Use and Abuse of the Indian Constitution

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I. Introduction

Constitutional developments in India, especially in recent years, have been the subject-matter of intense interest among the intelligentsia throughout the world, both developed and developing. India's size and population, its spiritual heritage and ancient culture and the significant role it plays in international relations are in themselves formidable reasons for commanding attention. But there are other, more fundamental reasons: the most important of which are the pursuit of democracy in India and the market-oriented economic reforms introduced at the beginning of this decade.

What seems to worry observers of the Indian political scene both within and outside India is the political instability said to arise out of several short-lived coalition regimes in the recent past. This, among others, has led to demands that the Constitution be reviewed, keeping in view the experience in its working since 1950.[1]

The central message of the Constitution lies in its promise to secure a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Towards this end, the Constitution seeks to protect, in Part III thereof, basic human rights. It directs the State, in Part IV thereof, to make the promise of a welfare State a reality. Together, these two Parts constitute the quintessence of the Constitution; while the Constitution is basically a political document, these two Parts make it a powerful social and economic instrument. The remaining parts of the Constitution are nothing but a mechanism designed to promote the objects and purposes of Parts III and IV. The Constitution builds this mechanism on the foundations of democracy, rule of law, secularism, free and fair elections, federalism, separation of powers and judicial review, all of which, in the view of the Supreme Court, represent the unamendable basic features of the Constitution.[2]

A. Accomplishments

The most significant achievement of the Indian Constitution is that it has succeeded in putting into practice the democratic way of political life. India has had

[1] See the National Agenda for Governance, subscribed to by the parties that formed the present coalition Government at the Centre, which supports the establishment of a Commission for this purpose. See, also, S.C. Kashyap (ed.), Perspectives on the Constitution, 1993.

[2] *Kesavananda* v. *State of Kerala*, All India Reporter (AIR) 1973 Supreme Court (SC) 1461; *Smt. Indira Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299; *Minerva Mills Ltd.* v. *Union of India*, AIR 1980 SC 1789; *Subesh Sharma* v. *Union of India*, AIR 1991 SC 631; *Kihota Hollohon* v. *Zachilhu*, AIR 1993 SC 412; *Delhi Judicial Service Association, Tis Hazari Court* v. *State of Gujarat*, AIR 1991 SC 2176.

twelve elections to the Lok Sabha (the lower House of Parliament) and several more elections to the Legislative Assemblies in the States based on adult suffrage. There were more than 600 million eligible electors on the eve of the just concluded 12th General Election to the Lok Sabha. Nearly 62 per cent of the electorate exercised their franchise.

The Constitution has also established and sustained an independent judiciary and a free press. As enjoined in Part IV of the Constitution, the judiciary has been separated from the executive in the public services of the State. The Constitution has also inspired the initiation of steps towards respect for human rights and social justice in such forms as abolition of untouchability, promotion of the welfare of the weaker sections of the people, and access to justice unburdened by technical features of court procedures. A high-powered National Human Rights Commission was established in 1993 to bring about greater efficiency and transparency in the matter of protection of human rights. The constitutional mandate of secularism has helped in sustaining the heritage of India's composite culture.

The Constitution has also made the transition from the system of mixed economy to one of market-oriented economy possible without any hiccups. The Indian economy is now beginning to grow in a rapid and progressive way. India has a professional, academic and business class, which is not inferior to that of any other country in the world. In the country as a whole, there is, undoubtedly, more material progress now than before.

As a result of the Constitution (Seventy-third Amendment) Act, 1992 and the Constitution (Seventy-fourth Amendment) Act, 1992, the Constitution has brought into existence local government – that is, government at the level of the Panchayats (i.e., institutions of self-government for rural areas) and the Municipalities – a constitutional reality with a view to strengthening democracy at the grass-roots level. In recognition of the important role of women in developmental activities, these Amendment Acts require that one third of the total number of seats to be filled by direct election in every Panchayat and every Municipality shall be reserved for women. In extension of the same logic, a proposal to amend the Constitution for the purpose of reserving 33 per cent seats for women in Parliament and State Assemblies is being debated.

Above all, the three branches of government, both at the level of Central and State Governments, and the people of the country as a whole, look up to the Constitution as the final arbiter in matters of democratic governance, social and economic transformation and the ushering of a society based on the rule of law. The relevance of the Constitution to the national life is thus well-established in India and does India proud.

B. Setbacks

There have, at the same time, also been serious setbacks in the implementation of constitutional goals. More than 36 per cent of the people still live below poverty line. The vast rural population suffers from lack of potable drinking water

and basic health care facilities. India has the maximum number of illiterates in the world (429 million) and this exceeds the total population of the United States, Japan and Canada. The infrastructure sectors, including power, roads and bridges and telecommunications, remain under-developed.

The constitutional provision of free and compulsory education for children remains largely unimplemented. India has also the largest number of children out of primary schools. The quality of primary schools is appallingly low and this may be due to partly lack of effective political commitment towards making primary education compulsory and partly on account of education not enjoying the first claim on budgetary resources. The burden of educational deprivation falls heavily on women, rural population, the Scheduled Castes and the Scheduled Tribes and other backward classes. The backward and weaker sections of the people remain substantially underdeveloped.

India is nowhere near the objective of stabilising its population growth, for India's population is increasing by more than 17 millions annually with adverse implications on its socio-economic development. A Constitutional Amendment Bill was introduced in 1992 in the Rajya Sabha, the upper House of Parliament, for the purpose of imposing a duty on the State to promote population control and the small family norm and to disqualify a person for being chosen as, and for being, a member of either House of Parliament or either House of the Legislature of a State, if he has more than two children. The Bill sought to bring out political will and commitment for population control. Regrettably, it did not make much headway and lapsed.

Among the other problems are the continued growth of communalism, casteism, disease amongst large sections of people, child labour, environmental threats, unemployment, corruption, migration of rural population to urban areas, drug trafficking, uneven economic growth and a skewed distribution of resources, criminalization of politics, terrorism, exploitation of religion for political purposes and such others.

The special session of Parliament, held in August 1997 to celebrate 50 years of Independence, had also drawn attention to these and kindred problems. What are the underlying reasons for lacklustre progress in the implementation of the constitutional promise? One may start the inquiry with an investigation of the working of the three branches of the State established by the Constitution – the Legislature, the Executive and the Judiciary – without whose effective participation no antidote for the country's problems can be found.

II. The Legislature

The Constitution prescribes a Parliamentary system of government, in which the Executive is responsible to Parliament, at both the Centre and the States. The primary functions of Parliament or of a State Legislature consist in control over the Executive, public finance and law-making. The working of Parliament in all these spheres leaves much to be desired.

A. Negative developments

Studies made by the Lok Sabha Secretariat disclose that successive Lok Sabhas have had lesser and lesser time for law-making. Similar trends appear even in the matter of passing the general budget, the railway budget and the budgets of the States under President's Rule. More than before Parliament's time is spent now on matters which do not pertain to its primary functions. What is more, the business of the Houses is sometimes transacted without quorum which is one-tenth of the total number of members of the House.[3]

It is very often the case that there is more of shouting and sloganeering than of informed debate in Parliament and State Legislatures.[4] Not infrequently, even the address of the President to Parliament or of a Governor to the State Legislature is interrupted. The question hour remains ineffectively used. The Zero Hour is generally used by the opposition parties to raise issues that have the potential to embarrass the Government. During this Hour, it is said that "everything is audible but nothing is intelligible".[5] It is also not uncommon to see the elected representatives throw themselves into the well of the House.

In the last few years, the Houses had to be frequently adjourned for prolonged periods in view of agitational approaches adopted by the opposition parties not to allow the Houses to transact business with a view to registering their protest against Government policies and actions; this has led to lapsing of Ordinances and neglect of important legislative business. Over a period of time, the Government felt more encouraged to avoid initiation of legislation in the Legislature and to promulgate Ordinances. Whereas the Constitution contemplates promulgation of Ordinances in the inter-sessional period where circumstances exist which render it necessary to take "immediate action", this requirement is often ignored. This is undoubtedly a disturbing trend that erodes the authority of Parliament.

With reference to an Ordinance promulgated in Bihar, the Supreme Court was called upon to decide the question whether the Governor had power to re-promulgate the same Ordinance successively without bringing it before the State Legislature.[6] The Court observed that the power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and that it cannot be allowed to serve "political ends", that it is a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution by adopting the methodology of re-promulgation and that such exercise of power will have the effect of "subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the Legislature as provided in the Constitution but by laws made by the Executive".

[3] See A. Surya Prakash, What Ails Indian Parliament? An Exhaustive Diagnosis, 1995, 165–175.

[4] See Surya Prakash (note 3), 139 – 148.

[5] Ibid.

[6] *D.C. Wadhwa* v. *State of Bihar*, AIR 1987 SC 579, 589. See also *R.K. Garg* v. *Union of India*, AIR 1981 SC 2138; *T. Venkata Reddy* v. *State of A.P.*, AIR 1985 SC 724.

B. Political defections

Yet another area which needs to be looked at relates to unprincipled political defections. The Constitution (Fifty-second Amendment) Act, 1985, added the Tenth Schedule to the Constitution to deal with this problem. The Supreme Court has struck down paragraph 7 of this Schedule, which in effect excluded the jurisdiction of courts on questions as to disqualification on ground of defection, for want of ratification by the State Legislatures.[7]

The Tenth Schedule seeks to disqualify a member of either House of Parliament or of either House of the State Legislature belonging to any political party for being a member of the House if he has voluntarily given up his membership of such political party or if he votes or abstains from voting contrary to any direction issued by his legislature party. However, the direction given by the political party to a member belonging to it, the violation of which may entail disqualification, is limited, by virtue of a Supreme Court ruling, to a vote on motion of confidence or no confidence in the Government or where the motion under consideration relates to a matter which was an integral policy or programme of the political party on the basis of which it approached the electorate.[8] The Schedule is not attracted if a group of members consisting of not less than one-third of the members of a legislature party were to split from such party or if a party were to merge with another party or if a member, not accepting the merger of his original political party with another party, opts out of such merger and retains the separate identity.

There is no doubt that the anti-defection law has to some extent succeeded in preventing defections by members on pain of disqualification when they constitute less than one-third of the members of the legislature party concerned. However, it is not uncommon to see splits in legislature parties, which do not attract this disqualification. Quite a number of members do not seem to have any compunction about changing political parties for personal gain; in the process political ideologies fall by the wayside. The integrity of the party system is constantly under pressure due to defections, especially having regard to the fact that there are about 55 political parties recognised by the Election Commission and that India is currently going through a phase of coalition governments surviving on wafer-thin majorities. The partisan manner in which some presiding officers of the House have generally acted in cases relating to disqualification and the enormous time taken to deal with such cases have further compounded the defection syndrome. The time has come to examine the question of entrusting disqualification cases to an authority such as the President of India who may be required to act according to the opinion of the Election Commission of India in the matter.[9] Consideration may also be given to evolving other measures such as denial of ministerial berths or positions of power for a specified period to legislators who change parties af-

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[7] *Kihota Hollohon* v. *Zachilhu* (note 2).

[8] Ibid.

[9] For similar provisions on disqualification of members, see articles 103 and 192 of the Constitution. See also the opinion expressed by Verma J., in *Kihota Hollohan's* case (note 2), at 471 – 472.

ter election even where such change does not amount to defection for the purposes of the Tenth Schedule.

The Special Session of Parliament held in August 1997 adopted a resolution unanimously which puts, among other things, electoral reforms, criminalisation of politics and orderly conduct of Parliamentary business on, what it calls, "Agenda for India" for action.

C. Electoral reforms

Neither the Indian Constitution nor the electoral law prescribes a minimum educational qualification for persons seeking election to Parliament. Nevertheless, there has been a steady improvement in the educational qualifications of members over the last 48 years. Looking at the background of members from the First to the Twelfth Lok Sabha, it appears that most members were in the fields of agriculture, social service, law and teaching. While this is to be welcomed, it is also necessary to attract economists, engineers and technologists, medical practitioners, scientists, sportspersons, traders and industrialists on a more liberal scale so as to enhance the quality of debates in Parliament.

Elections to the Lok Sabha, the Legislative Assemblies and other representative bodies are increasingly getting conditioned by money power, muscle power and narrow ideologies.[10] It appears that in a number of cases the choice of a candidate does not depend on his eminence or ability to represent a constituency but on whether he comes from the majority community or caste in the area concerned or can corrupt the electoral process both by money power and muscle power and win the election at any cost. The electoral law, no doubt, prescribes a ceiling on the expenditure of a candidate in connection with the election[11]; however, on account of an amendment made in 1974 to section 77 of the Representation of the People Act, 1951, the expenditure incurred by a political party or by any other association or body of persons or by any individual other than the candidate or his election agent is not required to be included in the election expenses of the candidate, and consequently the law on election expenses has come to suffer from two major weaknesses: first, as expenditure incurred by political parties, etc., is not required to be included in the ceiling of election expenses of the candidate, political parties remain free to spend any amount of money on the election campaign of its candidates; and, secondly, a candidate can even spend his own money on his election campaign by diverting it to his party for use by it on his election. Escape route for unlimited expenditure on election campaigns is thus built into the electoral law itself. The Supreme Court of India, the Election Commission of India and the Dinesh Goswami Committee on Electoral Reforms have underlined the need

[10] See the observations by the Supreme Court to the same effect in *Gadakh Y.K.* v. *Balasaheb Vikhe Patel*, AIR 1994 SC 678, 691.

[11] See section 77 of the Representation of the People Act, 1951, read with Rule 90 of the Conduct of Election Rules, 1961.

to remove the 1974 amendment from the 1951 Act with a view to curb, what the Supreme Court called, "the role of money power in the elections"[12] without which no "meaningful democracy" is possible. It is hoped that the Government would initiate action for appropriate reform in this regard.

Another factor that hurts the cause of democracy in India arises out of the serious problem of criminalisation of politics in which persons convicted by courts of law for certain offences are entering into the election fray and contesting as candidates. Section 8 of the Representation of the People Act, 1951, seeks to disqualify persons who are convicted of certain offences for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State for certain periods specified therein. Following judicial pronouncements[13], the Election Commission has recently clarified that this disqualification takes effect from the date of conviction by the trial court, irrespective of whether the convicted person is released on bail or not during the pendency of appeal (subject to the exception in the case of sitting MPs and MLAs under section 8(4) of the 1951 Act). The Commission also suggested that section 8 be restructured and made more stringent and easy to implement. It proposed that whoever is convicted of an offence by a Court and sentenced to imprisonment for six months or more should be debarred from contesting elections, for a period totalling the sentence imposed plus an additional six years.

While this proposal deserves to be considered, in the final analysis, the entry of criminals or of persons having criminal antecedents could be effectively checked only if the political parties themselves decide not to encourage history-sheeters as their candidates.[14] There are a number of other proposals on election reforms made by the Dinesh Goswami Committee, the Election Commission or the previous Governments which need to be considered in the interests of fair play in the political system, and these include giving statutory force to Part VII of the Model Code of Conduct, automatic disqualification of a person found guilty of a corrupt practice by an order of the Court for a period of six years from the date on which that order takes effect and empowering the Election Commission to countermand an election in case of booth-capturing on report from the Returning Officer or otherwise.

D. Powers and privileges

Reference may be made to the uneasy truce that prevails between Parliament and the Judiciary over the powers and privileges of the former, especially in the

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[12] *Gadakh Y.K.* v. *Balasahib Vikhe Patel* (note 10).

[13] *Purushottamlal Kaushik* v. *Vidya Charan Shukla*, 66 Election Law Reports 110; *Shri Sachindra Nath Tripathi* v. *Dondnath*, 84 Election Law Reports 46.

