ILS LAW REVIEW

Volume 1 March 2008

ILS LAW COLLEGE, PUNE
2008

ILS LAW REVIEW

Volume 1 March 2008

Mode of Citation: (2008) 1 ILS. L. R

ILS LAW COLLEGE
Law College Road, Pune - 411004
Tel.: 020-25656775, Fax: 020-25658665
Email : ilslaw@vsnl.com, Website : www.ilslaw.edu

The first volume of ILS Law Review

is dedicated to

Professor S.P. Sathe, (1931-2006)

Former Principal, ILS Law College, Pune

Honorary Director of Institute of Advanced Legal Studies, Pune

ILS Law Review

Number 1 **March 2008**

Contents

Students Section

MESSAGE FROM THE PRESIDENT

I regard it as a privilege to have been a student of the ILS Law College and thereafter the President of the Indian Law Society. Today it is in the background of the same privilege and with pleasure added, that I am writing these few words.

The ILS Law College has decided to bring out an annual publication called **'ILS Law Review'**. The first issue of the ILS Law Review is being brought out in March 2008. Distinguished academicians have contributed their articles to the ILS Law Review. We are thankful to them for sparing time in the midst of their busy schedule to write those articles for us. The students also have contributed their mite by writing articles which are extremely well-informed and instructive. I am happy that the young generation of law students is taking an active interest in the dynamics of law. The future of law depends upon their performance.

I wish the publication success in all its efforts.

Y. V. Chandrachud
Former Chief Justice of India,
President, Indian Law Society.

PRINCIPAL'S PAGE

I'm very happy to present the first volume of our law journal **'ILS Law Review'** to the legal fraternity. Publication of ILS Law Review was on our agenda for a long time and was over due.

Publication of this law review is not simply an academic activity for us but carries a lot of sentimental value. This first volume of the ILS Law Review contains presentations made by distinguished scholars and students of the ILS Law College at the Conference held during the **"Remembering S.P.Sathe"** event held on the 1st death anniversary of Professor Sathe, the former principal of the ILS Law College. It also contains the first **S. P. Sathe Memorial Lecture** delivered by Professor Upendra Baxi, during the said occasion. The event was held in March 2007.

Professor Sathe always encouraged his students to undertake research and to develop writing skills. There could not have been more befitting honour to his memory than to publish the brilliantly researched articles of the students of the ILS Law college in the form of a law journal. We are committed to bring out a volume of ILS Law Review every year.

I take this opportunity to thank all the scholars and our students for their contributions. I congratulate Mrs. Sathya Narayan, Joint-Director IALS and her team for very ably shouldering the responsibility to bring out the first volume of ILS Law Review. I appreciate the hard work she has put in.

I am confident that our journal ILS Law Review will be certainly acknowledged as a scholarly journal very soon. I wish the journal great success.

Vaijayanti Joshi
Principal, ILS Law College

EDITORIAL

The launching the first issue of the ILS Law Review, gives me great satisfaction, as our efforts to publish an annual academic law journal of the ILS Law College, which had, until now remained an unfulfilled dream, has become factual.

During the course of early discussions, which were held, to decide the format of the Law Review, it was suggested that it has be planned with a specific theme for each volume. It was also being planned to invite contributions from scholars and intellectuals in the law field. However, as our efforts towards that end made it apparent, that it would be too upbeat for a new law journal to be selective of contributors and of any particular theme, we determined to grab the first opportunity and decided to publish the presentations made by the ILS students and distinguished scholars at the **"Remembering S.P. Sathe"** event organised in memory of Professor Sathe on his first death anniversary. The three day event was organized on 9th, 10th and 11th March 2007. Professor Sathe was the former Principal of the ILS Law College and Honorary Director of Institute of Advanced Legal Studies. The event had three features: a Conference, a National Moot Court Competition and a Memorial Lecture, organised under the auspices of the Professor S.P. Sathe Foundation. Professor Sathe, the creative thinker, the inspiration of ILS Law College breathed his last on March 10, 2007.

The present format, which is adopted for the first volume of ILS Law Review, requires a special mention. This format is not designed for the perpetuity; it may change. The original idea of a single premise and to get hold of contributions from the academia is not adjourned *sine die*.

The opening section of the review contains the first S. P. Sathe Memorial Lecture delivered by Professor Upendra Baxi, on 10th March 2007. Upendra Baxi deliberated on globalisation in relation to the future of humankind, with a finale about the judicial conscientiousness. This section is designed to maintain, as much as possible, the articulations of the speaker with the larger audience. However, Upendra Baxi has thoughtfully has revised the text of his address, without impairing what was spoken a year ago.

A special feature of this issue is a section titled as **"Unfinished Agenda"** of Professor S.P. Sathe. This section contains lectures written

by Professor Sathe, which were to be presented by him in the lecture series, planned under the Principal Pandit's Memorial Lecture Series (Principal G.V.Pandit, former Principal, ILS Law College was Professor Sathe's teacher, guide and philosopher). Professor Sathe departed, before he could complete this assignment. Professor Sathe always believed in going through several drafts of his writings, which he circulated amongst his colleagues to read, to discuss and to correct. The three pieces (each being the third draft) that are included in the Law Review are in the state in which it was, when the work was halted, and as he intended them. Inclusion of these three pieces of Professor Sathe, posthumously, has undoubtedly enriched the ILS Law Review. We are confident that these unpublished pieces will have profound influence on the next generation of students and teachers and be a good source of inspiration for them to think.

The second section, the **"Articles"** section, though appears to be more on traditional lines, is in fact improved texts of presentations of Professor I.P.Massey, Advocate Andhyarujina, and Advocate Milind Sathe made during the Conference on **"Discussions on Current Constitutional Issues"** arranged on 11th March, 2007. This section takes us through a wealth of information and insights of these scholars into various constitutional issues. The presentation of Advocate Andhyarujina on **Basic Structure of the Constitution: The Noble fiction of the Supreme Court** has revealed certain hidden truths about the infamous doctrine 'The Basic Structure'.

An educational institution whether, new or time-honored, is most effectively defined by its students. This three-day event was significant in many ways and all the more because it was so remarkably made student intensive. The third section, under the title **"Students"** is included in the Law review, which contains contributions made by the ILS students. These contributions are revised texts of presentations of students made during the Conference on "Discussions on Current Constitutional issues". Professor Sathe would have loved it as he always favoured student participation in academic activities.

We hope, as this first issue of the ILS Law Review, gets underway successfully, it will establish an eminence at equivalence with its alma mater.

This issue is dedicated to Professor S.P. Sathe.

Sathya Narayan
Joint Director, IALS

ACKNOWLEDGEMENTS

We begin by showing our appreciation to all the contributors, students and the intellectuals who responded to our reminders, suggestions and clarifications with regard to their contributions.

Special thanks to Dr. Anupa V. Thapliyal, faculty member, ILS Law College who with great patience checked through the manuscripts and made important corrections.

It is necessary to acknowledge the efforts of Ms. Nilima Bhadbhade, faculty member, ILS Law College and Ms. Akshata Rao, Institute of Advanced Legal Studies, who with great diligence transcribed the recorded speeches of the senior contributors.

Ms. Smita Sabne, faculty member, ILS Law College has to be thanked for her constant support.

Ms. Manjusha Gurjar and Ms. Akshata Rao also have to be thanked for several rounds of checking the articles, for missing references, for missing footnotes.

Lastly, I would to like record our sincere appreciations to Shree J Printers Pvt Ltd. and Deepak Patil for responding to our save our soul demands and for having done an amazing job within the short span of time provided to them.

ABOUT THE CONTRIBUTORS

Upendra Baxi	Professor of Law, University of Warwick, London.
I.P. Massey	Visiting Professor of Administrative Law, Hidayatullah National Law University, Raipur.
T.R. Andhyarujina	Senior Advocate, Supreme Court and former Solicitor General of India, New Delhi.
Milind Sathe	Senior Advocate, Bombay High Court, Mumbai.
Preeti Mohan	Advocate, Madras High Court, Chennai.
Saswati Acharya	Executive Global Tax Advisory Services, Direct Tax at Ernst & Young., Pune.
Gunjan Khare	Associate, Majmudar & Co, International Lawyers, Mumbai.
Suchindran Bhaskar Narayan	Advocate, Madras High Court, Chennai.
Dwarkesh Prabhakaran	Pursuing Vth B.S.L at ILS Law College, Pune.
Bhushan Panse	Associate, DSK Legal, Mumbai.
Shreenivas S. Joshi	Assistant Legal Adviser for ONGC, New Delhi.
Gowtham Kumar K.	Advocate, Madras High Court, Chennai.

The New Property and Constitutional Impunity- Some Reflections on the New Age of Reforms[1]

Upendra Baxi *

Beloved Chief Justice Chandrachud, Vijaya and Nikhil Sathe, Professor Dhanagare, eminent colleagues and compatriots of Professor Sathe in social and legal action in Poona and elsewhere, distinguished participants to this memorial event including Professor Massey and Mrs. Massey and other colleagues, Principal Joshi and her eminent colleagues in the law school, Shri Rao Saheb Shinde and Sita Bhatia, friends and students.

Prefatory Remarks

This for me remains an overwhelmingly poignant moment of public utterance.

It's very difficult to be in Pune for me without the experience, now forever denied, of the warm embrace of Satyaranjan Sathe. The embrace was always an act of friendly provocation and of live disagreements between us. Being in Pune bereft of Satyaranjan's warm presence is indeed an uncanny experience. He lived a full, Constitutionally sincere, and always provocative citizen life. He has now assembled elsewhere, and yet today we all seek to address him and invoke his presence amidst us now. Yet, as Principal Joshi has said, his live legacy must continue to inform and reshape each one of our lives, infected with his prodigious and precious dedication to the redemption of forms of Indian Constitutionalism. I have no doubt that his spirit presides over this occasion.

Let me tell you how it presides over me! Whole through the last day and night, and much of today morning, I re-wrote the script of my lecture. And I have a feeling that Satyaranjan (as he allowed me to call him) was not clearly happy with what I had written. My laptop experienced his now divine presence, when it obliterated my script from the computer! He reaches out to me everywhere. He was not only as a teacher, and a friend, but also one of the sternest critics of my writing style, which I admit has lost its early innocence. So the erasure of the digital text is an occasion which marks, in yet another from of his co-presence in my life.

---

* The first memorial lecture delivered under the auspices of Professor S.P. Sathe Foundation durng the "Remembering S.P. Sathe" event organised by Indian Law Society, Pune, March, 10th 2007. baxiupendra@aol.com

1 This is a revised text of the address, including portions of the written text not actually presented in the Lecture, and the addition of some extempore remarks form the transcript of the speech that Sathya Narayan has so helpfully prepared. The major departure that this text makes is in the introduction of two categories of citizens. Some parts of the lecture as presented have been realigned as footnotes. Some portions from the transcript text have been deleted. All said and done, the basic structure of what was said a year ago is not here impaired!

In a sense, my presentation here this evening is also a sort of lovers' quarrel with him for his not being with us today, especially when his voice and his presence is needed in these days and moments of hyper-globalization of India. I miss him today especially when I consider the ways in which some of his views on judicial self-restraint in economic policies unfortunately in my opinion stand appropriated by new forms of judicial orthodoxy.

Thanks Vaijayanti, Sathya Narayan and other colleagues for inviting me for honoring me on this occasion. Thanks Sita for your kind words of introduction, which have reminded me of the ways in which I have mismanaged my life and time[2]! Congratulations also for making this event of three days so remarkably student intensive. I know Sathe Saheb would have loved it. That was him. Congratulations also because for setting up a whole new tradition of remembrance. The ILS Law College is already tired of reminded that it is women —led institution. So I will not reiterate this save saying thus much: I think the ILS Law College is a true feminist commune of law teaching, legal research and opening up new ways of legal sensibility and imagination. The question then is: how may it continue the pursuit of *feminizing*, in future years, the memory of Satyaranjan Sathe. Women remember in ways very different from men, who also assiduously cultivate the art and craft of repressive forgetfulness as well.

In that context I need to say that one human being, more than any one else, sustained S.P. Sathe. He was a difficult man to live with; at times impossible; remarkably, Vijaya Sathe sustained him in every walk of his life. I want to thank you Vijaya, for that and I am sorry that lump in my heart makes it difficult to say this fully.

The original title invoked the term- 'hyperglobalization.' Fortunately Sathya Narayan has wisely removed this word from the title of lecture. Sathe Saheb would have himself done the same! He avoided 'jargon' and admonished me for being an addict! Befitting this occasion, I try to speak simply, even as I would have to speak about the complex ideas rolled–up in expressions (such as globalization/ hyperglobalization) that convey some new histories for the future of humankind.

[2] A word of apology to Sita Bhatia, because when she was attempting to narrate my bio-data I had to interrupt her by saying *'Jasti Bolu Nako'*. There is a history to it. When I was a student in the University of California, Berkley, residing at its International Student House, there was a popular demand that I offer, at one of the inter- cultural events, a glimpse of Indian culture. So I decided to be a priest and perform marriage ceremony. I got angavastra and the Vedic texts from the rich University library, memorized the shlokas. The problem was how to find a couple for these rites! An already married couple — Vilas and Asha Munshi agreed to my priestly auspicious, Asha came in a very stunning bridal dress. I couldn't help saying how beautiful Asha looked, whereupon she sternly said: *'Jasti Bolu Nako'*. Te sternness of this remark has forever inhibited my attempts to speak in Marathi!

The Dreadful 'G'-word

Globalization means very many different things to very many different people in very many different times. In fact the word 'globalization' is a Wall Street word. It was invented by Wall Street Stock Brokers, as we all know. The sister term 'glocalization' was also invented by a Japanese businessperson. So, to start with we may not fail to note the close linkage between business/industry and the current idea of Globalization.

There are many things, one can be saying of globalization. I will have to be content here with some brief remarks. Because globalization has been a historically occurring process for quite a few centuries, may I present this history simply via the categories: **G1, G2** and **G3?** I have written about these rather extensively; but this is not an occasion to revisit what I have previously said

G1 means conquest globalization, where group of people, or state or a collectivity of states, proceed to conquer territories, peoples and resources and use them for their own advantage. This began in the earlier middle Ages, crystallizes more fully in the histories of European colonization. The Indian legal systems and cultures bear the fully brunt of these processes of conquest and subjugation even till the present moment.

G2 is a spectacular manifestation of the reversal of **G1.** In this, a new ethical sentiment emerges marked by the struggles of the subjugated nations and peoples directed towards freedom from colonial 'rule.' **G2** is the birth-site of the principle of self-determination. The historical enactment of this principle further reformulates the ethical sentiment described as the movement for human rights in postcolonial times. Human rights is a both a big subject and now also a mega-industry. Yet, the essential idea of human rights makes a simple but difficult demand that we all ought to take each other seriously. We should respect the dignity of the other as we respect the dignity of ourselves. A comparative study of postcolonial Constitution s clearly shows how arduous attempts were made to ground governance in distinctly human rights-friendly terms[3];

G3 is described variously. It is, in sum, a new phenomenon. It is a new ideological form which says simply: 'TINA' (There Is No other Alternative.) *No* alternative to what? Francis Fukuyama in his book, *The End of History and Last Man* says this in some stunning words: **G3** now means 'the terminus of mankind's ideological evolution and precludes any other alternative; to the 'universalization of Western democracy as the final form of human government.' In this sense, **G3** declares a war against

[3] Incidentally, some of my American friends constantly remind me that America was the first postcolonial society and Constitution. Well, this is a historical fact of some importance. But the American history also constitutes the postcolonial colonial times for other nations, as the various histories of the Cold war, and events since 9/11, so fully reveal. But this is scarcely an occasion for telling these stories.

political plurality. TINA also extends to other areas (there is no alternative to the TRIPS regime, no alternative to disinvestment, no alterative to abolition of capital control regimes, etc.) The trick here consists in the old magic of reiteration: the more people are made to say the TINA mantra, the less it remains possible for them to make sense of any alternatives!

G3 seeks to put at end the **G2** narratives. Note that just when for us the postcolonial society's history has begun, its end is speedily and terminally announced. G3 is a thriving business, indeed! It thrives in promoting the virtues of ***endology, endolatory and endomania.*** Various sorts of peoples compete to announce the end of something or the other— the end of ideologies, justice, human rights, work, science, agriculture, development, among other things. The beautiful thing about belonging to the community of enologists is just this: they are busy proclaiming end of everything in the world, excepting of the art and craft of endology! The other two terms will have to be explained summarily! Endolatory is simply the worship of the various histories of endings. Endomania is a symptom of a serious malady in search of a therapy.

G3 re-imagines the world in terms of integrated markets for the onward march of the global capital. For this to occur successfully, *disciplinary globalization* needs already be in place; and the histories of the 'conditionalities' imposed by the World Bank and International Monetary Fund in the name of structural adjustment already show how global capital begins to put disciplinary globalization in place. The second path of **G3** pursues what has been named as regulatory globalization-ways in which multilateral treaty regimes (like WTO, NAFTA, and the EU, though each very differently of course) install global-capital friendly from of *regulatory globalization.*

G3 means a fundamental change in the very idea of human rights. The Universal Declaration of Human Rights said just this: all human beings are entitled to equal worth and dignity and respect, because they are born as human. Today the shift is towards the understanding of human rights as trade market friendly, trade related human rights. That is global corporations claim that they should have human rights guaranteed to them as to right to property, right to honor, and the right to make super/hyper profits. Further, these rights should take priority over right of individuals and group of citizens. I don't recall now whether Chief Justice Chandrachud was on the bench, but there is an interesting case *Delhi Directory case, the Yellow Pages Case*, where the Indian Supreme Court said that the right to freedom of speech and expression means and includes right to free commercial speech; commercial free speech (thriving on advertisement revenues) in turn entails untrammeled, and un-enumerated, rights of global capital to own and to operate info-entertainment industries, with a meager Constitution al and judicial oversight.

This is not all. In **G3** stands further articulated a perspective the urges us to consider the 'fact' that global corporations should be given greater rights so that we can in turn serve human rights of individual better, or most effectively. In **G3,** *politics* becomes *commerce* and *commerce* becomes *politics*. This is how India that is Bharat (an identity proclaimed by Article 1 of the Indian Constitution) now simply becomes Indian Inc!

What is more important is that there is a change in the very idea of representation. The old theory was that elected representatives represented people. Today elected representative feel constrained to represent the community of multi-national global capital and direct foreign investors to their own people. The idea of representation has been transformed. Elected officials do not represent the people they represent the global capital to the people. There is a big change. Of course it is not an easy process to represent either people or global capital.

So what do we now daily hear? India will emerge as a major global power, with China, sometime in the early decades of the 21st century C.E. India should forever attract a larger share of global investment. In terms of the economic growth rate, India will catch up with China by 2020, excelling in global competition and even the United States of America by 2050. This is all that now seems to matter! Why should one want to do this in the first place seem no longer a Constitution ally pertinent question for India's arch-globalizing chattering classes!

Several important implications follow. The Indian Constitution must now be regarded not so much for its rights and justice assurances and potential, but as a repertoire of vast executive and administrative powers furthering **G3** policies. The fifteenth word of the Indian Constitution is 'socialist'— it should now be *tolerated* to adorn the Preamble, provided it is not taken seriously and does not intrude on **G3** governance. If it does, it may be amended away! The second fundamental duty of all citizens [Article 51-A *(b)*] to 'cherish and follow the noble ideals which inspired our national struggle for freedom' must be rendered meaningless in the typical zodiac of Indian **G3.** For, **G3** may thrive only when an abundant growth rate of the practices of assassinating historical memory; I was tempted to call these Assassins of Memory Citizens (AOMC.) Resisting this characterization, allow me to name such citizen practitioners as BCPC (Bury the Constitutional Past Citizens.) A contrasting category stands offered by Constitutionally Sincere Citizens (hereafter CSC.)

The BCPC now full-throatedly suggest that we move ahead and beyond the forms of constitututional nostalgia. The BCPC reject the notion that developmental governance should be human–rights based Indian governance because would be 'bad'/ inefficient governance. The BCPC insist that most developmental governance practices should provide scope for human rights *neutral forms and spaces of governance.* The BCPC

demand zones of administration and governance increasingly free of judicial process and power. BCPC see little wrong in the very performances of privatized governance; thus, for example, the Indian Planning Commission saw nothing wrong in opening the doors of Yojana Bhavan to the expert spokespersons of global capital. The BCPC seek, as we see later, to impose structural adjustment of the paradigmatic forms of Indian judicial activism; courts, including the Supreme Court of India, may speak occasionally to the rights and lights of India's Constitutionally worst-off peoples but in doing so may not deplete the aggrandizing **G3** governance agendum of economic rationalism. The BCPC themselves have no compunction in recoursing to the Constitution to preserve their Constitutional immunity and impunity.

In contrast, decent CSC continues to invite attention to the Indian Constitution as a charter of good governance. They point out that that Parts 111, IV and IV-A of the Constitution, as well as the preambulatory values, ought to remain resilient even in the Indian era of **G3**. CSC insist that these provide some key ideas of Constitution ally legitimate Indian development. They suggest that the fifteenth word of the Preamble still remains pertinent. Practices and policies of development may not be thought of human-rights neutral arenas but adverse human rights impacts should rather be consciously considered in defining developmental measures and project administration and evaluation. I may not here elaborate these contrasting mindsets save simply noting that in today's India it has become all to easy for the BCPC to brand CSC as 'enemies' of a New India and stand constituted as worthy recipients of the awesome state repressive power.

CSC continues to pursue constitutional authorized pursuit of citizen dissent and action. In this, they thus constantly invite vigorous exercise of state power, under the name of 'seditious,' and even 'treasonous' conduct. BCPC thus continue to blur some bright lines etched in the Indian Constitution between *democratic dissent* and *political treason*. The CSC practices now increasingly confront the BCPC-led state/regime sponsored propaganda, which brands them as 'anti-developmental.' Eminent CSC—such as Medha Patkar, Vandana Shiva, and Aruna Roy, in the company of others—must thus be constantly rendered by the BCPC practices as 'enemies' of the unconstitutional idea, and the imaginary, of a hyperglobalizing Indian moment. Less internationally known but locally activist CSC continue to face all kinds of state –political and legal- repression.

Thus stand re-enacted some intransigent concerns about the relations of human rights to the logics of globally competitive Indian development. Satyaranjan Sathe would have cautioned me against recourse to these terms of discourse; but I know that he would have remained deeply sympathetic to the spirit of my critique.

G3 Constituted Logics of New Property

BCPC now foster the idea of new property (hereafter, NP.) The old idea of property (hereafter OP) was articulated with much complexity in the Indian Constitution as a corpus of constraints on the power of the State to take away or over citizen's property. OP was overall conceived as inherent to the exercise of freedoms enshrined in Part III of the Constitutional mandate for the protection, and promotion of political freedoms such as freedom of speech and expression (recognized early by the Supreme Court of India in terms of the rights of a free press,) Article 30 type freedoms and rights to establish and administer educational institutions, and associated freedoms and rights under Article 19. At the same time, Part IV of the Constitution imposed a paramount Constitutional obligation on the Indian state to progressively implement laws and policies towards empowering the Constitutional have-nots. Inbuilt thus in the OP was a tension, even a series of contradictions. Holders of executive and legislative powers of the state, acting as institutionally sincere citizens were required to limit the sway of the ownership over the means of production; they were also summoned by the Supreme Court to show exemplary fidelity to the discipline of just compensation. Thus begins an extraordinary saga of conflicted relationship between the wielders of supreme executive/legislative power and of the apex adjudicative power. Some Justices were inclined to reinvest vast powers in the hands of elected officials; others thought that do this was to pave way to the ruination of the Constitutional logics of freedoms and rights of Indian citizens. Commentators on Constitutional change and development remained similarly, and equally, divided.

