chief Justice of the High Court and of the Governor of the State, 'the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who **[674]** are

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[209] Austin, *Cornerstone of a Nation*, above n 8, 176-83. Nehru, for example, played a significant role in the Assembly to ensure prominent and independent role for the Supreme Court; Alice Jacob, 'Nehru and the Judiciary' in Rajiv Dhavan & Thomas Paul (eds.), *Nehru and the Constitution* (Bombay: N M Tripathi Pvt. Ltd., 1992), 63, 65. He also vigorously defended the age of 65 years for the judges of the Supreme Court; VIII *CADs* 346-47.

[210] Austin, *Working A Democratic Constitution*, above n , 124.

[211] See generally Austin, *Working a Democratic Constitution*, above n 156, 125-38, 278-89, 344-46, and 516-33; Singh, 'The Indian Experience', above n 194, 265-66.

[212] AIR 1977 SC 2328.

[213] AIR 1982 SC 149.

[214] AIR 1994 SC 268.

[215] Id. at 442.

likely to be conversant with the affairs of the concerned High Court.'[216] Regarding the appointment of the CJI, the Court ruled that the convention of appointing senior most judge must be followed by the outgoing CJI, in making recommendation to the President, unless there are any doubts about the fitness of the senior most judge to hold the office. Regarding the transfer of High Court judges also, the matter lay with CJI who was expected to take into account the views of the Chief Justice of the High Court from which the judge was to be transferred, of any judge of the Supreme Court whose opinion could be of significance in that case, as well as the views of at least one other Chief Justice of a High Court whose views were considered relevant by the CJI.

This judgment also received a mixed response[217] and in view of the difficulties in its application the President made a reference to the Supreme Court to clarify certain doubts.[218] The Court clarified those doubts in the *Third Judges* case.[219] Generally upholding and reiterating its position in the *Second Judges* case it held that an opinion of the CJI not formed according to the majority judgment in the *Second Judges* case was not binding on the government. But the Court raised the strength of the collegium from three to five, i.e. the CJI and four senior most judges of the Supreme Court. The collegium is expected to make its decision by consensus but no appointment to the Supreme Court could be made unless the appointment is in conformity with the opinion of the CJI. However, the appointment must not be made if it is favoured by the CJI but not by the majority of the collegium. The collegium for appointment of judges to High Courts must consist of the CJI and the two senior most judges. Regarding the transfer of a judge from one to another High Court, the CJI should consult the Chief Justices of both the concerned High Courts and also one or more judges of the Supreme Court who are in a position to provide material information as to the desirability of a proposed transfer. Final decision on transfer must, however, be taken by the collegium as for the appointment of Supreme Court judges.

The judiciary did its best, even at the risk of being criticised for doing violence with the express text of the Constitution, in the *Second* and *Third Judges* cases to streamline the appointment and transfer procedures in order to ensure selection of most competent and meritorious judges as well as to safeguard independence of the judiciary. Though its interpretation has ousted the possibilities of executive making political appointments or transferring or superceding inconvenient judges,[220] it does not necessarily ensures competence and independence. Appointments of judges are still made in secrecy, vacancies still remain unfilled for months, no jurist has yet been appointed to the Supreme Court, corruption and misbehaviour still haunt the judiciary, and differences between the judiciary and the executive on the appointments continue.

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[216] Id. at 436.

[217] Lord Cooke of Thorndon, 'Where Angles Fear to Tread' in Kirpal et al (eds.), *Supreme but not Infallible*, above n 193, 97-106; Singh, 'The Indian Experience', above n 194. See, for a feminist critique of the judgment, Indira Jaising, 'Gender Justice and the Supreme Court' in Kirpal et al (eds.), *Supreme but not Infallible*, above n 193, 288, 291-92.

[218] See Singh, 'The Indian Experience', above n 194, 274.

[219] *In re, Presidential Reference*, AIR 1999 SC 1.

[220] See Austin, *Working a Democratic Constitution*, above n 156, 278-89, 344-47; Singh, *Constitution of India*, above n 16, 414.

[675] Besides the issues of appointment and transfer, growing incidents of misconduct and corruption among the judges have been noted.[221] The process of removal of the judges is so difficult that it has only once been unsuccessfully attempted.[222] There is no provision for taking any action against indiscipline and successive CJIs have expressed their inability to do anything in this regard. In view of all this, demand and suggestions for the establishment of a National Judicial Commission to deal with the issues of appointment and misconduct of judges have been made,[223] including by the NCRWC.[224] Accordingly, an amendment of the Constitution was moved in 2003 to constitute a National Judicial Commission consisting of the CJI as chair, two senior most judges of the Supreme Court, the Union Law Minister, and a nominee of the President to be appointed on the recommendation of the PM.[225] In view of the differences about the composition of the Commission and doubts about its effectiveness as well as non-inclination of the new government to pursue the matter, the Commission may not be created so soon as could be expected.[226]