[14] It is encouraging to note that whereas 40 persons with criminal record were elected to the Lok Sabha in 1996, only 15 persons with such record have been elected to the Lok Sabha in 1998. Further, whereas about 1500 candidates with criminal record contested the poll in 1996, this number fell to 150 in 1998. See The Pioneer (New Delhi Edition) dated 27 June 1998.

context of the fundamental rights guaranteed in Part III of the Constitution as also Parliament's competence to amend the Constitution. There seems to be a widely shared view among parliamentarians that the authority of Parliament, being an elected body, should remain unchallenged and that it should be comparable to that of British Parliament. It is untenable to compare the Indian Parliament with the British Parliament; though the Constitution of India adopted the British Parliamentary system of government, it limits the powers of all organs of the State and confers the power of judicial review on the Supreme Court and the High Courts.

Articles 105 and 194 of the Constitution specify the powers, privileges and immunities of Parliament and its members and of State Legislatures and their members in almost identical language. Article 105 is in four clauses. Clause (1) provides that there shall be freedom of speech in either House of Parliament subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of Parliament. Clause (2) grants absolute exemption to a member of Parliament from a court proceeding in respect of anything said or any vote given by him in Parliament. Clause (3) enables Parliament to define, by law, the other powers, privileges, etc., of each House of Parliament and of the members and committees of each House. It further contains a transitory provision, which provides that, until such law is made, Parliament, its members and committees shall enjoy the same powers, privileges and immunities, which the British House of Commons enjoyed at the commencement of the Constitution. By the Constitution (Forty-fourth Amendment) Act, 1978, the reference to the House of Commons was omitted. The transitory provision, as amended by the 1978 Act, states that, in respect of powers, privileges and immunities not covered by clauses (1) and (2), the powers, privileges, etc., of each House of Parliament and of the members and the committees thereof shall be those that existed immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978. Clause (4) extends the provisions prescribed by the preceding clauses to certain persons described therein. By the Constitution (Forty-fourth Amendment) Act, 1978, article 361A was inserted in the Constitution which gives protection to publication of a substantially true report of proceedings of Parliament and State Legislatures.

The Constitution does not subject any of the clauses of article 105 to the provisions on fundamental rights in Part III of the Constitution. The Supreme Court has also been consistent in declaring that violation of fundamental rights cannot be complained of in any court in respect of the speeches of MPs or votes given by them in Parliament since MPs enjoy complete immunity in this regard under clauses (1) and (2) of article 105.[15] It is in respect of the transitory provision in clause (3) that divergent opinions had come to be expressed by the Supreme Court.

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[15] *M.S.M. Sharma* v. *Sri Krishna Sinha*, AIR 1959 SC 395; *Reference under Art.143 of the Constitution in the matter of contempt of U.P. Legislative Assembly*, AIR 1965 SC 745; *P.V. Narasimha Rao* v. *State*, 1998 (3) Scale 53.

In the 1950s, the Supreme Court had no hesitation in giving primacy to parliamentary privileges and immunities over the fundamental rights of a citizen by applying the principle of harmonious construction.[16] In justification of this approach, the Court held that the provisions of article 105(3) are constitutional laws and that they are as supreme as the provisions of Part III. Later decisions reversed this position and thereby generated controversies between the Legislature and the Judiciary and brought them into a collision course, especially with regard to the powers of the former to commit a person for contempt by an unspeaking warrant issued by the Speaker.[17] The superior Courts have assumed the right to question proceedings in the House whenever a breach of fundamental rights was alleged, ignoring the absolute protection given to the legislative bodies by articles 105 and 194 of the Constitution on consideration of high public policy and the need to apply the principle of harmonious construction. These decisions are not in accord with the intention of the Constitution-makers according to whom the contempt powers of the legislature were not open to interference by courts.[18] Courts, of course, are entitled to interpret the scope of articles 105 and 194, but, once it is found that a power, privilege or immunity falls within the ambit of those provisions, the courts should declare that they have no more say in the matter and should really have none, since parliamentary privileges are of the essence of Parliamentary democracy. Be that as it may, having breached the inviolability of articles 105(3) and 194(3), the superior Courts proceeded to treat the legislative bodies as any other body not co-equal to them even in the sphere allotted to such bodies by the Constitution. Speakers of the Legislatures have been given notices to appear before courts and contempt proceedings have also been initiated against speakers,[19] all of which have contributed to avoidable friction between the legislative bodies and the Judiciary.

Bribe-givers and bribe-takers

More recently, however, the Supreme Court resisted arguments, which would have led to encroachment on the immunity granted to MPs under clause (2) of article 105. On 26 July 1993, a motion of no-confidence was moved in the Lok Sabha against the minority Government headed by P.V.Narasimha Rao. The Government needed the support of 14 members to have the no-confidence motion defeated. On 28 July 1993, the no-confidence motion was lost, 251 members having voted in support and 265 against. It was alleged that a number of MPs agreed to and did receive bribes, to the giving of which P.V.Narasimha Rao and some others were said to be parties, to vote against the no-confidence motion. A prosecu-

[16] *M.S.M. Sharma* v. *Sri Krishna Sinha* (note 15).

[17] *Reference under Art.143 of the Constitution in the matter of contempt of U.P. Legislative Assembly* (note 15); *Sudhir Kumar* v. *Speaker, A.P.*, 1989 (2) Scale 611, 613 – 614.

[18] See Constituent Assembly Debates, vol.8, 578 et seq. See also H.M. Seervai, Constitutional Law of India, 4th ed., vol.2, 1993, 2180 et seq.

[19] *Sudhir Kumar* v. *Speaker, A.P.* (note 17).

tion was launched against the alleged bribe-givers and bribe-takers subsequent to the vote upon the no-confidence motion.

The matter finally figured before the Constitution Bench of the Supreme Court. Opposing the prosecution, the appellants urged that, by virtue of the provisions of article 105, they were immune from prosecution and that, in any event, since they were not public servants for the purposes of the Prevention of Corruption Act, 1988, they could not be prosecuted under that Act. Whereas the Court was unanimous in holding that bribe givers do not enjoy immunity, it was divided on the question whether the alleged bribe takers who voted upon the no-confidence motion are entitled to the immunity conferred by article 105(2). The minority Judges (Agarwal and Anand JJ.) answered this question in the negative on the ground that any other view would "place such Members above the law" and "would not only be repugnant to healthy functioning of Parliamentary democracy but would also be subversive of the Rule of Law"[20]. The majority Judges (Bharucha, Rajendra Babu and Ray JJ.) answered the question in the affirmative on the footing that the protection against proceedings in court as envisaged under article 105(2) "must necessarily be interpreted broadly and not in a restricted manner", having regard to the object which is intended to be secured by it.[21] They held that it is of the essence of Parliamentary system of Government that people's representatives should be free to express themselves without fear of being made answerable on that account in a court of law.[22] They further observed:

> We are acutely conscious of the seriousness of the offence that the alleged bribe takers are said to have committed. If true, they bartered a most solemn trust committed to them by those they represented. By reason of the lucre that they received, they enabled a Government to survive. Even so, they are entitled to the protection that the Constitution plainly affords them. Our sense of indignation should not lead us to construe the Constitution narrowly, impairing the guarantee to effective Parliamentary participation and debate.[23]

The fact that a court cannot proceed against legislators who are alleged to be bribe takers does not mean that they could go scot-free. Any attempt to influence members by improper means in their parliamentary conduct is a breach of privilege of the House. Thus, the offering of a bribe to a member of Parliament to influence him in his conduct as a member or acceptance of a bribe by such a member is treated as a breach of privilege by Parliament though no money actually changes hands.[24] The minority Judges did not, however, find this in itself a "satisfactory solution".

All Judges agreed that a member of Parliament is a public servant for the purposes of the Prevention of Corruption Act, 1988. They further agreed that there is no authority under the said Act who can grant sanction for his prosecution

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[20] See *P.V. Narasimha Rao* v. *State* (note 15), at 81.
[21] Ibid., at 106, 115, 126.
[22] Ibid., at 114, 127.
[23] Ibid., at 127.
[24] See M.N. Kaul/S.L. Shakdher, Practice and Procedure of Parliament, 4th ed., 1991, 254.

under section 19(1) of the Act. The minority Judges (Bharucha and Rajendra Babu JJ.) held that MPs cannot be prosecuted for the offences mentioned in section 19(1), namely the offences punishable under sections 7, 10, 11, 13 and 15 of the 1988 Act because of want of an authority competent to grant sanction thereto, and expressed the hope that Parliament will address itself to the task of removing this lacuna with due expedition. They, however, held that sanction is not required in respect of offences not expressly specified in section 19(1). It appears that the minority Judges are referring here to the offences punishable under sections 8 and 9 in respect of which no sanction is required under section 19. The majority Judges (Agarwal, Anand and Ray JJ.) declared that, since there is no authority competent to remove a member of Parliament and to grant sanction for his prosecution under section 19(1), there is no limitation on the power of the Court to take cognisance, under section 190 of the Code of Criminal Procedure, of the offences mentioned in section 19(1) of the 1988 Act. They observed that the requirement of sanction under section 19(1) is intended as a safeguard against criminal prosecution of a public servant on the basis of malicious or frivolous allegations by interested persons and that the inapplicability of section 19(1) to a member of Parliament "would only mean that the intended safeguard was not intended to be made available to him."[25] They expressed the hope that Parliament will provide for an adequate safeguard in this regard by making suitable amendment to the 1988 Act. However, they held that, till such safeguard is provided by Parliament, the prosecuting agency, before filing a charge-sheet in respect of offences punishable under sections 7, 10, 11, 13 and 15 of the 1988 Act against a member of Parliament in a criminal court, shall obtain the permission of the Chairman of the Rajya Sabha/-Speaker of the Lok Sabha, as the case may be.

The Court's view that the 1988 Act applies to MPs does not appear to be sound. If the Act intended to apply to MPs, there is no reason why it would not have provided for the requirement of previous sanction in the case of MPs too. The view of the majority Judges that this safeguard was not intended to be made available to a member of Parliament appears to be faulty, for it is inconceivable that Parliament which enacted the 1988 Act would have deemed it appropriate not to make such safeguard available to its members, while making the same available to other public servants.[26] If that were the intention, as held by the majority Judges, then how could the Supreme Court create the safeguard on its own, thereby making legislation of its own contrary to the scheme of the 1988 Act. Even the view of the minority Judges that MPs can be prosecuted under the 1988 Act for offences not mentioned in section 19 appears to be faulty, for it is illogical to contend that the Act, while making provision for prosecution of MPs for offences under sections 8 and 9, intended to distance the MPs from the more significant offences specified in section 19; it cannot also be contended that sections 7, 10, 11,

[25] *P.V. Narasimha Rao* v. *State* (note 15), at 104.

[26] See also Verma, J.'s dissenting judgment in *Veeraswami's* case, 1991 (3) Supreme Court Reporter (SCR) 189, 285, 286.

13 and 15 are incapable of being applied to MPs. The merit in the minority view, however, is that they did not rush to fill the gaps said to exist in the Act but rather invited the attention of Parliament to them. If the minds of the Judges are agitated about improvement of statutory laws, there is the danger of Judges usurping the prerogative of the legislature to make law and failing to interpret the law according to the legislative intention. In the present case, both the majority and minority Judges appear to have been influenced by their perception of corruption at political levels and the need to bring such corruption within the discipline of the 1988 Act.

E. Overdose of legislation

By any reckoning, there is an overdose of legislation in India. Successive Governments appear to share the belief that every problem that the country faces can be tackled through legislation, either through a new enactment or an amending enactment. Not infrequently, amendments are mooted even before a new enactment is brought into force or is on the statute book only for a few years. Ministries seem to vie with each other for establishing a record of sorts regarding the number of enactments that owe inspiration to them. The same enthusiasm is never shown in the matter of enforcement of these laws. Most laws remain unknown to most people in India and no significant effort is made to disseminate information on these laws. In such an environment, the maxim that 'ignorance of law is no excuse' works hardship in practice.

Parliament has not shown any special interest either in discouraging overdose of legislation or taking the Executive to task for its lacklustre record in the matter of enforcement of laws. A useful beginning in this regard, however, has been made in 1993 when Parliament constituted department-related standing committees to examine bills referred to them for closer scrutiny before they are considered in the House. These committees too do not generally appear to display specialist skills required to ensure better parliamentary control over the Executive. They need to consult the interest-groups outside Parliament on an extensive scale before their recommendations are finalised.

F. Law-making activities

The Supreme Court, no doubt, declared at a doctrinal level that the Court could not even indirectly assume to itself a supervisory role over the law-making activities of the legislature or require the executive to introduce a particular legislation or the legislature to pass it.[27] Yet, in practice, the Supreme Court has not re-

[27] *Union of India* v. *Sukumar Sengupta*, AIR 1990 SC 1692, 1708; *State of H.P.* v. *A Parent of a Student of Medical College, Shimla*, AIR 1985 SC 910, 913; *Supreme Court Employees Welfare Association* v. *Union of India*, AIR 1990 SC 334, 353; *Narinder Chand* v. *U.T. Him. Pra.*, AIR 1971 SC 2399, 2401; *Ahmedabad Women Action Group & Ors.* v. *Union of India*, Judgments Today 1997 (3) SC 171.

strained itself from calling upon the legislature to enact law on the basis of national model laws or resolutions of State Ministers or otherwise.[28] Even where the legislature removes the defects in a statute pointed out by the Supreme Court, there is no assurance that the amended statute will receive the approval of the court if its validity is challenged on a future occasion.[29] This is different from the well-recognised principle that a statute which when enacted was justified may, with the passage of time, become arbitrary and unreasonable.[30] The legislature is held to be incompetent to set aside a judgment of a court, for the judicial power to make a judgment is vested by the Constitution in courts and not in a legislature.[31] However, it is recognised that it is permissible to a competent legislature to overcome the effect of a decision of a court by passing a suitable legislation amending the relevant provisions of the statute concerned with retrospective effect, thus taking away the basis on which the decision of the court had been rendered.[32] It has been held that there are certain inherent limitations on the power of Parliament to amend the basic features of the Constitution[33], a holding which in the view of a large number of members of Parliament amounted to an unwarranted encroachment on Parliament's amending power. More about this later.

G. Control over public expenditure

The Constitution lays down that no public expenditure can be undertaken without the consent or assent of the legislature and that the legislature is authorised and entitled to fix the priorities for the expenditure, upon the recommendation of the Executive.[34] The Supreme Court has declared – here again, at a doctrinal level – that it is loath to pass any order or give any direction, because of the division of functions between the three co-equal organs of the government under the Constitution and that courts cannot impinge upon the judgment of the legislature or of the executive as to priorities for the expenditure.[35] However, in practice, courts have not desisted from directing the Executive to favourably consider demands for additional funds for some project or the other and supervise implementation of its directions in this regard.[36] While the Supreme Court had no hesitation in striking

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[28] See, for instance, *Malpe Viswanath Acharya* v. *State of Maharashtra*, (1998) 2 SCC 1, 23; *Vineet Narain* v. *Union of India*, AIR 1998 SC 889.

[29] *L. Chandra Kumar* v. *Union of India & Others*, Judgments Today, 1997 (3) SC 589.

[30] *State of M.P.* v. *Bhopal Sugar Industries Ltd.*, AIR 1964 SC 1179; *Synthetics and Chemicals Ltd.* v. *State of U.P.*, (1990) 1 SCC 109, 156 – 157.

[31] *Shri Prithvi Cotton Mills Ltd.* v. *Broach Borough Municipality*, AIR 1970 SC 192, 195.

[32] *M/s. Hindustan Gum* v. *State of Haryana*, AIR 1985 SC 1683, 1687.

[33] *Kesavananda* v. *State of Kerala* (note 2); *Smt. Indira Nehru Gandhi* v. *Raj Narain* (note 2); *Minerva Mills Ltd.* v. *Union of India* (note 2); *Waman Rao* v. *Union of India*, AIR 1981 SC 271.

[34] See arts. 112 to 117 and 202 to 207 of the Constitution.