I have narrated these complex stories several times; so has Professor Sathe, in the companionship of fellow academicians. This is not an occasion to revisit these OP stories. Nor is it a right moment to revisit the scholarly critiques of the OP jurisprudence developed notably in *Golak Nath* and *Kesavananda Bharati*. Nor further may I engage here the constitutional, developmental, and social import of the demotion of Article 31 *fundamental* right into a mere constitutional right (Article 300A.) Even within these narrative confines, it however remains important to say that forms of contestation over OP always entailed an agonized deliberative attention concerning the ways of articulating the competing claims of constitutional haves and have-nots. The question was not simply about permissible ways of rearranging property rights and relations but rather crucially involved contestation about the *justice qualities* of these. The BCPC-constituted classes have simply no time, nor any inclination for these recent past times of Indian constitutional development. It is no mere word-play to suggest that the BCPC classes wield the power of digital cursor over the constitutional territories constantly refurbished by CSC practices.

This narrative should be enough for the present purpose as speaking to some new **G3** type of NP notions. I must immediately add a caveat: the expression NP in comparative Constitutional scholarship of the 70s and 80s signified the welfare rights of the impoverished. In sum, it was thought that the impoverished Indians should be invested/endowed with NP rights, in terms of respectful to their just claims over the modes of generation, and distribution, of social wealth. Today new property means something radically different.

NP, put this summarily today because I don't have the time for any larger presentation, transforms the idea of law, Constitution, and judicial process in terms of fashioning new instruments of *wealth maximization*. It has little or nothing to do with the rights and futures of the Constitutional have-nots. Unlike OP which was infested with the languages of social justice, NP addresses primarily the logics of policies that serve the enhancement of India as a player in global marketplace. No longer matter considerations of the fidelity towards justice obligations Constitutionally elaborated in Part IV (and also now in Part IVA.)

What matters decisively is how the Indian Constitutional and legal order should be rearranged, without the fury and the fanfare that necessarily stands etched in the languages of formal Constitutional amendments. What decisively matters on this BCPC Constitutional registers are ways of escalating favorable ranking in variously formulated global capital investment indices. NP thus almost entirely effaces the originary idea of Constitutional development as *disproportionately beneficial to Constitutional have-nots"*; rather, it privileges directions and movement towards further feats of empowerment of the Constitutional 'haves.'

'Free' market logics, rather than any originary Constitutional ones, now define the very idea of development. A new **G3** conception of *Sarvodaya* (lit. the rise of all together) thus emerges. What Dinkar Mehta, perhaps the sole great Marxian Gujarati thinker, said of the older notions of *Sarvodaya* applies its globalizing reincarnations as well? Mehta said memorably that *Sarvodaya* means just this: 'Let an ant double its size and let an elephant double its size!' What happens is that when an ant doubles its size it still remains a tiny creature compared to elephants. Social wealth maximization is always directed to the elephant's benefit, rather than being benign to ants. The **G3** NP *says this indeed ought to be so*! It is not clear though how the ants may thus at all stand to benefit!

NP, as now led by the BCPC classes, redefines the *rule of law* now as the *rule of global capital*. The primary business of the state is that it becomes just that: *business*. Put another way, the Indian state now owes more obligations to industries, multinational corporations, and diverse communities/constituencies of direct foreign investors than to its citizens.

Indeed, in the process the category of 'citizenship' thus remains hastily re-assembled in the imagery of the *financial* and *consumer* citizenship. The 'good' thing about financial citizenship is said to be this: it enhances India's competitive edge in the global marketplaces. Likewise, the 'good' thing about consumer citizenship lies in the fact that they remain conspicuous consumers; the more they pursue the new habits of consumption, the better emerges India's position as a global player. This new citizenry stands presented as the best from of Constitutional development because financial citizens demand a level-playing field and the consumer citizens demand a similar field via protection of their rights. All this, in turn, is said to further promote some new cultures of transparency and accountability in cultures of the Indian democratic governance.

No doubt active, and also activist, Indian citizenry champions and benefits a good deal from accomplishments of governance transparency, whether via the consumer protection or the right to information type legal regimes. At the same time, the jury remains out, as it were, concerning the question: How may after all these measures close in the very act of opening up the futures of human rights for the Indian impoverished?

Six Forms of New Property

I must hasten the pace of this presentation now. because I have still to find time for narrating some recent doings of the Indian Supreme Court. I simply 'love' the Indian Supreme Court. And Chief Justice Chandrachud would bear out this confessional statement; he valiantly experienced, and withstood, my 'love.' The Court, under his leadership, was indeed a great court. He bore with great dignity and quiet appreciation the Open Letter to the CJI, critiquing the *Mathura* decision, that I was privileged to initiate in the companionship of three other distinguished colleagues. He achieved more for us by declining the invitation to dismiss some inaugural social action litigation that Lotika Sarkar and I initiated via the *Agra Home Case*.

So let me come quickly to these six forms

First, Indian globalization means 3 D's: Disinvestment, Denationalization and Deregulation. What does this mean? This means that India as Constitutionally conceived is now a commodity constantly on put on 'sale' to the highest bidder. The three Ds also foster a new class of SOB. I must hasten to clarify, because I never use four-letter, and always deeply sexist slang words, and remain deeply offended by these. Let us pass over the gat that SOB is a three-letter' its import remains the same. So, I use SOB as signifying 'Sons of Bharat.' These now systemically put 'India' on sale in every respect. Indian resource-territories, policies, and even the Indian ideas Constitutionalism and justice are now presented, as it were, up for gabs in the global marketplace.

Why is India that is Bharat thus put to sale? It is on sale because as the learned Prime Minister Manmohan Singh frequently says we should be 'world-class' in every sphere,' as if the Constitutional discipline at all sequestered such happening! No doubt, being world class also means some investment in literacy and numeracy drives for Indian Constitutional worst –off and some afterthoughts by way of 'inclusive growth' typified by the Employment Guarantee Scheme Act, the distributional goods now promised to impoverished strata of Indian Muslims, and the fractured policy declaration concerning relief and rehabilitation for those fully adversely affected by developmental projects. Inclusive growth is that the supreme executive may say from time to time wish to say it is, unanchored in Part IV, IV-A, and the Constitutional perambulatory values. Should you doubt this, please do a number word count of how often theses occur in the Eleventh Plan formulation as compared with the previous **G3** texts. Incidentally, may I fondly hope that the ILS students and alumni may cultivate less grandiose and more Constitutionally sincere conception of Indian development? This lesser aspiration, I believe, will much better carry forward the Sathe legacy into future histories of Indian Constitutionalism.

Second, we are constantly told that India's future lies in an endless pursuit of knowledge-based economy. So India has now its own 'knowledge commission.' A handful of regime-picked, yet still eminent experts in their own right, will now tell us how to further the knowledge-based economy. Despite the fact that for six decades, the Indian Universities are producing knowledges, these are not to be trusted any longer to serve the distinctive Indian **G3** zodiac. J. P.Naik, whose centenary year we still continue to celebrate, would have been appalled by the idea of a knowledge commission! *Who today bothers, anyway?*

Third, the idea of knowledge-based economics is now subsumed almost entirely, by the WTO/TRIPS (Trade Related Intellectual Property Rights) regime. This altogether cancels the forms of autonomous development of national IPR regimes. TRIPS thus replace the world's first radical postcolonial legislation: The Indian Patent Act of 1972. India's first, and enormously long –serving, Prime Minister Jawaharlal Nehru himself attached great importance to an Indian patent system but was not able to achieve this because of the fierce pressures from the United States and international cartels like the OPPI. The reform was accomplished by India Nehru Gandhi, soon after the Bangla Desh 'war.' Later, CSC led, but still fully participatory, mass movements opposed the Dunkel Draft and at least one Constitutional challenge was filed against the ratification of WTO/TRIPS on the ground that it comprehensively violated parts III and IV of the Indian Constitution. The Bombay High Court failed to rise to the occasion. I have narrated the story elsewhere. I may not here engage you with further stories concerning how reform of patent law was vigorously opposed by Indian human rights activists and yet eventually fully inscribed on the statute book.

The overall result is just this: MNCs now determine the futures of Indian social and economic rights. Agribusiness determines the itinerary of yet a third green revolution in-the –making; (please think of Monsanto and BT Cotton stories here.) MNCs now indisputably determine the future of the right to food in India. Pharmaceutical MNCs likewise determine the future of Indian human right to life and livelihood. They claim a *right* to undermine Indian drug control, safety and pricing policy. A new category of 'evergreen' patents is now sought to be imposed (as unfolding now in the Novartis Case. A depletion of India's power to produce life saving generic drugs (anti -retroviral drugs for HIV, AIDS treatment) seems already on the WTO regulatory cards. Put in stark words, the pharmaceutical MNCs now claim the sovereign right to administer capital punishment to Indian citizens without due process. That's what knowledge-based economy means. I hear your applause but may I say to you: please don't applaud me, fight against it.

Fourth, a totally new form of property rights now emerges, especially via the ways of protection and facilitation of the rights of foreign investors, regardless of the Constitutional mandate and imperatives. This leads to a sea-change in Indian Constitutional law and interpretation. New institutionalities thus emerge in the shape of regulatory agencies. (Think here of privatization of electricity, water, infrastructure development projects etc.) The reigning idea here is not *social justice* but *market efficiency* that liberally passes on the costs to consumers in the name of more effective development. Regulation is directed to provide level-playing field for the competing fractions of capital. It must now so proceed as to ensure and boost investor confidence and the *right* to make not just profits bur *super/ hyper* profits. Should you doubt this, please read word by word the Special Economic Zone (SEZ) Act 2005 and the rules made thereunder, especially the language of power under Section 49 of the SEZ Act. Via the SEZ regime, the Indian state assumes the form of a *sabbatical* state. By this, I mean here that the State and the law go on a longish Constitutional holiday!

Why so? India's exports have to increase. Why should India's export increase? Because SEZ should after all remain representable in terms which would maximize the prospects of India as a long-term competitive global player. Why should it become competitive global player? Because, it is said, India should overtake China by 2020, and America by 2050. This is a fairy tale, also embodying many horror stories of CSC repression. The BCPC classes have little patience for the horror stories of the sorrow and suffering of Singur, Nandigram, and as of now (at least on my present cont) as many as 117 Special Economic Zones. The CSC protest and movement stands greeted by some lethal forms of India's dragnet security legislations.

A *fifth* form of new property consists in creation of what is called 'flexible labour markets'. 'Flexible labour markets' means simply this: 'organized' trade union movements should be further disorganized and every prospect of organizing the 'unorganized' workers should be fully stymied by the state/law combine. The old management prerogatives of hire and fire, wage depression, and the disciplinary powers must now be fully resurrected. Labour, as far as possible, should have no rights. Management should have all prerogatives. I will come now to the Supreme Court of what it has done with labour laws. Look at the 11th Draft Approach Plan, one of its chapters actually begins by saying that India's great strength, in terms of global competitive market, is her vast reservoir of formal or informal workers.

The *sixth* form of new property is rather is technically produced. It stands doctrinally created by some public law decisions of the Supreme Court of India. For example,

- Ø The Supreme Court has held in the *Balco Case* that the doctrines and principles of natural justice have no role whatsoever to play in disinvestment decisions
- Ø The doctrine of legitimate expectations means that industries, global and national, have a right to have their expectations fulfilled
- Ø The state may not arbitrarily withdraw tax and related concessions granted to industry; award of government contracts should afford a level-playing field for all bidders
- Ø The fledging doctrine of public accountability applies to government servants but not to corporate citizens.

There is here no need to enlarge the list. However, it is clear that these, and related, trends in judicial decisions more fully honour the rights of financial capital than of the Indian citizens (recall the *Bhopal* and *Narmada Cases*.) I can already feel the frowning look of Satyaranjan when I say all this because he after all believed in the unity of public law, an outlook that suggests that no matter how in-egalitarian the immediate judicial outcomes, administrative law developments enable/empower the Constitutional have–nots in the long run. I think Professor Massey, another great student of the subject, may also wish to agree. Yet, this 'truth' is not entirely manifest.

The Social Responsibility of Constitutional Adjudicators

Now this question forms the last part of my rather meandering presentation. What should justices do, how should they act and conduct themselves in times of globalization or hyperglobalization? Clearly, as

justices they may not entirely act as articulately as the BCPC policy-making citizens. Nor may they act entirely in the image of the protestant communities of CSC. To go either way is to compromise the ideal and ideology of a relative autonomous judiciary.

No doubt, judicial independence must always be measured by the distance between Shastri Bhavan, or the North Block, and Tilak Marg where Supreme Court sits. Geographically, it is a very small distance. But Constitutionally, it ought to remain a very vast distance, indeed un-traversable distance. The moment this distance becomes unConstitutional, we are in trouble. What then should justices do?

Now, beloved Satyaranjan, you proposed a way out with which in your lifetime amidst us I had fully contested. You wrote in your classic *Judicial Activism* book, in effect, that that the choice of economic policy should not be left to court'. You maintained that the Court should not impose economic theory on the nation. You further said that the Indian Supreme Court should *not* read classical socialism in to Indian Constitution. And, therefore, you counsel that judicial restraint is the only sensible Constitution al adjudicatory policy.

While I understand your concern about the eventual preservation of judicial review power, and in part at least also share it, please allow me to still raise a few questions. Indeed, you remain very close to the canon of judicial self-restraint so marvelously urged by Chief Justice Chandrachud, in his most articulate dissent in *Kesavananda Bharati*. May I suggest that we all read and re-read this magnificent piece of judicial prose Chief, your successors unfortunately find it difficult to follow the gift of your Constitutionally chiiselled prose. That is how it is. And you were, 'Chief,' as I must still continue to address you!), the first and the only judge in whole world to utter a judicial curse Do you recall your saying that we have given you Parliament vast powers to amend the Constitution but woebegone you , if you use it in vagabond ways?

Still, one must ask: What may judicial self-restraint mean, in a hyperglobalizing Indian moment, beyond the power of judicial curse? Does it mean that judges, justices ought to abdicate their Constitutional responsibility especially towards India's Constitutional have-nots? No doubt, justices, singly and collectively have, and continue to, develop a judicial policy. That is, they will decide when they would intervene in policy and when they would not intervene. There always exists in India and everywhere else a judicial adjudicatory policy which institutionally disposes occasions of judicial engagement as well disengagement. Nothing wrong with all this, until we begin as CSC to ask some hard questions concerning Constitutional thresholds of adjudicatory policies.

A very good friend Brother Venkataramiah, in the *Sant Longowal* habeas corpus case, sitting as a vacation judge, said that he could not decide complex issues, thus presented, because 'my shoulders are humble'. And, he in effect said, that I will wait for the vacation to end so that the bigger bench could decide. By way of a critique, I wrote an article, translated in many Indian languages, castigating 'the doctrine of humble shoulders' as an unConstitutional doctrine and an act of judicial abdication. A Judge has to decide a case on argument and merits. A judge cannot say, I cannot decide. And I urged the President of India because the Constitution of India says that a judge may resign his office by letter in his own writing to accept Brother Venkataramaih's judgment as an act of resignation. I nearly lost an eminent judicial friend thus; but that is not the point. The point is where we may draw a line between restraint and abdication. That is an important question. I suggest quickly, and rather summarily, four things.

First, restraint is unConstitutional when courts and justices say that even if there is a strong argument that the new economic policy violates fundamental rights, we will offer the executive a Constitutional *carte blanche*. The job of the Supreme Court is to protect and enforce Fundamental Rights. There is no scope for judicial restraint. Judges have the right and power to interpret what rights means. But they cannot say we are going to observe restraint at the threshold.

Second, I suggest, that because the Indian Supreme Court of India is the world's most important court for developing principles of administrative law, natural justice, judicial self-restraint in the domain of new economic policy must be informed by the court's own institutional inheritance. To depart randomly and at will from this just because political times have changed (recall Brother Venkatachaliah's phrase about the 'winds of change' in *TOMCO Case*) now means that Justices should feel authorized at will to erode the interpretive inheritance.

Third, the Supreme Court of India cannot exercise restraint Constitutionally, when CSC demonstrate in social action litigation that a new economic policy violates the *new rights* created by the Supreme Court: the rights to livelihood, right to dignity, right to health, the right to shelter, and the right to sustainable development, for example. These are not rights, clearly unwritten in the Constitution, have been written justices themselves into the Constitution. And they cannot simply say: 'Now is not the time for us to enforce, or even look at, these.' They themselves have created legitimate constitutional expectations; the doctrine of public accountability that they have so well-crafted must also (and even more rigorously) extend to judicial obligation to accomplish constitutional justice.

Fourth, the discipline of basic structure doctrine as developed with and since *Kesavananda* binds all constitutional actors, notably, their Lordships the foremost. If the Indian Parliament may not proceed to amend

the away the basic structure, and its essential features, nor may eminent Justice do so by *ad hoc* postures of judicial self-restraint in ways that disproportionately disfavour the Constitutionally worst-off Indian citizens, as most **G3** governance practices no resolutely, and systematically. do.

I know the contempt law is flourishing very strongly in Pune now; and Sathe Saheb always warned me to be careful, lest some district lawyer will always file a contempt suit! I hope there is nobody here inspired by this culture of Pune. I hope the distinguished members of the bar to whom I look at sharply now will protect me from this extravagant form of public censorship!

Let me put in simple words, forgetting all the technical aspects. If the new economic policy constitutes *unConstitutional economics* (to follow here Kishen Mahajan's gifted phrase), should the Supreme Court further this by its typical ways of the exercise self-restraint? What may unConstitutional economics mean? The Indian Constitution has a distinctive economic theory; it says that the Indian state should organize and redistribute its resources so as to avoid 'common detriment' and subserve the' common good' (Article 39 (*b.*) Part IV offers some detailed precepts to define the import of these two terms. And Part IV=A equally extends to citizen-justices. Undiscerning pursuit of judicial self-restraint as an adjudicatory policy remains Constitutionally impermissible at the threshold.

What does the Supreme Court do? It says that the policy of privatization and liberalization a Constitutional free zone. So is the regime of Special Economic Zone, whose Constitutionality the justices may not imply touch. Well, take the case of BALCO, the first major case of privatization of, of the Bharat Aluminum Corporation. What did the workers say? The workers said we ought to have been consulted. Why did they say that we ought to have been consulted? Because the disinvestment policy, under the Ramakrishna Commission, said that workers should be consulted in every respect as stakeholders. What did the government do? They didn't consult them. The workers came to court. What did the court do? The court says, 'Sorry, chums', there is such requirement under the Constitution. The policy is one thing but the Constitution does not allow you to be consulted. You do not have the right to be consulted. Natural justice does not apply to privatization. I would like to ask, and even beg you to think where the justices may derive the authority for this proposition? Why should natural justice, right to hearing and consultation of the workers not apply to new economic policy? I tried to find an answer. I found none. Hopefully you can help me!

Then justices say in various cases the following 'Look, we cannot interfere with policy. Policy is for elected politicians to decide.' Fair enough. Which sensible Indian (a scarce commodity, the best and brightest of middle class Indians are schizophrenic) may disagree with the proposition that

justices can't write economic policy. They don't have expertise and they have the right to say that they don't have the expertise. So far so good; or bad.

In practice and I am summing up a long discussion in my paper, what the Supreme Court is saying in plain and simple language. And please listen to this carefully.

Carry on you BCPC boys and girls! You have right to make and change economic policies, more or less as you like. We will not go in to the wisdom of your policy. That's your domain. Please be sure that if anybody is stupid to say the policy is *mala fide*, we will make sure they will not succeed. But please be careful that you don't violate fundamental rights. The trouble is nobody knows what rights people have excepting as we from time to time, may still decide what rights people may have. We can't finally say what residual rights workers, including the disorganized ones, may have in this age of reforms. So carry on BCPC boys and girls. Be careful that you don't violate natural justice but as we just told you natural justice do not quite apply to privatization, liberalization. So don't worry too much. Of course we will hear the parties and we will say that it does not apply. But be careful when the policy is based on a statute as against the executive policy. If allegations are made that the policy remains in contradiction with the statutory authorization, we will then have to subject your acts to judicial review. But please be assured that at the end of the day, you BCPC boys and girls of the coalitional government, we will overall refrain from fettering your globalizing choice of action.

That's the message emanating from scores of carefully studied Supreme Court decisions on privatization in last few years. It is a message, more rather than less, composing a constitutional *carte blanche*.

All this provides further for constitutional impunity. What is constitutional impunity? In sum, it means just this: 'You can do just as you like, without any judicial oversight.' Indeed, such judicial oversight that we, as Justices, may after all offer is via incremental yet real liberation from constitutional discipline over executive power.

Look at what happened in the *Bhopal Case*. The settlement orders cheerfully allowed the scaling down of Government of India's own claim for US $3 billion damages award to merely a sum of US $470 million. The Bhopal settlement orders were made behind the back of the victims. We, the CSC, were the victim's petitioners denied any presence in chambers-type adjudication, led by Chief Justice Raghunandan Pathak. The settlement orders went so far as to say that the Union Government shall give complete immunity in civil and criminal proceeding to Bhopal, to the Union Carbide Corporation. Not merely that, the settlement orders said Indian Government shall represent and defend Union Carbide Corporation

in India and elsewhere against all suits and proceedings worldwide! The SSC filed the review petition against this omnibus impunity, disgracing one of the world's leading courts. Brother Venkatchalliah said, in effect, 'well we should have heard the victims; so we now provide you with a postdecisional hearing!' The Court struck down the immunities/impunities but preserved the 'integrity' of the settlement amount! We said that it is not hearing. Brother Venkatchalliah, a great judge who knew lot of literature and lot of law, quoted *Mac Beth*; quoting the Bard of Avon, he said this: 'To do great right sometimes a little wrong is justified.' Two hundred thousand children, women and men now are suffering for 25 years. This was, after all, a little wrong. What was the 'great right?' The great right is to ensure that MNCs do business in India, with fullest regard for the forms of MNC Constitutional immunity and impunity. Is that for what the Constitution meant? I will leave it to you to further ponder.

A 2006 judgment by brother Balsubramaniam in *Uma Devi's case* concerned regularization of workers who were there for 20 years in a government corporation and elsewhere said two things: I hereby 'denude' all prior decisions of the Supreme Court, contrary to what this court now rules. This has never happened in Constitutional jurisprudence of India. You cannot 'denude' prior decisions wholesale. You have to discuss each decision and say what's wrong with it. And second he said these judges, (earlier judges like D.A. Desai, Chinnappa Reddy, Krishna Iyer, M.P. Thakkar, and occasionally P.N. Bhagwati) labored under a *misimpression* that ours was *socialist* Constitution. I was at Warwick then. And the panic thus occasioned suggested to me that the fifteenth word of the Indian Constitution was indeed amended away! The good news is that socialism remains in preamble; The bad news is the Supreme Court cannot be bothered to take any longer seriously take this word! I sincerely hope that I remain wrong in reading adjudicatory policy thus now emergent.

So, my dear Satyaranjan, I must now end this rambling peroration. You may not like my way of putting this, but allow me still to say that what's now happening is not merely structural adjustment of the Indian Constitution but the structural adjustment and judicial globalization of Indian judicial activism. The question then is what may CSC proceed to do? And I think Satyaranjan always told the students directly or indirectly, don't curse, but try to light a candle. What candles can we light in the present darkening Constitutional landscape of India?

To say the least, to cherish Sathe Saheb's memory imposes an obligation on us all to work with CSC rather than the BCPC. Given the immense corporatization of the Indian legal consciousness and the consequent depletion of the imagination of alternative Constitutionalisms, overall constantly produced by the mushroom growth of brand-equity type 'national law schools,' the Sathe legacy remains all the more worthy of some future insurrectionary CSC- type struggles.