C. *Judicial activism and public interest litigation (PIL)*

The Indian judiciary has always been active in the sense that whenever approached it has responded and has hardly decided not to decide. But 'judicial activism' is not activism in this sense.[227] Instead, it denotes a phenomenon when the judiciary departs from its role as a conventional adjudicator and acts in innovative manners by entering into policy issues normally assigned to the other organs of the government. While assuming this responsibility as a custodian of the Constitution, it has interpreted FRs in the light of DPs, reminded the executive and legislature of their constitutional obligations, issued appropriate directions to concerned authorities, monitored working of government institutions, and has even filled in the legislative gaps by laying down guidelines. In many such cases the judiciary has either acted without being activated, i.e., *suo motu*, or enabled its activation in simple and speedy manner by relaxing the substantive and procedural requirements of locus standi.[228] Just to illustrate, the canvass of **[676]** judicial activism ranged from the protection of historical places to environmental pollution; from sexual harassment at the work place to adoption of children by foreigners; from exposing

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[221] See P P Rao, 'The Judiciary' *The Hindu*, available at <http://www.thehindu.com/2003/05/15/stories/2003051500361000.htm> (accessed on 15 May 2003).

[222] See Singh, *Constitution of India*, above n 16, 416.

[223] See, for example, Rajindar Sachar, 'National Judicial Commission' *The Hindu*, available at <http://www.thehindu.com/2003/03/28/stories/2003032801441000.htm> (accessed on 28 March 2003).

[224] Above n 28, paras 7.3.7 and 7.3.8.

[225] The Constitution (98th Amendment) Bill 2003.

[226] See, the statement of Law Minister H R Bharadwaj, *The Hindu*, (25 May 2004), 1.

[227] Hassall and Saunders illustrate the distinction, what they term, between 'judicial activism' and 'judicial quietism'; Graham Hassall & Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge: Cambridge University Press, 2002), 170-71. Baxi also differentiates between an 'active' and an 'activist' judge; Upendra Baxi, 'The Avatars of Indian Judicial *Activism*: Explorations in the Geographies of [In]justice' in Verma & Kusum (eds.), *Fifty Years of the Supreme Court of India*, above n 16, 156, 165-66. Also see M P Singh, 'Judicial Activism in India' (2002) 5 *Waseda Proceedings of Comparative Law* 72.

[228] See Ashok H Desai & S Muralidhar, 'Public Interest Litigation: Potential and Problems' in Kirpal et al (eds.), *Supreme but not Infallible*' above n 193, 159, 162-67; S P Sathe, *Judicial Activism in India – Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2002), 201-09; Justice P N Bhagwati, 'Judicial Activism and Public Interest Litigation' (1985) 23 *Columbia Journal of Transnational Law* 561.

corruption at high places in the government to granting compensation for violation of FRs; from release of bonded and child labours and under trial prisoners to free legal aid; from the right to free and compulsory primary education to right to information; from criminalisation of politics to running of blood banks; and from construction of dams to allotment of government houses and petrol pumps.[229] The effect of all this is that now the judiciary can *legitimately* claim itself to be 'an arm of social revolution'.[230]

As judicial activism is primarily a post-emergency – 1977 onwards – phenomenon, it is often suggested that the judiciary tried to regain its constitutional place and people's faith through judicial activism. Though this could be one of the reasons, this cannot be sole or even primary reason. The judiciary fought a long struggle for its place in the governance since its inception. It sustained and strengthened its power to act in activist manner over a period of time through various steps. Most notable amongst them are: the evolution of basic structure doctrine in *Kesavananda Bharati*; insistence on due process requirement in post-*Maneka Gandhi* era; integrated reading of FRs and DPs; liberalisation of substantive and procedural requirements of locus standi; vigilant safeguard of the power of judicial review; and establishing legitimacy amongst 'We, the people of India' by championing the rights of powerless ignorant masses. Besides, the weak executive at the Centre since 1989 and the growing gulf between the constitutional promise and reality has led to the fast growth of judicial activism.