[35] *State of H.P.* v. *Umed Ram*, AIR 1986 SC 847, 852 – 953; *Krishena Kumar* v. *Union of India*, AIR 1990 SC 1782, 1801; *Union of India* v. *Tejram Parashramji Bombhate*, AIR 1992 SC 570, 571.

[36] *State of U.P.* v. *Umed Ram* (note 35), at 855. See also *Nakara* v. *Union of India*, AIR 1983 SC 130.

down the direction of a tribunal to the Central Government to sanction a second school and to create an adequate number of posts for that school on the ground that no court could compel the government to change its policy involving expenditure[37], it had no hesitation in giving directions regarding service conditions of judicial officers ignoring the heavy financial burden likely to be imposed by its directions on the ground that the Executive and the Legislature had failed in their obligations on that behalf and that its directions were called for to maintain the independence of the judiciary.[38] There is here a clear affirmation, contrary to the declared jurisprudence that, even in the matter of incurring expenditure or fixing priorities of expenditure, courts could give directions if in their perception the Executive and the Legislature have failed to perform, in the words of the Supreme Court, "their obligatory duties". It is never explained as to what these so-called obligatory duties are.

III. The Executive

A. Parliamentary form of government

Though the Constitution does not adhere to the doctrine of separation of powers as it is known in the United States of America, it sufficiently differentiates between the functions of the Legislature, the Executive and the Judiciary; these organs discharge the sovereign power of the State in their respective spheres.[39] The Constitution does not contemplate assumption by one organ of the State of functions that essentially belong to the other.[40] Ordinarily the executive power connotes the residue of Governmental functions that remain after legislative and judicial functions are taken away.[41] It includes the initiation of legislation, the maintenance of law and order, the promotion of social and economic welfare, the direction of foreign policy and the carrying on or supervision of the general administration of the State.[42] By virtue of article 73 of the Constitution, where the Constitution does not require an action to be taken only by legislation and there is no legislation to fetter the executive power of the Union, the executive power of the Union becomes, subject to the provisions of the Constitution, co-extensive with the legislative power of the Union. A similar principle is applicable even at the State level.

The Indian Constitution prescribes the same system of Parliamentary form of government as in England.[43] In India, as in England, the executive has to act sub-

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[37] *Union of India* v. *Tejram Parashramji Bombhate* (note 35), 571 – 572.

[38] *All India Judges' Association* v. *Union of India*, AIR 1993 SC 2493, 2504.

[39] *Ram Jawaya* v. *State of Punjab*, AIR 1955 SC 549; the advisory opinion of the Supreme Court *In the matter of: Cauvery Water Dispute Tribunal*, AIR 1992 SC 522, 550.

[40] *State of H.P.* v. *Umed Ram* (note 35), at 853.

[41] *Madhav Rao Scindia* v. *Union of India*, AIR 1971 SC 530, 565.

[42] *Rama Jawaya* v. *State of Punjab* (note 39), at 556.

[43] *U.N.R.Rao* v. *Indira Gandhi*, AIR 1971 SC 1002, 1003.

ject to the control of the legislature. Under article 53 of the Constitution, the executive power is vested in the President but under article 74 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The president has thus been made a formal head of the executive and the real executive power is vested in the Council of Ministers. Similar provisions obtain in regard to the Government of a State. The Council of Ministers enjoying a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions.[44]

B. Conventions

The Constitution does not constitute an exhaustive source of constitutional law. Courts have recognised certain conventions under the Constitution, modelled on British constitutional conventions, to fill up the gaps in the Constitution and to make it workable, especially in the matter of the working of the Parliamentary system of government[45]. These conventions help in bringing about constitutional development without formal changes in the Constitution and in guarding against the irresponsible abuse of powers. For instance, the Supreme Court has recognised that the President or the Governor can act on his own in exceptional situations which relate to – (a) choice of a Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House but refuses to quit office; (c) the dissolution of the House when an appeal to the country is necessitous.[46]

In the matter of appointment of a Prime Minister, one President of India – President Venkataraman – claimed: "I had established a convention that the largest party should be offered the first option of forming the government and if that party declined, other parties should be offered the chance successively according to their strength in the Lok Sabha,"[47] without looking into the question whether that party could secure majority support in the House.[48] This is an unsound approach; it could lead, and in fact led, to the leader of the largest party becoming the Prime Minister even when he does not command majority support in the Lok Sabha. It is not in consonance with the constitutional command in article 75(3) that the Council of Ministers shall be collectively responsible to the Lok Sabha; this provision endorses the fundamental principle of the Cabinet form of Government in England that the party which commands the majority in the popularly

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[44] Ibid.

[45] See Kuldip Singh, J.'s, observations in *S.C.Advocates-on-Record Association* v. *Union of India*, AIR 1994 SC 268, 400 – 405; *U.N.R. Rao* v. *Indira Gandhi* (note 43); *Samsher Singh* v. *State of Punjab*, AIR 1974 SC 2192, 2219 et seq.

[46] *Samsher Singh* v. *State of Punjab* (note 45).

[47] R. Venkataraman, My Presidential Years, 1994, 464. This so-called convention was followed by President Shankar Dayal Sharma, successor to Venkataraman.

[48] Ibid., at 275.

elected House is entitled to have its leader placed in office with the right to select his colleagues.[49] If no single party controls a majority in the Lok Sabha, the President should summon a leader who, in his opinion, is capable of controlling a majority by entering into a coalition or compromise with some other party or independents for, as the Supreme Court observed in the *Samsher Singh* case, the paramount consideration in the matter of a choice of the Prime Minister (Chief Minister at the State level) is that the person invited to form the Government should command a majority in the House.[50]

In India, as in England, a sound convention has developed that the Prime Minister should belong to the popular House, though the constitutional requirement in India will be satisfied if he belongs to either House of Parliament. This convention was recently broken by one Prime Minister[51] who preferred to get elected to the Rajya Sabha. It is hoped that the convention will continue to be respected in future, for it is a basic postulate of a representative democracy that the man who leads that democracy is someone directly elected by the people.

In keeping with another British convention, article 74(1) provides that the President shall, in the exercise of his functions, act in accordance with the advice given to him by the Council of Ministers. However, it empowers the President to direct the Council of Ministers to reconsider any advice given to him; the President is required to act in accordance with the advice tendered after such reconsideration. There has been one instance in the very recent past when the advice given by the Council of Ministers in the matter of imposition of President's Rule in Uttar Pradesh was withdrawn after the President sought its reconsideration. In practice, Governments have generally avoided having confrontation with the President.

C. Coalition Governments

The most salient political trend of recent times is the increasing presence of regional political parties in Parliament. These parties doubled their shares of votes and seats in Parliament between 1984 and 1996; they have since again doubled them. Today, coalition partnership between national and regional parties in the governance of the country has become indispensable. There is an expectation that this growing power of the regional parties could set right the pervasive trend towards greater centralisation of powers over the years in the hands of the Centre and that there would be more autonomy for states. Though nothing of this sort has so far happened, the National Agenda for Governance of the present coalition Government supports devolution of more financial and administrative powers and

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[49] A.V. Dicey, Introduction to the Study of the Law of the Constitution, 10th ed., 1959, 421; Rodney Brazier, Constitutional Practice, 1988, 6.

[50] AIR 1974 SC at 2230. This was reaffirmed in several cases, including the recent *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1918.

[51] H.D.Deve Gowda. I.K.Gujral, the Prime Minister who succeeded Deve Gowda, was a Rajya Sabha member at the time of his appointment as the P.M. He did not make any effort to get elected to the Lok Sabha.

functions to the States. Concrete legislative proposals are under active consideration to carve up new States out of bigger States like Uttar Pradesh, Bihar and Madhya Pradesh.

Running a coalition government is still a messy affair in India. It is not uncommon to see a coalition partner insist on its share of the cake and threaten to walk out if the demands are not met. The Prime Minister/Chief Minister is often dictated by coalition partners as to who from their parties should be made Ministers; the prerogative of the Prime Minister/Chief Minister to choose his Ministers is thus getting eroded. It is not uncommon to see that the Ministers so chosen exhibiting subordination to their respective political bosses. These developments are not in keeping with established traditions of Parliamentary form of Government.

It is not as if minority or coalition Governments have all contributed to negative growth in the country. It was a minority Government installed in 1991 which provided a much-needed fillip for economic reforms, restored normalcy in Punjab, succeeded in amending the Constitution to provide a third-tier of Government at the level of the Panchayats and the Municipalities, organized elections in Jammu and Kashmir, quietened the agitation in the matter of implementation of Mandal Commission's recommendations on reservations in favour of backward classes of citizens, etc. It was again coalition Governments which have also helped the coalition partners, which have hitherto been the opposition parties, to understand better the complex problems involved in running the Government. On the whole, the logic of recent events has underlined the need for the Government to pursue solutions through consensus, since no single party is in a position to run the Government without the help of the other parties in varying degrees.

D. Size of Council of Ministers

In a number of States, especially those which have coalition Governments, the size of the Council of Ministers is quite large by any reckoning. Apart from creating avoidable stress on State funds, the over-sized cabinets make co-ordination between different departments difficult. The problem of an over-sized cabinet is also seen at the level of the federal Government in recent years. Private Member Bills have been introduced in Parliament from time to time seeking to amend the Constitution for the purpose of limiting the size of the Council of Ministers but without any success.

India has had four general elections in less than a decade, though the Constitution fixes a five-year term for the Lok Sabha. There have lately been a succession of minority Governments at the Centre whose continuation depended entirely on outside support. It is mainly the fear of facing elections at short intervals that kept the outside support in place. There are tensions in the air, since the parties extending support from outside often made demands of their own on the Government; this amounts to exercise of power clandestinely without being accountable either to the people or to Parliament. It is often alleged that minority Governments, not

being sure of their continuation for any specified period, are concerned more with problems of keeping their support from outside intact than with long-term policies that the country is in need of.

Not all the coalition Governments that ran the Government have had cohesive policies. The Government suffered on account of the ideological contradictions and other policy differences among the parties constituting it. As a consequence, among other things, market-oriented economic reforms could not be pursued with the vigour than they deserved. Every coalition partner, no doubt, subscribed to a Common Minimum Programme to be pursued by the Government; however, in practice, divergence of opinions on key issues remain. With no majority or wafer-thin majority in the Lok Sabha, the coalition Governments have been unable at times to secure majority support for enactment of important legislation even from parties extending support from outside.

E. Civil service

It is the Council of Ministers or the political executive, which exercises the State-power in the executive sphere, and not the civil service, which carries out the decisions of the political executive.[52] Nevertheless, civil servants are accountable for the acts done by them, unless there are special circumstances absolving any officer of accountability.[53] The Constitution does not model the civil service on the "spoils system" obtaining in the United States of America. It, having borrowed the Cabinet form of government, modelled its civil service on the permanent civil service in the United Kingdom; the same system also prevailed in British India.[54] Officers are generally recruited through competitive examinations held by Public Service Commissions, which are independent bodies established by the Constitution[55]; they enjoy security of tenure[56]. There are also all-India services common to the Union and the States.[57]

In the formative years of Independent India, the civil service, both at State and Central levels, helped the political executive in keeping the country together and in arriving at sound policy decisions. It ensured continuity in administration even when Governments changed from time to time. Though the Indian civil service is rated as one of the able services in the world, lately its image has suffered on account of several factors including its failure to tune itself to the requirements and demands of a welfare state and growing corruption. The Indian bureaucracy resists efforts to associate outside talent and expertise with the Government. There is little formal connection between the Government and academics or professional experts.

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[52] *All India Judges' Association* v. *Union of India* (note 38), at 2502.

[53] *State of Bihar* v. *Subhash Singh*, AIR 1997 SC 1390.

[54] See H.M.Seervai, Constitutional Law of India, vol. 2, 4th ed., 1993, 2109 et seq.

[55] See articles 315 – 323 of the Constitution.

[56] See articles 309 – 311 of the Constitution.

[57] See article 312 of the Constitution.

Over the years, in pursuit of a welfare state, the role of the Executive has been extended to practically every socio-economic activity, which in turn led to a great volume of legislation giving unprecedented power to the Executive. The higher judiciary has evolved principles of administrative law to restrain the Executive from exercising its powers in an arbitrary and mala fide manner. One sees a widening gap between what the courts proclaim in this regard and the actions of the Executive. Consequently, Government happens to be the major litigant before the courts. A lot of well-meaning actions are set aside, since Government fails to adhere to the principles of administrative law. Judges at the highest level have also observed that civil servants have been buck-passing and are disinclined to take decisions lest they be blamed if the decision proved to be wrong later on.

Civil servants often complain of more unwarranted interference by the political executive at the State level than at the Central level, with the result that officers on deputation from the State Government to the Central Government are generally reluctant to go back to the State Government. Not infrequently, State Governments use transfers as a weapon to victimise officers.

With all its problems, the civil service in India is still a strong factor in sustaining the government at all levels. Though it developed and maintained license-permit Raj for over forty years and thus acquired enormous powers in its hands, it responded well to the political call for dismantling this Raj to suit market-oriented economic reforms. The All India Services provide an effective and valuable link between the Union and the State Governments.

The civil service, especially its senior officers, is in need of adequate in-service exposure to general principles of administrative law and of constitutional law and specialisation in such areas as intellectual property rights, information technology, trade, commerce and finance, agriculture and environment, if it has to remain responsive to the requirements of modern India.

F. Execution of laws

The Constitution does not create administrative agencies of the Union for the execution of its laws. Only a few subjects specified in the Union List in the Seventh Schedule to the Constitution are administered by the Union directly through its own agencies.[58] Administration of several matters in the Union List as also most matters in the Concurrent List and enforcement of Union laws relating to them are entrusted to the executive machinery of the State.[59] The Constitution-makers considered that this arrangement is more economical and effective than the one obtaining in some federations in which the Union and States have separate agencies for administration of their respective laws. The Constitution expressly

[58] E.g., Defence, Foreign Affairs, Foreign Exchange, Posts and Telegraphs, All India Radio and Television, Airways, Railways, Currency, Customs, Union Excise, Income-tax. For a discussion on this aspect, see Report of Sarkaria Commission on Central-State Relations, Part I, 97 – 110.

[59] See articles 73 and 163 on the extent of executive power of the Union and of the States, respectively. See also article 258 on power of the Union to confer powers, etc., on States in certain cases.

obligates the States to secure compliance with the laws made by Parliament and the Union Executive is also empowered to give necessary directions to a State for that purpose.[60] Whatever be the constitutional arrangements in this regard, it is well-known that one of the weak points of the Indian constitutional system relates to the enforcement of enacted law.

After independence, there has been a virtual explosion in the field of enacted law; perhaps, India has a greater number of laws than any other country in the world. A whole lot of legislation deals with socio-economic matters aimed at improving the lot of the common man. The State machinery which is to enforce the law remains very ineffective. The State Governments often accuse the Central Government of not providing adequate financial resources for enlarging and strengthening the enforcement machinery. This charge is not admitted by the Central Government as it argues that division of financial resources takes place as per the constitutional scheme. Enforcement of law mainly depends upon complaints by affected persons; however, most laws remain unknown to the persons for whose benefit they are enacted. A significant part of the enforcement machinery is seen as making money for personal gain either for enforcing or not enforcing the law. It is often alleged that the political executive too restrains the enforcement machinery from proceeding against the offenders. In any view of the matter, there is a crying need for reducing drastically the number of laws and the involvement of the Government in all and sundry matters.

G. Abuse of discretionary powers

No Government can function without discretionary powers.[61] It is in this area that abuse has occurred in a significant manner. This may be illustrated by the manner in which President's Rule has been imposed in States under article 356 of the Constitution, Governors of States are selected, contracts are awarded, the status of Scheduled Castes, Scheduled Tribes and other backward class is conferred on newer sections of population, especially on the eve of elections, Ordinances are promulgated, public sector undertakings are managed, etc. The public appears to be deeply cynical about the Executive, whether it be civil or political. It is significant that there are very few social action groups to mobilise public opinion against abuse of executive power and in favour of obliging the public authorities to comply with the enacted law and discharge their duties. There is virtually no public resistance to wrongful deeds of government functionaries. A government proposal to establish a high level statutory body, to be known as the *Lok Pal*, to deal with corruption charges against all those who hold public office, including the Prime Minister, is under consideration.