Secularism Under the Constitution of India*

S.P. Sathe

Introductory

Secularism has been a subject of great controversy in India in recent years. The interesting thing that can be observed is that barring a few diehard fanatics, no one, even the BJP has challenged secularism as a political necessity and Constitutional ideal. There are some theorists who oppose secularism because of its emphasis on strict separation of the State from religion and irrelevance of religion to politics not because they want theocracy.[1] Secularism is the opposite of theocracy and no one ever thought of a theocratic state. While all agree that it should be a secular state, there are vast differences in the conception of secularism among political parties, intellectuals, judges, social activists and the lay people. The Bharatiya Janata Party accuses Congress and other secular parties of being pseudo-secular and all other political parties, which call themselves secular, accuse (BJP) of being communal and therefore anti secular. Major viewpoints that often enter this debate are the following: (1) A secular state must be completely separated from religions and should have nothing to do with them. Similarly, religions should have nothing to do with temporal matters which are the exclusive domain of the State. This is the rationalist model of secularism and is based on western prototype of the secular state: (2) the State may not be separated from religion but must respect and treat all religions equally (*Sarva dharma Sam Bhav*). (3) the State must treat all its citizens equally but there could not be any minority rights, different laws for different communities (there must be uniform civil code) or different rights of any region. (Article 370 of the Constitution which recognizes special status of the state of Jammu and Kashmir). This view is based on the premise that the majority community i.e. the Hindus has a long tradition of tolerance and has always treated persons of other religions with respect and equality. But such persons who belong to other religions must accept Hinduism as a culture and get assimilated in the mainstream, which according to them is the Hindu way of life. This is called cultural nationalism, which means the majority community's nationalism which is a euphemism for Hindu nationalism. This viewpoint is put forward by the proponents of Hind*utva*.... In these lectures I propose to deal with the following matters: (i) Does the Indian Constitution provide for the total separation of the state from

* Draft of the First Lecture, which was to be delivered in the Pandit Memorial Lecture Series. However before the lecture series was organised Professor Sathe passed away on March 10, 2006

1 T.N. Madon, *"Secularism in its Place"* in Rajeev Bhrgava (ed) *Secularism and its Critics* p.297 (OUP Paperbacks 1999, Fourth Impression 2005); Ashis Nandy. *"The Politics of Secularism and the recovery of Religious Tolerance"* in Rajeev Bhargave, *ibid* p.321.

religion as is envisioned by the rationalist model? Why does the Constitution depart from that model? This will be my concern in the first lecture. In the second lecture, I shall deal with the freedom of religion whichever person (not only citizen) enjoys under the Constitution and to what extent it had to be constrained and restrained in order to facilitate social reform which in many ways that was absolutely necessary for ushering into a modern democratic society. In the third lecture, I shall deal with pluralism that has been situated in the Constitution and particularly how the right to equality has been provided to all with affirmative provisions for the minorities, the Scheduled Castes, the Scheduled Tribes , women, children. and physically challenged persons. How peoples' right to be different within this pluralistic framework of nationalism has been preserved. We will argue here that the Constitution did not merely provide for secularism, but it has gone further in providing religious, ethnic, linguistic and cultural pluralism.

Why Secularism at all?

How did the leaders of the national movement for independence come to think of secularism as an essential requisite of the future independent India? Perhaps, they did not understand the word "secularism" in the same sense in which it was understood in the West. In 1857, the first war of independence, which was trivialized by colonial rulers as sepoy's mutiny, was waged and fought by Indians under the leadership of the last Mughal emperor Bahadurshah Zafar. This was the beginning of pan Indian nationalism. The formation of a body to negotiate with the colonial rulers in 1885 under the chairmanship of an Englishman Hume marked the beginning of the struggle for independence. This body called the Indian National Congress consisted of all Indians irrespective of their religion. The British policy was to divide Indians on communal lines and the Congress sought to frustrate that divide and rule policy by insisting that independent India would belong to all Indians irrespective of their religion. The freedom fighters envisioned a State in free India which would not be aligned with any religious group. In fact the colonial State was such a state. Queen Victoria in her proclamation of 1858 made at the time of taking over the reigns of power from the East India Company had said :

We declare it to be our Royal will and pleasure that none be in any wise favoured, none molested or disquieted, by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law; and we do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any of our subjects on pain of our highest displeasure.[2]

2 D.E. Smith, *'India As A Secular State'*, Princeton University Press, New Jersey, 1963 p.72

A country like India, with her diversity of religions, and a large minority of the Muslim population could not have survived as a nation and a democracy without a State which not only was but appeared to be just and fair to all diverse sections of the people. The State would acquire and sustain its legitimacy only if it had no religious affiliation. There could not be a democracy without secularism and there could not be secularism without democracy. The development of a secular state in the West overlapped with the maturation of democracy. Secularism means that the State should not establish any religion. No section of society should be alienated from the State. All sections must feel that they have equal access to the State and they can participate equally in governance. Such a state must protect freedom of religion, which is an aspect of individual liberty and provide equality before the law to its citizens. These two have always been held as essential requisites of the rule of law. This seems to have been the understanding of secularism among Indian leaders also. Therefore they insisted upon providing a bill of rights in the future Constitution of India. The first explicit demand for inclusion of a declaration of fundamental rights in the Constitution appeared in the Constitution of India Bill 1895 passed by the Congress. Since then such a demand was repeated a number of times in Congress party's resolutions.[3] The report of the Nehru Committee in 1928 said that "our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances." The committee attached great importance to such a declaration of rights as a means to settle the communal problem.[4] Congress adopted the recommendations of the Nehru Committee by a resolution moved by Jawaharlal Nehru at its session held at Karachi. The bill of rights provided freedom of religion as well as equality before the law. The Nehru Committee's report and the resolution passed by the Congress party at Karachi were the inspirations behind the unanimous approval of Part III of the Indian Constitution, which contains fundamental rights.

Essentials of Secularism

D.E. Smith has described secularism in terms of three types of relationships; (i) between the State and the individual- the relationship is based on equality before the law and equal protection of the law. Citizenship is not dependent upon the religion of the person; (ii) between the individual and the religion, it is of non interference by the State and (iii) between the state and the religion, it is of total separation. The State should not have any thing to do with region.[5] While the first two are absolutely necessary, on the third there seems to have been greater flexibility. Will we call England a secular state although it has an established religion? In England, both individual liberty

[3] Granville Austin, "*The Indian Constitution: Cornerstone of a Nation*", 1966 p. 53
[4] Austin, *id.* p. 55.
[5] *Supra* note 2

and equality before the law are observed most scrupulously. They form the components of the doctrine of rule of law, which is the cornerstone of British democracy. In India, first relationship fully satisfies the test of secularism. The Constitution guarantees equality before the law and equal protection of law and forbids discrimination between persons on the grounds of religion, race, caste, or sex. The only exception is that it provides discrimination in favour of the Scheduled Castes, the Scheduled Tribes and other weaker sections of society. Such discrimination is on the ground of caste, though religion is not entirely irrelevant. But such discrimination has a strong motivation of social justice and it strengthens rather than weakens secularism. In respect of the second relationship between the religion and the individual, the State has extensive powers of supervision and intervention which are justified by Indian conditions. It is here that the Indian secular model differs from the Western model of secular state. Since the inter-action between the State and the religions is quite extensive and penetrating. Since the second relationship does not meet the test of Western model of secularism the third relationship between the State and the religions also cannot meet such test of total separation. Is there a universalistic conception of secularism? Really speaking strict separation of the State from religion is not adhered to even in the Untied States. Secularism need not be conceptualized in such doctrinaire absolutes. There can be a variety of secular models. Three most essential postulates of secularism are (i) the State should not have an established religion; The U.K is an exception which is secular despite such a contradiction: (ii) the individual should enjoy freedom of religion in so far as such freedom does not cause violations of human rights; and (iii) the State must treat its citizens equally and without any discrimination on the ground of religion. The nature of secularism will vary according to the historical, political and social circumstances obtained in a country. The European and American prototypes need not be replicated elsewhere. Although secularism grew as a Christian concept, it has now become universal because societies have become multi-religious and multi-cultural Secularism must be considered as embedded in the human rights discourse.

What is the meaning of secularism under the Indian Constitution?

What does the Indian Constitution mean by secularism? The word "secularism" did not appear in the original text of the Constitution. In fact, attempts to have it included in the Constitution failed. The late Mr. K. T. Shah had suggested in the Constituent Assembly an amendment to Article 1 of the Constitution which describes the name and territory of the Union that it should read as follows: "There shall be a secular, federal, and socialist union of India" That amendment was rejected and Article 1 was phrased as follows: "*India, that is Bharat shall be a union of states.*"[6]

[6] Constituent Assembly Debates Vol 7 p.400, (1st Nov. 1948) All references to the Constituent Assembly Debates shall hereafter be as C.A.D, prefixed by the volume number and the date.

Shah made another attempt to bring in the word secularism in the Constitution where he moved an amendment suggesting insertion of Article 18A to make explicit that the Indian States hall have no contact with religion, which also failed when the amendment was rejected.[7] However, from the debates in the Constituent Assembly, it can be inferred that the makers of the Constitution envisaged a secular state. The provisions of the Constitution, particularly Articles 14, 15, 16 and 25, 26 and 27 have incorporated the essential aspects of a secular state, such as (i) the State not having any religion and no citizen to be made to pay tax for the promotion of any particular religion (ii) the individual having freedom of religion subject to restrictions imposed upon it by the Constitution and (iii) the State being required to treat all persons equally and to provide equal protection of law and being forbidden to discriminate between citizens on the ground of religion. When it was repeatedly said during the period of the National Movement as well as in the Constituent Assembly that India would be a secular state, it was essentially said in opposition to the two nation theory which propounded that Hindus and Muslims constituted two nations. The freedom fighters as well as members of the Constituent Assembly visualized a pluralistic nation consisting of persons of diverse religions ,cultures ethnicity and languages. The State of such a nation had to have all the characteristics which we have mentioned above. But the Indian reality also had to be taken into account. In India, religion has been the basis of all of society. The Constitution of India is less a consensual document, despite its preambulary declaration in the name of "the people of India" than a document that was forged by an educated elite typified by Nehru and Ambedkar.[8]

Justice P.N. Bhagwati, one of the chief exponents of judicial activism in India (others being Krishna Iyer, O, Chinappa Reddy and D.A. Desai JJ) had said in one of his academic writings: [9]

Thus it will be seen that the omission of the word "secular" or "secularism" was not accidental but was deliberate. It seems that perhaps the Constitution makers were apprehensive that if the words "secular" or "secularism" were introduced in the Constitution, they might unnecessarily bring in, by implication, the anti-religious overtones associated with the doctrine of secularism as it had developed in Christian countries. The Indian concept of secularism recognizes the relevance and validity of religion in life but seeks to establish a rational synthesis between the legitimate functions of religion and the legitimate and expanding functions of the State and since this concept is clearly brought out in the various provisions of

7 7 C.A.D. 815 (3rd Dec. 1948.)

8 Robert D. Baird, *"Religion and Law in India : Adjusting to the Sacred as Secular"* in Robert D. Baird(ed) *Religion and Law in Independent India*, Manohar 2005. p. 7

9 P.N. Bhagwati, *"Religion and Secularism"* in Richard Baird (ed) Religion and Law in Independent India, opp. cite at p.35, 37,

the Indian Constitution, the Constitution makers might perhaps have felt that it was not necessary to use the word "secular" or "secularism", particularly as it might give the impression of establishing a State structure inconsistent wit the cultural ethos of the Indian people.

The word "secularism" was brought into the Preamble of the Constitution by the Forty-Second Constitutional Amendment in 1976. There had not arisen any immediate threat to secularism at that time. The Indira Gandhi government had imposed emergency on the Nation under Article 352 of the Constitution, which had substantially curtailed individual liberty and access to courts against the authoritarian emergency rule.[10] The forty-Second Smendment had various authoritarian provisions[11] and the inclusion of "secularism" and "socialism" in the Preamble of the Constitution had been mainly to soften the blow of the authoritarian provisions contained in that amendment. The Supreme Court upheld the amendments bringing in secularism and socialism into the Preamble.[12] This was obvious because the original Constitution did contain the essential elements of secularism such as a non-discriminatory, non-denominational state. The word "secularism" was not included in the original Constitution because perhaps the makers of the Constitution did not wish to bind the Constitution down to certain meaning of that expression, which it had acquired in the West. The secular state in the West had emerged out of the struggles for individual freedom against the tyrannies of the Church and also against the domination of the Church over the State. In India, where the two major religions, Hinduism and Islam, did not have ecclesiastical establishments, they had never overpowered the state. The rulers, both Hindu as well as Muslim, had contributed to religions in equal measure There had been some religious intolerance by some rulers and exceptionally some persecution of the religious dissenters. But those things had been exceptional.[13] With such a different history of the relationship between the state and the religions, India did not need to imitate the same model of secularism which had found favour in Europe or the United States. Secularism in India had two dimensions, one of assuring the religious minorities equity and justice and the other of eliminating social injustice arising out of the caste system and gender discrimination. The first was against communalism and the second was against religious orthodoxy and fundamentalism. It is rather paradoxical that challenges to secularism surfaced after the inclusion of that word in the Constitution. Two challenges to secularism emerged since then, namely of the *Hindutva* ideology and the growth in fatalism and obscurantism

10 ...

11 See this author's criticism of the Forty second Amendment in *"The Forty-fourth Constitutional Amendment"* in A.B. Shah (ed) *Democracy and Constitution (42nd Amendment Bill* p. 9- 29 (Citizens for Democracy 1976). Also in Economic and Political Weekly 23 October 1976.

12 *Minerva Mills v. India* AIR 1980 SC 1789

13 *Supra* note 2

among the political elite. While Prime Minister Nehru was agnostic, Prime Minister Indira Gandhi unfortunately paid allegiance to mysticism and fatalism, though she was not communal.[14]

Despite such challenges, secularism has survived as a legitimating factor of governance The fact that the BJP could not secure more than 26 % votes in any election and that it had to put its *Hindutva* agenda on the backburner in order to secure the support of other political parties to form government evidenced the societal consensus in favour of non communalism.[15] Secularism is understood in India by most people as being the opposite of communalism and separatism. Communalism is a peculiar Indian expression, which means hatred of a community because of its religion. The two nation theory propounded first by the Hindu Maha Sabha[16] later by the Muslim League was sought to be combated by pleading that India would not be a Hindu State. Secularism was often used in that sense of being a state without affiliation to a religion of the majority. That is how a large number of people and even political parties in India understand secularism. We shall try to examine how secularism is situated in the Constitution and how it has been conceptualized by the Supreme Court which has interpreted the Constitution.

Freedom of Religion and Equality Before the law in Other Constitutions and International Human Rights Declarations.

In India, freedom of religion and equality before the law had found place in the bill of rights which the Indian national Congress had visualized in its Karachi Resolution of 1931. These guarantees of human rights had appeared in the bills of rights of other Constitutions been secularism was embedded in the human rights discourse which took shape since the Karachi Resolution of the Congress of 1931, to which I have referred earlier. Such a discourse had been embedded in the Constitutions of other countries much earlier.

Secularism as embodied in Constitutions and International Documents.

The First Amendment to the Constitution of the United States of America read as follows:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."

This emphasized separation of the State from the church and freedom of religion of the individual. The guarantee of equal protection of law came through the Fourteenth Amendment. S. 116 of the Commonwealth

[14] See Katherine Frank Indira Gandhi and Pupil Jakar, Indira Gandhi.
[15] See Amartya Sen, *'The Argumentative Indian'*, Penguin Books Ltd, England, 2005.
[16] ...

of Australia Act, provides that "the commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. Secularism although originated from Christian religion, became a political ideology with its emphasis on a State separated from the church. Separation of the State and the church, which is the chief distinguishing aspect of American and French Constitutions, was not adopted by other countries which also had secular states. The British North America Act, 1867, which is now called the Constitution of 1982 of Canada does not contain any "establishment" clause. The Charter of Rights which was added by the amendment enacted in 1982 included the right to freedom of conscience and religion[17] and the right to equality before the law and equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[18] Canada, however, has no State religion.

The international rights documents also include generally two important aspects of secularism namely (a) the right to equality and prohibition of discrimination on the ground of religion, race or caste and (b) the right to freedom of religion. Thus the Universal Declaration of Human rights provides that "all are equal before the law and are entitled without any discrimination to equal protection of law."[19] The UDHR further provides that everyone has the right to freedom of thought, conscience and religion. This includes the freedom to change her religion or belief and freedom, either alone or in community with others and in public or private to manifest her religion or belief in teaching, practice worship and observations."[20]

The International Covenant on Civil and Political Rights provides that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law." The article further prohibits discrimination on "any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[21] That Covenant also says that "everyone shall have the right to freedom of thought, conscience and religion." This right shall include freedom to have or to adopt a religion or belief of her choice, and freedom, either individually or in community with others and in public or private, to manifest her religion or belief in worship, observance, practice and

[17] S. 2 (a) The Constitution Act. 1982. See Peter Hogg, *Constitutional Law of Canada*, Appendix III, 4th ed. Carswell , Thomas Canada Ltd,. 1997. p.435
[18] Article 15, *ibid.*
[19] Article 7.
[20] Article 18
[21] Article 26, The International Covenant on Civil and Political rights.

teaching."[22] Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that " the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[23] The covenant also guarantees the right to freedom of thought, conscience and religion.[24] In all these international conventions two aspects of secularism namely equality before the law and the freedom of religion have been included. The "no establishment" clause does not find place in any of them.

The Human Rights declarations, either international or national, have embodied the two principles of secularism out of three mentioned by Prof. D.E. Smith in his "*India as a Secular State*", namely that (a) there should be freedom of religion for individuals as well as corporate entities; and (b) all citizens must be treated equally without any discrimination on the ground of religion. The third principle, which Prof. Smith considers vital namely that the State must be separate from religion – it should neither promote nor interfere with any religion, does not find mention in such international documents. It is also absent from the bills of rights embodied in several Constitutions.

The Wall of Separation Doctrine in the United States.

The first ten amendments of the Constitution of the United States imposed curbs on the power of the State in the interest of the liberty of the individual and one of the curbs imposed by the first amendment was that the State shall not establish any religion and it shall not interfere with freedom of religion. Whether this meant total separation of the State from religion is doubtful. Six of the thirteen American states, which were part of the United States had religious establishments when the First Amendment was passed. In fact, the First amendment intended to protect the states from interference by the Federal government. De-establishment of religions in states took place much later.[25]

The first ten amendments of the United States Constitution were held to be not applicable to the states. They could be invoked only against the Federal Government.[26] The Fourteenth Amendment addressed the states and told them not to deprive any person of life, liberty or property without due process of law nor to deny to any person within its jurisdiction equal

[22] Article 18 ICCPR.
[23] Article 14. The European Convention for the Protection of Human Rights and Fundamental Freedoms
[24] Article 9.
[25] Michael J. Sanders *"Religious Liberty : Freedom of choice or Freedom of Conscience* "in Rajeev Bhargava, (ed) Secularism and Its Critics p.73,75.
[26] *Barron v. Baltimore*, 32 U.S. 243 (7 Pet)

protection of the laws. It was held in *Cantwell v. Connecticut*[27] that the first ten amendments were incorporated in the fourteenth amendment and were therefore applicable to the states also. By virtue of that decision the First Amendment also became applicable to the states.

The first authentic interpretation of the First Amendment came from the United States Supreme Court in 1947 in *Everson v. Board of Education* as follows:[28]

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect " a wall of separation between church and State."

But the interpretation of the "no establishment" clause has been far from unanimous. The judges have differed on its purport. In *Everson v. Board of Education*[29] mentioned above, the impugned provision which provided payment of bus fares to parents of children attending parochial schools was upheld on the ground that the money aided the children, not the church. In *McCollum v Board of Education*,[30] the court was asked to consider whether the Illinois School Board could impart religious instruction in a public school. Under that scheme, religious teachers employed by private religious groups were allowed to come into the school building once a week during regular school hours to teach their faith for 30 minutes. Students who did not want to attend were required to leave their classroom and go elsewhere to study. This scheme was assailed by one of the parents of a child in the school on the ground that it violated the no establishment clause of the First Amendment. The Court struck down the scheme. Later in *Zorach v. Clauson*[31] the Court approved a scheme in which children were not taught religion within the walls of the public school but were allowed to leave the school once a week to go to religious centers for instruction. The Court held that such released time scheme did not violate the First Amendment. The Court qualified the separation doctrine by holding that it should not encroach upon the other aspect of the first amendment, namely the free exercise of religion. Justice Douglas reasoned that State and Church could not be separated for all other respects. He

[27] 310 U.S. 296 (1940)
[28] 330 US 1, 15-16 (1947)
[29] 330 U.S. 1 (1947)
[30] 333 U.S. 203 (1948)
[31] 343 US 343 (1952)

said that "otherwise the State and religion would be aliens to each other – hostile, suspicious and even unfriendly."[32]

Engel v. Vitale[33] involved the singing of a prayer by students in a public school. Students were given freedom not to attend the singing of the prayer. This was challenged as being contrary to the no establishment clause of the First Amendment. This decision came in 1962. It was argued that the declaration of independence had four references to the creator and that the Constitutions of 49 out of 50 states recognized the existence of the Almighty God. Justice Black in his majority judgment held that "neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students was voluntary, can serve to free it from the limitations of the establishment clause."[34] There was a dissenting judgment by Justice Stewart who argued that voluntary prayer did not establish an official religion. In his opinion to deny children the opportunity of joining in the recitation of the prayer was to deny them the opportunity of sharing in the spiritual heritage of the nation. He pointed out that almost every President of the U.S., Washington to Lincoln to Kennedy, had in his inaugural address "asked the protection and help of God" and that metaphor like the "wall of separation" was nowhere to be found in the Constitution.

The decisions of the Untied States Supreme Court on the interpretation of the First Amendment differed because of the varying perceptions among judges of the two competing provisions, namely of no establishment and free exercise thereof.

Separation Doctrine

Many critics of Indian secularism have disputed the authenticity of Indian secularism by pointing out the interaction between the state and the religions which takes place with full support of the Constitution. Often such criticism is based on the belief that secularism must mean total separation of the State from religions.[35] The critics of Indian secularism have often measured Indian claims of a secular state on the touchstone of the American model of separation between the State and the religion and have said that the Indian state is at the most a non denominational State. A futuristic view was taken by D.E. Smith of Indian secularism and he had hoped that after the teething troubles were over, India could emerge as a secular state.[36] The essential difference between the histories of Europe

[32] *Id.* p.312.
[33] 370 US 421 (1962)
[34] *Id.* p.432. See Fred W. Friendly and Martha J.H. Elliot, "*God and the Classroom- Free Exercise of Religion v Establishment of Religion.*" in The Constitution That Delicate balance : Landmark Cases That Shaped the Constitution p. 109 (Arnold – Heinemann 1984)
[35] R.A. Jahgirdar, "*Secularism in India: The Inconclusive Debate*" in Venkat Iyer (ed) Constitutional perspectives Essays in Honour and Memory of H.M. Seervai p 53 (Universal 2001)
[36] D.E. Smith, *'India As A Secular State'*, Princeton 1963. p.72

and India was that while Europe faced a severe conflict between the State and the Church, no such conflict had existed in India. Secularism in the West came after the Reformation and Renaissance had brought about the secularization of the civil society and limited the space religion occupied in peoples' lives. Separation of the State from the Church was necessary for assuring freedom of religion and equality, both essential values of democracy. In India, there had always existed a close inter-action between the State and the religions. During the period before the advent of British rule, Hindu kings gave grants and protected not only Hindu temples but also Muslim mosques and dargahs. Similarly, Muslim rulers also gave grants to temples. During the East India Company's rule, the Company administration did promote prosytalization by Christian missionaries. The laws such as the Caste Disabilities Act, 1850 were passed to help conversion to Christianity. This Act had provided that a person would not lose her civil rights which she had acquired by virtue of her belonging to a religion even if she converted herself to another religion. Although the law looked secular in so far as it recognized the freedom of religion, it was in fact intended to facilitate conversion to Christianity. Colonial rulers became aware of Indian religious susceptibilities after the 1857 uprising of Indians, and therefore in Queen Victoria's proclamation of 1858, which we have referred above, a clear assurance was given that the government would not interfere with freedom of religion of the Indians and would treat all its citizens equally irrespective of their religions.