Out of many aspects of judicial activism, liberalization of the requirement of locus standi deserves special treatment. Modification of the traditional requirement of standing was sine qua non for the evolution of PIL and any public participation in justice administration. The need was more pressing in a country like India where a great majority of people are either ignorant of their rights or are too poor to approach the court. Realising this the Court held that any member of public acting bona fide and having sufficient interest has a right to approach the court for redressal of a legal wrong, especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights is at stake. To make it effective the Court appointed fact-finding commissioners, resorted to the device of *amicus curiae*,[231] and also evolved epistolary jurisdiction by which even letters or telegrams are accepted as writ petitions.[232] The Court has, however, been careful that any 'busybody' or 'meddlesome interloper' does not misuse this liberalization. In certain instances fine has been imposed for misusing the judicial process.[233]

The judicial activism and PIL have, however, led to new problems. Some of them include unanticipated increase in the workload of the superior courts; lack of judicial infrastructure to determine factual matters; gap between the promise and reality; abuse **[677]** of process; friction and confrontation with fellow organs of the government; and dangers inherent in judicial populism.[234] The judiciary is well aware of these problems and has been working towards

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[229] See, for some of these decisions, Singh, *Constitution of India*, above n 16, 166-81; Das, above n 208, 38-44; Desai & Muralidhar, above n 228, 168-76; Sathe, above n 228, 116-29, 139-47, 219-29.

[230] See Austin, *Cornerstone of a Nation*, above n 8, 164.

[231] See generally Desai & Muralidhar, above n 228, 164-67.

[232] See, for example, *Sunil Batra v Delhi Administration* AIR 1980 SC 1579.

[233] *Janta Dal v H S Chowdhary* (1992) 4 SCC 305; *S P Anand v H D Deve Gowda* (1996) 6 SCC 734; *Raunaq International Ltd. v IVR Construction Ltd.* (1999) 1 SCC 492.

[234] See Desai & Muralidhar, above n 228, 176-83; Baxi, above n 227, 161-65.

containing them and finding their solutions so that a useful tool does not turn into a suicidal weapon.

D. *Power to punish for contempt*

The Supreme Court and the High Courts enjoy the power to punish for their contempt as well as the contempt of the subordinate courts.[235] Though this power is justified in the interest of administration of justice, its exercise has often been controversial. For example, in contempt proceedings against a senior advocate the Supreme Court not only sentenced him to imprisonment but also suspended his license to practice, which only the Bar Council could do.[236] Even though the facts of the case proved contempt, the Court went beyond its powers in canceling the license and had to later overrule itself.[237] Similarly, in proceeding against Arundhati Roy[238] the Court took cognizance of an insubstantial, rather baseless, contempt petition against Ms Roy and others for committing criminal contempt of the Court by protesting at the gates of the Court against its ruling on the construction of a dam. Though the Court found the contempt petition grossly defective, taking exception to some of the expressions in the reply of Ms. Roy pointing out these defects, it punished her for contempt. As expression of truth is no defence in contempt proceedings, media and others are scared of reporting about the patent irregularities of the judges, their incompetence and corruption. Realising the adverse effect on the administration of justice of such exercise of contempt power, opinion is building in the legal circles to make truth as a valid defence against contempt. The need of protecting judicial integrity and independence through contempt power also needs to be balanced with the other equally important values such as the freedom of speech and expression, and the role of public criticism as a mechanism for judicial accountability.

VI. CENTRE-STATE RELATIONS

A. *Nature of federation*

The Indian Constitution has been given different labels – unitary, federal, quasi-federal, federal in form but unitary in substance, amphibian, and cooperative federation – by different people but the President of the Constituent Assembly did not **[678]** attach any importance to any label if the Constitution served the intended 'purpose'.[239] The purpose was to ensure national unity and integrity while at the same time performing the task of socio-economic reconstruction through democratic means. To achieve this purpose and to meet the special needs of India, which other federations did not share, the Constitution framers developed a *sui generis* variation of

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[235] Articles 129 and 215. See also the Contempt of Courts Act 1971, and the decisions in *Delhi Judicial Services v State of Gujarat* (1991) 4 SCC 406; *ITAT v V K Agarwal* (1999) 1 SCC 16.

[236] *In re V C Mishra* (1995) 2 SCC 584.

[237] *Supreme Court Bar association v Union of India* (1998) 4 SCC 409.

[238] The details of the controversy and the consequent Supreme Court decision convicting Ms. Arundhati Roy for one day imprisonment are available at <http://www.narmada.org/sc/contempt> (accessed 26 August 2003). Also *Arundhati Roy, In Re*, AIR 2002 SC 1375.

[239] Dr Rajendra Prasad, XI *CADs* 987.

federation.[240] The Constitution is not federal in Wheare's definition,[241] but Wheare's definition is not a universally agreed standard for federalism. There are several variations of federalism, depending upon the situation and need of every federating society. The Constitution of India is one of them. The Constitution incorporates federal features such as distribution of powers between the Centre and the States, supremacy of the Constitution, and independent judiciary for the resolution of federal issues, but it also has some unitary features such as single judiciary, common all-India services, single citizenship, common constitution for the Centre and the States.[242] The states can be amalgamated, bifurcated or changed by the Centre.[243] The Centre can legislate on state subjects and also give executive directions to states during emergency[244] or even otherwise.[245] Certain laws either cannot be introduced in the state legislature without previous sanction of the President or could be reserved by the Governor for the consideration of the President.[246] Defending the constitutional scheme in the Assembly, Dr. Ambedkar said that the Constitution 'can be both unitary as well as federal according to the requirements of time and circumstances.'[247]