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[60] See article 256.

[61] On abuse of discretionary powers, see, generally, *Ramana* v. *International Airport Authority of India*, AIR 1979 SC 1628; *Common Cause, A Registered Society* v. *Union of India*, AIR 1996 SC 3538.

IV. The Courts

In India, there is only one set of courts with the Supreme Court at its apex. Jurisdiction in respect of both Union and State laws is conferred on the same hierarchy of courts. The superior Courts – the Supreme Court and the High Courts – are endowed by the Constitution with the power of declaring a law unconstitutional if it is beyond the competence of the legislature according to the distribution of powers provided by the Constitution, or if it is in contravention of the fundamental rights guaranteed by the Constitution or any other mandatory provision of the Constitution.

The Supreme Court has made significant contributions in evolving administrative law[62], in guarding the fundamental rights from unwarranted legislative and executive encroachments, in creating awareness of the need to protect environment[63] and in rendering relief to aggrieved persons through the medium of public interest litigation (PIL)[64].

Following the English courts, the Supreme Court has articulated and evolved principles of administrative law to control governmental power so as to protect the individual against its abuse and to ensure transparency and accountability in the actions of the Government; it held that every activity of the Government, whether it be under the authority of law or in exercise of executive power, has a public element in it and that it must, therefore, be informed with reason and guided by public interest[65] and that this is so even in matters of governmental policy.[66] It further held that the principles of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary[67] and that they apply to both administrative and quasi-judicial action.[68] Judicial review of administrative action has, without any doubt and controversy, been one of the most important elements that has promoted public confidence in the justice-dispensing system in India.

It is in the area of constitutional law that the role of superior Courts has become the subject matter of differing perceptions. Here too, in the first two decades of its existence, the Supreme Court largely went by the language of the Constitution. The Court adopted a protective attitude towards the fundamental rights, assumed in that respect the role of "a sentinel on the *qui vive*" and declared that none of the fundamental rights could be waived by the party affected. If at all, it was in the

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62 See, generally, S.P. Sathe, Administrative Law, 5th ed., 1994.

63 See R.S.Pathak, Human Rights and the Development of the Environmental Law in India, Commonwealth Law Bulletin, vol. 14, 1988, 1171 – 1180.

64 See Jamia Cassels, Judicial Activism and Public Interest Litigation in India, American Journal of Comparative Law, vol. 37, 1989, 495.

65 *M/s Kasturi Lal* v. *State of J. & K.*, AIR 1980 SC 1992.

66 *Shrilekha Vidyarthi* v. *State of U.P.*, AIR 1991 SC 537, 551.

67 See, generally, *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597; *M.S. Gill* v. *Chief Election Commissioner*, AIR 1978 SC 851; *State of Orissa* v. *Dr.(Miss) Binapani*, AIR 1967 SC 1269; *A.K. Kraipak* v. *Union of India*, AIR 1970 SC 150; *Charan Lal Sahu* v. *Union of India*, AIR 1990 SC 1480.

68 *D.K. Yadav* v. *J.M.A. Industries Ltd.*, (1993) 3 SCC 259.

area of the Supreme Court's judgments on the then existing fundamental right to property that Parliament and the Executive accused the judiciary of displaying a conservative attitude[69] and blocking enforcement of agrarian reforms. It is a different story that the Constitution was finally amended with the result that the right to property is no longer a guaranteed fundamental right in Part III of the Constitution; that right is now provided for in article 300A as only a constitutional right.

A. Basic structure doctrine

The ease with which the Constitution was being amended – by 1967, the Constitution was amended 20 times – led the Supreme Court to change its earlier view that every part of the Constitution was amendable[70] and declare in 1967 in the *Golak Nath* case[71] that the provisions on fundamental rights are not amendable under article 368, which provides for the amendment of the Constitution. Realising the obvious untenability of this declaration, in the much celebrated case of *Kesavananda* v. *State of Kerala*[72], the majority of a Full Bench of 13 Judges overruled the *Golak Nath* case and laid down a new doctrine according to which there are certain basic features of the Constitution which are not open to Parliament's amending power under article 368. This judgment kept the list of basic features open-ended; however, the following, among others, have been held to be basic features: judicial review[73], rule of law[74], democracy[75], powers of the Supreme Court under articles 32, 136, 141 and 142[76], free and fair elections[77], the principles of equality[78] and separation of powers.[79] The doctrine of basic feature represents an important beginning of a new phase of judicial legislation or legislative judgments in India. It discloses judicial mistrust of legislative ventures; the fact that Parliament's ultimate accountability is to the electorate of India makes no difference in this regard. Though unsupported by legal theory and unprecedented in other jurisdictions, the Court's doctrine has, no doubt, helped in slowing down the unwarranted haste to amend the Constitution.

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[69] See, for example, *State of West Bengal* v. *Subodh Gopal*, AIR 1954 SC 92.

[70] *Shankari Prasad* v. *Union of India*, AIR 1951 SC 458; *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845.

[71] *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643.

[72] Supra note 2.

[73] *Subesh Sharma* v. *Union of India* (note 2); *L. Chandra Kumar* v. *Union of India* (note 29).

[74] *Subesh Sharma* v. *Union of India* (note 2); *Smt. Indira Nehru Gandhi* v. *Raj Narain* (note 2).

[75] *Kihota Hollohan* v. *Zachilhu* (note 2), at 347, 386.

[76] *All India Judicial Service Association, Tees Hazari Court, Delhi* v. *State of Gujarat*, AIR 1991 SC 2176.

[77] *Kihota Hollohan* v. *Zachilhu* (note 2).

[78] *Raghunathrao* v. *Union of India*, AIR 1993 S.C. 1267.

[79] *Smt.Indira Nehru Gandhi* v. *Raj Narain* (note 2); *Minerva Mills Ltd.* v. *Union of India* (note 2), at 1832; *Praga Ice and Oil Mills* v. *Union of India*, AIR 1978 SC 1296, 1310.

B. New human rights jurisprudence

(i) Expansive view

Kesavananda judgment was the progenitor of judicial activism which in several cases border on judicial legislation based on new theories and concepts. This phase began with the judicial introduction of "due process" clause in article 21 which in turn led to an explosive enlargement of fundamental rights.

Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to "procedure established by law". The Supreme Court, in the *Gopalan*[80] case in 1950, held that the word "law" in the expression "procedure established by law" referred to enacted law and not to "due process" of law in its American sense. It further held that certain articles of the Constitution on fundamental rights exclusively dealt with specific matters and that, where the requirements of an article dealing with a particular matter in question were satisfied and there was no infringement of the fundamental right guaranteed by that article, no recourse could be had to fundamental rights covered by any other article. This doctrine of exclusivity was over-ruled by the Supreme Court in 1970 in *Cooper* v. *Union of India*.[81]

Later, in 1978, in *Maneka Gandhi* v. *Union of India*[82], the Supreme Court introduced the "due process" clause into the Constitution when it held that "procedure" in article 21 of the Constitution means a procedure which is reasonable and fair and which can stand the test of article 14. And if a law is challenged, its validity has to be tested from the standpoint of all other articles of the Constitution, especially articles 14, 19 and 21. The Supreme Court has thus moved from the doctrine of exclusivity to the doctrine of inclusiveness. It has come to rely heavily on the test of reasonableness or of non-arbitrariness in adjudging the constitutional validity of a statute or of executive action, virtually treating the substance of all other articles on fundamental rights as falling within the doctrine of non-arbitrariness, and declaring that what is arbitrary depends on the facts of each case.

The assumption of such wide jurisdiction has rendered the outcome of legal proceedings in courts unpredictable. It has also encouraged litigants to come directly to the Supreme Court under article 32 of the Constitution in an increasing number of cases on the ground that the law in question is arbitrary. This problem is further compounded by the very expansive view taken by the Supreme Court on the scope of articles 14 (equality before law), 21 (protection of life and personal liberty) and 22 (protection against arrest and detention in certain cases), pursuant to what the Supreme Court considered to be its duty to advance the human rights jurisprudence.[83]

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[80] *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27.

[81] AIR 1970 SC 564.

[82] Supra note 67. See also *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1675, 1690; *Mithu* v. *State of Punjab*, AIR 1983 SC 473, 476.

[83] *Ajay Hasia* v. *Khalid Mujib*, AIR 1981 SC 487, 493; *M.C. Mehta* v. *Union of India*, AIR 1987 SC 1086, 1089, 1097.

The procedural clause in article 21 has been enlarged for giving it a substantive meaning.[84] A reasonable and fair procedure, it is said, includes free legal service to the poor[85], the right of undertrials to a speedy trial[86], prohibition against handcuffing and parading of an undertrial prisoner[87], the right of a detenu to consult a lawyer of his choice for any purpose[88], the right of working women against sexual harassment at work places[89], prohibition against a prisoner being subjected to any physical or mental torture which is not warranted by the punishment awarded by a court of law[90], etc.[91] "Life and personal liberty" concept in article 21 too has been used by the Supreme Court as a spring-board to extend its scope to all aspects of life which go to help a person live with human dignity; it has been held to cover not just bare existence but a "life of dignity" which would include at least "the bare necessities of life as adequate nutrition, clothing and shelter over the head"[92]. It includes the right to privacy[93], the right to receive medical help in police custody[94], the right to receive instant medical aid in case of injury[95], the right to receive free education up to the age of 14,[96] prohibition against public hanging.[97] Since setting aside an unconstitutional action may not amount to personal relief to an aggrieved person, the Supreme Court introduced an innovative approach, in the exercise of its writ jurisdiction, by awarding compensation payable by the State, where there has been a flagrant violation of article 21[98].

(ii) Impracticable approach

Some of these rulings have, no doubt, helped in expanding the concept of human dignity under article 21 and made the Supreme Court believe that it could, by the want of judicial activism, enlarge the number of fundamental rights guaranteed in Part III of the Constitution, sometimes by reading the non-enforceable

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[84] Sujatha Manohar, Judiciary and Human Rights, Indian Journal of International Law, April-June 1996, 39 – 54.

[85] *Madhav Hoskot* v. *State of Maharashtra*, AIR 1978 SC 1548; *Khatri* v. *State of Bihar*, AIR 1981 SC 928.

[86] *Hussainara Khartoon and Others* v. *Home Secretary, State of Bihar, Patna*, AIR 1979 SC 1360.

[87] *State of Maharashtra* v. *Ravikant S. Patil*, (1991) 2 SCC 373.

[88] *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, AIR 1981 SC 746.

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

[90] *Sunil Batra* v. *Delhi Administration* (note 82); *Sita Ram* v. *State of U.P.*, AIR 1979 SC 745.

[91] See, for a general account of the cases, *Rama Murthy* v. *Karnataka*, 1997 (1) Scale 95.

[92] *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi* (note 88).

[93] *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295; *State of Maharashtra* v. *Madhukar*, AIR 1991 SC 207; *Unnikrishnan* v. *State of A.P.*, AIR 1993 SC 2178, 2191.

[94] *Supreme Court Legal Aid Committee (Through its Hony. Secretary)* v. *State of Bihar and Ors*, (1991) 3 SCC 482.

[95] *Pt. Paramanand Katra* v. *Union of India and Ors.*, AIR 1989 SC 2039.

[96] *Unnikrishnan* v. *State of A.P.* (note 93), at 2233.

[97] *Attorney General* v. *Lachna Devi*, AIR 1986 SC 467.

[98] *Rudul* v. *State of Bihar*, AIR 1983 SC 1086; *Saheli* v. *C.P.*, AIR 1990 SC 513; *P.U.D.R.* v. *Police Commissioner*, (1989) 4 SCC 730.

Directive Principles of State Policy into article 21[99]. Article 21 has been held to extend to the right to pollution-free water and air[100], right to a reasonable residence[101], right to food and clothing[102], decent environment[103], protection of cultural heritage[104], right of every child to a full development[105], right of residents of hilly areas to access to roads[106], right to education[107], protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, just and humane conditions of work and maternity relief[108], etc. These judicially created rights are imprecise in scope and cannot be protected by a judicial order. A right not capable of such enforcement, if spelled out from article 21, may result in trivialisation of court pronouncements and encourage the habit of ignoring them[109].

While the impatience of the judiciary in the matter of implementation of the Directive Principles of State Policy by other organs of the State is understandable, any court given to practical and pragmatic approaches ought to realise that it cannot artificially force the pace of development in the absence of resources for promoting such development. As in the case of basic features of the Constitution, the rights flowing from article 21 have also been kept open-ended. In short, article 21 has now come to be invoked as a "residuary right, – to an extent undreamt of by the fathers of the Constitution or by the judges who gave it the initial gloss."[110]

Article 22 offers safeguards to persons arrested or detained under a law other than a preventive detention law on the one hand and under preventive law on the other.[111] Preventive detention in times of peace is a serious invasion of personal liberty. The Supreme Court has, therefore, rightly considered its duty to ensure that the safeguards provided in article 22 against the improper exercise of the power to detain persons "must be jealously watched and enforced by the Court". Innumerable procedural safeguards have been created by the Supreme Court and,

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[99] For a general account, see Basu's Commentary on the Constitution of India, 7th ed., vol. D, 108.

[100] *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420.

[101] *Shantistar Builders* v. *Narayan Khimalal Totame*, AIR 1990 SC 630.

[102] *Kishen* v. *State of Orissa*, AIR 1989 SC 677.

[103] *Shantistar Builders* v. *Narayan Khimalal Totame* (note 101).

[104] *Rama Sharan* v. *Union of India*, AIR 1989 SC 549.

[105] *Vishal* v. *Union of India*, AIR 1990 SC 1412.

[106] *State of H.P.* v. *Umed Ram* (note 35).

[107] *Mohini* v. *State of Karnataka*, (1992) 3 SCC 666.

[108] *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802.

[109] Manohar (note 84), at 45.

[110] See Basu's Commentary on the Constitution of India (note 99), at 107. It has been held that art.21 may supplement the various requirements laid down in art.22. See *Kamla* v. *State of Maharashtra*, AIR 1981 SC 841. A law or order of preventive detention, to be valid, must satisfy the requirements of articles 14, 19 and 21. See *Nand Lal* v. *State of Punjab*, AIR 1981 SC 2041.

[111] Pursuant to article 22(7), Parliament enacted the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980; the National Security Act, 1980.

if any one of them is not complied with, the detenu is released.[112] Though unintended, this strict approach, enunciated in the name of protection of the dignity of the individual, has helped criminals, especially economic offenders, to go scot-free on account of non-observance of procedural technicalities or minor lacunae in presentation of materials. It is common knowledge that Government officials dealing with detention are not well-versed in the ever-growing jurisprudence of the judiciary in this regard and lawyers engaged by detenus take advantage of some lapse or the other in the making of the detention order; the detaining authority is not given an opportunity to cure the defect. The jurisprudence of the judiciary should be such that it helps the State in dealing with criminal elements effectively and not to base judgment in criminal cases solely on procedural technicalities.

The Constitution (Forty-fourth Amendment) Act, 1978,[113] amended article 359 to make it clear that, even where a Proclamation of Emergency is in operation, the enforcement of articles 21 and 22 cannot be suspended, a positive development that places human dignity above anything else and constitutes an important milestone in the constitutional history of India.

(iii) Impact of international conventions

Attention may also be drawn to another facet of the Court's jurisprudence in respect of the fundamental rights developed in PIL petitions. *Visakha* case[114] involved a petition seeking suitable directions to prevent sexual harassment of working women in all work places through judicial process. The Court found that sexual harassment violates the victim's fundamental right under article 19(1)(g) of the Constitution "to practice any profession or to carry out any occupation, trade or business" and this right depends on the availability of a "safe" environment, that such harassment results in violation of the fundamental right of "gender equality" and the right to live with dignity as are assured by articles 14, 15 and 21 of the Constitution, that the primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the Legislature and the Executive, and that an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum. The Court then laid down certain guidelines and norms for due observance at all work places in public as well as private sectors, until a legislation is enacted for the purpose. It said that these guidelines would be binding and enforceable in law.