The British policy of non interference with religion also meant non interference with the caste practices which denied equality and freedom to persons because of their caste.[37] The government of free India could not remain unconcerned about such practices which were enjoined by religion but clearly conflicted with the principle of rule of law. The Constitution therefore provided ample space for the State to determine the ambit of the freedom of religion. Even colonial government had made secular affairs associated with religion subject to State's supervision and control.

The makers of the Indian Constitution have very consciously departed from the American model of separation of the State from religions because the State had to redefine the scope of freedom of religion and supervise over the religious endowments and trusts so as to protect them from being abused.[38] The basic condition of a secular state that it should not establish any religion was implicit in Article 27 which reads as follows:

"Freedom as to payment of taxes for promotion of any particular religion. No person shall be compelled to pay any taxes, the proceeds of

[37] Marc Galanter, *Competing Equalities : Law and The Backward Classes in India*, p.19 "Non-interference implied doing what rulers in India had always done – actively upholding and supporting the caste order (OUP 1984).
[38] See Article 25.

which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

This means that the State cannot have its own religion. But the separation does not go enough to bar any financial aid to a religious activity as long as all religions are treated equally in giving facilities or tax exemptions.

The provision that the State shall not impose any tax for the promotion of any particular religion could mean that such tax can be imposed for the promotion of all religions pro rata. The provision would have been "any religion" instead of "any particular religion" if the Constitution makers wanted to insulate the State from religion altogether. The above provision, however, was intended to state the neutrality and equi-distance of the State from all religions. There was very little discussion on that Article in the debates of the Constituent Assembly.[39] The only judicial decision in which that Article came up for interpretation was a decision of the Bombay High Court way back in 1964. That was the decision in *Lavan prasad v. India*.[40] In this the petitioners had challenged the extension of facilities such as railway concessions, exemption from customs duties for Articles imported, and the grant of premises without charging any rent by the State for the international Eucharistic Congress held in Mumbai in 1964. Tarkunde J. held that such facilities to a religious activity did not amount to promotion of any particular religion.[41] Those facilities could be given by the State to any organization which worked in public interest. The Court held that religious activity could not be singled out for exclusion from such State largess, which would be available to other public activities as part of the welfare function of the State. Justice V. M. Tarkunde was a committed rationalist and before as well as after his tenure as a judge worked for the Radical Humanist Party of Mr. M. N. Roy. It is laudable that he did not allow his personal predilections to influence his Constitutional interpretation.

Rejection of the strict separation of the State from religion was also implicit in Article 25 which in clause (1) guarantees "to all persons equally " the right to profess, practise and propagate religion "subject to public order, morality and health and to other provisions of this Part" (fundamental rights) Clause (2) of that Article permits the State to "restrict or regulate any economic, financial, political or other secular activity associated with religious practise"[42]; and to provide for social welfare and reform or for throwing open Hindu religious institutions of a public character

[39] The corresponding number of that Article in the draft Constitution was 21. 7 *C.A.D.* p. 864. (7 Dec. 1948)

[40] Misc Petition 129, 432 and 439 of 1964, See S. P. Sathe, *"Secularism and Law"* in V.K. Sinha (ed) Secularism in India p.71, 87 (Lalvani, 1968)

[41] S.P. Sathe, "*Secularism and Law*" in V.K. Sinha ed. Secularism in India Lalvani 1968, p.71

to all classes and sections of Hindus.[43] A clear departure from the wall of separation theory is contained in Article 290-A of the Constitution and reads as follows:

A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Kerala every year to the Travancore-Devaswom Fund, and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of the Madras State [the name of the state was later changed to Tamil Nadu by s. 4 of the Madras State (Alteration of Name) Act, 1968] every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore-Cochin.

This provision had to be made in fulfillment of a pre-condition to the merger of the state of Travancore-Cochin in India. It came through the Seventh Amendment enacted upon the merger of the State of Travancore and Cochin into the states of Tamil Nadu and Kerala.[44] Obviously such a commitment would have been inconsistent with Article 27. We wonder why the Article does not start with a non-obstante clause which would have saved it from inconsistency with Article 27. Article 290-A is clearly in promotion of the Hindu religion. It is submitted that such grants from the Consolidated Funds of those two states to the Devaswom, which is a religious body clearly violates Article 27. Since both the Articles, namely Article 27 and Article 290-A are provisions of the Constitution; they will have to be harmoniously construed so as to save either of them from being void. It means that barring the above grants to the Devaswom Fund of specified trusts in Article 290-A no grants shall be given for the promotion and maintenance of any particular religious institution. The basic structure doctrine laid down by the Supreme Court in *Kesavananda Bharati v Kerala*[45] was not in existence when that article was enacted and no body has challenged it on the ground of its inconsistency with the basic structure.

While colonial government was reluctant to legislate social reform due to its sensitivity to Indian religious susceptibilities, the Constitution had clearly declared that untouchability is abolished and its practice in any form is forbidden and enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.[46] This was clearly an interference with freedom of religion. While granting freedom of religion, the Constitution makers had to take care that it would not become an

[42] Article 25 (2) (a).

[43] Article 25 (2) (b).

[44] Section 19, The Constitution (Seventh Amendment) Act, 1956.

[45] AIR 1973 SC 1471

[46] Article 17

instrument of maintaining the status quo in social relations. The State had to intervene in religion in order to make its practice compatible with the values of democracy. The founding fathers of the Constitution realized that strict separation between the State and the church could disable the state from bringing about social reform. If the State were separated from religion, it would have amounted to "giving Constitutional protection to social injustice, exploitation and cruelty in the name of religion."[47] The Constitution did not want merely to protect the individual's freedom of religion from the state but also wanted to protect it against religious orthodoxy. While the First Amendment of the U. S. Constitution says that Congress shall not make a law to curb free exercise of religion, and leaves it to the. Supreme Court to say what is free exercise of religion, the Constitution of India defines the scope of such freedom with great care and meticulousness and gives power to the State to intervene in religion in the interest of freedom of the individual and social equality If freedom to practise religion were given in unrestricted terms, not only untouchability, but even human sacrifice, widow immolation and dedication of women to God (*devdasi*- a sophisticated prostitution) would have claimed Constitutional protection. Therefore the article giving freedom of religion was subjected to greatest scrutiny.

The clause as originally drafted read as follows:

All persons are equally entitled to freedom of conscience and the right freely to profess, and practise religion subject to public order, morality or health and other provisions of this chapter.

Explanation I : the wearing and carrying of kirpans shall be deemed to be included in the practice of the Sikh religion

Explanation II- The right to profess and practise religion shall not include any economic, financial, political or other secular activities that may be associated with religious worship.

Explanation III No person shall refuse the performance of civil obligation or duties on the ground that his religion so requires.[48]

Alladi Krishnamaswami Iyer in his letter to B.N. Rau said that in view of the wide import that might be given to the word "religion" the above clause would have the effect of making all future social reform legislation impossible". Iyer therefore wanted specific provision to be included to protect social reform.[49] Ultimately the plenary scope of freedom of religion was significantly curtailed by starting the clause with "subject to public order, morality and health and to other provisions of this Part". Had

[47] P. K. Tripathi, "*Secularism: : Constitutional Provision and Judicial Review*" in *Spotlights on Constitutional Interpretation* p. 100, 105 This was reprinted from 8 *JILI* p 1 (1966);
[48] B. Shiva Rao, *The Framing of India's Constitution Selected Documents* Vol. 2, 4 (iv) p. 140.
[49] Shiva Rao *Select Documents* II 4 (v) (a), pp. 143-46.

the earlier draft been accepted, freedom of religion would have occupied a much vaster canvass and the burden of defending every restriction as being necessary for maintaining public order, morality and health would have fallen on the State. Much would have depended upon how the courts would have interpreted the freedom of religion. The makers of the Constitution did not want to take any chances. There had been communal riots arising out of processions with music having been carried over a mosque or congregations seemingly religious becoming communal. The words "public order" as qualifying the exercise of freedom of religion gave power to the State to regulate religious activity in the interest of maintaining peace and social harmony. The word "morality" which qualified the freedom to practise religion by excluding the practices such as *devdasi* from freedom of religion and the word "health" enabled the State to impose restrictions necessary for maintaining public health and sanitation without having to justify them as restrictions on freedom of religion. Further, the words "subject to other provisions of this Part " juxtaposed freedom of religion with the fundamental rights to equality, personal liberty and freedom of speech and expression. The plenary scope of freedom of religion is determined after making room for the demands of "public order, morality and health" and other fundamental rights. All other provisions of the fundamental rights follow a particular order. The right is mentioned first and restrictions that can be imposed thereupon mentioned subsequently. For example, a citizen has fundamental right to freedom of speech and expression.[50] The State may, however, impose reasonable restrictions on freedom of speech in the interests of the sovereignty and integrity of India, the security of the State, public order, morality and decency etc.[51] Here the right to freedom of speech is absolute but the State may impose restrictions in the interests mentioned in clause (2) of Article 19 and it has to justify that such restrictions are reasonable. But if one practices untouchability, and is prosecuted under the Civil Rights Act, she cannot plead that it was her freedom of religion to practise untouchability and the State should prove that the Civil Rights Act is not a matter of religious freedom because whatever conflicts with any of the fundamental rights is not included within freedom of religion. The State can prosecute her without justifying it against the claim of freedom of religion because freedom of religion is what is not contradictory to any of the fundamental rights. Similarly, if the Police Commissioner asks a religious procession to be routed in a particular way, her order cannot be challenged as being violative of freedom of religion taking out such a procession is not within freedom of religion. The careful drafting which starts with the words "subject to public order, morality and health and subject of other provisions of this Part" "reduces the plenary scope of that right. Further, the State has been given power to intervene in freedom of religion for restricting and regulating any economic, financial, political and other secular

[50] Article 19(1)(a)
[51] Article 19(2)

activity associated with religion"[52] and also for "social welfare and reform and throwing open Hindu religious institutions of public character to all sections and classes of Hindus."[53] The State's power to restrict and regulate "economic, financial, political and other secular activities associated with religion" meant that the freedom of religion is with respect to matters which fall within religion strictly so called. The essentials of a religion have to be separated from the non essentials, which would be called "other secular" matters. The non essentials would be subject to restrictions or regulation imposed by the state but both the essentials as well as the nonessentials would be subject to the power of the State to legislate for social welfare and reform and for throwing open Hindu religious institutions to all sections and classes of Hindus.

Such extensive State power to intervene in religion was perceived to be necessary since the scope of religious practice had not been defined. Dr. Ambedkar described the state of religion in the following words: [54]

The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing that is not religion.... There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious.... I personally do not understand why religion should be given this vast expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all what are we having this liberty (to encroach upon religion) for? We are having this liberty in order to reform our social system which is so full of inequities, discriminations and other things which conflict with our fundamental rights.

Although the above speech was made in response to an amendment proposed by a member to save personal laws from legal reform by making it part of the freedom of religion, which Dr. Ambedkar strongly and unequivocally refuted, his speech was directed at redrawing the scope of freedom of religious practise so as to make it compatible with modern India's concerns for liberty, equality and justice.

Secularism under the Indian Constitution therefore does not envisage separation of the state from religions but envisages equal distancing from religions. It also envisages non communalism. It is in this sense that the Supreme Court held in *S. R. Bommai v Karnataka*,[55] that secularism was part of the basic structure of the Constitution. The basic structure doctrine

[52] Article 25 (2)(a)
[53] Article 25 (2) (b).
[54] 7 C.A.D. p.781 (2nd December, 1948).
[55] AIR 1994 SC 1918

had been laid down by the Supreme Court in *Kesavananda Bharati v Kerala*.[56] It came as a limitation upon Parliament's power to amend the Constitution. It was held that the constituent power of Parliament under article 368 could not be so exercised as to destroy the basic structure of the Constitution. What was the basic structure had to be determined by the Court in each case. Although the judges in *Kesavananda* described various features as part of the basic structure, they we mere *obiter dictas*. Chandrachud J., as he then was, made a most valid observation regarding the basic structure in the following words:[57]

For determining whether a particular feature of the Constitution is part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance.

Even though the word "secularism" was added to eh preamble by the forty-second amendment, the term secularism was nowhere defined in the Constitution. An attempt was made by the Constitution (Forty-fifth Amendment) Bill 1978 to insert the definition of secularism as "equal respect for all religions."[58] This amendment was not passed since it was rejected by the Council of States. (Rajya Sabha). This rejection came because the Congress party had majority in that House and it was bent upon rejecting whatever the janata government proposed. The Congress party obviously did not have any objection to the definition suggested by the above bill.

Bommai did not involve any question of the Constitutional validity of a Constitutional amendment. It involved the question of the legality of the President's proclamation under Article 356 of the Constitution causing dismissal of state governments on the ground that they did not function in accordance with the Constitution. Dismissals of the governments of Karnataka, Meghalaya, Nagaland Madhya Pradesh, Rajasthan and Himachal Pradesh had been challenged. A bench of nine judges namely Ahmadi C.J., J. S. Verma J (as he then was), Pandian, Kuldip Singh, P. B. Sawant, K. Ramaswami, S.C. Agrawal. Yogeshwar Dayal and B. Jeevan Reddy JJ decided the case. Six judges held that while dismissal of the state governments of Karnataka, Meghalaya and Nagaland had been illegal, dismissal of the state governments in M.P. Rajasthan and H.P. was valid. BJP was the ruling party in those three states and it was the BJP which had espoused the cause of locating a temple in place of a mosque which it claimed had been originally located on that site. Ultimately that agitation

[56] AIR 1973 SC 1467
[57] AIR 1975 SC 2299, 2465.
[58] Clause 44 of the Bill provided that Article 366 shall be renumbered as cl. (2) and in cl. (1) the definition of secularism was provided, See Seervai, '*Constitutional Law of India*', Vol.1, p. 277.

had culminated in the demolition of the mosque by the zealots of the Sangh pariwar. The judges obviously held that in view of BJP's ideology and its active involvement in the agitation which ultimately led to the demolition of *Babri Masjid* and the influence of RSS over it, it would not be able to protect the minorities in those states. In other words, according to these six judges, the state governments run by BJP would not be able to sustain "secularism" which was part of the basic structure of the Constitution. Although the majority decision of upholding the dismissal of the three BJP governments in M.P., Rajasthan and Himachal Pradesh was by six against three judges, the *obiter dicta* that secularism formed part of the basic structure of the Constitution was shared by all the nine judges. The three dissenting judges, namely Ahmadi C.J., Verma J (as he then was) and Dayal J had held that the decision of the President to dismiss the state governments could not be assessed by judicially manageable standards. Since the word "secularism" had not been in the original Preamble of the Constitution, but was added by the Constitution (Forty-second) Amendment Act in 1976, a question has been raised if such subsequent addition to the Constitution could be part of the basic structure of the Constitution?[59] The judges in *Bommai,* however, had proceeded on the premise that secularism had always been part of the Constitution. Referring to this Ahmadi C.J. said:[60]

Notwithstanding the fact that the words "Socialist" and "Secular" were added in the Preamble of the Constitution in 1976 by the 42nd Amendment, the concept of secularism was very much embedded in our Constitutional philosophy. The term "secular" has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined.

P.B. Sawant J. explained the purport of secularism as follows:[61]

As stated above, religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution. We have accepted the said goal not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism.

Ramaswami J. said:[62]

The State does not extend patronage to any particular religion. State is neither pro particular religion nor anti-particular religion. It stands aloof, in other words maintains neutrality in matters of religion

[59] H.M. Seervai, *'Constitutional law of India.'*
[60] *Id.* p. 1951 (para 28) AIR 1994 SC 1918, 1951
[61] (1994) 3 SCC 1, 147-48, (para 151).
[62] *Id.* p. 163 (para 178); p. 168 (para 183).

and provides equal protection to all religions subject to regulation and actively acts on secular part.

B. Jeevan Reddy J. (with Aggrwal J.) emphasized that secularism was "a positive concept of equal treatment of all religions."[63] The demolition of the mosque at Ayodhya by Hindutva fanatics had been a great challenge to secularism. The communal situation was tense, he noted. After holding that the President's action of dismissing the three state governments ruled by BJP could not be faulted, the learned judge said:[64]

Secularism is one of the basic features of the Constitution. While freedom of religion is guaranteed to all person in India, from the point of view of the State, the religious, faith and belief of a person is immaterial. To the state, all are equal and are entitled to be treated equally. In matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any state government which pursued unsecular policies or unsecular course of action acts contrary to the Constitutional mandate and renders itself amenable to action under Article 356.

This is the most important decision on secularism. It was the first case in which secularism as a concept came up for judicial interpretation. In previous cases, the cases involved interpretations of various Articles of the Constitution such as Articles 25, 26 or 27, 28, 29 and 30, The Court had spoken on the extent of freedom of religion, rights of religious denomination or the rights of the minorities, and incidentally also on secularism which in its opinion was ingrained in the above provisions of the Constitution. But no legislative or administrative action had been impugned on the ground that it violated secularism. The change in interpretational methodology occurred since the decision of the Supreme Court in *Kesavananda Bharati*[65] . In the judgments of the majority judges in that case, secularism appeared as one of the basic features of the Constitution, Although strictly speaking such observations were mere *obiter dictas* because the *ratio* was restricted to judicial review being an aspect of the basic structure since the last clause of Article 31-C which gave finality to the President's declaration that a law was in relation to the objectives mentioned in Article 39, clauses (b) and (c) and thereby had foreclosed judicial review of the relevance of the law to those directive principles had been struck down. *Kesavanand* decision applied strictly to Parliament's power to amend the Constitution and was to be applicable only to Constitutional amendments and not to ordinary laws. In *Bommai,*[66] the Court expended the application of the basic structure doctrine to the exercise of power, other than of Constitutional amendment and not only by Parliament

[63] *Id.* p. 233, (para 304).
[64] *Id.* p. 2113, (para 365).
[65] AIR 1973 SC 1461.
[66] AIR 1994 SC 1918.

but also by the President under Article 356 of the Constitution. In *Bommai,* nine judges unanimously held that secularism was an aspect of the basic structure of the Constitution. Here it appears as a *ratio* and not a mere *obiter* because the President's action of dismissal of the three BJP ruled state governments could not have been sustained except on the ground that those governments in the opinions of the six judges, who held their dismissal by the President valid, could not have governed in accordance with secularism.

The Court has extended that doctrine to make the violation of basic structure a parameter for judging whether a state government functioned in accordance with the Constitution for the purpose of Article 356 of the Constitution. The President can dismiss a state government under Article 356 if he is of the opinion that the state government was likely to act in such a manner as to cause erosion of the basic structure of the Constitution. Will the Court extend the basic structure test to determine the validity of a law enacted by Parliament or a state legislature? Professor Upendra Baxi had suggested that confining the basic structure doctrine only to Constitutional amendments was not logical and that it should also be extended to the validity of an ordinary legislation also.[67] *Bommai* has extended it to the exercise of power under Article 356. In some other cases, the basic structure parameter seems to have been tacitly invoked even against an executive action resulting in transfer and appointment of judges of the High Court or the Supreme Court when the Court said that independence of the judiciary was a basic feature of the Constitution.[68] The net undercurrent of *Bommai* declaration that secularism was part of the basic structure of the Constitution seemed to convey to political parties, and particularly the parties with communal agendas that even if they acquired the required majority for amending the Constitution, an amendment of the Constitution which subverted secularism would be unconstitutional and void. Here the Court certainly acted as a political institution going much beyond its black letter tradition and much beyond the judicial power assigned by the doctrine of separation of power, which it itself had held to be an integral part of the Constitution in *Indira Gandhi v. Raj Narain,*[69]

Kesavananda Bharati marks the change in the Supreme Court's approach to Constitutional interpretation from positivism to structuralism. By structuralism I mean an interpretation of a provision of the Constitution against the perspective of the entire Constitution and its philosophy.[70] Since

[67] Upendra Baxi, "*Constitutional Quick sands of Kesavananda Bharati and the Twenty-Fifth Amendment*" (1974) 1 SCC (Jour) p 45.

[68] *S.P. Gupta v. India*, AIR 1982 SC 149; *Supreme Court Advocates on Record Association v. India* (1993) 4 SCC 441: AIR 1994 SC 268; *In re Art, 143 of the Constitution, Presidential Reference* 1998 (1998) 7 SCC 739: AIR 1999 SC 1.

[69] AIR 1975 SC 2299.

[70] See S.P. Sathe, "*India: From Positivism to Structuralism*" in Jeffrey Goldsworthy(ed), Comparative Constitutional Interpretations, OUP England, 2006.

then challenges to State actions on the ground of their being inconsistent with the structure of the Constitution began to be made. Instead of being required to examine the validity of the exercise of power with reference to specific provisions of the Constitution, such as Article 14, 15 or 25, 26 or 27, the Court was called upon to decide such validity with reference to a more indeterminate norm called secularism. In *Bommai* the Court upheld the President's proclamation under Article 356 on the ground that the dismissed governments could not have or might not have acted strongly against anti-secular forces which had been responsible for the demolition of the *Babri masjid.* Here unwillingness or inability to protect the prayer place of the minorities was held to be an anti-secular act.

In *Ismail Faruqui v India,*[71] referring to the demolition of the *Babri masjid* on 6 December 1992, the Supreme Court said[72]

It was an act of "national shame": What was demolished was not merely an ancient structure; but the faith of the minorities in the sense of justice and fairplay of majority It shook their faith in the rule of law and Constitutional processes.

After the demolition of the *Babri masjid,* the Government of India had passed an ordinance called the Acquisition of Certain Area at Ayodhya Ordinance, 1993 by which it acquired 67, 703 acres of land comprising Ram Janmabhoomi-*Babri masjid* complex and some adjacent land. This ordinance was replaced by the Act of the same name. The Government had also requested the Supreme Court under Article 143 of the Constitution to give advisory opinion on whether a Hindu temple or any Hindu religious structure existed prior to the construction of the *Babri masjid.* Since all the disputed land was now vested in the State, the State would deal with it only in accordance with the opinion that might be delivered by the Supreme Court. It was stated that the Government was "confident that the opinion of the Supreme Court will have a salutary effect on the attitudes of the communities and they will no longer take conflicting positions on the factual issue settled by the Supreme Court."[73] Petitions taking objections to the validity of the above Act on the ground that it was contrary to secularism and to other provisions of the Constitution had been filed. The reference under Article 143 and the petitions challenging the validity of the above Act were heard together by a bench of 5 judges of the Supreme Court. Article 143 of the Constitution says that the Supreme Court "may" give opinion in response to such a request from the President. The word "may" implies that the Court is not bound to give opinion. The Supreme Court refused to respond to the reference. The Court, however, dealt with

[71] (1994) 6 SCC 360.