Going by the difference drawn by Wheare between a federal constitution and federal government, even if the Constitution of India is not federal during the last five and a half decades it has moved towards the establishment of a federal government. Some of the contentious issues such as the appointment of Governor, invocation of Article 356, and allocation of financial resources are also moving towards amicable solutions. Various committees and commissions have been constituted in the past to suggest reforms in the contentious areas.[248] Such suggestions have been playing expected role since the split in one party rule in 1967 at the states level and since 1989 at the Central level.[249] The establishment of minority or coalition governments at the Centre since 1989, the emergence of several regional parties, the creation of a third tier of government at the village and municipal levels by constitutional amendments in **[679]** 1992,[250] willingness of the Court to interfere in the imposition of Central rule in the states in *Bommai* case in 1994 and recognition of federalism as one of the basic features of the Constitution in the same case, and the recommendations of the NCRWC in 2002 have all contributed to strong federal tendencies.

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[240] Sathe observes that 'every federation is a product of its own history, traditions, and political culture'; S P Sathe, 'Nehru and Federalism: Vision and Prospects' in Dhavan and Paul (eds.), *Nehru and the Constitution*, above n 209, 196. See also generally Austin, *Cornerstone of a Nation*, above n 8, 186, 188-92.

[241] The general and regional governments which are 'coordinate' and 'independent' within their spheres is the crux of Wheare's definition. K C Wheare, *Federal Government* (4th edn., 1963), 10.

[242] State of Jammu and Kashmir is an exception to this which has its own Constitution and special position under the federation by virtue of article 370.

[243] Articles 2-4.

[244] Articles 352-354 read with article 250, and articles 356, 357 and 360.

[245] Article 249, article 252 and articles 256 and 257 read with article 365.

[246] Articles 200, 201, 288(2) and 304.

[247] Dr Ambedkar, VII *CADs* 33-34.

[248] See, for example, the Administrative Reform Commission (1967-70); the State of Tamil Nadu Inquiry Committee on Centre-State Relations (1971); the Sarkaria Commission on Centre-State Relations (1988). The NCRWC also examined these issues in its report; above n 28.

[249] See Austin, *Working a Democratic Constitution*, above n 156, 560-72.

[250] The Constitution (73rd Amendment) Act 1992 and the Constitution (74th Amendment) Act 1992, respectively.

B. *Legislative, administrative and financial relations*

The specific provisions related to legislative, administrative and financial relations between the Centre and states are laid down in Part XI and Part XII, though provisions elsewhere in the Constitution also influence the power relation between the two federal participants.[251] As regards the distribution of legislative powers, the Constitution divides the legislative heads into three lists – Union, State and Concurrent – in the Seventh Schedule.[252] Any legislative head not covered in any of the lists lies within the exclusively competence of Parliament.[253] The Parliament has exclusive power to legislate on 97 matters in the Union List. The state legislatures have exclusive powers to legislate on 66 matters contained in the State List. The Concurrent List consists of 47 items.[254] Both the Parliament and State legislatures have the power to make laws on the matters contained in this list. In case of repugnancy between the two, the law made by the Parliament shall prevail with the exception that a latter law of State legislature shall prevail over the earlier law of the Parliament if the State law was reserved for the consideration of the President and received his/her assent.[255] In case of overlapping of subjects amongst three lists, though the constitutional text gives hierarchical primacy to the law enacted by the Centre, courts have applied the principles of 'harmonious construction' and 'pith and substance' to mitigate the rigour of such primacy.[256] Laws of Parliament may extend to the whole or any part of the territory of India or even beyond the territory of India while the state laws may extend to the whole or any part of the State.[257]

As already mentioned, the executive powers of the Centre and states extend to those matters on which they have legislative competence.[258] The Centre is also empowered to give directions to states in order to ensure that the state executive does not impede or prejudice the laws or executive power of the Union in exercise of its authority.[259] In case a state fails to comply with or give effect to such directions of the Centre, the **[680]** President may declare the failure of constitutional machinery in the state and may take over its government.[260]

Dividing sources of revenue in a federal set up is always a delicate exercise. The Indian Constitution, tries to minimise those difficulties by making elaborate provisions for division of

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[251] See, for example, the emergency provisions contained in Part XVIII, and some provisions in Part XXI.

[252] Article 246. This scheme was taken from the Government of India Act 1935. See, for insight into the framing of the scheme, Austin, *Cornerstone of a Nation*, above n 8, 195-203.

[253] Article 248.

[254] M V Paylee, *Constitutional Government in India*, 3rd edn. (London: Asia Publishing House, 1977), 628.