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[112] See also *Ram Krishna* v. *State of Delhi*, AIR 1953 SC 318; *Dwarika* v. *State of Bihar*, AIR 1975 SC 134; *Bhupal* v. *Arif*, AIR 1974 SC 255. For a general account of safeguards see Basu's Commentary on the Constitution of India, vol.1, 7th ed., 196 – 214.

[113] This Act was enacted to overcome the decision of the Supreme Court in *A.D.M. Jabalpur* v. *S. Shukla*, AIR 1976 SC 1207.

[114] *Visakha* v. *State of Rajasthan* (note 89).

One should welcome the initiative taken by the Court in dealing with a problem which has always been a major area of concern for women, though it is not free from doubt whether articles 14, 15, 19 and 21 could serve as a launch pad for enforcing the directives in the private sector. Even the theory that in laying down the guidelines the Court was filling a "legislative vacuum" is open to objection, for the Legislature might have thought that the Indian Penal Code and the applicable service rules in public and private sectors are adequate and that the social problem cannot be dealt with entirely through the legislative process. There may be other reasons as to why the Legislature has not moved into the matter. It is common knowledge that the laws enacted to deal with the oppression of women have largely remained ineffective. The question to be asked is whether the Constitution mandates the Legislature to legislate in respect of all social problems. It is hoped that the Court's guidelines would help in giving relief to working women.

Be that as it may, it is the wider message that the judgment gives in respect of its basic approach to the fundamental rights that deserves to be noted. The Court observed: "Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions (on fundamental rights) to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit in article 51(c)."[115] The statement lacks clarity. Not all conventions could be relevant for the purpose of interpreting the constitutional provisions on human rights; only conventions to which India is a party could be relevant. Even here, such conventions could be used to remove ambiguity, if any, in the domestic provision so that the laws are so interpreted as to be consistent with India's international obligations under the convention in question. The international conventions creating human rights cannot be used to supplement *en bloc* the fundamental rights without a formal amendment to the Constitution, for it is well-established that the Constitution does not render treaties to which India is a party the law of the land, that a treaty cannot create an enforceable right unless backed by appropriate legislation and that remedial action on the basis of the unincorporated treaty at the instance of an aggrieved individual is beyond the area of judicial authority.[116] Lord Templeman said, "English Judges cannot meddle with unincorporated treaties."[117] What he said of English Judges is equally valid for Indian Judges. Taking recourse to an unincorporated treaty for the removal of ambiguity is a different matter. In any view of the matter, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region cannot serve – the Supreme Court thinks that it does[118] – as the basis for its expansive view. This case as also other cases discussed elsewhere in

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[115] Ibid., at 456. Art.51(c) of the Constitution, which is a Directive Principle of State Policy, states that the State shall endeavour to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another". For the effect of this provision, see P. Chandrasekhara Rao, The Indian Constitution and International Law, 1993, 7, 124 – 125.

[116] Ibid., at 126 – 148.

[117] *J.H. Rayner Ltd.* v. *Department of Trade*, [1989] 3 W.L.R. 969, 986.

[118] *Visakha* v. *State of Rajasthan* (note 89), at 457.

this article underline the tendency of the Supreme Court, acquired in more recent years, to refer to the recommendations of experts or expert committees and interpret the constitutional provisions in terms of, or in substantial compliance with, such recommendations, ignoring in the process the generally accepted principles of statutory construction.

C. Politics of reservation

In more recent years, the judgments of the Supreme Court have shown a degree of unpredictability. The Court appears to have scant regard for its earlier judgments. The law declared by the Supreme Court is influenced by the social philosophy of the judges on the Bench at a given point of time. What appear to be clear judgments of the Court are reopened because in later cases some judge or the other either states that the law on the subject is not yet settled or that a decision of the Court is not clear on the subject. The judgments of the Court in the matter of reservations in public employment is a conspicuous example of this trend.

Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Clause (2) of article 16 declares that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Clause (4) provides: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State." Article 335 further provides that the claims of the members of the Scheduled Castes and the Scheduled Tribes in the matter of providing such reservations shall be taken into consideration "consistently with the maintenance of efficiency of administration". Clause (4) does not confer a right on any member of the backward classes to reservation of appointments or posts; it is an enabling provision which confers a discretionary power on the State.[119] It is also well-established that clause (4) has to be interpreted in the light of article 335.[120]

The interrelationship of clauses (1), (2) and (4) of article 16 has been the subject matter of differing judgments by the Supreme Court, especially on the question whether clause (4) is an exception to clause (1) read with clause (2); this question has a vital bearing on the extent of reservation under article 16. B.R. Ambedkar, the Chairman of the Drafting Committee, made it clear in the Constituent Assembly that clause (1) is "a generic principle" of equality of opportunity, that clause (4) contains "the exception" to this principle and that "the seats to be reserved, if the reservation is to be consistent with the sub-clause (1)" of article 16 "must be

[119] *Devadasan* v. *Union of India*, AIR 1964 SC 179.
[120] *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477.

confined to a minority of seats".[121] A bare reading of the said clauses also reinforces Ambedkar's own interpretation in the matter.

As early as 1963, in the *Balaji* case[122], a Constitution Bench of 5 Judges declared that clause (4) is an exception to clauses (1) and (2). This was reiterated in the *Devadasan* case[123] in 1964 and in the *Rajendran* case[124] in 1968. The Court came clearly to the conclusion that the exception in clause (4) cannot be so interpreted as to nullify or destroy the main provision in clauses (1) and (2). Accordingly, it was held that the maximum permissible reservation could not exceed 50 %. In the first three cases mentioned above, the judgments of 5-Judge Benches were unanimous; it was only in the *Devadasan* case that there was a dissenting opinion by Subba Rao J., who held that the opening words "Nothing in this article" in clause (4) underline the emphatic way of stating that the power conferred by the said clause is not limited by the main provision in clause (1) but falls outside it. Normally, it would be the general expectation that the interpretation given by Ambedkar in the Constituent Assembly and confirmed by so many Constitutional Benches would not be lightly disturbed. However, in the *Thomas* case[125] in 1976, 4 (Ray C.J., Mathew, Krishna Iyer and Fazal Ali JJ.) out of 7 Judges (the three dissenting Judges being H.R. Khanna, A.C. Gupta and Beg JJ.) upheld the dissenting opinion of Subba Rao J., in the *Devadasan* case.

The manner in which Subba Rao J., and later the majority Judges in the Thomas case, interpreted the words "Nothing in this article" in clause (4) may cause amazement to any legislative draftsman. Clause (4) starts off with the words "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens" etc. These words suggest that but for them the State would have been prevented from making any provision on reservations by virtue of clauses (1) and (2) which enshrine the general rule of equality of opportunity in public employment. This is the most legitimate and normal way of interpreting clause (4). Yet, strangely enough, the majority Judges in the *Thomas* case gave an interpretation in support of what they considered to be a legitimate cause, i.e., releasing clause (4) from the rigours of clauses (1) and (2) so that the total extent of reservation could go beyond 50 %. Later, in the A.B.S.K. *Sangh* case[126] in 1981, Krishna Iyer J., who was one of the majority Judges in the *Thomas* case, changed his position and concurred with the view that clause (4) is an exception to clauses (1) and (2) of article 16. Had he taken this view in the *Thomas* case, a murky affair could have been avoided.

Not surprisingly, the majority judgment in the *Thomas* case led a number of States to reserve 66 or even 70 per cent of posts and appointments for backward

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[121] See Constituent Assembly Debates, vol. 7, 701 – 702.
[122] *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649.
[123] *Devadasan* v. *Union of India* (note) 119.
[124] *Rajendran* v. *Union of India*, AIR 1968 SC 507.
[125] *State of Kerala* v. *N.M. Thomas*, AIR 1976 SC 490.
[126] *A.B.S.K. Sangh* v. *Union of India*, AIR 1981 SC 298.

classes, much beyond 50 per cent. The question of extent of reservation figured again before a 9-Judge Bench in the *Indra Sawhney* case[127] in 1993 wherein the Court considered the constitutional validity of the Orders of the Central Government with regard to the implementation of Mandal Commission's recommendations relating to reservation for backward classes other than the Scheduled Castes and the Scheduled Tribes. The majority judgment upheld the *Thomas* holding on clause (4) not being an exception to clauses (1) and (2) of article 16 without any critical examination of the earlier decisions on the subject, but the sting out of this holding has been greatly nullified by the declaration that, except in certain extraordinary situations, the reservation under article 16(4) should not exceed 50% of the appointments in a grade, cadre or service in any given year.[128] The Court further held that reservation can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate. Though the view that article 16(1) is not in the nature of an exception amounts to a constitutional distortion, if reservation were not to extend beyond 50% under article 16(4), there does not appear to be any substantial difference between the Supreme Court holding that article 16(4) is an exception and holding that it is not.

Again, if one looks at the question of reservation in the matter of promotion, it was for the first time in the *Rangachari* case[129] in 1962 that the Supreme Court held that article 16(4) permits reservations not only in initial appointments but also in promotions as well. *Rangachari* held the field for over 30 years. In the *Indra Sawhney* case, the Supreme Court overruled *Rangachari* (though that it was not an issue that arose out of the Government Orders under challenge) on the ground that it ignored the provisions of article 335. The Court held, by a majority of 8 to 1, that reservations in promotions are "bound to affect the efficiency of administration" and are not "in the larger interests of the nation" and that such reservations violate the rule of equality of opportunity in matters of public employment. The Court observed that reservation in promotions, "would mean creation of a permanent separate category apart from the mainstream – a vertical division of the administrative apparatus. The members of the reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and 'heart-burning' among open competition members and that once the backward class of citizens enter the service 'efficiency of administration demands that those members too compete with others and earn promotion like all others.'"

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[127] *Indra Sawhney* v. *Union of India* (note 120).

[128] For a more recent case on the subject, see *Post Graduate Institute of Medical Education and Research* v. *Faculty Assn.*, (1998) 4 SCC 1. The Court held that reservation in a single cadre for the backward classes cannot be made either directly or by applying rotation of roster points.

[129] *General Manager, S.Rly.* v. *Rangachari*, AIR 1962 SC 36.

Notwithstanding this judgment, Parliament amended article 16 by the Constitution (Seventy-seventh Amendment) Act, 1995, whereby a new clause – clause (4A) – was added by virtue of which the State is enabled to continue reservations in promotions. This is in total disregard of the judgment of the Supreme Court rendered by a majority of 8 to 1 that reservations in promotions are not in the larger interests of the nation and are in violation of the principle of equality and of article 335 on the maintenance of efficiency of administration. The Supreme Court has to take the blame on itself for its judgment being ignored by Parliament. If the backward classes of citizens enjoyed the benefit of reservation in promotions for more than three decades, thanks to the *Rangachari* case, how could that class be told that that benefit would not be available now – this is how the political parties argued in favour of the constitutional amendment.

Throughout its judgments on reservation, the Supreme Court ignored its own dictum that "in law certainty, consistency and continuity are highly desirable features."[130] It is rather unfortunate that political parties have come to treat reservations as a vote-catching device. They seem to glorify the reservation policy in the name of social justice and do little to find genuine solutions to strengthen the capabilities of the backward classes so that they could satisfy the competitive requirements of the civil services and grow without the need for props.

Following the Office Memorandum dated 13 August 1990 implementing the Mandal Commission recommendations on reservations in favour of Other Backward Classes and the judgment of the Supreme Court in the *Indra Sawhney* case, there is now a growing demand in India by various castes to be treated as "backward classes" within the meaning of article 16(4). The requirement of article 335 that the claims of the Scheduled Castes and the Scheduled Tribes in the matter of reservations should be taken into consideration "consistently with the maintenance of efficiency of administration" has been consistently given a marginal role both by the Executive and the Judiciary; when at long last the Supreme Court appeared in the *Indra Sawhney* case to give article 335 its due place, Parliament silenced it by adding clause (4A) in article 16. The story is not far different in respect of the extent of reservation of seats in public educational institutions under article 15(4) for socially and educationally backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes.

Looking at the politics of reservation, the Indian Muslim League has been demanding lately reservation in favour of Muslims in public employment and educational institutions. This demand also received support from some political parties on the eve of the last two general elections. It cannot obviously be entertained in the face of clauses (1) and (2) of article 16.

It may be worthwhile to note here the decision of the Supreme Court in Government of *A.P.* v. *P.B. Vijaykumar*[131] in the matter of reservation for women in

[130] *Indra Sawhney* v. *Union of India* (note 120), at 518.
[131] AIR 1995 SC 1648.

public services. It may be recalled that article 16(2) expressly forbids discrimination in matters of public employment on any of the grounds specified therein, including sex. This is in contrast to article 15(3), which permits the State to make any special provision for women. Since article 16 deals with public employment, it is logical and reasonable to think that article 15(3) covers matters other than public employment. Yet, in the *P.B. Vijaykumar* case, speaking for the Court, Sujatha Manohar J. had no hesitation in holding that article 16(2) does not derogate from article 15(3). It is never explained as to how both articles 15(3) and 16(2) can be made to co-exist and, if matters relating to women are covered exclusively by article 15(3), why was the ground based on "sex" included in article 16(2). The judgment of the Court is in clear disregard of the express provisions of article 16; it is a clear case of judicial legislation.

D. Strictly judicial approach

Secularism and rights of minorities are two areas, to mention a few, where the Court adopted a liberal and progressive interpretation of the constitutional provisions without any policy twists and turns.

(i) Secularism

The Preamble to the Constitution expressly declares that India is a secular State; this is also apparent from articles 25 to 30 as also from the other articles of the Constitution which prohibit religion as a basis for discriminatory treatment.[132] There are also provisions in the Representation of the People Act, 1951, to curb religious appeals to the electorate. The Constitution ensures equality of all religions. It makes freedom of conscience and freedom of religion a fundamental right. The Supreme Court has taken an enlightened view of the constitutional provisions on religion. In addition to upholding measures of social reform in a number of cases, while taking care that such reforms do not affect the basic tenets of any religion, the Court placed secularism on a high pedestal when a 9-Judge Bench of the Court in the *Bommai* case declared in unequivocal terms that secularism is a basic feature of the Constitution, that in matters of State religion has no place, that no political party can simultaneously be a religious party, that politics and religion cannot be mixed and that any State Government which pursues unsecular policies or unsecular course of action contrary to the constitutional mandate renders itself liable to action under article 356.[133] These affirmations were in response to the demolition, on 6 December 1996, of the Ram Janmabhoomi-Babri Masjid Structure in Ayodhya which contributed to a loss of sense of security among the minorities. Despite the safeguards provided in the Constitution, communalism could not be wiped out from India.

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[132] See also *S.R. Bommai* v. *Union of India* (note 50), at 2065.

[133] Ibid., at 2112 – 2113.