[72] *Id.*

[73] The reference to the Supreme Court by the Government, as reproduced in the judgment of Verma J. (as he then was) at p.390.

the petitions. The petitioners had raised the following questions: (1) the acquisition was unnecessary: (2) a mosque being a place of religious worship by the Muslims was wholly immune from the State's power of acquisition and the acquisition violated Articles 25 and 26 of the Constitution; (3) the legislation was tilted in favour of the Hindu interests, and therefore suffered from the vice of non-secularism and discrimination in violation of the right to freedom of religion of the Muslims; (4) the statute read with the reference under Article 143 was a veiled concealment of a device adopted by the Central Government to perpetuate the consequences of the demolition of the mosque on 6th December, 1992.

The Act intended to maintain the status quo regarding the rights and obligations of the rival parties, Hindus and Muslims, as it existed on 7-1-1993 the day on which the Act was enacted. It authorized the acquisition of the disputed land over which the demolished mosque stood before its demolition and the adjacent land owned by Hindu owners to be returned to them after the dispute was settled. The purpose of acquiring such excess land was to ensure that the rights which Muslims ultimately might secure through adjudication would not be hampered by the existence of ownership of such adjacent properties. The impugned Act permitted worship and prayers by Hindus on the disputed land but forbade Muslims from doing it. The majority held that since Muslims had not been performing any worship or *namaz* on the disputed land since 1949 but the Hindus did, the *status quo ante*, though seemingly biased in favour of the Hindus, was in reality not so.

Bharucha J (as he then was) speaking on behalf of himself and Ahmadi CJ, in his dissenting judgment held that the impugned Act did not give equal treatment to two communities and therefore violated the principle of secularism. He noted that before the commencement of the impugned Act, " the disputed structure had been demolished, the idols had been placed on the disputed site and *puja* thereof had begun." . The learned judge lamented[74]

No account is taken of the fact that the structure thereon had been destroyed in a most reprehensible act.... No account is taken of the fact that there is a dispute in respect of the site on which the puja is to be performed; that as stated in the White Paper (of the Government of India) until the night of 22-12-1949/23-12-1949, when the idols were placed in the disputed structure, the disputed structure was being used as a mosque and that the Muslim community has a claim to offer Namaz thereon.

Both the majority and the minority judges seemed to conceptualize secularism as equal treatment of religions by the State. They obviously did

[74] (1994) 6 SCC 360, 437

not think that separation between the State and the religions was necessary for secularism.

Secularism under the Constitution seems to have been similarly conceived by other judges also. The Supreme Court of India has explained the real purport of the word "secular" in the Indian context as follows. Justice Ruma Pal observed in *T.M.A. Pai Foundation v Karnataka*: [75]

The word "secular is commonly understood in contradiction to the word "religious" The political philosophy of a secular government has been developed in the West in the historical context of the pre-eminence of the established Church and the exercise of power by it over society and its institutions. With the burgeoning pressure of diverse religious groups and the growth of liberal and democratic ideas, religious intolerance and the attendant violence and persecution of "non believers" was replaced by a growing awareness of the right of the individual to profession of faith or non profession of any faith. The democratic State gradually replaced and marginalized the influence of the Church. But the meaning of the word "secular state" in its political context can and has assumed different meanings in different countries., depending broadly on historical and social circumstances, the political philosophy and the felt needs of a particular country. In one country secularism may mean an actively negative attitude to all religions and religious institutions, in another it my mean a strict "wall of separation" between the State and religion and religious institutions. In India, the State is secular in that there is no official religion. India is not a theocratic State. However, the Constitution does envisage the involvement of the State in matters associated with religion and religious institutions, and even indeed with the practice, profession and propagation of religion in its most limited and distilled meaning.

The learned Judge further said:[76]

Although the idea of secularism may have been borrowed in the Indian Constitution from the West, it has adopted its own unique brand of secularism based on its particular history and exigencies which are far removed in many ways from secularism as it is defined and followed in European countries, the United States of America and Australia.

Religious Instruction and Educational Institutions

We have seen above that in the United States, the wall of separation doctrine did not allow religious instruction to be imparted in any public school. The U.S. Supreme Court held that even holding of religious instruction and making it entirely voluntary could not be done in public

[75] (2002) 8 SCC 481, 651, (para 331).
[76] *Id.* 651-52 (para 332).

institutions financially supported by the State. The makers of the Indian Constitution did not subscribe to such a dogmatic position considering the fact that the Indian civil society had been deeply religious. The Constitution provides in Article 28 (1) that "no religious instruction shall be provided in any educational institution wholly maintained out of State funds" Clause (2) of Article 28 provides that the above prohibition regarding the administration of religious instruction shall not apply to "an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution. "Clause (3) of Article 28 provides that religious instruction might be provided in a private educational institution which receives financial assistance from the State on condition that it should be imparted only to such students whose parents give their consent for it. Contrast this with the American Constitution which does not allow any State aid to an educational institution which imparts religious instruction. In India, education even during colonial rule was not entirely in government schools and colleges. Private schools and colleges existed but they were given government grants. While some were run by Hindu managements, many were run by the minorities. The Constitution did not want to put private educational institutions to a disadvantage. Therefore they were given the option of imparting religious instruction without making it compulsory for those who did not wish to have it. . Even while granting special right to the religious and linguistic minorities to establish and administer educational institutions of their choice in Article 30, the Constitution mandated the State not to discriminate against them while giving grants[77] The State funding of educational institutions has existed since colonial rule. The Constitution therefore distinguishes between institutions wholly maintained by the State and those which received aid from the State. While the former ought not to impart religious instruction, the later may with the consent of the pupils. Total prohibition of religious instruction in educational institutions wholly funded by the State arises from the separation of the State from religion. Questions arise as to what is religious instruction?

In *DAV College v Punjab*,[78] the DAV trust challenged the validity of certain provisions of the Guru Nanak Act, 1969, which provided for the study of Guru Nanak being in violation of Article 28(1) of the Constitution. Since the Guru Nanak University was entirely funded by the State, it was contended that such a course of study would amount to the imparting of religious instruction in disregard of the mandate of Article 28(1). While rejecting that contention, the Supreme Court said [79]

Religious instruction is that which is imparted for inculcating the tenets, the rituals, the observances and modes of worship of a

[77] Article 30 (2).
[78] (1971) 2 SCC 269.
[79] *Id.* p.279, (para 26).

particular sect or denomination. To provide for academic study of life and teaching or the philosophy and culture of any great saint of India in relation to or the impact on the Indian and world civilizations cannot be considered as making provision for religious instruction.

In India, unfortunately religion is mixed up with matters which are really secular. Is the teaching of Sanskrit or Urdu a matter of religion? In the communal discourse, these languages are identified as of Hindus and Muslims and therefore objections are raised against their teaching. It was rightly observed that the teaching of Sanskrit as an elective subject could not be faulted as violation of secularism. Even study of a religion need not be mixed up with the imparting of religious instruction. One can study Hinduism or Islam even in an institution entirely funded by the State. A Muslim student may opt to study Hinduism and a Hindu student may opt to study Islam. Difference between religious education and religious instruction is that the former is not undertaken necessarily by the followers of that religion and the study does not involve worship or faith. Such a study or a provision for such a study in a university entirely funded by the State need not conflict with Article 28(1). For example, will the teaching of *Bharat Natyam* conflict with Article 28(1)? In India, religion and culture overlap and if we are to exclude even cultural matters because of their association with religion, secularism will become a very oppressive doctrine. Much flexibility is necessary in this regard. Some writers have taken objections to the broadcast of devotional songs on the All India Radio, which is a State owned medium[80].It is submitted that Indian music, as other arts also, reflect amalgamation of two major religions Hinduism and Islam. Several Hindu singers have sung *Bandishis* which include names of *Allah* and several Muslim singers sing *Bandishis* which include the names of *Lord Rama* and *Lord Krishna*.

Such overlap between religion and culture may cause the occasional crossing of borders by State agencies but enough care does not seem to have been taken to prevent the State from going into religious matters to the extent of patronizing it. Although the Constitution does not envisage strict separation between the State and religions to the extent it is envisaged by the Constitution of the Untied States, it does not seem to have been intended by the Constitution that the State should directly sponsor or even get involved in religious activities. If separation were not to be envisaged, why did the Constitution provide that no religious instruction should be imparted in an educational institution wholly funded by the State? Separation was set aside only to the extent it was necessary to enable the State to supervise over religious endowments' secular activities and to initiate social reform. But unfortunately the State and its office bearers have crossed limits of such exceptions to separation....

[80] D.E. Smith, *"India As a Secular State"*, Princeton University Press, New Jersey, 1963.

The question of religious instruction came up once again recently in *Aruna Roy v India*.[81] A public interest litigation questioning the validity of the school curricula prescribed by the National Curriculum Framework For School Education (NCFSE) was challenged on the ground that inclusion of religions or religious content in it offended Article 28(1) of the Constitution and therefore violated the "rubric of secularism".[82] The teaching of religion as an academic study and that too offering it as an optional subject certainly does not offend secularism. But the teaching of religion must be distinguished from the preaching of a religion. It was contended in the petition that the curriculum recommended by the NCERT included the imparting of religious instruction in violation of Art. 28(1) of the Constitution. The Court could have said that what was offered in the curriculum was not religious instruction but education of religion. What causes concern are the observations of the judges regarding the need of religious education for promoting morality and good citizenship among children. Shah J, referring to religion said: [83]

Although it (religion) is not the only source of essential values, it certainly is a major source of value generation. What is required today is not religious education but education about religions. These need to be inculcated at appropriate stages in education right from the primary years. Students have to be given the awareness that the essence of every religion is common, only the practices differ.

The learned judge, however, cautions that "Education about religion must be handled with extreme care".[84] He said:[85]

All steps must be taken to ensure that no personal prejudice or narrow minded perceptions are allowed to distort the real purpose of this venture and no rituals, dogmas and superstitions are propagated in the name of education about religions. All religions have to be treated with equal respect.

The learned judge observed that "for controlling wild animal instinct in human beings and for having civilized cultural society" religion has come into existence. He said "religion is the foundation for value based survival of human beings in a civilized society".[86] Dharmadhikari J. in his separate concurring judgment also drew a distinction between religious instruction and religious education. According to him, religious instruction is forbidden but not religious education. Why does the Constitution prohibit religious instruction in a State funded educational institution? Did they mean by religious

[81] AIR 2002 SC 3176.
[82] *Id.* 3180 (para 2).
[83] *Id.* p. 3186, para 27.
[84] *Ibid.*
[85] *Ibid.*
[86] *Id.* p 3190 (para 34).

instruction merely dogmas, mysteries or rituals as the learned judges observed?[87] Why did the Constitution permit the imparting of religious instruction in a private school only with the consent of the child or her parent? Does it mean that the Constitution considered that the children who or whose parents do not consent to receive religious instruction need not be sensitized of morality? It is submitted that the Constitution did not use the words "religious instruction" with such a narrow meaning. It does not mean merely rituals, dogmas or superstitions. The fact that the Constitution did not allow religious instruction to be imparted in educational institutions funded by the State and allowed such instruction in other non government institutions only with the consent of the pupils or their parents shows that the Constitution clearly meant that the State should not be a party to imparting religious instruction and nobody should be compelled to receive religious instruction. Article 28(1) forbids any "religious instruction" and it includes "instruction about all religions". It allows State aided institutions to impart religious instruction only with the consent of the pupils or their parents which is in deference to the freedom of religion. The secular state has to be not only neutral between various religions but also between believers in religion and non-believers of religion. By excluding religious instruction from State run institutions, it scrupulously protects the State from any rapport with religion but leaves open the way to those who desire such instruction. Obviously the Constitution does not envisage religiousness as essential to morality. One can be morally good even without being religious. Secularism itself is a moral system like democracy. It is submitted that the assumption of the judges that religious education would make children better citizens goes totally against the concept of secularism. The very basis of secularism is that people have to imbibe the morality of liberalism, which cherishes individual liberty, equality and the rule of law. A religious person may be morally good or bad. An atheist may be morally good or bad. Whether one should receive religious education or not is a matter of individual liberty in which the State does not interfere. No body can say that Bertrand Russell or M. N. Roy lacked commitment to morality. They could be cited as examples of morally best human beings. It is submitted that the views expressed by the learned judges in *Aruna Roy*, stressing the need of religious education for promoting morality are totally at variance with the concept of a secular state as is understood in the West. Secularism in India does not mean total separation of the State from religions, it also does not mean indifference to religions but it means equal respect for all religions. This view is shared by judges as well as political parties an political players in India. No atheist can ever get elected as President or Prime Minister of India. Jawaharlal Nehru was an exception but he could be Prime Minister because of his active involvement in the National movement and again he had to make compromises as he did on the issue of the Somnath temple's

[87] *Id.* p.3196.

inauguration.

Political Parties and Secularism

Democracy operates through political parties. How far are political parties required to abide by secularism? We have seen above that in *Bommai*, the Supreme Court upheld the dismissal of three BJP ruled state governments on the ground that BJP might not have sustained secularism. Formerly, the Constitution did not mention political parties but they came to be mentioned in the Tenth Schedule which was added to the Constitution by the Constitution (Fifty-second Amendment) Act, 1985. This schedule has since then been further amended by the Constitution (Ninety-first) Amendment Act, 2002. This schedule contains grounds on which a member of a legislature incurs disqualification if she defects from a political party on whose sponsorship she was elected to the legislature. The Representation of the People Act, 1951 is the law which lays down how elections are to be held, who can contest elections, and how disputes regarding elections are to be adjudicated upon. In 1989, the Act was amended to insert a new section called 29-A. That section provided that all political parties shall apply for registration. The Act details what information the applicant has to provide. S. 29-A provides that the application shall be accompanied by a copy of the memorandum or rules and regulations of the association which shall contain a specific provision that it shall "bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy and would uphold the sovereignty, unity and integrity of India", Although such declarations form part of every party's memorandum, the manifestos and ideologies of some political parties clearly display their communal/ parochial character. Although the Election Commission has power to recognize a party, it does not have the power to de-recognize a party.[88] On what basis did the Supreme Court hold that secularism would not be sustained in BJP ruled states? If the majority judges held that BJP was not likely to sustain "secularism", how did BJP rule at the Centre from 1999 to 2004? BJP was certainly the major constituent of the National Democratic Alliance government that governed India during that period. A political party is required to sign a memorandum containing its fidelity to secularism but it cannot be de-recognized if it does not abide by secularism, though its government can be dismissed on that ground itself. These are some of the contradictions. The question that remains is how do we decide whether political party is secular.

Can a political party espouse a religious cause? In fact, it was the Congress party which during early years of independence espoused the cause of renovating a temple at *Somnath* which had been destroyed by Allauddin Khilji many years ago. The renovation of the temple had taken

[88] *Indian national Congress (I) v. Institute of Social Welfare,* (2002) 5 SCC 685.

[89] R.A. Jahagirdar, *"Secularism in India: The Inconclusive Debate"* in Venkat Iyer (ed) Constitutional perspectives: Essays in Honour and Memory of H.M. Seervai p. 53, 62.

place with full participation of the state authorities including President of India Dr Rajendra Prasad.[89] In the eighties, the BJP espoused the cause of Ram mandir which helped it gain political dividends. Even the Government of India said before the Supreme Court in *Ismail Faruqui v India* that it was committed to the construction of a Ram temple and a mosque.[90] This shows that not only the political parties but even the governments have not felt shy of openly espousing a religious cause. It is submitted that building temples or mosques could not be the function of the secular state. Equal treatment to all religions should only be in respect of facilities which are extended to other organizations as welfare functions. Providing facilities for pilgrims of Hindu congregations or Muslim pilgrims for the *Haj* or Christians for the Eucharistic Conference such as travel concessions or security or against health hazards may be included in its normal welfare functions as such facilities are also extended to sports, music or literary activities.

Even the BJP or the Sangh pariwar does not call the issue of Ram mandir as a religious one. They say that the Ram mandir is a cultural issue and a national issue. This is an example of secular gloss being put on a religious issue This was evident in the case of the first Mahamasthakaabhisheka celebrations held at Shravanbelegola. The *Hindu* reported as follows:

The hills of Vindhyagiri and Chandragiri in the ancient town of Shravanbelegola resounded with chants of " Bhagwan Bahubali ki jay" as President Abdul Kalam on Sunday declared open the first Mahamastakbhisheka of the millennium and reiterated the Jain tenets of non-violence in a strife ridden world.[91]

The President, who is a Muslim, was invited to address a vast gathering of Jain munis, nuns, Acharyas and devotees who had assembled from all parts of the world. The address of the President aimed at secularising the occasion by highlighting non violence and peace as the motives of the religion Members of various political parties including the former Prime Minister of India Mr. Deve Gouda.were present. All of them call themselves secular. This shows that secularism is understood mainly as equal respect for all religions and negation of communalism and not as total insulation of the State from religion. We find that similar views regarding religion were also expressed by the judges of the Supreme Court in *Aruna Roy's* case.[92]

One result of such vague conceptualisation of secularism has been that the State and its functionaries have crossed limits of State's

[90] (1994) 6 SCC 360, 390.

[91] The *Hindu,* Jan. 23, 2006 p. 1.

[92] AIR 2002 SC 3176.

association with religion. Equal treatment of religions remains a mere façade and what happens is a much more favoured treatment of the majority religion. There are temples and images of God men in police stations and other government offices. Ministers and other functionaries, including judges do not feel shy of participating in Hindu religious prayers as rituals in government functions. All government offices are inaugurated with religious rituals All political parties, with the exception of perhaps of the Communist parties, have shown proneness to religious rituals such as purification of government offices or satyanarayan puja. Saraswati vandana is sung almost in all government functions. Without having conceded the BJP's claim to a Hindu Rashtra, most of the secular parties have almost converted the State into a Hindu State The difference between them and the BJP is only on the extent of exclusiveness of Muslims. Not having been communal is the only criterion of secularism for most of the non BJP political parties. But they have often indulged reverse communalism by appeasement of the minorities in order to cultivate their vote banks. Those subjects will be discussed in subsequent lectures.

Freedom of Religion and Communalism*

S.P. Sathe

Freedom of Religion

A secular state is not against religion. Although it must not have its own religion, it allows its citizens to profess and practise their religion. Unlike in the West where civil society is to a great extent secularized, in India, the civil society, which includes most of the political leaders as well as judges of the Supreme Court and High Courts, continues to be deeply religious and even obscurantist. The makers of the Constitution were firm on limiting the scope of religion in public life and therefore they drafted the Articles on freedom of religion, namely Articles 25 and 26 with meticulous care. They provided that the State could make any law to restrict or regulate any economic, financial, political or other secular activity which may be associated with religious practice,[1] and to provide for social welfare and reform. or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.[2] These provisions clearly show the other dimension of Indian secularism, which was to bring about equality between different castes of Hindus in India, simultaneously two revolutions existed during colonial rule, one for political independence against the Britain and the other one against the unjust caste and gender discrimination which also emanated from religious orthodoxy. Denial of access to temples for the untouchables had been a burning issue as was the practice of untouchability. The Constitution abolished untouchability forbidding its practice in any form and making the practice punishable.[3] Facilitating access of the erstwhile untouchables to Hindu religious institutions was part of the same agenda of banishing caste discrimination. Freedom of religion had to be restricted in the interest of bringing about social change leading to equality before the law, which is an important value of secularism. Caste discrimination and gender injustice were two vices of a traditional society and both had root in religion. In order to address them, the State had to intervene and restrict the practice of religion.

Freedom of Religion in the United States and India: A Comparative View

Here the Indian Constitution differ from the U.S. Constitution because the US. Constitution was an eighteenth century product steeped

* Draft of the Second Lecture, which was to be delivered in the Pandit Memorial Lecture Series. However before the lecture series was organised Professor Sathe passed away on March 10, 2006.

1 Article 25 (2) (a).

2 Article 25 (2) (b).

3 Article 17.

in individualism and laissez faire whereas the Indian Constitution was a product of the twentieth century with emphasis on collectivism and reform. The scope of religious freedom therefore had to be differently construed in these two countries. In the United States, the civil society had been much more secularized and therefore religion had come to occupy lesser space in public life. In India, religion occupied much larger space. Interpretation of freedom of religion in the United States was governed by the philosophy of individualism and therefore was given a maximum ambit. In India, on the other hand, it was necessary to construe the freedom of religion rather narrowly in view of the restrictions imposed by the Constitution.

The first Amendment of the U.S. Constitution was interpreted by the U.S. Supreme Court so as to maximize the scope of freedom of religion. In *Cantwell v Connecticut*,[4] Cantwells, who had been playing a phonograph record denouncing the Catholic Church as an instrument of Satan had been convicted for causing breach of the peace. They appealed against that conviction on the ground that their freedom of religion had been infringed. The Supreme Court quashed their conviction upholding their freedom thereby giving a wide latitude for the freedom of religion. In India, freedom of religion does not include freedom to denounce any religion or insult it. The Indian Penal Code makes insult to religion punishable[5] and this section was upheld by the Supreme Court against the challenge on the grounds of freedom of speech as well as freedom of religion.[6]

In *Minersvile School District v Gobitis*,[7] a 12 year old Lilian Gobitis and her 10 year old brother William had been expelled from school because they refused to salute the national flag of the Untied States. They contended that being Jehova's witness, such an act repelled against their religion. Justice Frankfurter, who always stood for judicial restraint, held that their expulsion was valid. He was joined by Hughes, Black and Douglas JJ. Justice Stone dissented. In his dissenting judgment he held that protecting the rights of the children was more important than the State concern of maintaining discipline in the school. In *Board of Education v Barnette*,[8] this question came up again. This time Stone had become the chief justice and except Frankfurter, the other judges Justices Black, Douglas and Murphy agreed with him. Justice Jackson wrote the judgment for the majority holding the requirement of flag salute un Constitutional as being contrary to the first Amendment's requirement of freedom of religion. He said:[9]

If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox

4 310 U. S. 296 (1040).
5 S. 295-A.
6 *Ramji Lal Mody v. State of U.P*, AIR 1957 SC 620.
7 310 U.S. 586 (1940).
8 319 U.S. 624 (1943).
9 *Id.* p. 642.

in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.... We think the action of the local authorities in compelling the flag salute and pledge transcends Constitutional limitations on their power and invades the spheres of intellect and spirit which, it is the purpose of the First Amendment to our Constitution to reserve from all official control.

In India, a similar decision of the Supreme Court was rendered in *Bijoe Emanuel v Kerala.*[10] This case was not about flag salutation but it was about the singing of the national anthem. Some children, who professed the Jehova's witness refused to sing the national anthem because such singing was prohibited by their religion. They were expelled from school for their refusal to sing the national anthem. These children did not show any disrespect towards the national anthem. They stood silently while it was being sung. The Supreme Court held that their expulsion was without the authority of law since there did not exist any legal provision providing punishment for such refusal to sing the national anthem. Under the National Emblem's Act, there was no provision authorizing punishment for refusal to sing the national anthem. O. Chinappa Reddy J. held that those children had the right to be silent, which was included within their right to freedom of speech. The Court also upheld the right of the children not to sing the national anthem as part of their right to freedom of religion because the requirement of singing it was not warranted by public order, or morality or health to which freedom of religion was subject. Seervai complimented Justice O. Chinappa Reddy for having "discharged his duty as a judge undeterred by ignorant popular clamour."[11] However one pseudo patriot had spoken uncharitably about the judge that the Supreme court judge who held that the singing f the national anthem was not compulsory had no right o be either an Indian or a judge." Contempt proceedings were initiated against the author for this.[12]

Freedom of Religion under the Constitution of India

I have already discussed in the first lecture how the plenary scope of freedom of religion was constrained by the tight drafting of Article 25. Freedom of religion is subject to public order, morality and health [13]. "Public order" enables the State to regulate religious congregations and processions, morality enables it to ban dedication of women to God, which was a kind of prostitution in the name of religion and health permits the State to intervene by making small pox or plague inoculations compulsory or which will permit restrictions on reproductive functions in the interest of preventing

10 (1986) 3 SCC 615. See S. P. Sathe, "*Constittuional Law I (Fundamental Rights)*" in 1986 Annual Survey of Indian law.
11 H.M. Seervai, *Constitutional Law of India*, Vol.1, para 10.118, 4th edition, Universal, Delhi (Reprinted 2002) p.760.
12 H.M. Seervai, *ibid.*
13 Article 25 (1).

the spread of Aids. Freedom of religion is also subject to other provisions of Part III, which means fundamental rights. Further, the Constitution permitted State intervention in following matters (a) the State could regulate economic, financial, social and other secular matters associated with religion[14] (b) it could throw open Hindu temples to all sections of Hindus and (c) it could legislate for social welfare and reform.[15] In Article 26, religious denominations have been given the following four rights: (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property and (d) to administer such property in accordance with law. The provision in Art. 25 (2) (a) permitting the State to regulate or restrict any economic, financial, political or other secular activity associated with religion was read with Article 26(b) which gives to religious denominations the right to manage its own affairs in matters of religion. Under Art. 25(2) (a) the State can regulate or restrict "secular" activities associated with religion and under Art. 26(b), a religious denomination has freedom to manage its affairs in "matters of religion". The courts were therefore engaged in identifying what are matters of religion. They had to be those other than the "economic, financial, political or other secular activities associated with religious practice". Such matters are the essentials of the religion. In respect of such essentials, the state has no power to restrict or regulate under Article 25(2) (a). Such essentials are matters of religion for the purpose of Article 26 (b).