[255] Article 254.

[256] *Prafulla Kumar v Bank of Commerce* AIR 1947 PC 60; *State of Bombay v F N Balsara* AIR 1951 SC 318; *State of Rajasthan v G Chawla* AIR 1959 SC 544; *D G Bose & Co. v State of Kerala* (1979) 2 SCC 410.

[257] Article 245.

[258] Articles 73 and 162.

[259] Articles 256 and 257.

[260] Article 365.

tax powers between the Centre and the states,[261] unlike several other federations where they are generally concurrent.[262] All taxes have been placed in the exclusive jurisdictions of either the Centre or States, without any tax being in the concurrent list. For dealing with the imbalance in the revenues of the two, the Constitution provides for distribution of revenues. Some duties are levied by the Union but collected and appropriated by the states; some taxes are levied and collected by the Union but assigned to the states; and there are certain taxes which are levied and collected by the Union but distributed between the Union and the states. This distribution is done on the recommendations of the Finance Commission constituted under Article 280. The Constitution also provides for the grants-in-aid to be given to the states by the Union.[263] Though these provisions have been working without much change, the states have always been demanding more and more financial resources. They have alleged that revenue sharing is heavily titled in favour of the Centre, which needs to be rectified by amending the Constitution.[264]

C. *Centre-state relations during emergency*

The larger share to the Centre in the Constitution of India has further been augmented by the emergency provisions.[265] The Constitution contemplates three types of emergencies. Article 352 contemplates imposition of an emergency in case of war, external aggression or armed rebellion.[266] A proclamation under this provision could be issued for the whole country or any part of it. Out of three occasions for invoking this power, the proclamation issued only in June 1975, imposing internal emergency, was controversial while the other two were issued during wars with China and Pakistan. The second situation, which is not strictly a situation of emergency, arises when there is a failure of constitutional machinery in a state.[267] The power under this provision, which has no nation-wide application, has been used for over 100 times since the inception of the Constitution and remains the much debated issue both inside and outside **[681]** the court. The 'financial emergency' is the last among the three emergencies, which has never been invoked so far.

If the President is satisfied that a situation justifying the exercise of such power exists, (s)he may proclaim any of the three types of emergencies.[268] The satisfaction of the President should be based on objective facts and is open to judicial review on limited grounds.[269] A proclamation issued under any of these three situations is a temporary measure in terms of duration. It must be

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[261] See Articles 268-281.

[262] See, for why the Assembly members made 'the Union government the banker and collecting agent for the state government', Austin, *Cornerstone of a Nation*, above n 8, 217-19, 221-226.

[263] Article 275.

[264] See generally Austin, *Working a Democratic Constitution*, above n 156, 614-22 and the material cited therein.

[265] Part XVIII, articles 352-360. For the background and justification of the provisions see generally Austin, *Cornerstone of a Nation*, above n 8, 207-08. See further, for the drafting history of these provisions, 209-16.

[266] The ground of 'armed rebellion' has been substituted for 'internal disturbance' by the Constitution (44th Amendment) Act 1978.

[267] Article 356.

[268] President's satisfaction means satisfaction of the Council of Ministers. This rule has been expressly incorporated in clause (3) of article 352 by the Constitution (44th Amendment) Act 1978, in view of alleged non-compliance with it by Ms Indira Gandhi in 1975.

[269] *State of Rajasthan v Union of India* AIR 1977 SC 1361; *S R Bommai v Union of India* AIR 1994 SC 1918.

approved by the Parliament within a specified period otherwise it ceases to operate.[270] A proclamation of emergency entitles Parliament to make any law on any state subject and to give any executive direction to the state executive, as if the Constitution was unitary.[271]

During the continuance of proclamation issued on the ground of 'war' or 'external aggression', the freedoms contained in Article 19 are suspended to the extent that no legislative or executive action made in pursuance of emergency could be challenged on the ground that it violated Article 19.[272] Besides, the President may also suspend the right to move any court for the enforcement of any FR,[273] except the rights contained in Articles 20 and 21 which can no longer be suspended after the constitutional amendment in 1978. It must, however, be noted that these provisions would not validate an action which is unconstitutional otherwise, or which was unconstitutional before the proclamation of emergency.