(ii) Rights of minorities

Articles 29 and 30 of the Constitution guarantee the cultural and educational rights of minorities. Article 29 guarantees to any section of citizens the right to conserve its own language, script or culture. Article 30 guarantees the right to minorities to establish and administer educational institutions of their choice and further declares that the State should not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. As in the sphere of secularism, in the field of rights of minorities too, the Supreme Court has consistently adopted a protective attitude.[134] It has vigorously resisted any effort on the part of the Government to take over the management of a minority educational institution,[135] to compel the minority management to surrender its right of administration,[136] to constitute a managing committee according to its order[137] and to dissolve or supersede the managing committee and appoint *ad hoc*-committee in its place.[138] It has also disapproved government orders requiring minority educational institutions to reserve seats[139] or imposing any language as the compulsory medium of instruction in a minority institution.[140] The Court held that while granting aid or extending recognition to a minority institution, the State cannot impose such conditions as will substantially deprive the minority community of its rights under article 30(1).[141]

At the same time, the Supreme Court has had no hesitation to subject the right of a minority institution under article 30(1) to reasonable regulations[142] for the purpose of ensuring competence of teachers, excellence of educational standards, security of the services of teachers and other employees, maintenance of discipline, etc., and to prevent maladministration. It had no hesitation in exposing unscrupulous people from taking advantage of benefits conferred on minority institutions.[143] Consistent with the requirement of national integration, it has held that no minority institution can admit students belonging to its community beyond 50 % of the annual admission and that the remaining seats should be made available to members of other communities purely on the basis of merit.[144]

In the *St. Stephen's* case, a 5-Judge Bench of the Supreme Court held that article 30 clothes a minority educational institution with the power to admit students

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[134] See, generally, *St. Xavier's College* v. *State of Gujarat*, AIR 1974 SC 1389.

[135] *Kerala Education Bill, in re*, AIR 1958 SC 956.

[136] *Bihar State Madarasa Board* v. *Madarasa Hanfia*, AIR 1990 SC 695.

[137] *Patro* v. *State of Bihar*, AIR 1970 SC 259.

[138] *Bihar State Madarasa Board* v. *Madarasa Hanfia* (note 136).

[139] *Frank Anthony Association* v. *Union of India*, AIR 1987 SC 311.

[140] *D.A.V. College* v. *State of Punjab (II)*, AIR 1971 SC 1737.

[141] *St. Xavier's College* v. *State of Gujarat* (note 134); *Sidhrajbhai* v. *State of Gujarat*, AIR 1963 SC 540.

[142] *Frank Anthony Association* v. *Union of India* (note 139); *St.John's T.T.I.* v. *State of Tamil Nadu*, AIR 1994 SC 43; *Virendra Nath* v. *Delhi*, AIR 1990 SC 1148.

[143] *A.P. Christian Medical Educational Society* v. *Government of A.P.*, (1986) 2 SCR 749.

[144] *St. Stephen's College* v. *University of Delhi*, 1991 (2) Scale 1217.

by adopting its own method of selection. Later, in the *T.M.A. Foundation* case,[145] another 5-Judge Bench differed with this and held that so long as the minority institution is permitted to draw students belonging to that minority community to the extent of 50% seats even by going down by the merit list, there is no reason why the State/affiliating University cannot stipulate that the general students as well as the minority students must also be drawn only from the common merit pool and that even the minority community students must also be admitted on the basis of *inter se* merit determined on the basis of common entrance test. This issue as also certain basic questions relating to the meaning of the expression "minorities" and to the criteria for determining whether an institution is a minority educational institution have been referred to a 11-Judge Bench of the Supreme Court.[146] What is important to note is that the Court's judgments in matters relating to minorities emphasise, to borrow the words of an informed commentator, "the rare consistency with which the Supreme Court has interpreted Arts.29(1) and 30(1)".[147]

E. Public interest litigation

The Constitution-makers took the unprecedented step of enabling an aggrieved person to approach the Supreme Court directly for the enforcement of fundamental rights; the High Court too can be moved under article 226 for the enforcement of these rights and "for any other purpose". They could not visualise that the list of fundamental rights would be ever expanding by virtue of the judgments of the superior Courts made possible mainly on account of what is called public interest litigation (PIL). Commencing from the early years of 1980s, the Supreme Court began taking a broad view of *locus standi* in matters relating to litigation in constitutional matters, deriving inspiration from the practice of Anglo-American Courts.[148] The removal of traditional limits on access to Writ Courts has multiplied opportunities for judicial activism. While PIL started as a device to help the poor and helpless persons to move the Supreme Court or the High Courts through post-cards and letters for the enforcement of fundamental rights, it is no longer confined by these limitations; it has now been allowed to be invoked by any person not only in respect of the enlarged sphere of fundamental rights but also in respect of any public wrong or public injury or, for that matter, any aspect of administrative action.

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[145] *T.M.A. Foundation* v. *State of Karnataka*, AIR 1994 SC 13, 21 – 22.

[146] *T.M.A. Foundation* v. *Karnataka*, 1997 (2) Scale (SP) 6. For a list of questions to be considered by this Bench, see *T.M.A. Foundation* v. *State of Karnataka*, AIR 1995 SC 2431.

[147] Seervai, Constitutional Law of India (note 18), vol. 2, 4th ed., at 1346.

[148] See, generally, *Ratlam Municipality* v. *Vardichand*, AIR 1980 SC 1622; *People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473; *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149; *Sheela Barse* v. *Union of India*, AIR 1986 SC 1773; *D.C. Wadhwa* v. *State of Bihar* (note 6); *M.C. Mehta* v. *Union of India*, AIR 1987 SC 1086; *Bandhua Mukti Morcha* v. *Union of India* (note 108); *Janata Dal* v. *H.S. Chowdhary*, AIR 1993 SC 892; *State of H.P.* v. *A Parent of a Student of Medical College* (note 27); *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180.

There is no doubt that PIL has helped the Courts, while exercising writ jurisdiction, to deal with such matters as preservation of environment, abuse of Ordinance-making power, corruption in public life and a wide variety of matters involving social justice such as welfare of children in jails, sexual exploitation of the blind, gas leak tragedy in Bhopal, blinding of prisoners in Bhagalpur Jail, ill-treatment of women suspects in police lock-ups, non-payment of minimum wages to the workers employed in famine relief, freedom for bonded labour, etc.

Excess of use

However, courts do not always remain circumspect in the use of PIL. Petitions are allowed to be filed based on newspaper reports which may not be based on verified facts and courts rush to issue notices, seek production of original files by public authorities and continue proceedings for prolonged periods. Sometimes, courts act *suo motu* on unverified or one-sided newspaper report or private petition and summon public authorities to explain. Judges do very little to discourage frivolous PIL petitions; no punishment is awarded to petitioners telling falsehoods to the court.

The very recent *Vineet Narain* case,[149] popularly known as the Hawala case, underlines the dangers involved in pursuing an activist approach in PIL litigation. It involved a complaint of inertia by the Central Bureau of Investigation (CBI) in matters where accusations of corruption were made against high dignitaries and a prayer that the investigative process, which is under the control of the Executive, be activated. Two diaries and two note books were seized from the premises of the alleged bribe giver. These documents contain accounts of payments made to persons identified only by initials which, it was alleged, corresponded to the initials of various high-ranking politicians, in power and out of power, and of high ranking bureaucrats. The Supreme Court thought it fit to keep the matter pending while the investigations were being carried on ensuring that this was done by monitoring them from time to time and issuing orders in this behalf. The Court stated that the task of monitoring would end the moment a charge-sheet was filed in respect of a particular investigation and that the ordinary processes of the law would then take over. It further directed the CBI not to report the progress of the investigations to the Prime Minister so as to maintain, what it called, the credibility of the investigation. It stated that the procedure adopted by it in this case was one of "continuing mandamus".

After investigation, 34 charge-sheets against 54 persons were filed. However, a large number of prosecutions launched as a result of monitoring by the Supreme Court have finally resulted in discharge of the accused[150] at the threshold since the trial court was not satisfied that a *prima facie* case was made out by the investigation. While reflecting on these discharges, the Supreme Court felt that either the

[149] *Vineet Narain* v. *Union of India* (note 28).

[150] See, for example, *Central Bureau of Investigation* v. *V.C. Shukla*, 1998 (1) Scale 84.

investigation or the prosecution or both were lacking. The Court held that, by virtue of article 32 read with article 142, where there is inaction by the Executive in the matter of observance of the Rule of Law or of human rights, the judiciary must step in to provide a solution till such time as the Legislature acts to perform its role by enacting a proper legislation to cover the field. The Court then proceeded to direct that the CBI be given statutory status, that the Central Vigilance Commissioner (CVC) be appointed by the President on the basis of recommendations of a Committee consisting of, among others, the Prime Minister and Leader of the Opposition, that the CVC should be responsible for the efficient functioning of the CBI, that proposals for improvement of infrastructure, methods of investigation should be decided urgently, etc. The Court gave similar directions in respect of the Enforcement Directorate, Prosecuting Counsel, appointment of special counsel, etc. These directions were, no doubt, the product of the Court's eagerness to deal with corruption, particularly at high places.

The *Vineet Narain* judgment can be faulted on several grounds. It ought to have been clear to the Court from the time it looked into the case that its monitoring role would exert enormous pressure on the CBI to file charge-sheets in the competent court. It may not be fair for the Court to accuse either the investigation or the prosecution for the discharge of the accused. There could be no serious objection to the Court directing CBI to investigate the allegations, since it felt that that body failed in performing its duty; but the Court going beyond that in its activist role through the medium of what it called "continuing mandamus" caused irreparable damage to the reputation of scores of high functionaries for no fault of theirs.

The declaration that the Supreme Court could legislate till the Legislature occupies the field is a mere affirmation without any support from articles 32 and 142, the articles claimed by the Court as supporting such a declaration; it undermines the principle of separation of powers. The legislative and executive measures directed by the Supreme Court are accordingly unsupportable; in ordering them, the Court is also getting into a sphere in which it has no experience or special insight at all and on that account may end up making mistakes affecting its credibility as a judicial organ of the State. Look at what happened in *Unnikrishnan* v. *State of A.P.*, wherein the Supreme Court thought it fit to frame a detailed scheme for admission to, and fees chargeable by, private medical engineering and certain other professional colleges.[151] The scheme was no doubt intended to check commercialisation and profit-making by private institutions. Many times thereafter it had to clarify and modify that scheme.[152] Instead of interpreting the Constitution, the Court is now engaged in interpreting the meaning and scope of its administra-

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[151] *Supra* note 93, at 2247 – 2250.

[152] See *Unnikrishnan* v. *State of A.P.*, (1993) 4 SCC 111; *T.M.A. Pai Foundation (I)* v. *State of Karnataka*, (1993) 4 SCC 276; *T.M.A. Pai Foundation* v. *State of Karnataka and Others*, (1994) 2 SCC 199; *Manipal Academy of Higher Education* v. *State of Karnataka*, (1994) 2 SCC 283; *T.M.A. Pai Foundation* v. *State of Karnataka*, (1994) 2 SCC 734; *Pavai Ammal Vaiyapuri Educational Trust* v. *Government of T.N.*, (1994) 6 SCC 259; *Institute of Human Resources Development* v. *T.R. Ramesh*

tive scheme. A court is not simply equipped or empowered to evolve a comprehensive administrative scheme.

F. Judicial supremacy

There is a widely shared feeling in the Executive Wing, not always without justification, that there is today a "government by the judiciary"; even Prime Ministers have aired this perception publicly. It is argued that whereas a direction for release of children detained illegally in jails can be a legitimate focus of PIL, a direction that the Government undertake certain measures towards restructuring the social and economic order may amount to judicial governance, contrary to the separation of powers and the checks and balances doctrines enshrined in the Constitution, since priorities in this area are, it is maintained, a matter of policy. The Supreme Court too has not helped the cause that it espouses on account of its judgments that have come to be seen as having established judicial supremacy and denied to the other organs of the State what is theirs under the Constitution.

(i) Appointment and transfer of Judges

In *Supreme Court Advocates-on-Record Association* v. *Union of India*,[153] popularly known as the *Second Judges'* case, the Supreme Court dealt with, among other things, the weight to be given to the opinion of the Chief Justice of India (CJI) in the matter of appointment of Supreme Court/High Court Judges. Article 124 of the Constitution provides that every Judge of the Supreme Court shall be appointed by the President after "consultation" with the CJI and such of the Judges of the Supreme Court and of the High Courts as the President may deem necessary for the purpose. Similarly, article 217 provides that every Judge of a High Court shall be appointed by the President after "consultation" with the CJI and others mentioned therein. Article 222 provides that the President may, after "consultation" with the CJI, transfer a Judge from one High Court to another. Before the *Second Judges'* case, the Supreme Court has had two occasions in which to interpret the expression "consultation" in the aforesaid articles, the first time in the *Sankalchand* case[154] by 5-Judge Bench in 1977 and the second time in the *S.P. Gupta* case,[155] also known as the *First Judges'* case, by 7-Judge Bench in 1982, and on both occasions it was declared in clear terms that "consultation" did not mean "concurrence", that, while such consultation with the CJI must be full and effective and not formal consultation, the last word in the appointment of Judges did not belong to the CJI and that the President was competent to differ from the other constitutional functionaries for cogent reasons. Even in the Constituent As-

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Kumar, (1995) 4 SCC 211; *T.M.A. Pai Foundation* v. *State of Karnataka*, (1996) 5 SCC 8; *Shri Chander Chinar Bada Akhara Udasin Society* v. *State of J & K*, (1996) 5 SCC 732.

[153] AIR 1994 SC 268.

[154] *Union of India* v. *Sankalchand*, AIR 1977 SC 2328.

[155] *S.P. Gupta* v. *Union of India* (note 148).

sembly, a proposal that the concurrence of the CJI be sought was rejected.[156] The record of the Executive in this regard is by no means bad; from 1983 to 1993, 547 judges were appointed, and only in 7 cases the advice of the CJI not accepted.

In the *Second Judges'* case, a 9-Judge Bench overruled its earlier judgment and held that the last word in the matter of appointment of any Judge to the Supreme Court or any High Court must rest with CJI; further, the CJI is required to form his opinion after taking into account the views of his senior colleagues. The Court further held that fixation of Judge-strength in the High Courts is justiciable (overruling thereby the decision in the *First Judges'* case to the contrary), notwithstanding the clear wording of article 216 that every High Court shall consist of a Chief Justice and such other Judges "as the President may from time to time deem it necessary". There is no requirement of even consultation with the CJI.

Although it is the Constitution, and not an ordinary statute, which is being interpreted, and as such a broad and liberal approach should inspire those whose duty it is to interpret the Constitution, the Judges ought to respect the well-established principle of interpretation that they are not free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory;[157] in the present case, it is the theory of independence of the judiciary that was employed to substitute "concurrence" for "consultation" and to make the Judge-strength justiciable – an incredible exercise which was performed in total disregard of the language used by the relevant provisions and the intention of the Constitution-makers and which amounted to rewriting those provisions. It is rather unfortunate that the interpretation of the provisions of the Constitution has to come to fluctuate with the different "values" in which different Judges believe.[158] Even before the ink on the judgment in the *Second Judges'* case is dry, it is being widely argued that the solution offered by the judgment in the *Second Judges'* case is unsatisfactory and that the whole question be entrusted to a National Judicial Commission, to be set up through a constitutional amendment, to make recommendations to the Government in the matter of judicial appointments.[159]

(ii) Service conditions

The Constitution lays down a clear scheme with regard to the conditions of service of the subordinate judiciary in articles 309, 312, etc. Under article 312, after the Rajya Sabha makes the necessary declaration on this behalf, Parliament is empowered to create an all-India judicial service (which will include posts not inferior to the post of District Judge as defined in article 236) common to the Union

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[156] See Constituent Assembly Debates, vol. 8, at 658. See also the statement of Dr. Ambedkar, ibid., at 258.

[157] See *In re the C.P. & Berar Act*, 1938, (1939) F.C.R. 18, 37.

[158] Seervai (note 18), vol. 3, 4th ed., 2944.

[159] A Constitution Amendment Bill for this purpose – Bill No.93 of 1990 – was introduced in the Lok Sabha on 18 May 1990 but lapsed with the dissolution of the House. The National Agenda for Governance supports the establishment of a National Judicial Commission.

and the States, and, subject to the other provisions of Chapter I of Part XIV, regulate the recruitment, and the conditions of service of persons appointed, to any such service. Under article 309, the recruitment and conditions of service of the members of the subordinate judiciary are to be regulated by the Acts of the appropriate Legislature, and, pending such legislation, the President and the Governor or their nominees, as the case may be, are empowered to make rules regulating their recruitment and the conditions of service.