The Supreme Court held in *Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Swamiar*[16] (known as *Shirur Math* case), that matters essential to religion are not within the purview of the state's power of restricting or regulating religious activities. The validity of the Madras Hindu Religious and Charitable Endowments Act, 1951, that sought to control and regulate the functioning of religious endowments. was challenged on the ground of its alleged violation of the rights guaranteed by Articles 25 (1) and 26 (b) The validity of the impugned law depended upon whether what was regulated and controlled was a secular activity. The court rejected the State's minimalist definition of religion as matters of faith regarding the relationship between a person and God. The Court held that "a religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."[17] What is essential to a religion is to be decided from what that religion considers to be essential. This is determined from the doctrines and practices of that religious establishment. Among Hindus, this may change

[14] Article 25 (2) (a).
[15] Article 25 (2) (b).
[16] AIR 1954 SC 282.
[17] *Id.* p. 290

with every caste or denomination. The subjective element in the determination of essentiality of a practice or a ritual therefore cannot be ruled out. Such a view of autogenesis of religions was, however, contested by . Gajendragadkar J. as he then was, a reformist judge. in *Durgah Committee, Ajmer v Syed Hussain* as follows:[18]

(E)ven practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26, may have to be carefully scrutinized; in other words the protection must be confined to such religious practices as are essential and integral part of it and no other

How does one determine what is superstition and what is essential to a religion? Did the Constitution envision a social reformer's role for a judge? What appears to be a superstition for one judge may not appear so to another judge. Seervai criticized the above *obiter* in the following words:[19]

It is submitted that the above obiter runs directly counter to the judgment of Mukherjee J. in Sirur Mutt case and substitutes the view of the Court for the view of the denomination on what is essentially a matter of religion. The reference to superstitious practices is singularly unfortunate, for what is superstition to one section of the public may be a matter of fundamental religious belief to another.

If essentiality of a religion is to be determined by what that religion considers to be so, the main objective of the Constitution, which was to narrow the scope of religion in social life would be defeated. At the same time, can we entrust to the judges the task of distinguishing essentials from superstitions? Should judges substitute their view of religion in place of the view held by the religion itself, which is manifested through its doctrines and practices? Should superstitions also be considered as essential to a religion? According to Professor P. K. Tripathi, the theory of autogenesis of denominational authority propounded by Mukherjee J. in *Sirur Mutt* case could completely annihilate the rights of the individual to freedom of religion.[20] This is the dilemma of the Indian Constitution. Does it want the State to intervene in matters of religion so as to weed out the irrational or superstitious content from it? If that is the intention, who will do it? The Parliament or the Judiciary? If the power is to be vested in Parliament or a legislature, is there no fear of its acting in a majoritarian manner? Parliament may by majority decide that certain matters of religion are not

[18] AIR 1961 SC 1402.
[19] H.M. Seervai, *Constitutional Law of India* Vol 2, 4th ed., Universal, Delhi 2002. p.1268
[20] P. K. Tripathi, "*Secularism: Constitutional Provision and Judicial review*" in *Spotlights on Constitutional Interpretation*, Tripathi, 1972. p.100, 115

essential to it. It may offend the minority view of that religion. Democracy does not mean majoritarian rule, it is majority rule where majority is a shifting reality. Where majority and the minorities are divided by religion or ethnicity, it may be not rule by majority but rule of the majority, which is what we call majoritarian. If the court were to decide what is essential to a religion, again it may amount to much more subjective, class or caste biased view of the religion. It will also vary with the social philosophy of a judge. Rationalist judge may define the scope of religion very narrowly whereas a religious minded judge may define it to include various superstitions and irrationalities. Who is to decide what is rational? The safest course is to leave it to the religion to say what is essential. But that might stultify the social, change. If religion is given the final word in determining what is essential, freedom of religion could become a source of oppression of the dissenters.

Does the Constitution not intend to protect individual freedom from the oppressive power of the religious establishment? True, neither Hinduism nor Islam have religious establishments in the sense in which the Catholic Church in the West had. When the First Amendment of the U.S. Constitution used the word "establish" it had the existing religious establishments in mind. In India, even in the absence of a formal establishment, religions had become oppressive and denied individual liberty. The fact that the Constitution declared that untouchability was abolished proves that the makers of the Constitution were determined to de-legitimate religious practices, whether essential or superstitions, which encroached upon liberty, equality and justice. The Constitution wanted to save the individual from the tyranny of both, the religion as well as the State. Tyranny of religion could be eliminated by reinterpreting the scope of religion so as to make freedom of religion compatible with the values of liberty, equality and justice and therefore the Constitution made freedom of religion subject to public order, morality and health and also to other fundamental rights Subjecting the freedom of religion to other fundamental rights also meets the requirement of preventing tyranny of the majority. It is not enough for a court to decide whether a matter is essential to religion. Even if it is essential, it cannot form part of freedom of religion if it contravenes any of the fundamental rights. Courts may not decide what is essential to a religion. They may leave it to the religion itself to say what it considers to be essential. But even if it is essential, it cannot contravene any of the fundamental rights. Courts can therefore review an essential religious practice from the perspective of the fundamental rights. If it violates a fundamental right, it is not protected by Article 25. A court may defer to the decision of a religion regarding the essentiality of a religious practice, but it may nevertheless review it to make sure that it does not contravene any of the fundamental rights. Judicial review will also be to make sure that al law which transgresses upon an essential religious practice is in the

interest of public order, morality and health. These will be the threshold issues of judicial review. If a law is not objectionable for the above two reasons, namely public order, morality and health, and fundamental rights, then the court should examine whether it is a religious practice that can be restricted or regulated by the State under Article 25(2). (a). Further, if a law has been enacted for social welfare and reform or for throwing open Hindu religious institutions for all sections and classes of Hindus, courts will examine whether such laws are for the purposes mentioned in Article 25(2) (b). Such laws do not have to be consistent with the right to freedom of religion guaranteed by Article 25(1) because Article 25(2) starts with a semi-non obstante clause. "Nothing in this Article shall affect the operation of any existing law or prevent the State from making any" law. This will also save the courts from deciding whether a religious practice is essential and save them from the embarrassment of upholding a superstition. Even a superstition will get the protection of religious freedom under Article 25 (1) if it does not contravene any of the fundamental rights. Religious practices such as sati are outlawed because if their inconsistency with the fundamental rights.

Unfortunately such an approach was not adopted by the Supreme Court during the first two decades. We must be grateful to the majority which held in *Kesavananda Bharati v Kerala*[21] that the basic structure of the Constitution must be preserved even against a majoritarian decision to amend the Constitution. That decision brought about a revolutionary metamorphosis in the interpretational approach of the Supreme Court.[22] Before that, the Court looked to each Article of the Constitution separately as a code in itself. That was an unfortunate gift of the majority decision in *A. K. Gopalan v Madras*[23]. *Kesavananda* brought an entirely different approach to Constitutional interpretation. The Court started considering the Constitution as a whole and not in terms of separate Articles. It was considered as an organic law having its roots in the National Movement for independence. The Constitution had to be interpreted not in terms of what was intended by the Founders originally but in terms of what they would have intended faced with the circumstances, as they existed at present. Had this approach been followed in the late fifties or the sixties, some of the decisions on freedom of religion might have been different.

Two cases in which the Supreme Court adopted positivist approach to interpretation of the Articles on freedom of religion are discussed below.

In *Saifuddin Saheb v Bombay*[24], the Court heard a petition in which the validity of the Bombay Prevention of Ex-communication Act, 1949

[21] AIR 1973 SC 1461.
[22] See S. P. Sathe, "*India: From Positivism to Structuralism*" in Jeffrey Goldsworthy (ed.) Interpreting Constitutions, OUP, U.K. 2006
[23] AIR 1950 SC 27.
[24] AIR 1962 SC 853.

was challenged on the ground that it violated Articles 25 (1) and 26(b) of the Constitution. Dasgupta J. for himself, Sarjkar and Mudholkar JJ. held the Bombay Prevention of Ex-communication Act invalid as being contrary to the right of the religious denomination to manage affairs of religion .guaranteed by Article 26(b). Ayangar J. agreed in a separate concurring judgment. Sinha CJ dissented. According to the learned Chief Justice, such a matter could not be considered essential for a religion. Moreover, he compared ex-communication with untouchability and held that the prohibition of ex-communication was a legitimate measure of social reform. The impugned law was doubtless a measure of social reform. Since Article 26, unlike Article 25 did not include the words "subject to other provisions of this part" which was an inadvertent omission, the Court held that Article 26 was not controlled by Article 25 (2) (b). The impugned Act curbed the power of the Sayedna, the head of the Bohras to ex-communicate those who did not comply with his dictate. This power was arbitrary and resulted in the denial of civil rights of the ex-communicated person. such as access to places of worship or burial., social intercourse with other members of the community and also ostracization by the community. . In this case, the majority does not seem to have considered the relationship of Articles 25 and 26. Article 25 guarantees freedom of conscience, and the right freely to, profess. practise and propagate religion whereas Article 26 gives rights to religious denominations to manage their affairs in matter of religion. Wherever individual's right and a collective right appear together, the latter is an extension of the former. For example, an individual has a right of freedom of speech and its extension is freedom of the press. An individual has the right to personal liberty and her right to form associations or to assemble peacefully is an extension of that right. Whether the right of the religious denomination under Article 26(b) was subject to the right of the individual to freedom of religion. under Article 25(1). Had the wider meaning of the words "personal liberty" in Article 21 as interpreted in *Maneka Gandhi v India*[25] been available, it could have also been argued that the power of ex-communication of the Bohra religious head was violative of the individual's right to personal liberty. Further, was the power enjoyed by the head of the religious denomination not arbitrary? If it is arbitrary, does it not offend Article 14 which provides equality before the law? Ex-communication could have been challenged as being instrumental in causing breach of the rights given by Articles 14 and 21. Sayyedna is a State within State in so far as its orders have mandatory/coercive sanctions. Are his orders the law for the purpose of Article 21? Further, it is submitted that it was not argued before the Court that the impugned law could be protected under Article 25 (2)(b) being a measure of social welfare and reform. Seervai has held the view that "In the context in which the words 'a measure providing for social welfare and reform "were used in Art. 25 (2)(b), it was intended to save the validity of only those laws which did

[25] AIR 1978 SC 1718

not invade the basic and essential practices of religion guaranteed by Article 25(1)".[26] It is submitted that the power of regulation or restriction given by Article 25(1)(a) is subject to the condition that it can be exercised only in respect of matters which fall out of the essential aspect of religion. The power to legislate given by Article 25(2)(b) is not constrained by the essential aspects of religion. This is obvious from the fact that such power can be used for throwing open the Hindu religious institutions of a public character to all sections Hindus. No body can say that denial of temple entry was not an essential aspect of Hindu religion .Further, Article 25(1) does not give the right to practise religion in absolute terms. That right is not only subject to public order, morality and health but also to other provisions of Part III, which means that freedom is subject to the other fundamental rights such as the right to equality and the right to freedom of speech. The Constitution makers clearly intended to override the freedom of religion where vital social welfare and reform was required. Therefore they conferred power on the State to legislate for social welfare and reform.

The religious denomination's right to manage its own affairs in matters of religion had to be read as subject to the member's right to freedom of religion guaranteed by Article 25(1) and it also ought to have been read as subject to other fundamental rights. It was a mere drafting lacuna that the words "subject to other provisions of this part" were not included in Article 26, while they were there in Article 25(1).

Seervai, who in his previous editions had supported the majority decision in *Saifuddin Saheb* realised later that such widespread power of the Sayyedna could result in oppression of the dissenters within the community. He observed "the consequences of ex-communication are so grave that the nature of the ex-communication, the conditions of its exercise, and the areas of the followers life which it can and cannot affect require careful examination."[27] He further asks "whether ex-communication should not be abolished for every religion by an amendment of the Constitution."[28] It is submitted that with the wider contour of "Personal Liberty" in Article 21 as given by the Court tin *Maneka Gandhi*, it should not be difficult to hold a prohibition of ex-communication Constitutionally valid. Had Articles 14 which forbids arbitrariness and Article 21 which guarantees personal liberty been invoked and had Article 25(2)(b) been invoked with a wider meaning of social welfare and reform, the impugned Act could have been upheld. Article 25(2)(b) gives plenary power to the legislature to make a law for social welfare and reform. The only limitation will be that such a law should be within the legislative competence of the legislature as drawn

[26] *Supra* n 19, p.1270. "In the context in which the words 'a measure providing for social welfare and reform" were used in Article. 25(2)(b), it was intended to save the validity of only those laws which did not invade the basic and essential practices of religion guaranteed by Article 25(1).

[27] *Supra* n 19, p. 1276.

[28] *Id.* p. 1277.

by Article 246 of the Constitution and be not inconsistent with any of the fundamental rights. It can very well be argued that ex-communication is violative of the fundamental rights contained in Article 14 and 21.

In *Venkataramana Devru v Mysore*.[29] the validity of a law providing for access to temples to all sections of Hindus was challenged. The temple was owned by religious denomination of Goud Saraswat Brahmin to which members of that caste had exclusive access. It was contended on behalf of the trust that admission to a temple was a matter which fell within the matters of religion and therefore whom to admit was entirely for the trust to decide. Their autonomy in this regard was fully protected by Article 26(b) which gave them the right to manage its own affair sin matters of religion. The question was whether the right under Article 26(b) was controlled by Article 25(2)(b) which gave power to the State to make a law for throwing open Hindu temples to all sections of Hindus. Since Article 26 does not start with the words "subject to other provisions of this Part" as Article 25(1) starts, the Court held that there was a conflict between Articles 26(b) and 25(2)(b). Therefore applying the rule of harmonious construction, the Court held that while admission to the temple had to be open to all sections of Hindus, the access to the inner sanctum sanatorium where the idol was placed could be restricted only to persons belonging to that particular caste. It is submitted that had the Court read the right under Article 26(b) as subject to Article 25(2)(b), there would not have been any conflict and therefore there would not have been any need to apply the rule of harmonious construction. These two decisions show that neither the concerned governments which had enacted the impugned laws, nor the Supreme Court gave due importance to the most important clause in Article 25, namely cl. (2)(b) which gives overriding power to the state to legislate for social welfare and reform including the reform of providing temple entry to the marginalized sections of the Hindu society.

What causes us most concern as secularists is that the Court has recognized the autonomy of a caste and its power to exclude persons of other castes from access to a temple. When the judiciary recognises caste as an autonomous unit, it being an organ of the State, does it not negate secularism?

Article 25(2)(a) gives power to the State to restrict or regulate secular activities associated with religion. Such restriction and regulation is quite incisive. Article 16 (5) makes an exception to the right to equality in public employment given by clauses (1) and (2) of Article 16. It says that "nothing in this Article shall affect the operation of any law which provides that the incumbent of an officer in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a

[29] AIR 1958 SC 255.

particular denomination. Here the interaction between the State and the religion is quite close. The State does not merely regulate activities of religious institution but it nominates persons on a body which is supposed to perform religious functions. It nominates persons on the managing committee of a temple who must belong to a particular religion.

In *M. P. Gopalkrishnan Nair v Kerala*[30], the validity of the nominations made by the Government of Kerala on the managing committee of the Krishna temple at Guruyavoor was questioned on the ground that the Hindu ministers who were required to make it did not believe in temple worship as they were communists and their ideology did not allow them to be believers in temple worship. S. 4 of the Guruyavoor Devaswom Act, 1978 provided that some members of the managing committee should be nominated by the Hindu ministers of the Kerala Government. The petitioners, who were the members of the Hindu Vishwa Parsihad had raised objection to the nominations on the ground that thought the ministers who made them were Hindus, they were not believers in temple worship The Supreme court rejected that contention. The persons to be nominated had to be believers in temple worship but those who were to nominate were not required to be so. It was enough that they were Hindus. The Court observed;[31]

The management or administration of a temple partakes to a secular character as opposed to the religious aspect of the matter. The 1978 Act segregates the religious matters with (sic) from secular matters. So far as, religious matters are concerned, the same have entirely been left in the hands of the "Thanthri". He is the alter ego of the deity. He gives mool mantra to the priests. He holds a special status. He prescribes the rituals. He is the only person who can touch the deity and enter the sanctum sanctorum.

The Court thus shows that the supervisory functions, which are secular, are performed by the State but while doing so, care is taken to leave freedom of religion of the individual intact and unencroached upon. The nominations are to be made by Hindu members of the council of ministers but the Hinduness does not depend upon their being believers in temple worship. A person can be a Hindu even without believing in temple worship. In fact a person can be a Hindu even being an atheist. What the law insists however is that the persons to be nominated to the temple committee must believe in temple worship. A fine line dividing the secular supervision of the State from the individual freedom to profess and practise religion has been drawn by the impugned legislation.

[30] AIR 2005 SC 3053.
[31] *Id.* p. 3061 (para 22).

Freedom of Religion as a site for Communal Conflicts

Cow is a sacred animal for Hindus and there has been a long standing demand for a ban on cow slaughter. In fact, many Hindu-Muslim riots had occurred on the controversy regarding cow slaughter. Hindus thought that Muslims slaughtered cows only to offend their sentiments .In the constituent Assembly, some members of the Congress party had raised this question and the above Article came in an effort to appease them. In the Constituent Assembly, Pandit Thakur Das Bhargava vehemently argued in favour of a ban on the slaughter of cows. He said:[32]

Ours is an agricultural country and the cow is kam-Dhenu to us- fulfiller of all our wants. From both points of view, of agriculture and food, protection of the cow becomes necessary. Our ancient sages and Rishis , realising her importance , regarded her as very sacred. Here, Lord Krishna was born, who served cows so devotedly that to this day in affection he is known as makhan chor.... But I would like to tell you that even during the Muslim rule, Babar, Humayun, Akbar, Jahangir and even in the reign of Aurangzeb,. cow slaughter was not practised in India; not because Muslims regarded it to be bad but because from the economic point of view it was unprofitable.

The member tried to make out a case for banning cow slaughter on secular grounds though his argument could not be totally divested of the religious element. Article 48, which finally emerged roped in a ban on cow slaughter in the total scheme for organization of agriculture and animal husbandry on modern and scientific lines. This Article reads as follows:

The State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle.

In pursuance of this directive principle, but mainly to appease the religious sentiments of the majority community, the states of Bihar, Uttar Pradesh and Madhya Pradesh had passed laws banning cow slaughter. The validity of such laws was challenged by petitioners who were butchers by profession and Muslim by religion. The first case that came before the Supreme court was *Hanif Quareshi v Bihar*[33]. The validity of the law was challenged on the following grounds: (a) it violated their right to carry on their trade or business guaranteed by Article 19(1)(g) of the Constitution since they were butchers; (b) it violated their right to freedom of religion guaranteed by Article 25(1). Since they were Muslims and according to Islam they had to sacrifice a cow on *Id*. The Court examined the objection in (a) to find out whether a ban on cow slaughter was a reasonable

[32] 7 C.A.D. p. 569 (24th November, 1948)
[33] AIR 1958 SC 731.

restriction in the interest of the general public. on the right to carry on any trade or business permitted by Article 19(6), and in (b) to determine whether the sacrifice of a cow on the day of *Id* was an essential practice enjoined by Islam. Referring to the acrimony involved in rival contentions, which had communal overtones. Chief Justice S.R. Das speaking for the Court observed:[34]

The controversy concerning the slaughter of cows has been raging in this country for a number of years and in the past it generated considerable ill will amongst the two major communities resulting even in riots and civil commotion in some places. We are, however, happy to note that several contentions of the parties to these proceedings have been urged before us without importing into them the heat of communal passion and in a rational and objective way., as a matter involving Constitutional issues should be.

What the Court had to decide was whether such a ban could be considered as a reasonable restriction on freedom of the butchers to carry on their trade or business. Although directive principles of state policy are not enforceable by any court, they are "nevertheless fundamental in the governance of the country."[35] The Court had left behind its black letter law logic of treating directive principles as of less importance and subservient to fundamental rights.[36] The Court considered directive principles while examining the Constitutional validity of a statute from the standpoint of its consistency with the fundamental rights In the light of this directive principles, the Court held that while a ban on the slaughter of milch and draught cattle was valid as being a reasonable restriction on the right to carry on any trade or business. a ban on the slaughter of other cattle which were not capable of yielding milk or of use for breeding or serving other purposes would be an unreasonable restriction on the fundamental right of the butchers to carry on their occupation. The Court upheld the total ban on the slaughter of (i) cows of all ages; (ii) calves of cows and she buffaloes, male or female, and, (iii) she buffaloes, or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they were milch or draught cattle The Court held that a ban on the slaughter of buffaloes and other cattle which were not capable of yielding milk or useful for other purposes was an unreasonable restriction on freedom of the butchers to carry on their occupation. Since the Court had applied the test of usefulness, the exception in favour of the cows did not appear to be rational. The Supreme Court had for the first time used the *Brandies brief* regarding the animal population. The Court observed that for the preservation of the useless cattle, the country would have to spend enormous amount of money. It would have been impossible to maintain such a huge cattle population.

[34] *Ibid*
[35] Article 37
[36] *Madras v Champakam Dorairajan* AIR 1951 SC 226.

If this was the logic behind holding a total ban on slaughter of cattle un Constitutional, why did the court not go whole hog and apply the same utilitarian logic to hold that a total ban on cow slaughter would be un Constitutional?[37]

Another argument of the petitioners was that such total ban on cow slaughter infringed their right to freedom of religion since offering cow a sacrifice on the day of *Id* was an essential requirement of Islam. The Court observed that a Muslim could offer a cow or six goats or a camel as sacrifice. From this it concluded that sacrifice of a cow was not an essential condition of Islam. Therefore the impugned law did not violate their freedom of religion.

Even if the Court were to hold that the offering of a cow was an essential aspect of Islam, if the country needed cows to be saved from slaughter on economic grounds and not religious grounds, the Court could certainly have upheld the ban under clause (2) (b) of Article 25 which permits the State to make a law for social welfare and reform. The Court seems to have focused its attention to cl (2) (a) which permits the state to intervene only in secular matters associated with religion Therefore the court had to decide whether particular legal intervention was in a matter not essential to a religion.