The emergency authorizing the taking over the government of any state is justified on the ground of Article 355 which imposes the duty on the Centre 'to ensure that the government of every State is carried on in accordance with the provisions of this Constitution'.[274] The President can issue a declaration under Article 356 if (s)he is satisfied, on the report of the Governor or otherwise, that the government of a state cannot be carried on in accordance with the provisions of this Constitution. The proclamation would, inter alia, have three consequences. First, the President can assume to himself/herself all or any of the functions of the government of the state, and all or any of the powers vested in or exercisable by the Governor. Second, the President may declare that the powers of the state legislature shall be exercisable by or under the authority of **[682]** the Parliament.[275] Third, the Legislative Assembly of the concerned state can be dissolved or suspended.[276]

The President may issue a proclamation of financial emergency if (s)he is satisfied that the financial stability or credit of India, or any part thereof, is threatened. During the operation of such proclamation the executive authority of the Union shall extend to the giving of directions to any state to observe such canons of financial propriety as may be deemed necessary and adequate, including requiring the state government to reduce salaries of its employees. The

[270] The proclamation under article 352 shall cease to operate after one month whereas the proclamation issued under articles 356 and 360 shall cease to operate after two months unless approved by the parliament during that time. *Moreover, in case of proclamation under article 356 the Constitution places an upper limit of one year, which may extend to three years if special conditions are satisfied, at a time during which the proclamation could remain in force.*

[271] Article 353 read with article 250; articles 356(1) and 357; and article 360(3)/(4).

[272] Article 358.

[273] Article 359. See, for details, Singh, *Constitution of India*, above n 16, 848-55.

[274] See the justification advanced by Dr Ambedkar while introducing Draft Article 277A, IX *CADs* 133. While responding to the debate, Dr Ambedkar had hoped that article 356 would become a 'dead letter' as this power is meant to be invoked only as a last resort when other remedies fail to deliver (at 176-77).

[275] Article 357.

[276] The Supreme Court's judgment in *Bommai* case has, however, put some fetters on the power to dissolve the Assembly. Now the Assembly can only be dissolved if the proclamation has been approved by the Parliament. The Court in a way adopted the recommendation made by the Sarkaria Commission on this point.

direction may also be issued for reduction of salaries of the judges of the Supreme Court and the High Courts.[277]

A constitution is not a pact to commit suicide and therefore, emergency provisions are justified for the preservation of the constitution. Care must, however, be observed against their misuse. The use of the first kind of emergency during 1975-77 remains controversial as an instance of misuse of power against which adequate safeguards have now been provided by amending the Constitution.[278] Similarly, by creative interpretation the Supreme Court in *Bommai* case has minimized the chances of the misuse of the second kind of emergency. Consequently, it has also not been invoked during the last few years.[279] With the growing political maturity, stability of democracy and existence of several political parties, it is hoped that the emergency provisions will be used only for the preservation of the Constitution.

VII. AMENDMENT OF THE CONSTITUTION

Since Constitution is a living document, it is considered essential that it lays down the power and procedure for its own amendment. Article 368 is the general provision for the amendment of the Constitution, but a few other provisions for specific purposes also exist.[280] An amendment under Article 368 can be initiated by introducing a Bill in either House of Parliament which if passed by a majority of the total membership of each House of Parliament as well as a majority of not less than two-thirds of the members of the House present and voting and assented by the President, amends the Constitution. If the Bill involves the amendment of certain provisions enumerated in the proviso to Article 368 such as the election of the President, distribution of powers between the Centre and the states, the superior judiciary, representation of the states in **[683]** Parliament and Article 368 itself, the Bill must also be ratified by the legislatures of not less than one-half of the states before it is assented by the President. Non-observance of the procedure in Article 368 makes the amendment unconstitutional.[281] The procedure so provided is quite flexible, which stands proved by the number of amendments made in the Constitution so far.[282]

The judicial interpretation has, however, excluded some of the amendments from this procedure. The demand for such an interpretation was raised soon after the commencement of the Constitution as it was amended for the first time. In 1951 the Supreme Court in *Sankari Prasad* v *Union of India,*[283] where doubt was raised about the amendability of the FRs in view of

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[277] Article 360(4)(*b*).

[278] Both the then PM Indira Gandhi, who had recommended for imposition of emergency, and her political party had lost the elections held after the revocation of emergency. Moreover, the Constitution (44th Amendment) Act 1978 has introduced safeguards in order to preempt the future possibilities of abuse. See, for changes introduced by the amendment, Singh, *Constitution of India*, above n 16, 843-44.

[279] The NCRWC in its report has also recommended for codification of the suggestion made by the Sarkaria Commission as well as by the Court in *Bommai* case. Above n 28, paras 8.18, 8.19.2, 8.19.5, 8.20.3-8.20.5, 8.21.4 and 8.22.3.

[280] See, for example, Articles 2-4, 169, 171(2), and 239-A.

[281] *Kihoto Hollohan v Zachillu* AIR 1993 SC 412.

[282] The number has reached nearly one hundred.