In 1991, the Supreme Court gave certain directions to improve the service conditions of the members of the subordinate judiciary largely based on the recommendations of the Law Commission of India made in its 14th Report prepared in 1958.[160] Upon filing of review petitions, the Court considered the matter again in 1993 and gave modified directions.[161] The Union of India contended that the service conditions of the subordinate judiciary are a matter of policy and the authority to prescribe them is vested in the Legislature and the Executive, that the implementation of the directions given by the Court would place a very heavy financial burden on the public exchequer and might generate similar demands by the other services, etc. Rejecting the arguments, the Court observed that the members of the judiciary are comparable to the Council of Ministers and legislators and, accordingly, stand on a higher footing than the members of the other services, that the society has a stake in ensuring the independence of the judiciary and, therefore, the judges cannot be kept in want, that, though article 309 only gives power to the Executive and the Legislature to prescribe the service conditions of the judiciary, it would be in the interests of the independence of the judiciary to allow the judiciary to play a role in this behalf, and that, if the Executive and the Legislature alone are allowed to deal with the matter by virtue of article 309, they may use that power "to turn and twist the tail of the judiciary". The Court then proceeded to give directions related to setting up of All India Judicial Service, raising of superannuation age of judicial officers up to 60 years, uniformity in payscales, grant of residence-cum-library allowance, provision of conveyance, in-service training, etc.; it specified time-limits for implementing these directions. The view of the Court that article 309 can be breached by it in the interests of the independence of the judiciary is a dangerous proposition and raises the question whether the Court sees its role as the protector of judicial independence rather than of the Constitution of India. The Court obviously made up its mind that the lot of the judicial officers needed to be improved and laid down fanciful theories in support thereof.

[160] *All India Judges' Association* v. *Union of India*, AIR 1992 SC 165.
[161] *All India Judges' Association* v. *Union of India*, AIR 1993 SC 2493.

(iii) Criminal cases against Judges

In *K. Veeraswami* v. *Union of India*,[162] the Supreme Court, while declaring that the Prevention of Corruption Act, 1947, applied even to the Judges of the Supreme Court and of the High Courts, held that, in order to protect the independence of the judiciary, it was essential that no criminal case shall be registered under section 154 of the Code of Criminal Procedure against such a Judge, unless the CJI is consulted and he assents to such an action being taken. The Court observed that the apprehension that the Executive, being the largest litigant, is likely to misuse the power to prosecute the Judges seems to be "not unjustified or unfounded". The need for obtaining the assent of the CJI was thus introduced into the Act not by Parliament but by the Supreme Court; it amounted to enacting a new law outside the scope of the Act.[163]

If the Supreme Court is correct in assuming that the other organs of the State cannot be trusted when the matter involved is one of judicial independence it could well lead to a situation in which one could have misgivings as to how the CJI would act in a case where one of his own colleagues is sought to be prosecuted on charges of corruption. Decisions in such matters, needless to say, have to be based on "trust" and not "mistrust".

(iv) Belittling administrative tribunals

In *L. Chandra Kumar* v. *Union of India*,[164] the Supreme Court swiped at articles 323A and 323B of the Constitution – inserted in the Constitution with effect from 3 January 1977 – containing enabling provisions for the establishment of administrative tribunals. Pursuant to article 323A, Parliament enacted the Administrative Tribunals Act, 1985, for the resolution of service disputes and for the exclusion of the jurisdiction of all courts, except the jurisdiction of the Supreme Court under articles 32 and 136 of the Constitution. Article 323A was inserted in the Constitution by the Constitution (Forty-second Amendment) Act, 1976, to provide for the expeditious disposal of service disputes by tribunals which are not bound by strict rules of procedure or of evidence.

The validity of the aforesaid Act was first considered by the Supreme Court in 1985 in the *Sampath Kumar* case,[165] wherein a 5-Judge Constitution Bench directed the carrying out of certain measures with a view to ensuring the functioning of the Central Administrative Tribunal along constitutionally sound principles. The Act was amended by Act 19 of 1986 to bring about the changes prescribed by the Court. Following the order of the Supreme Court in 1987,[166] the Act was again amended. It was felt, thereafter, that the constitutional validity of

[162] (1991) 3 SCC 655.
[163] See also the dissenting judgment of Verma, J., in *Veeraswamy* case, (1991) 3 SCC 655, 727.
[164] *Supra* note 29.
[165] *Sampath Kumar* v. *Union of India*, (1985) 4 SCC 458.
[166] (1987) 1 SCC 124.

article 323A or of the Act was beyond doubt and challenge. In fact, in the *Sampath Kumar* case, it was clearly held that the vesting of the power of judicial review in an alternative institutional mechanism, after taking it away from the High Court, would not do violence to the basic structure of the Constitution.

However, in 1997, in the *L. Chandra Kumar* case, the Supreme Court held that articles 323A and 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under articles 226/227 and 32 of the Constitution, are unconstitutional since such exclusion offends the basic structure of the Constitution. It further held that all decisions of Administrative Tribunals will be subject henceforth to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. There seem to be several unstated premises behind this judgment: the apprehension that the High Court's jurisdiction is being gradually taken away by the establishment of Administrative Tribunals on a variety of subjects; Supreme Court not wanting direct appeals from the decisions of Administrative Tribunals; etc.

It is unfortunate that the Supreme Court's approach was allowed to be coloured by factors which were not strictly germane to the basic structure doctrine. The *L. Chandra Kumar* judgment gave a rough deal to the Administrative Tribunals and struck a blow at the tribunalisation of justice. Instead of being a substitute for the High Courts, these Tribunals have now become substitutes for subordinate courts. Not many senior and able judicial or administrative officers may be forthcoming to be members of these bodies in future years. High Courts too would be burdened heavily with appeals filed routinely by parties losing at the level of Tribunals. After twenty long years of the existence of the articles in question on the statute, and ten long years after the Supreme Court expressed the view – and that view shared by an activist judge like Bhagwati – that the power of judicial review could be vested by a constitutional amendment in an alternative institutional mechanism, the Court now finds that this view is constitutionally unsound.

G. Judicial legislation

Though the story of judicial legislation in India is rather long and is narrated to some extent in the preceding pages, one cannot leave it without referring to the recent *Bommai* case[167] which dealt with the scope of article 356 of the Constitution and the extent of judicial review in relation thereto. Article 356, an emergency provision, provides for imposition of what is popularly known as President's Rule in a State in case of failure of constitutional machinery in that State. Since article 356 provides for the dismissal of a State Government and suspension or dissolution of a State Legislature, Dr. Ambedkar expressed the hope in the Constituent Assembly that the provision would "remain a dead letter".[168] However, power tempts and it tempted the Central Government run by different parties at differ-

[167] *S.R. Bommai* v. *Union of India* (note 50).
[168] Constituent Assembly Debates, vol. 9, 177.

ent times to invoke article 356 over 100 times and in most cases to get rid of inconvenient State Governments controlled by political parties in opposition, making thereby serious inroads into the federal structure of the Constitution.

In the face of the gross abuse of article 356-power, the Supreme Court has rightly held that the President's Proclamation is justiciable (though the extent of judicial review has been the subject matter of differing perceptions in different judgments) to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the Proclamation was issued in the *mala fide* exercise of the power and that article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction.[169]

However, it is in the area of consequences of President's Proclamation that the *Bommai* judgment engages in judicial legislation. Under article 356(3), every Proclamation shall be laid before Parliament and shall (except where it is a Proclamation revoking a previous Proclamation) cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. Interpreting this provision, a 7-Judge Bench of the Supreme Court held in 1977 that there is nothing in article 356 to make approval by either House of Parliament a condition precedent to the exercise of the power of dissolution of a State Legislative Assembly by the President under article 356(1) and that article 356(3) makes it clear that the only effect of a failure or refusal by either House of Parliament to approve the Proclamation is that it ceases to operate after two months; this means that the Proclamation operates for at least two months and whatever is done in these two months cannot be held to be illegal.[170] The practice followed consistently since the inception of the Constitution in the matter of President's Rule also supports the Supreme Court's holding.

In the *Bommai* case, 5 Judges in a 9-Judge Bench of the Supreme Court overruled the 1977 judgment and held that the President has power only to suspend, and not to dissolve, the Legislative Assembly by a Proclamation under article 356(1) until the Proclamation is approved by both Houses of Parliament under article 356(3), and that, if the Proclamation is not approved by Parliament, the Government which was dismissed revives and the Legislative Assembly gets reactivated.[171] Further, if the Court strikes down the Proclamation, it has the power to restore the dismissed Government to office and reactivate the Legislative Assembly, whether it may have been dissolved or kept under suspension.[172] The Court further added that it has the power by an interim injunction to restrain the holding of fresh elections to the Legislative Assembly pending the final disposal of the challenge to the validity of the Proclamation to avoid a *fait accompli*.[173]

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169 *S.R. Bommai* v. *Union of India* (note 50), at 148, 296 – 298.
170 *State of Rajasthan* v. *Union of India*, AIR 1977 SC 1361.
171 Ibid., at 149, 296 – 298.
172 Ibid.
173 Ibid., at 149.

It is apparent that the Court's view is not supported by the language of article 356. In justification of its view, the Court held that article 356(3) is meant to be a check by Parliament on the powers of the President under article 356(1) and the check becomes meaningless if the President takes irreversible actions under article 356(1). The Court does not explain why the check in article 356(3) loses its character if the Proclamation ceases to operate following its non-approval by Parliament. The fact that article 356 has been abused cannot in itself be the basis for rewriting the provisions of the Constitution. Article 356(3) declares that if the Proclamation is not approved, it ceases to operate at the expiration of two months. Cessation of the operation of a Proclamation cannot be interpreted as implying that the Proclamation itself becomes void *ab initio*. A contrary view was never even in contemplation for more than 40 years from the commencement of the Constitution and the Supreme Court itself rejected it in 1977.

The Court was obviously influenced by the recommendation of the Sarkaria Commission on Centre-State Relations – the Court cited this recommendation[174] – that the State Assembly should not be dissolved until after Parliament has had an opportunity to consider the President's Proclamation. However, whereas the Sarkaria Commission stated that article 356 be amended for giving effect to its recommendation, the Court gave effect to the recommendation through an interpretative technique. That apart, does the doctrine of non-dissolution of the State Legislature until Parliament approved the Proclamation offer a real safeguard against abuse? Parliament has not disapproved any Proclamation so far issued. No responsible Central Government would ever impose President's Rule unless it is sure of securing the majority support in both Houses of Parliament lest it is said that the Government lost the confidence of the House. Accordingly, this safeguard is more imaginary than real, especially in cases where the ruling party (or parties) enjoys majority support in both Houses of Parliament. Article 356 was amended 6 times and no political party ever thought proposing an amendment to article 356 on the lines of the so-called safeguard enunciated by the Court.

In the *Bommai* case, the Court further held that, in deciding whether the Ministry continued to command majority support in the Legislature, "the only way of testing it is on the floor of the House except in an extraordinary situation where because of all-pervasive violence, the Governor comes to the conclusion – records the same in his report – that for the reasons mentioned by him a free vote is not possible in the House."[175] In support of this conclusion, the Court cited the recommendation made by a Committee of 5 Governors appointed by the President of India which, in the relevant part, reads as follows: "As a general proposition, it may be stated that, as far as possible, the verdict as to majority support claimed by a Chief Minister and Council of Ministers should be left to the Legislature."[176] Reliance was also placed on a statement of G.S. Dhillon, the then

[174] Ibid., at 230.

[175] Ibid., at 277 – 278. Emphasis supplied.

[176] Ibid. Emphasis supplied. The Sarkaria Commission also recommends the adoption of floor test.

Speaker of the Lok Sabha, that the doubt as to majority support "should as far as possible be left to be resolved on the floor of the House".[177]

The Constitution does not prescribe any particular method which the Governor should adopt in determining whether a ministry has lost the confidence of the Legislature. There is no doubt that a floor test is a very fair procedure and should, as a general rule, be adopted. Even the Governors' recommendation is that this test be adopted "as far as possible". However, in addition to the extraordinary situation referred to by the Court, the exigencies of other situations, all of which cannot be foreseen, may also require the Governor to depart from the floor test. Supposing, at a time when the House is not in session, the Governor comes to the conclusion, on the basis of evidence before him, that the Chief Minister no longer commanded majority support in the Legislature and that he was engaged in the process of causing defections by illegal means from other parties, there is no reason why he should wait till the House is convened for the floor test to be taken.[178] The Court's view that the floor test is mandatory limits, unnecessarily, the scope of the Governor's power under the Constitution. However, to minimise abuse, if any, in the exercise of power, the Court could insist that the Governor should record his evidence in his report.

Be that as it may, in the very recent *Jagadambika Pal* case, the Supreme Court enforced the floor test.[179] When the Governor of Uttar Pradesh installed a new Chief Minister on the ground that the old one had lost majority support in the Assembly, the High Court stayed the same. On appeal, the Supreme Court directed that a special session of U.P. Assembly be convened by the date specified therein to have a floor test to see which of the two contesting claimants to Chief Ministership has a majority in the House. The Court's further direction reads as follows: "It is pertinently emphasised that the proceedings in the Assembly shall be totally peaceful and disturbance, if any, caused therein would be viewed seriously."[180] Besides the fact that the Court could not have found it easy to enforce its direction, the direction may suggest that it is not the House but the Court which would enforce discipline in the House, a proposition that may not accord with the constitutional prescription that it is the House itself which has the exclusive competence to maintain order therein.

Practically every political party which ran the Central Government was a party to the abuse of article 356; yet every political party proposes that article 356 be amended to prevent the misuse of that article. However, successive governments have not been able to find a legislative solution to the problem. A suggestion has been made in some quarters that the general rule that the President is bound to act according to ministerial advice may not be followed in this matter and the President, in the exercise of his individual judgment, may be permitted to accept or re-

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[177] Ibid. Emphasis supplied.

[178] See Ramaswamy J.'s view to the same effect expressed in his well-reasoned dissenting judgment in the *Bommai* case. *Supra* note 50, at 204.

[179] *Jagadambika Pal* v. *Union of India*, 1998 (2) Scale 82, 84.

[180] Ibid. Emphasis supplied.

ject the advice about the imposition of President's Rule. This suggestion is untenable as it undermines the foundations of Parliamentary system of government. The abuse of not only this article but a number of other articles of the Constitution is on account of the degradation in the political environment of the country and it is this factor which needs to be attended to for any meaningful solution to the problem.

H. "Saviour" obsession

The Supreme Court has gone as far as it could in establishing judicial review of President's action under article 356 but the Court should realise that judicial legislation may not offer a quick panacea for the country's political problems. In the *Bommai* case, the Court observed:

> So far the power under the provision [article 356] has been used on more than 90 occasions and in almost all cases against governments run by political parties in opposition. If the fabric of pluralism and pluralist democracy and the unity and integrity of the country are to be preserved, judiciary in the circumstances is the only institution which can act as the saviour of the system and of the nation.[181]

It is this "saviour" concept that makes the Court think of novel theories *de hors* the Constitution and, in the process, fail to distinguish between what the law is and what it ought to be in its opinion. The Court is not sensitive to the idea that its new doctrine may not offer a solution to the problem; in fact, unwittingly, it may create new problems. It is also presumptuous of the Court to deride the other branches of the Government and place itself on a higher pedestal.

In the *Indra Sawhney* case too, the Supreme Court observed that it was dealing in that case with "complex, social, constitutional and legal questions upon which there has been a sharp division of opinion in the society, which could have been settled more satisfactorily through political processes. But that was not to be. The issues have been relegated to the judiciary – which shows both the disinclination of the executive to grapple with these sensitive issues as also the confidence reposed in the organ of the State".[182] This is not an entirely correct view of the matter, for the central issue arising out of that case was the consequence of conflicting judgments of the Court which could not have been resolved without further judgment by a larger Bench.