The question of a ban on cow-slaughter came before the Court recently in *Gujarat v Mirzapur Moti Kureshi Kasabji Jamat*.[38] The State of Gujarat had enacted an amendment to the Bombay Animal Preservation Act, 1954, now known as the Bombay Animal Preservation (Gujarat Amendment) Act, 1994, totally banning the slaughter of cows, the calf of a cow, whether a male or a female, whether castrated or not, a bull below the age of sixteen years and a bullock below the age of sixteen years. The law had been held unconstitutional by the Gujarat High Court. and the state government came in appeal to the Supreme Court. Lahoti CJ speaking on behalf of six judges pointed out various developments which needed to be taken into account before deciding the correctness or bindingness of the earlier decision in *Quareshi*. Two Articles, one a directive principle, 48-A and another a fundamental duty 51-A were added to the Constitution since that decision. The Court of *Quareshi* could not have had the benefit of those two Articles. The Court reiterated the view that sacrifice of a cow was not an essential aspect of Islam and concentrated on the other argument, namely of whether such a ban on the slaughter of cows and calves etc was a reasonable restriction on the fundamental right to carry on occupation. While doing so, the Court seems to have taken a more societal view rather than the narrow individualistic view. The important

[37] See S. P. Sathe," *Cow Slaughter : The Legal Aspect" in* A.B. Shah (ed) Cow Slaughter' Horns of a Dilemma, Lalvani, 1967. p. 69

[38] (2005) 8 SCC 534.

concern was not to mitigate the restriction on a few butchers but to see how far such a ban on the slaughter of animals was going to benefit the economy of the country. The learned judge observed:[39]

Cow progeny excreta is scientifically recognized as a source of rich organic manure. It avoids the farmers avoid the use of chemicals and inorganic manure. This helps in improving the quality of the earth and the environment. The impugned legislation enables the State in its endeavour to protect and improve the environment within the meaning of Article 48-A of the Constitution.

The Chief Justice then interpreted Article 48, particularly the words "cows and calves and other milch and draught cattle". He said:[40]

Cows are milch cattle, calves become draught or milch on attaining a particular age. Having specifically spoken of cows and calves, the latter being a cow progeny, the framers of the Constitution chose not to catalogue the list of other milch and draught cattle and felt satisfied by employing a general expression "other milch and draught cattle" which in their opinion any reader of the Constitution would understand in the context of the previous words "cows and calves".

This means that the Constitution presumed that all cows and calves were milch and draught cattle and wanted other cattle to be subjected to the test of being milch or draught. Thus, according to the learned Chief Justice, "milch" and "draught" were used as adjectives simply to enable the classification or description of cattle by their quality. The judge relied upon Article 51-A (g) of the Constitution which requires every citizen to have compassion for living creatures. This is based on "the rich cultural heritage of India, the land of Mahatma Gandhi, Vinoba, Mahaveer, Buddha, Nanak and others"[41]

Was this decision based on the presumption of Constitutionality or judicial restraint? A.K. Mathur J. in his dissenting judgment said that it was not proper to overrule the decision in *Quareshi*'s case which had held the field for more than twenty years. The Cow slaughter legislation had come in fulfillment of the Hindutva agenda and was enacted only in states ruled by the BJP. The Court has upheld the impugned law by invoking a substantial socio-economic data. The Court's decision can be supported as an example of judicial restraint. In days where the Supreme Court has usurped so much space that really belonged to other organs of the State, one cannot find fault with such judicial restraint. We cannot also accuse the Court of having been infidel to secularism. The rights of a few butchers

[39] *Id.* p. 567 (para 50)

[40] *Id. p.* 569 (para 63)

[41] *Id.* p. 570 (para 67)

to kill cattle could not be a very strong argument for striking down the law. Lahoti CJ pointed out that butchers were doing their business since generations, but they did not slaughter merely cow class of animals. They slaughtered and traded the meat of other animals like buffaloes, sheep, goats, pigs and even poultry. In Gujarat, there were only 38 registered slaughter houses. And beef contributed only 1.3% of the total meat groups. The majority judgment has defended the impugned statutes merely on secular grounds. But the hidden nuance, of such legislation is doubtless religious or even communal.

Freedom to Propagate Religion

Should freedom of religion include the freedom to propagate religion? A good deal of debate took place on this in the Constituent Assembly. Many members were apprehensive of this provision. Two religions, Islam and Christianity are proselytizing religions and their members strongly felt that religious freedom without the right to propagate their religion would be incomplete. Ultimately the right to propagate was included in Article 25(1).[42] Otherwise also it would have formed part of the right to freedom of speech and expression guaranteed by Article 19(1)(a). Both the right to practise and the right to propagate religion were pregnant with inter-communal tensions. But they could be restricted in the interest of public order since public order was a ground for imposing reasonable restrictions on freedom of speech by clause (2) of Article 19, and the right to practice and propagate religion was subject to public order. The freedom to propagate in Article 25(1) would not include the freedom to abuse another religion or insult it since this would not be considered as an essential aspect of religion and restriction thereupon would fall within clause (2) of Article 19. Therefore S. 295-A of the Indian Penal Code, which punishes speeches causing insult to a religion, was held as a reasonable restriction in the interest of public order on freedom of speech and expression. In *Ramji Lal Modi v U.P.*[43], it was argued that insults to a religion might not always lead to public disorder and therefore the provision making such speeches punishable could not be said to be in the interest of public order within the meaning of clause (2) of Article 19(2). The Supreme court while rejecting this contention observed that the words "in the interest of public order" in clause (2) of Article 19 have a much wider ambit than the words "maintenance of public order" "If, therefore, certain activities have a tendency to cause public disorder , a law penalizing such activities as an offence cannot but be held to be a law imposing reasonable restrictions in the interests of public order although in some cases those activities may not actually lead to a breach of public order."[44] Judicial review would have the same scope in either of the provisions. Since freedom of religion is subject to other fundamental

[42] B Shiva Rao, *"The Framing of India's Constitution Selected Dcouments,"* Vol. 5, Study. p. 261.
[43] AIR 1957 SC 620 Seervai, *"Constitutional Low of India"* Vol.1, 4th ed., Universal, Delhi, 2002. p.716
[44] *Id.* p. 622.

rights, freedom to propagate religion would also be subject to clause (2) of Article 19 and therefore could be restricted in the interests mentioned in that Article. Similarly, section 153-A of the Indian penal Code is another anti-communalism provision. It punishes acts promoting enmity between different groups on grounds of religion, race, place of birth, residence, language etc. S. 153- B punishes acts involving imputation against any class of people that because of their religion they are not loyal to this country or acts that in some other way create disharmony among different religious groups. These sections were also upheld by the Supreme Court as being reasonable restriction upon the right to freedom of speech.[45] Since the speeches did not involve the exercise of freedom of religion, Article 25 was not pressed into service.

In view of the restricted scope of Article 25, the freedom to propagate religion includes only innocent statements praising a religion and persuading people to convert to it but it does not include advocacy for conversion based on showing that the other religions are bad. Such an advocacy may infringe S. 295 of the IPC. Therefore a law prohibiting conversion by force or fraud can be passed without violating the freedom to propagate religion. Such conversion advocacy will not be considered as essential to religion and therefore cannot be included within the protection of Article 25, The State is anti communalism. Various provisions of the Indian Penal Code cited above testify to this character of the Indian State. Such provisions have been upheld by the Supreme Court as reasonable restrictions on freedom of speech.

Religion and Elections

The Constitution provides for Parliament, state legislatures and municipalities and panchayats to be elected by people through adult franchise. Every adult above the age of 18 years has the right to vote.[46] No person can be ineligible to vote on the ground of her religion, race, caste or sex.[47] A person is qualified to be a member of the Lok Sabha if she is a citizen of India and subscribes before some person authorized by the Election Commission of India an oath or affirmation according to the form set out in the Third Schedule of the Constitution.[48] A person must be above 25 years of age for being elected as a member of the Lok Sabha and above 35 years of age for being a member of the Rajya Sabha.[49] She should also possess such other qualification as may be prescribed by or under any law made by Parliament[50] Similar requirements are prescribed for a member of the state legislature.[51] She should be not less than 25

[45] M.P. Jain, *"Indian Constitutional Law,"* 5th ed., Wadhwa & Co., Nagpur, 2005.
[46] Article 326
[47] Article 325
[48] Article 84 (a)
[49] Article 84 (b)
[50] Article 84 (c)
[51] Article 173 (a)

years of age to be a member of the assembly and not less than 35 years of age for being a member of the Legislative Council.[52] A member of a House of parliament or a state legislature should also possess such other qualification as may be prescribed by or under any law made by Parliament.[53] The Representation of the People Act, 1951 is the election statute providing for the conduct of elections, adjudication of disputes regarding elections and gives grounds on which a person may be disqualified. A person who is convicted for certain offences such as S. 153 –A. (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language etc., and doing acts prejudicial to the maintenance of harmony), or offence of rape under sections 376, or 376-A, or 376-B or 376-C or 376-D; S. 505 (offence of making statement creating enmity or hatred between classes in any place of worship or assembly engaged in the performance of religious worship) and sentenced to not less than six months of imprisonment shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since her release.[54] Section 123 of the RPA states the corrupt practices which may disqualify a person from being a Member of Parliament or a state legislature. Two corrupt practices are regarding communal advocacy by persons canvassing for election. Section 123 (3) makes it a corrupt practice if a candidate or his agent or any other person with the consent of the candidate or his election agent appeals to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or uses religious symbols for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate. Sub-section 3A makes it a corrupt practice if candidate promotes or attempts to promote, feelings of enmity or hatred, between different classes of citizens on grounds of religion, race, caste, community or language for the furtherance of the prospects of the election of that candidate. In some of the cases, the validity of both of these sub-sections was questioned on the ground of their alleged inconsistency with the rights of freedom of speech and freedom of religion.

S. 8-A of the RPA as originally enacted provided for automatic disqualification of a member for contesting any election for six years since the decision of the High Court under S. 99 of RPA holding her guilty of such corrupt practice. However, when the Allahabad High Court held Prime Minister Indira Gandhi guilty of a corrupt practice and set aside her election to Parliament on that ground, S. 8-A was amended by R.P. Amendment Act, 1975. and the amended section provided that after the High Court gave a finding that the person was guilty of corrupt practice, her case may be referred to the President for determination whether and if so for how

[52] Article 173 (b)
[53] Article 84 (c): Article 173 (c)
[54] S. 8 (1) (a) The Representation of the People Act, 1951

long the member should be disqualified.[55] Clauses (3) and (3A) of S. 123 have been subject of a good deal of litigation.

The validity of clauses (3) and (3A) of section 123 of the RPA were challenged in several cases. Although the Supreme Court upheld them, the reasons given in support of them sound weak and rather defensive. In *Subhash Desai v Sharad Rao* while upholding these clauses, the Court said:[56]

Sub-sections (3) and (3-A) of Section 123, in no way are in conflict with Article 25 of the Constitution - both can coexist. Article 25 enables every citizen of India to profess, practice and propagate his religion, whereas sub-sections (3) and (3-A) of Section 123 purport to ensure that an election is not influenced by considerations for religion, race, caste, community or language. Sub-section (3) and (3-A) of Section 123 merely prescribe the conditions, which must be observed, if a candidate wants to enter in Parliament or Legislative Assembly. The right to stand for an election is a special right created by a statute and can be exercised on the conditions laid down by the said statute. Keeping in view that the election should not be contested on the ground of religion, race, caste, community, or language and result of an election is not affected by promoting feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community or language; the framers of the Act, have declared appeal on ground of religion, race, caste, community or language for creating feelings of enmity or hatred between different classes of citizens as corrupt practices, which shall vitiate the election.

Freedom of religion does not include the freedom to appeal to voters to vote or not to vote for a candidate because of her religion. Article 25 clearly states that freedom of religion is in matters which are essentially religious. In the above case, the Supreme Court held that both, section 123 (3) of the Representation of the People Act and Article 25 of the Constitution co-exist without affecting each other. It is submitted that this argument is fallacious because if an ordinary law like the Representation of the People Act conflicts with a provision of the Constitution like Article 25, it must be held to be void. There cannot be harmonious construction between a statutory provision and a Constitutional provision. If cl. (3) of S. 123 of the Representation of the People Act restricts freedom of religion, it must be held to be void. A person who contests an election cannot be said to have been divested of her fundamental rights. In fact, the election law being a 'law' within the meaning of Article 13 of the Constitution, it cannot take away or abridge any of the fundamental rights. The proper question, which the Court should have asked was whether appealing to

[55] S. 8-A
[56] (1994) Supp. (2) SCC 446, 455.

voters in an election to the House of a legislature or any public office on the ground of religion was included within the freedom of religion covered by Article 25(1). It is certainly not an essential aspect of any religion to seek votes by appealing to it. The right to propagate religion given by Article 25 does not include the right to appeal to voters to cast their vote on religious considerations Further, such a law would doubtless cause a reasonable restriction in the interest of public order upon the freedom of speech as permitted by Article 19 (2). There is no right, much less a fundamental right to canvass in an election by appealing to religion... Further, in view of the *Bommai* decision[57] in which it was held that secularism is part of the basic structure of the Constitution, the right to freedom of religion as well as the right to freedom of speech both must be informed by the ideal of secularism and their ambit must be construed in that light. It is in the interest of secularism that canvassing in election by appealing to religion ought to be forbidden. The Court was right in rejecting the above argument, though in our view, the doctrinal basis of its rejection could have been more forthright and precise.

The weakness which the Court showed in *Desai* was further reinforced in three decisions given thereafter. In the post Babri Masjid demolition, the Hindutva advocacy had been emboldened.. The election speeches of leaders of some political parties contained innuendoes and satirical comments against Muslims. The High Court had held the elections of persons void for the use of such objectionable advocacy. In appeal, the Supreme Court reversed some of these decisions and held that reference to Hindutva did not amount to an appeal to voters on the ground of religion.

These cases were *Dr.Ramesh Prabhu v. Prabhakar Kashinath Kunte*,[58] *Manohar Joshi v Nitin Bhaurao Patil*[59] and *Ramchandra G. Kapse v Haribansh Ramakbal Singh*.[60]

The High Court of Bombay had held that Prabhu, Joshi and Kapse had committed corrupt practice as defined in sub-sections 3 and 3A of Section 123 of the RPA and therefore their elections to the legislatures were invalid. Appeals against those decisions were heard by the Supreme Court which upheld the Bombay High Court's decision in *Ramesh Prabhu* but reversed those in *Joshi* and *Kapse*. Two questions mainly concern us in this Article: (i) What is the meaning of the words "appeal on the ground of religion" in Section 123(3) of RPA? and particularly whether the appeal based on Hindutva amounted to an appeal on the ground of religion?; (ii) Whether clauses (3) and (3A) of Section 123 of the RPA violated the freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution? Does freedom of speech include the freedom to appeal to

57. *S.R. Bommai v India* AIR 1994 SC 1918 : (1994) 3 SCC 1
58. (1996) 1 SCC 130.
59. (1996) 1 SCC 169.
60. (1996) 1 SCC 206.

the religious sentiments of people while seeking their vote in an election to a public office?

In *Prabhu*, three speeches made by Shiv Sena chief Mr. Bal Thackaery were held to be amounting to corrupt practice and since Prabhu's complicity in such a communal campaign was established, his election was set aside. Whether a particular appeal offends the above sub-sections is a question of fact which will have to be decided in each case. Verma J. as he then was, observed that the above provisions were "in keeping with the secular character of the Indian polity and rejection of the separate electorates based on religion."[61] An appeal forbidden by sub section (3) need not actually cause breach of the public order. It would be enough if it has the tendency to cause such a breach. The learned judge then proceeded to define what kind of speech would not come within the prohibition even if it has reference to a religion Since Indian secularism is not anti religion but is anti communalism, mere reference to a religion may not come within the prohibition of sub-section (3), The learned judge therefore said:[62]

It cannot be doubted that a speech with a secular stance alleging discrimination against any particular religion and promising removal of the imbalance cannot be treated as an appeal on the ground of religion as its thrust is for promoting secularism.... In other words, mention of religion as such in an election speech is not forbidden by sub-section (3) so long as it does not amount to an appeal to vote for a candidate on the ground of his religion or to refrain from voting for any other candidate on the ground of his religion. When it is said that politics and religion do not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage by seeking votes on the ground of the candidates' religion or alienating the electorate against another candidate on the ground of the other candidate's religion.... It also means that the State has no religion and the State practices th policy of neutrality in the matter of religion..

This means that just because a person refers to a religion or religiosity, his speech does not fall within the prohibition of sub section (3). For example, Gandhiji often referred to Ram Rajya. Was it an appeal on the ground of religion? In a sense it was but not in the sense in which an appeal on the ground of religion is prohibited by sub section (3) of S. 123.What the sub section prohibits is an appeal asking people to vote because of one's religion or not to vote because of some other persons religion. He described the purport of the above provisions most succinctly follows:[63]

61. (1996) 1 SCC 130, 145.
62. *Id.* p. 147.
63. *Id.* p. 150.

It seems to us that Section 123, sub-sections (2), (3) and (3A) were enacted so as to eliminate from the electoral process, appeals to those divisive forces which arouse irrational passions that that run counter to the basic tenets of our Constitution, and, indeed, of any civilized political and social order. Due respect for the religious beliefs and practices, race, creed, culture and language of other citizens is one of the basic postulates of our democratic system.

Manohar Joshi had clearly said that if Shiv Sena won, Maharashtra would be the first Hindu State Did this not amount to a communal appeal? What is the meaning of the "Hindu State"? Here the learned judge goes into the meaning of "Hindu" as well as "Hindutva". The learned judge referred to Gajendragadkar CJ's view in *Sastri Yagnapurushdasji v Muldas Bhudardas Vaishya*[64] on who is a Hindu. It is respectfully submitted that the views of Gajendragadkar CJ were quoted entirely out of context. The question in that case was whether the members of the *satsangi* cult, who worshipped only *Swaminarayana*, the founder of the faith, and had scriptures of their own as well as their own peculiar diksha could be considered as Hindus for the purpose of Article 25(2)(b) which gives power to the State to throw open Hindu religious institutions to all sections and classes of Hindus. The word "Hindu" is explained in Explanation II of Article 25(2)(b) as "including a reference to persons professing the Sikh, Jain or Buddhist religion", and it is made explicitly clear that reference to "Hindu religious institutions" in that Article should be construed accordingly,[65] Gajendragadkar CJ. described that Hindu religion did not have one prophet or one holy book and therefore with all its plurality, it was a way of life. The learned judge wanted to say that which religious rituals one followed and which one worshipped was not the key to define who was a Hindu. Hindusim has so much plurality within it regarding prayers or thoughts that being a Hindu did not require adherence to any form of worship or allegiance to any spiritual head. Who is a Hindu was defined by him only for the purpose of narrating the scope of the provision which enabled the State to throw open Hindu religious institutions for all sections and classes of Hindus. The practice of excluding some people on the basis of caste had prevailed among all those who initially were Hindus. Since caste system had traveled with them into the new religion, they were to be considered as Hindus for the purpose of Article 25(2)(b) considered as appeal on the ground of religion. In *Yagnapursuhdasji,* the question was regarding Sikhs, Jains and Buddhists being "Hindu" for the purpose of access to religious institutions. Even the Hindu personal law defines Hindu as inclusive of these religions for the purpose of those laws. No body thereby can say that they profess the Hindu religion. The word 'Hindu' will include these three religions only when the law so specifies

[64] AIR 1966 SC 1119.
[65] Explanation II, Article 25.

and that for the limited purpose mentioned in those laws. The Hindu Marriage Act, 1955 applies to Sikhs and Jains or Buddhists not because they profess the Hindu religion but because Parliament thought that culturally they were alike to Hindus and therefore since the same customs and traditions prevailed among them, the same law could apply to them.

That analogy, however, need not apply to other laws. For example, if a person speaks ill of the Sikh religion, he will be prosecuted for insulting a religion under S. 295-A of the IPC or if a person makes a speech causing hatred or enmity between Hindus and Sikhs, she will be prosecuted under S. 153-A of the IPS. Similarly, the word Hindutva, when used in an election speech, doubtless refers to a community of persons who have a particular religion. The whole purpose of S. 123 (3) and 123 (3A) is to forbid parochial appeals invoking community or religion and asking voters to vote on the basis of belonging to that religion. An appeal to "Hindutva" was certainly an appeal falling within the prohibition of clauses (3) and (3A) of section 123 of the RPA. Hindutva is essentially a political concept and not a religious concept. It is a communal concept which describes Hindus as a community different from those who profess different religions. Religion is used merely to identify the people who are juxtaposed against persons of other religion. Many follower of Hindutva ideology, other than those who belong to the Sangh pariwar, are atheists. But they are communal in so far as they consider those other than Hindus as aliens. The main thrust of the above provisions of the RPA is against communalism. Appeals which are forbidden by the above sections are essentially those (i) in which voters are asked to vote for a person because she is a Hindu or not to vote for a person because she is not a Hindu or (ii) in which any other community which is not called Hindu is vilified and described as enemy of the nation What the law forbids is an appeal to voters to vote example, if one said that if she is elected, she will create a Ram Rajya, will it constitute an appeal on the ground of religion? Ram Rajya is an ethical concept which means good governance. Just because Lord Rama is a deity of the Hindus, it may not become an appeal on the ground of religion, unless the context shows otherwise shows. An appeal on the ground of religion essentially should mean an appeal containing hatred against persons belonging to another religion or caste or language and asking people to vote for a candidate because she is a Hindu or a Christian or a Muslim.

Pluralistic Nationalism and the State in India*

S.P. Sathe

Pluralistic Nationalism

Pluralistic nationalism, was the basis of the National Movement for independence. It means that all those who are in India are the nationals of India, irrespective of religion, race or any other ascriptive status. Such pan-Indian nationalism started taking shape since the first war of independence waged in 1857, which was derisively described as sepoy's mutiny by colonial power. In 1885, the All India Congress was established under the chairmanship of an Englishman Hume to urge the British government to accord greater space for Indians in the governance of the country. Started with such a modest aim, that party grew into a major force for galvanizing the people against foreign rule. Congress not only included Indians of all religions and languages but several English men and women were associated with it and contributed to India's effort to win independence.

Two Nation Theory.

Pluralistic nationalism was opposed by the two nation theory, which was propounded both by the Hindu Maha Sabha and the Muslim League. The two nation theory propounded that Hindus and Muslims constituted two different nations and therefore they could not live together. While the Hindu Maha Sabha said that after Independence India would be a Hindu State (Hindu Rashtra), the Muslim League said that since Muslims constituted a nation, they must have their separate homeland called Pakistan. The two-nation theory suited the British rulers because it became a good excuse for denying independence to India. Congress never accepted the two nation theory. It asserted that the state in free India would not have religious affiliations, which it would treat all its citizens equally and would allow all of them to have freedom of religion. Indians never accepted the nation-state model of a homogenous people with common history, common religion and common traditions. The idealized Mazzinian view of a culturally homogenous nation-state has really never existed in any part of the world. India's sub-continental character did not support such nationalism. India was more similar to the Untied States than to Europe. Like the United States it did not subscribe to the melting-pot theory for the simple reason that unlike the United States, India did not grow by immigration. Indian population had diversity and each group of people, different because of religion or language wished to retain its distinct character. Each of such

* Draft of the third lecture which was to be delivered in the Pandit Memorial Lecture Series. However, before the lecture series was organized Professor Sathe passed away on March 10, 2006.

different groups benefits by remaining together and wants to retain its different identity. This is the crux of pluralism. The melting-pot theory presupposes that all such groups lose their distinctiveness and ultimately merge to become a single mainstream. This is the theory of assimilation. In reality this did not happen even in the United States. Each of the groups of people such as the Jews, the African Americans, the Indians, the Chinese, the Japanese, the Latin Americans, the Europeans, the Asians other than those mentioned above, who have obtained American citizenship continue to cherish their separate identities. Jews constitute a powerful group politically. Now even Indian-Americans are becoming a powerful group. These groups have not melted away but tend to retain their cultural and nostalgic links with the countries of their origin in terms of their religions and cultures. America is multi-cultural though the originals and the later immigrants have shared the common American culture and traditions. But the composite American culture itself is pluralistic and with its emphasis on individual liberty and individualism is bound to allow distinct identities to survive. It allows every section of society to conserve its distinct script, language and culture. The Indian Constitution does not provide for the melting pot theory. Justice Ruma Pal of the Supreme Court of India observed in *T.M.A. Pai Foundation v India* (hereafter *'the Minority's case'*) that[1]

The Constitution as it stands does not proceed on the "melting pot" theory. The Indian Constitution, rather represents a salad bowl where there is homogeneity without an obliteration of identity.