[283] AIR 1951 SC 458.

prohibition on their abridgement in Article 13 (2), ruled that the power of Parliament to amend the Constitution included the power to amend any provision of the Constitution including any FR. An amendment was not a 'law' in the ordinary legislative sense.[284] This position was reiterated by the Court in *Sajjan Singh* v *State of Rajasthan*[285] and held the ground until its reversal in *Golak Nath* v *State of Punjab*[286] in 1967. In *Golak Nath* a majority of 6:5 held that there is an 'implied limitation' on the power of Parliament to amend the FRs. The Court further ruled that Article 368 only provided for the procedure and not the power for amendment, and that an amendment is 'law' for the purpose of Article 13(2) meaning thereby that there is no distinction between a constitutional amendment and an ordinary law.[287] The *Golak Nath*, in essence put the FRs beyond the reach of Parliament's power of amendment and more importantly asserted the authority of judiciary vis-à-vis legislature and executive. Naturally, any such unequivocal assertion of judicial supremacy in a democracy was not to be taken easily and therefore, the government reacted by overturning the justifications of *Golal Nath* by amending the Constitution by the Constitution (24th Amendment) Act 1971. The amendment, in brief, provided that an amendment was not a 'law' for the purpose of Article 13(2) and that Parliament could amend any provision of the Constitution in the exercise of its constituent power under Article 368.

The validity of 24th amendment, along with some other related amendments, was challenged in *Kesavananda Bharti v State of Kerala*.[288] The majority of the Court upheld the validity of the 24th amendment and also overruled *Golak Nath* on the point that the Parliament could not amend FRs. The Court, however, held that the power to amend could not be exercised to destroy the 'basic structure' of the Constitution. The judgment **[684]** received mixed reactions,[289] as the Supreme Court did something unprecedented. It did not take very long for the Court to invoke the *Kesavananda* doctrine to invalidate Article 329A, a provision inserted by a controversial amendment to secure the election of the then PM, Indira Gandhi.[290] Though this case clearly established the utility of basic structure doctrine in controlling the abuse of amendment power by Parliament, the government of the day was not willing to accept any limitation, especially the one imposed by the judiciary. It first unsuccessfully tried to get *Kesavananda* reconsidered and overruled[291] and then amended Article 368 removing any limitation on the power of amendment.

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[284] Article 13(2) reads: 'The State shall not make any law which takes away or abridges the rights conferred by this Part [i.e., Part III FRs] and any law made in contravention of this clause shall, to the extent of contravention, be void.'

[285] AIR 1965 SC 845. It must be noted though that two of the judges (Justice Hidayatullah and Justice Mudholkar) in that case had expressed doubts about the parliament having an absolute power to amend the Constitution.

[286] AIR 1967 SC 1643.

[287] See, for a critique of the majority judgment in this case, P K Tripathi, 'Golak Nath: A Critique' in *Some Insights into Fundamental Rights* (Bombay: N M Tripathi Pvt. Ltd., 1972), 1.

[288] AIR 1973 SC 1461.

[289] See, for example, P K Tripathi, 'Kesavananda Bharti v State of Kerala – Who Wins?' (1974) 1 *Supreme Court Cases (Journal)* 3 and 'Rule of Law, Democracy and Judicial Activism' (1975) 17 *Journal of Indian Law Institute* 17; H M Seervai, 'The Fundamental Rights Case at the Cross Roads' (1973) LXXV *Bombay Law Reporter* (J) 47; Upendra Baxi, 'The Constitutional Quicksands of Kesavavanda Bharti and the Twenty-Fifth Amendment' (1974) 1 *Supreme Court Cases (Journal)* 45.

[290] *Indira Gandhi v Raj Narian* AIR 1975 SC 2299. See, for an analysis of the case, Sathe, above n 228, 72-77.

[291] Sathe, above n 228, 85-86.

In *Minerva Mills v Union of India*[292] the Supreme Court firmly and finally buried any resistance to the basic structure doctrine by striking down the above amendments. Since then the Court has consistently applied the doctrine to test the validity of various constitutional amendments, some of which sought to restrict or exclude judicial review.[293] It is also interesting to note that the application of basic structure doctrine has not been limited to judge the validity of constitutional amendments alone. In some instances, the validity of ordinary laws or even executive actions has been tested on the touchstone of the doctrine of basic structure.[294]

Though the doctrine of basic structure is now well established and has also spread to some other countries in the Indian subcontinent,[295] it puts judges above the people in so far as it remains undefined and uncodified. An effort to codify it failed. It is now generally suggested that in view of growing soundness of democracy in India, it must be used cautiously and sparingly to prevent gross misuse of the power of amendment.[296]

[685] VIII. MISCELLANEOUS AND CURRENT THEMES

Most of the issues that we have discussed above are common to most of the constitutions, yet the Constitution of India has worked in the most trying conditions. Many predictions against the Constitution have proved wrong. Most of these predictions were based on experience from the working of the Western constitutions. As the Constitution formally adopts the Western model, it is assessed in the light of the experience gained from the working of those constitutions. The assessment could not always grasp the spirit of India and its people, who had to work the Constitution. If the Constitution has worked reasonably well, there must be something in India, its people and their Constitution not yet known or discovered. It is not mere providence or a matter of chance.