Further, look at the order of the Supreme Court in *State of Tamil Nadu* v. *State of Karnataka*[183] which is contrary to what it professes. The Court was in that case dealing with the question of Karnataka Government's refusal to release water in terms of the Cauveri Water Tribunal's Report dated 19 December 1995. Instead of dealing with the matter itself, the Court called upon the then Prime Minister to

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[181] See *Bommai* judgment (note 50), at 1980. Emphasis supplied.
[182] AIR 1993 SC 477, 518.
[183] 1995 (7) Scale S.P. 9.

consult the Chief Ministers of Tamil Nadu and Karnataka and other political representatives of the State with a view to evolving a solution either by consensus or by his own decision for releasing the water. One should have thought that the question of implementation of the Tribunal's order involved a judicial function, not an executive one. Could one then state that the Court was not inclined to grapple with the sensitive issue arising in the case and, therefore, reposed confidence in the Executive to handle the matter? There are several inter-state river disputes pending in the Supreme Court which have a bearing on the livelihood of several millions of people and which could resolve inter-State tensions on that account; yet the Supreme Court keeps on adjourning these cases from time to time, instead of bringing them forward on its agenda of judicial business.

I. Concentration of powers

If, in the name of its right to interpret the Constitution and defend the independence of the judiciary, the higher judiciary has come to (i) acquire complete control over the judicial appointments and transfer of Judges; (ii) lay down conditions of service of judicial officers without reference to the Legislature and the Executive; and (iii) ensure that no Judge of the superior Courts is prosecuted without its permission; then the resulting situation is one which leads to the establishment of judicial supremacy, and the Supreme Court has given enough indications that it is going to zealously guard this supremacy and predominance.

Again, if the Judiciary could impose limitations on the amending power of Parliament, if it could legislate until the field is occupied by the Legislature, if it could direct how the law to be made by the Legislature should be structured, if it could dictate how the legislators should behave in the House, if it could force expenditure on projects that it considers should be undertaken by the Executive, if it could direct where industries should be located and mining should not be undertaken, if it could make administrative schemes, if it could disregard express provisions of the Constitution on the ground of protecting the independence of the judiciary, if it could think that it is the saviour of the nation, then, it is increasingly asked, what is it that the judiciary cannot do except, like the British Parliament, "make a woman a man and a man a woman", and whether concentration of legislative and executive powers also in the judiciary would be in the interests of a democratic government. It may be apposite to recall what Chandrachud J. (as he then was) warned:

> The truth of the matter is that the existence and the limitations on the powers of the three departments of the Government are due to the normal process of specialisation in governmental business which becomes more and more complex as civilisation advances. The legislature must make laws, the executive enforce them and the judiciary interpret them because they have in their respective fields acquired an expertise which makes them competent to discharge their duly appointed functions ... [T]he concentration of powers in any one organ may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged.

... No Constitution can survive without a conscious adherence to its fine checks and balances.[184]

J. Courts' management faulted

While the Judiciary finds fault with the other two organs of the State for not doing what is expected of them or for doing what is not expected of them, what has it done, it is asked, to reform itself. Among the other questions raised are the following: (i) What effective steps has the judiciary taken to weed out corruption within? As an English jurist observed, "Judges, like Caesar's wife, should be above suspicion". (ii) Apart from introducing computers and grouping of cases, at least up to the level of the Supreme Court and the High Courts, what effective strategies has the judiciary come up with to deal with the exploding court dockets? There are more than 25 million cases pending in different courts. Whatever be the causes for this, faith and confidence in the administration of justice are steadily declining. Justice is neither perceived as being readily available nor meted out expeditiously. Unless remedial measures are taken soon, the justice system may loose its base of popular support on which it must ultimately rely. More and more people are taking recourse to remedies which are not sanctioned by law, undermining thereby the vitality of the democratic process. The judiciary has to think of drastic measures and that too very quickly to cope with the difficult situation. (iii) What steps has the judiciary taken to improve its management? In one of its judgments, the Court observed, "perhaps the time is ripe for imposing a time-limit on the length of submissions and page-limit on the length of judgments", "the time is probably ripe for insistence on brief written submissions backed by short and time-bound oral submissions", "the time is certainly ripe for brief and modest arguments and concise and chaste judgments", and "we will find them [drastic solutions] and we do hope to achieve results sooner than expected."[185] To the same effect were the decisions taken unanimously at the Chief Ministers' and Chief Justices' Meeting which was held in 1993. This Meeting further emphasised that reserved judgments should ordinarily be delivered within a reasonable time and that a convention should be developed that would discourage granting of adjournments except in exceptional circumstances.

It is rather unfortunate that there is not much progress to write about in any of these areas. The 1993 Meeting further noted that unsatisfactory appointment of Judges could contribute to accumulation of arrears and to the deterioration of the quality of justice administered by courts. The fact of the matter is that the judiciary is unable to attract the front-ranking advocates to be Judges of the higher judiciary. The size of the Supreme Court judgments is rising relentlessly. The *Kesavananda* judgment occupies 1594 printed pages in All India Reporter, the *Bommai* judgment 171 pages and the judgment in the *Second Judges'* case 186 pages. Judg-

[184] *Smt. Indira Nehru Gandhi* v. *Raj Narain* (note 2), at 2471.
[185] *LIC of India* v. *Escorts Ltd.*, AIR 1986 SC 1370, 1375 – 1376.

ments of Indian and foreign courts, reports of expert bodies, views of eminent personalities from Swami Vivekananda to Marx and Engels are quoted chapter and verse; in most cases, these quotations could be avoided since they make the judgments wobble. The Court needs to display courage and should be prepared to incur the displeasure of the Bar on that account, if it has to put into practice the hopes that it talked about in its judgments.

More recently, the Central and State Governments have taken significant legislative and administrative measures to bring their financial systems in tune with the requirements of market economy. The successful implementation of these measures depends on, among other things, the ability of the judicial system to respond to the logic of globalisation and liberalisation of economy. Except where the infringement of any constitutional or statutory provision or principle of administrative law is involved, the Court should generally exhibit self-limitation as the path to judicial wisdom and institutional prestige and stability. Extravagant and highly imaginary versions of the rule of law and of the independence of the judiciary should be eschewed.

It is noteworthy that the essentiality of judicial independence has not been questioned and that this independence continues to be respected in India. There have been practically no Executive attempts to influence or coerce the judiciary. The principle of the supremacy of the Constitution proclaimed by the Supreme Court deserves to be given more than lip sympathy; the Courts should interpret it according to the well-settled principles of interpretation and not stretch the language of the Constitution according to the individual philosophy of Judges sitting on the Bench, for, as pointed out by Chief Justice Patanjali Sastri, "the Constitution is meant not only for people of their way of thinking, but for all"[186]; they should not breach the checks and balances built into the Constitution in restraint of power. Democracy survives in this country on the basis of public opinion ascertained through periodic general elections. It is wrong to think that the judiciary has become the sole saviour of democracy, though it is an important element in preserving the fine balance of the Constitution.

V. Review of the Constitution

A. General review

Though it represents a higher law, the Constitution is by no means immutable, since, like any other positive law, it too is amendable depending upon the needs of time. Here and there, a view is expressed that the Indian Constitution is "non-Indian" and that the institutions that it established do not suit the Indian genius. A view is also sometimes expressed in the western world that the Indian Constitution cannot be worked out in a country that is so vast, populous, poor and ridden with superstition. It may be true that a large part of the Constitution draws its in-

[186] *State of Madras* v. *Row*, (1952) S.C.R. 196, 607.

spiration and concepts from western democracies. Even the concept that all human beings are born free and equal in dignity and rights that underlies the Fundamental Rights part of the Constitution was not enforced in caste-ridden India until the commencement of the Constitution. That said, it should not be forgotten that democratic roots run deep within India's ancient tradition and culture. The Vedantic proclamations assert "the sameness of every thing" and "oneness of all". The contemporary concept of human rights, therefore, finds a ready response in the Indian soil. The forebodings about the future of democracy and the rule of law in India have been proved wrong by about 50 years of independent India. The demand for radical restructuring of the Indian Constitution is, fortunately, not supported by the dominant political sections. Nor would such demand be compatible with the doctrine of basic structure of the Constitution.

There have been so far seventy-seven Constitution Amendment Acts as a result of which large numbers of articles were either omitted or amended and new articles added to the Constitution. This too takes the wind out of the demand for general review. A general review of the Constitution should never be undertaken lightly, for it may debilitate the existing structure without producing a more efficacious one and thereby create more problems than it can solve. The argument that the Constitution should be reviewed since it has been in existence for nearly 5 decades cannot be taken seriously. What is it that could be achieved by a review which seventy-seven Constitution Amendment Acts could not accomplish? Or, has the Constitution become a scapegoat for the failure of the country's leadership to solve the problems of the country? Though the Constitution should not be looked at with sanctimonious reverence, it ought not be treated as an ordinary statute to be changed at will.

B. Demand for change in form of government

The demand for a constitutional review is now mainly focused on changing the Parliamentary system of government into a Presidential system of government. The main political party presently in power at the Centre too has supported the view that such switch over in the political system deserves to be explored. In support of a switch over, it is said that the Parliamentary system is suited to a two-party political dispensation; since it cannot cope with the conundrums created by the multiplicity of political formations, rise of strong regional parties and the now familiar phenomenon of coalition governments run with outside support based on convenience rather than principle, instability of political governance is the inevitable corollary in the special conditions obtaining in India. At the bottom of the argument for change is the perception that at any cost a fixed 5-year term should be assured to the chief executive head by not being responsible to, and removable by, the legislature and that the executive head should also have the freedom to choose eminent people as his advisers. But it is never explained as to how in a Presidential system the country could avoid facing fractured legislatures making it very difficult for the executive head to ensure smooth passage of bills and the Budget.

While the executive head may be assured of a fixed term, the government may get paralysed by non-cooperation of a legislature in which the party of the executive head may not have majority support.

The Constitution-makers considered but rejected the Presidential form of government and adopted the same Parliamentary system as in England[187] and with it have been borrowed the British models in respect of civil services, the appointment of judges, legislative role of legislature, the powers, privileges and immunities of the legislatures, the legislative procedure in respect of finance, the provision for a consolidated fund, the scrutiny and supervision of Union and State public accounts by an independent Comptroller and Auditor-General of India, etc.[188]

The Constitution, however, derives its inspiration from the American Constitution in respect of its provisions on the fundamental rights, judicial review of legislative action, separation of powers and federal structure involving a distribution of legislative and executive powers between the Union and the States. But, unlike the American Constitution, the Indian Constitution does not provide for a separate Constitution each for the Centre and for the States, does not reserve residuary powers to the States or prescribe dual citizenship or dual agencies for carrying out Central and State laws or equality of representation of the States in the Rajya Sabha, etc.[189] What is more, unlike the American Constitution, the Indian Constitution establishes a federal State with a bias towards the Centre;[190] which was justified by the Constitution-makers as being necessary to keep the country together.

C. Sarkaria Commission on Centre-State Relations

There is today a strong agitation for greater devolution of powers, especially in the financial sector, in favour of the States and omission of constitutional provisions that give dominant say to the Centre in such matters as imposition of President's Rule and appointment and removal of Governors. In 1983, the Central Government appointed a Commission, headed by Sarkaria, J., a retired Judge of the Supreme Court, to undertake a comprehensive review of the arrangements between the Union and the States in all spheres, keeping in view the social and economic developments that have taken place over the years and the importance of the unity and integrity of the country for promoting the welfare of the people.

The Sarkaria Commission Report on Centre-State Relations, submitted in 1987, while finding that the working of the Constitution has demonstrated that its fundamental scheme and provisions have withstood reasonably well the inevitable

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[187] See articles 75 and 163 of the Constitution. See also *Samsher Singh* v. *State of Punjab* (note 45). See also Shri Alladi Krishnaswami's statement in the Constituent Assembly of India extracted in Alladi Kuppuswamy, A Statesman Among Jurists, 1993, 232–234.

[188] See Seervai (note 18), vol. 1, 4th ed., 158 – 160.

[189] Ibid., 160 – 171.

[190] See, generally, articles 155 – 156, 201, 249 – 254, 256 – 257, 352 – 360, 365, entries 23, 42, 52, 54, 97 of the Union List in the Seventh Schedule to the Constitution.

stresses and strains of the movement of a heterogeneous society towards its developmental goals, notes that there has been a pervasive trend towards greater centralization of power over the years, *inter alia*, due to the pressure of powerful socio-economic forces, underlines the need to counter it all the time and suggests specific amendments, not drastic by any reckoning, to the Constitution and the development of sound conventions for this purpose. The Commission also recommended the need for decentralization of the Planning process and empowerment of the Panchayats and the Municipalities by making adequate finances available to them. Meaningful action has yet to be taken on the recommendations of Sarkaria Commission. Though the Constitution was amended in 1992 to create a third-tier of government at the level of the Panchayats and the Municipalities, States have not shown inclination to decentralise powers to these bodies which remain anaemic. Whereas the States demand that the Centre should engage in greater decentralisation of power, they themselves do not concede similar demand by institutions of local self-government.

D. Whether basic structure doctrine attracted

To revert to the demand for switch over to the Presidential form of government, there is the basic question whether the Parliamentary system of government is a basic feature of the Constitution. In *Kihota Hollohon's* case, in 1993, the Supreme Court left this question undecided, for it was not squarely in issue in that case. The Court observed: "Democracy is a basic feature of the Constitution. Whether any particular brand or system of Government by itself has the attribute of a basic feature, as long as the essential characteristics that entitle a system of Government to be called democratic are otherwise satisfied is not necessary to be gone into."[191] There is, however, no doubt that a constitutional amendment to incorporate a Presidential form of government will not be a simple surgery. It may not be that an assured term of office to the President is the sole objective; important changes may also have to be made in the constitutional provisions dealing with separation of powers, civil services, appointment of judges, powers and privileges of the Legislature, conversion of the chief executive at the State level also into a directly elected office of Governor with effective powers and a host of other matters.

Though at first blush these provisions might appear disconnected, there is a close connection between them. It is not, therefore, free from doubt whether the switch over to the Presidential system will not be seen as impinging on the basic structure of the Constitution. It needs also to be carefully examined whether the Presidential form of government could take roots in the Indian soil and whether one-man rule, as it were, could help in harmonizing regional interests and national unity. One man executive rule has its own disadvantages. Major democracies of the world do not experiment with their political systems. The present system in

[191] *Kihota Hollohon* v. *Zachilhu* (note 2), at 432.

India too has not failed the Indian people; the present phase of no-party getting adequate popular vote may be a transient phenomenon. The current political uncertainties are on account of the fall in political morality and they could bring even a Presidential system of government under stress.

The idea of India shifting to a Presidential form of government is not well-received by the opposition parties in Parliament; it is seen as a ploy to bloc the sharing of power by the leadership of the backward classes of citizens. Accordingly, the necessary support for amending the Constitution for this purpose may not be forthcoming in the near future.

E. Sound Constitution

The Constitution has not shown any serious weakness ever since its founding in 1950. In many areas, the Constitution fulfilled its mandate impeccably. Impartial observers have noticed that democracy is safe in India and that its citizens have taken to constitutional government like ducks to water. In spite of India's huge problems, the vitality of the democratic process has sustained its constitutional system. Human Rights, parliamentary democracy, federalism, secularism, independence of the judiciary and rule of law have struck deep roots in India, the occasional aberrations notwithstanding. These are remarkable achievements in a developing country such as India. But there were also some serious setbacks. And, sadly, only these setbacks get highlighted rather than the successes.

Whatever the Constitution, its successful working depends upon the honesty of people occupying positions in the legislative, executive and judicial wings. It may not be possible to secure honesty merely through statute and judicial exhortations. The spiritual and moral values and the commitment to the pursuit of constitutional goals need to be firmed up. It is pertinent to recall what Dr. Rajendra Prasad, in his concluding speech as President of the Constituent Assembly, said:

> Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these qualities, the Constitution cannot help the country.