In their long history people of India have learnt to respect diversity and to live with it. They have kept their doors open for people and ideas from any part of the world. They have not fossilized any religious or other dogmas or isms. Nor have they imposed them on others. This has not made them all necessarily democratic and liberal, but it has taught them to respect differences of all kinds between (wo)man and (wo)man and their groups. It is this innate quality that led them to make the kind of constitution they have and to get it adjusted to suit that quality. May be the foregoing discussion does not specifically project any such speciality of the Constitution. But

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[292] AIR 1980 SC 1789.

[293] *Waman Rao v Union of India* AIR 1981 SC 271; *S P Sampath Kumar v Union of India* AIR 1987 SC 386; *P Sambhamurthy v State of Andhra Pradesh* AIR 1987 SC 663; *L Chandra Kumar v Union of India* AIR 1997 SC 1125.

[294] *Ismail Faruqui v Union of India* (1994) 6 SCC 360; *G C Kanungo v State of Orissa* (1995) 5 SCC 96; *S R Bommai v Union of India* AIR 1994 SC 1918.

[295] See, for application of doctrine in Bangladesh, Pakistan, Sri Lanka and Nepal, Raju Ramachandran, 'The Supreme Court and the Basic Structure Doctrine' in Kirpal et al (eds.), *Supreme but not Infallible*, above n 193, 107, 126-28. Also D. Conrad, *Zwischen den Traditionen* (Stuttgart, Franz Steiner Verlag, 1999, T. Luetta and M. P. Singh editors), 480ff.

[296] Id., 106-32. Tripathi also believed that article 368 'does not empower the Court to strike down constitutional amendments on substantive grounds'; P K Tripathi, 'Perspective on the American Constitutional Influence on the Constitution of India' in Lawrence Ward Beer (ed.), *Constitutionalism in Asia – Asian Views of the American Influence* (Berkeley: University of California Press, 1979), 60, 95.

quite a few are there. The Constitution not only ensures justice, liberty, equality, fraternity and human dignity to all, it also ensures among the FRs, DPs and FDs special affirmative programmes for the most disadvantaged sections of the society, which many other constitutions could have afforded to ignore. Even a miniscule minority of comparative recent origin like the Anglo-Indians has been given several special safeguards including representation in the national and state legislatures.[297] Special safeguards for other weaker sections of the society, particularly for SCs and STs as well as for women have been provided to ensure their participation not only in the social and economic life but also in the political life and decision-making.[298] The Constitution guarantees adult suffrage to all without the difference of religion, race, caste or sex.[299] It recognizes the difference between different regions of the country and has accordingly adjusted to their requirements.[300] It continues to give due respect to their differences consistently with the unity of the nation. It makes special provisions for the protection of different languages and linguistic groups in the country.[301] Fairness of the elections and entry into the public services has been ensured in the Constitution.[302] These are some of the aspects of the Constitution, which do not appear so important but which carry the secret of its success.

The most prominent demonstration of this secret has been given by the people in electing Sonia Gandhi – a person of Italian origin – to be the PM of the country in **[686]** May 2004 in spite of staunch opposition by some political groups and individuals that a person of foreign origin could not hold that office. Equally great example has been set by her by declining to accept the offer to become PM of the country and by agreeing to serve as leader of a political party. Moreover, she saw to it that a member of a minority community became the PM. It must be a unique example in the world history of democracy that the President and the Prime Minister of India are both members of two different minority communities, who could have never been elected if the people did not bear the fundamental values of humanity.

If the Constitution of India has worked with some success in all kinds of adversities, it is because of this spirit of the people of India which runs through its provisions, their interpretation and application. So long as that spirit lives, the Constitution will also live and grow.[303]

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[297] See articles 331, 333, 336, and 337.

[298] See, e.g., articles 15 (3) & (4), 16 (4), (4-A) & (4-B), 17, 243-D, 243-T, 244, 244-A, 330, 332, 335-340 and V & VI Schedules.

[299] Article 325.

[300] See article 370, 371- 371-I and V and VI Schedules.

[301] See articles 348 to 351 and VIII Schedule.

[302] See Parts XIV and XV.

[303] If some of the Western authors have appreciated the contribution of the Constituent Assembly to the constitution making and of the Constitution, they have tried to search for these secrets. Hassal and Saunders, for example, point out that India can take the credit of convening 'one of the most successful constituent assemblies in modern times'. Hassal & Saunders, above n 227, 56. See also the much acclaimed work of Austin on Indian Constitution; *Cornerstone of a Nation*, above n 8 and *Working a Democratic Nation*, above n 156.