Article 29(1) of the Constitution provides for such pluralism as follows: "Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." This Article follows a title which reads: "Cultural and Educational Rights". Clause (2) of that Article says "no citizen shall be denied admission to any educational institution maintained by the State on grounds only of religion, race, caste, language or any of them." This Article is followed by Article 30, which contains rights of the religious and linguistic minorities. While Article 30 is for the religious and linguistic minorities, Article 29 (1) is for any section of the citizens. Such section of the citizens may not be a minority as understood for the purpose of Article 30. That shows that the makers of the Constitution were aware that even among the majority community, there was pluralism and several sections of citizens had different language, script and culture. This is an admission of the cultural plurality of the Indian people. Justice Ruma Pal's description of India as a salad bowl is therefore most appropriate.

Canada has gone farther than the United States in pluralism of her

[1] (2002) 8 SCC 481, 653 (para 340)

nationality. The immigrants to Canada do not give up their identity even after becoming citizens of that country. There are Chinese Canadians, Vietnamese Canadians, Indian Canadians, Thai Canadians, Pakistani Canadians, Bangladeshi Canadians, SriLankan Canadians and Canadians of several other nationalities. Such pluralism seems to have blossomed since the introduction of the Charter of Rights into the Constitution of Canada by the amendment of the Canadian Constitution in 1982. England, which a century before had a homogenous population has now become a multi-religious, multi-cultural nation. Professor Bhiku Parikh, who is now a member of the House of Lords, recently submitted a report on multi-culturalism in England.

One nation-one religion has become an obsolete concept. All nations in Europe subscribe to Christianity and yet they are different states and nations. England and Germany the majority of whose people are Christians fought two world wars and were bitter enemies. Today Europe is uniting under a common market not because of religion but because of common economic interests. However, the strong nationalistic tendencies in Europe are surfacing again and coming in the way of unification, which became obvious from the results of the recent referendum in France and Netherlands where unification was rejected. Similarly, there are several Muslim countries, for example Iran and Iraq, which have fought wars against each other.

Pakistan was formed on the basis of a separate nation of the Muslims. Although the founder of Pakistan M.A. Jinnah had envisioned Pakistan to be a majoritarian secular state, it has been at the most a mild theocratic state. A secular state cannot grow along with dictatorship. Lack of democracy was the cause of the secession of its Eastern Part consisting of Bengali Muslims from Pakistan and emerging into a sovereign State of Bangladesh. Had Pakistan been a democracy, such a split could have been avoided because Bengalis aspirations could have been accommodated within the composite democratic state of Pakistan through proper federal arrangements. Compared to that India, despite various disputes arising out of the North versus the South, Hindus versus Muslims, regional disputes on territories and distribution of water has remained united. The democratic process facilitates the co-existence of various rival forces by providing space for their accommodation. Democracy in India has provided space for each different unit thereby facilitating reconciliation between conflicting groups. The fact that Mayavati had to persuade Brahmins and tell them that her party was not against them, and even some sections among the BJP think that the party could not come to centre-stage if it continued to treat Muslims as its enemy, evidences that the need to carry diverse sections of people is a political compulsion.

Hindu State - NO

Ultimately the sub continent called India was partitioned and two nations called India that is Bharat and Pakistan were created. Pakistan proclaimed itself an Islamic Republic because that was the promise on which Muslims with (a very limited franchise) had voted for its creation. India decided not to become a counterpart of Pakistan. The Indian leadership was determined to sustain the pluralistic character of the Indian nationalism and refused to make India a Hindu State. India, even after partition, had a large Muslim population. Today India has the largest Muslim population next only to Indonesia. Further there were many other religious minorities such as Christians, Parsis and Jews. There were three other religions, which were carved out of Hinduism, namely Sikhism, Buddhism and Jainism. Although these three religions are often included in the definition of Hindu[2], they often insist on their being different from Hinduism. Jains have in fact claimed a minority status.[3] Sikhs fought for an independent nationhood. Even Hindus do not constitute a monolithic society. It is stratified by castes and has diversity of languages, cultures and traditions.

Pluralistic Nationalism under the Indian Constitution

The Constitution of India, which came into force in 1950, incorporated all the essential aspects of pluralistic nationalism. Citizenship of India does not depend upon religion. Anybody who is born in India or either of whose parents was born in India or who has been ordinarily resident in India for not less than five years immediately before the commencement of the Constitution is a citizen of India.[4]

The Constitution further provided that a person who had migrated to India from the territory, which after the partition became the territory of Pakistan shall be a citizen of India, if she or either of her parents or any of her grandparents was born in undivided India (India as defined by the Government of India Act, 1935)[5] and where such a person had so migrated before the nineteenth day of July, 1948, she should have been ordinarily resident in the territory of India since the date of her migration.[6] In the case of a person who had migrated on or after 19th July, 1948, she should have been registered as a citizen of India by an officer appointed by the Government of India before the commencement of the Constitution.[7] Persons who migrated to the territory then known as Pakistan ceased to be citizens of India. But even such persons if they came back to India

2 See Article 25(2), explanation II. Also see the Hindu Marriage Act 1955, The Hindu Succession Act, 1956 and the Hindu Adoption and Maintenance Act, 1956.
3 See the recent decision of the Supreme Court in *Bal Patil v India,* AIR 2005 SC 3172
4 Article 5
5 Article 6(a)
6 Article 6(b)(i)
7 Article 6(b)(ii)

under a permit for resettlement or permanent return were deemed to have migrated to India before 19th July 1948.[8] Persons can acquire citizenship of India by fulfilling the requirements laid down under the Citizenship Act, 1955.[9] If a person voluntarily acquires citizenship of another country, she loses her Indian citizenship[10]. The Government has recently passed a law permitting non-resident Indians, who have acquired citizenship of another country to retain their Indian citizenship subject to some qualifications such as ineligibility to vote in elections or to contest any election for a public office.

The Constitution further says that there shall be equality before the law and equal protection of law[11] and that no one shall be discriminated on the ground of religion, race, caste or sex.[12] It treats all citizens as equal. The Constitution is liberal in extending various fundamental rights to "persons" as distinguished from "citizens". All fundamental rights except those in Articles 15 (right not to be discriminated on the ground of religion, race, caste, sex or place of birth); right to equality in public employment (Article 16), six freedoms such as freedom of speech and expression, freedom of assembly, freedom of association, freedom of movement, freedom to reside and settle in any part of India and the right to carry on any profession, or occupation or conduct any trade or business (Article 19), and the right not to be denied admission to any educational institution maintained by the State or receiving aid out of State funds on grounds such as religion, race, caste, language or any of them (Article 29 (2)), which are given only to citizens, are available to any person. It was such foresight of the makers of the Constitution that helped India remain a Constitutional democracy for more than 50 years. No other country liberated from colonialism after the Second World War has remained under one single Constitution for more than half a century. Other countries were either engulfed by ethnic conflicts or taken over by dictators.

In the previous lecture, I have discussed the nature of secularism as incorporated in the Indian Constitution. The theme of this lecture is to point out how the Constitution of India and the laws enacted by Parliament and various State legislatures combat fundamentalism and communalism. Lastly, it will be my effort to point out how *Hindutva* or its euphemistic nomenclature "cultural nationalism" is against the Constitution, and anti-democratic because it is essentially majoritarian and therefore against pluralism.

Constitutional Ethos.

The Constitution was made for a changing society. If the United States Constitution reflected the contemporary Eighteenth century political

[8] Article 7.
[9] S. 7 of the Citizenship Act, 1955.
[10] Article 7 of the Constitution
[11] Article 14
[12] Articles 15, 16, 29(2) and 324.

philosophy of economic *laissez faire* and individualism, the Constitution of India reflected the twentieth century philosophy of welfare state, social engineering through law and social modernism. A feudal and superstitious civil society had to be modernized and made compatible with the values of liberty, equality, fraternity and social justice, which were essential for the sustenance of democracy. A movement against caste and gender injustice had already started during colonial rule and it ran parallel to the national movement for independence. After getting independence, India had to address those social evils, which had kept India backward. Therefore the Constitution included the abolition of untouchability as a fundamental right in the Constitution[13]

Fundamentalism

"Fundamentalism" according to Oxford Dictionary means "strict maintenance of ancient or fundamental doctrines of any religion. "Orthodox" means holding correct or currently accepted opinions, especially on religious doctrine, morals etc." Fundamentalism and orthodoxy are many a time synonymous and overlapping. Orthodoxy, however, is less monstrous than fundamentalism because it changes with the times. Hinduism is known for orthodoxy but much less for fundamentalism. This is because the norms of Hindu religion and morality changed very often with custom. Since custom was an important source of Hindu law, the latter continuously evolved and changed with the times. The caste system was the result of orthodoxy, and cleverly conceived to perpetuate social inequality. It, however, acquired the character of fundamentalism at times. The practice of untouchability was an instance of orthodoxy as well as fundamentalism. The pluralistic nature of Hinduism also prevented the growth of fundamentalism. There were various streams in Hinduism ranging from atheism to bhakti. [Charwak to Dyneshwar-Tukram] Since there is no holy book or one God, fundamentalism was also compartmentalized. Compared to Hinduism, Islam and Christianity provided greater space for fundamentalism because they have a holy book, one God and rituals. But this difference between orthodoxy and fundamentalism is rather semantic. In terms of oppression of human freedom, both are alike. Fundamentalism addresses the members of the religion. Its oppressive regime is directed more inwards against the followers of that religion. It insists that women must wear veil that they must not go to school, that they must be married before they reach the age of puberty. It also insists that a person must pray at a particular time and so many times in a day. He must grow beard or must shave his head on certain occasions. It insists that abortion or even family planning was against the religion. These are mostly rules of morality which have the sanction of religion, and they are enforced through collective coercive force. It restricts individual liberty and particularly imposes severe restrictions on

[13] Article 17

women. It denies equality and gender equality and is most oppressive against the dissenters. It does not allow any criticism of religious doctrines and therefore prevents any reform of the religion. The most recent example of a fundamentalist regime was the Taliban regime in Afghanistan. It imposed severe curbs on human freedom and almost enslaved the women folk.

Orthodoxy and fundamentalism have been old friends and have often lived together. As a society moves towards modernization, orthodoxy becomes less and ultimately it weakens the fundamentalism also. Freedom kills fundamentalism and therefore fundamentalists are hostile to freedom. Fundamentalism and democracy are also therefore against each other. Therefore fundamentalism and authoritarianism go together. The post-Shah Iran was fundamentalist. Saudi Arabia is fundamentalist. But authoritarianism is not always supportive of fundamentalism. Stalin's regime was not fundamentalist. China's regime is not fundamentalist. But both could be described as authoritarian.

In Europe, fundamentalism was fought through reformation, renaissance and enlightenment. The establishment of democracy and secular state was the ultimate result of such developments. Secular state was an answer to religious intolerance and existence of a variety of faiths in a society. It also prevented fundamentalism by assuring freedom to the individual. Secularism and democracy were considered to be inseparable. Although the United Kingdom is theoretically a denominational State, it is for all practical purposes a secular state because English society is by and large secular.

Communalism and Fundamentalism

Communalism and fundamentalism also need to be distinguished. "Communalism" as understood in India means hatred of another community and pride of one's own community. A communal person may or may not be religious. She may be an atheist also. But she is against another group of people because they belong to another religion or speak another language. Mahatma Gandhi or Dr. Ambedkar were religious persons but were not communal. Swami Vivekanand was a deeply religious person but treated all religions with respect. While a fundamentalist is oppressive towards people of his own community, and seeks to impose obsolete code of conduct on his people in the name of religion, a communalist is oppressive against people of another community. He is essentially exclusivist. He may not be religious at all. He uses religion only to discover an enemy within his own country. Hitler was a racist and anti-Semitic. He was neither religious nor fundamentalist. He was communal. The word "communal" has a typical Indian connotation. It only means being against some other community because of its different religion or language. Communalism often leads to genocide or pogroms of extermination of a minority or the hated

community. In the context of *Hindutva*, it means hatred of Muslims and other religious minorities.

Hindutva ideology denies that India is a country of diverse cultures and traditions. *Hindutva*, say its protagonists, is not a religion but a way of life- a culture and a tradition to which every nationalist must subscribe. Unfortunately the Supreme Court of India also gave an identical version of *Hindutva* when it held that advocacy based on *Hindutva* did not offend the provision of the Election Law which forbids appeal to the electorate on the ground of religion.[14] If Hinduism is a way of life, are Islam and Christianity not ways of life? To say that *Hindutva* is a way of life is tantamount to equating *Hindutva* with nationalism. It doubtless belittles the importance of other ways of life. It also means that those who are not Hindus must accept *Hindutva* as a way of life and as far as possible obliterate their distinct ethnic, religious or cultural identity.

Constitution Against Fundamentalism and Communalism

India became a Secular State mainly because of the need to facilitate her pluralistic nationalism, which had emerged since her struggle for independence. One way to refute the two nation theory was to reassure the minorities that they would not suffer from the majoritarian State. The main concern of the makers of the Constitution was to combat fundamentalism and communalism and ensure the protection of minority rights.

While Hindu communalism has a long history, Hindu fundamentalism has reappeared after it seemed to have died under the efforts of social reformists such as Raja Ram Mohan Roy, Mahatma Jyotiba Phule, Shahu Maharaj and Dr. Ambedkar. Fundamentalism reappeared through the revival of sati in Rajasthan. This practice, in which a widow burns herself alive on the pyre of her deceased husband, had been abolished during colonial rule and Raja Ram Mohan Roy had crusaded for its abolition. It suddenly reappeared in the eighties and even ministers and governors blessed the practice. A temple was built on the place where sati took place and soon it became a pilgrimage site. This became a very profitable commercial enterprise for people who could take advantage of peoples' blind faith. The widow seldom died by her free will. It was always imposed on her, allurement being better life in next life. To a society, which had started looking backwards, such revivalism was bound to be a good tranquilizer against uncertainties of life that had come as a result of the rapid social change. Hindu fundamentalism got further boost when a movement for Ram-mandir was undertaken by the Vishwa Hindu Parishad and which was blessed by BJP. Hindu fundamentalists raised the question of locating

[14] *Manohar Joshi v Nitin Bhurao Patil* (1996) 1 SCC 169; *Dr. Ramesh Prabhu v Prabhakar Kashinath Kunte* (1996) 1 SCC 130; *Ramchandra G. Kapse v Haribansh Ramakbal Singh* (1996) 1 SCC 206. S. 123 (3) of the Representation of the People Act, 1951.

temples on the very sites on which mosques were situated on the ground that those mosques were built after demolishing the temples by Muslim invaders. This might have happened 1200 years ago. VHP insisted that temples must be built on those very sites by removing the mosques. It was such pernicious campaign that ultimately led to the demolition of the Babri Masjid situated at Ayodhya on 6 December 1992. BJP as a political party had supported this cause and had derived immense political mileage from owning that agenda. After the demolition of the Babri Masjid, the President of India acting under Article 356 of the Constitution dismissed the three state governments of the BJP on the ground that they could not function in accordance with the Constitution. This dismissal was challenged before the Supreme Court by the BJP governments. The Supreme Court not only upheld their dismissal but declared that secularism was an aspect of the basic structure of the Constitution.[15] The electorate, however, had endorsed their dismissal even before the Court upheld it by rejecting BJP in the elections held for those state assemblies Parliament passed law under which the land on which the demolished mosque stood along with surplus land was acquired by the State. The surplus land was to be given back to their respective owners after the court resolved the dispute about the location of the temple.[16] BJP now finds itself in a tight corner. Having encouraged the agitation for the temple in the past, now it could not facilitate its construction due to legal and Constitutional constraints. Being in the seat of power, it has to abide by the law. The tangle can be solved either by a court verdict or through settlement of dispute between the Hindu organizations, and Muslim organizations which oppose the construction of the temple. The Allahabad High Court has asked the Archaeology Department to excavate the site of the temple to find out if there are any evidences of the existence of a temple. In the meantime, the Government of India has filed an application in the Supreme Court asking permission to give part of the land other than the land on which the mosque stood to the trust which desires to build a temple.

The movement for relocation of temples was an essentially anti-Muslim agenda. Why rake up matters, which took place thousand years ago and about which no concrete evidence would be available. This has stopped the development of the country. This leads to constant law and order problems and the energy of the State is wasted in merely keeping peace. BJP is committed to the Hindu side. Other political parties want to keep mum. They are equivocal on that issue. They want to please both the communities. VHP and Bajrang Dal of the Sangh Pariwar openly proclaim their intention to establish the Hindu Rashtra and bury secularism. Religious festivals are often exploited for whipping up mass hysteria against the minorities. In Yavatmal in Maharashtra, a Hanuman idol was placed in

[15] *S.R. Bommai v. Union of India (1994) 3 SCC 1*
[16] *Ismail Farukhi v. Union of India* (1994) 6 SCC 360

a church after destroying the cross.[17] Such incidents have been occurring quite regularly. Christian missionaries are often beaten or even murdered. *Hindutva* fascism is targeting Muslims, Christians and secular Hindus who do not agree with them. Any opinion, which they disapprove, if expressed, is retaliated by physical manhandling of the person.

Why Are Such Acts Not Punished?

There are enough laws to combat fundamentalism as well as communalism. Hate speeches are forbidden by the Indian Penal Code. The Sangh Pariwar has been spreading hatred against Muslims. Violence is the outcome of such hatred. Speeches and writings full of venom against minorities is continuously poured out. In reality, Muslims have been victims of hidden communal bias in the majority community. No action is, however taken against such offenders because the governments are afraid of the muscle power which such perpetrators can mobilize. Although the Constitution guarantees fundamental right to freedom of speech and expression, in reality that right has almost vanished so far as anti-*Hindutva* opinions are concerned. People are afraid of speaking because of the threat of physical violence. *Hindutva* lobby has no patience for any discussion. Their only way is to shut the mouths of those who criticize them. English newspapers such as the Hindu and the Times of India come out with critical articles but no language paper has shown courage to join issue. The present state is worse than the emergency of 1975 because this is an undeclared emergency.

Secularism as a Constitutional Principle

Although the Constitution did not say so. the Indian State was conceived as a secular state from the beginning. It satisfied the three essential criteria of a secular state[18] namely (1) the State had no religion;[19] (2) there was guaranteed equality before the law and equal protection of law and prohibition of discrimination on the ground of religion, race, caste, and place of birth or any of them.[20] and (3) the individual had freedom to believe or not to believe and to practise, profess and propagate his religion.[21] The Constitution purposely did not include the word "secular" in the original preamble of the Constitution. The word "secular" had acquired a very specific meaning in the Western democracies because of the peculiar historical process through which secularism had evolved. The West had gone through a severe and bitter conflict between the Church and the state and ultimately it had ended in the clear division of powers between the Church

[17] Times of India, 15 March, 2003.
[18] D.E. Smith, *"India As A Secular State"*, Princeton University Press, New Jersey, 1963. p.19
[19] Unlike the Constitution of the United States, the Indian Constitution does not expressly say that the State shall not establish any religion. See the First Amendment) But in Article 27 it is says that the state shall not impose any tax for the promotion of any particular religion.
[20] Articles 14, 15, 16 and 29(2).
[21] Article 25

and the State. The Church was supposed to be the exclusive guardian of spiritual aspects of individual's life and the state was to be the exclusive guardian of temporal affairs. The Constitution of the United States provided in the First Amendment that "the Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof". This has been interpreted by the United States Supreme Court as erecting a wall of separation between the Church and the State.[22] The Constitution of India did not envision such wall of separation.

In India, where history of Church-State relationship was different, total insulation of the State from religion was neither necessary nor desirable. In India, the Secular State was conceived mainly as a solution to the multi-religious character of Indian nationalism. We wanted the State which will treat all persons irrespective of their religion with equality and be equidistant from all religions. Indian society is essentially religious and a secular state of the Western model would not have been suitable. Further, history of India had been of not mutual exclusiveness but of collaboration and co-operation. Even Muslim kings gave financial help to Hindu religious institutions Hindu Kings similarly helped Muslim darghas and endowments. The colonial government also continued the same tradition. Therefore, although the Constitution forbids imparting of religious instruction in any educational institution maintained wholly out of state funds or receiving aid out of State funds[23], it allows such instruction to be given in institutions administered by the State but which are established under any endowment or trust which requires that such instruction shall be imparted.[24] Further, educational institutions which are recognized by the State or receiving aid out of State funds shall require any person to attend such religious instruction without her consent[25].

While providing for such tolerance of religions and a limited intercourse between religion and the State the founding-fathers of the Constitution also provided for State-intervention in religion with a view to redrawing the limits of freedom of religion. Untouchability was abolished and its practise in any form was made punishable, Article 25 of the Constitution clearly shows the limits of freedom of religion. While it guarantees freedom to practise, profess and propagate religion, it makes such freedom subject to public order, morality and health and to other provisions of Part III of the Constitution which contains the bill of rights (Fundamental Rights). Further, the State has been given power to make law to regulate or restrict any economic, financial, political or other secular

[22] *Everson v Board of Education* 330 U.S. 1 (1947). See Fred W. Friendly and Martha J.H. Elliot "God And The Classroom- Free Exercise of Religion vs Establishment of Religion" in *The Constitution : That Delicate Balance- Landmark Cases That Shaped the Constitution* p. 109. [Arnold-Heinemann, 1987]

[23] Article 28(1)

[24] Article 28(2)

[25] Article 28(3)

activity which may be associated with religious practice; and to provide for social welfare and reform or the throwing of Hindu religious institutions of a public character to all classes and sections of Hindus. An entire reading of the Article 25 shows the concern of the founding-fathers regarding the transformation of a medieval society into a modern, egalitarian society. Article 26 gives four rights to religious denominations which are

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own an acquire movable and immovable property; and

(d) to administer such property in accordance with law.

These provisions clearly show that the Constitution did not envisage a strict separation between the State and the religion as is envisaged in the First Amendment of the Constitution of the United States. The Constitution visualized State intervention in religion with a view to limiting the scope of religion and confine it to spiritual matters. When it was suggested that personal laws should be saved from future legislative action, Dr. Ambedkar emphatically rejected it. Supporting the State intervention in matters of religion he said:[26]

"I should like to say this that, if such a saving clause was introduced into the Constitution, it would disable the legislatures in India from enacting any social measure whatsoever. The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religious and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill."

He further said:[27]

"There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious."

Separation of what is essentially religious from what is not is a delicate question and depends upon the proper modernization of society. Unfortunately, the Supreme Court of India held that what was essential has to be decided by considering what was considered essential by that religion. Such essentiality ought to have been deciphered from the religious texts, traditions and customs and also examining them with reference to

[26] Vasant Moon (ed) Dr. Babasaheb Ambedkar- Writing and Speeches Vol 13 Dr. Ambedkar The Principal Architect of the Constitution of India, p.405 [Education Department, Government of Maharashtra, 1994]

[27] *Ibid.*

the fundamental rights guaranteed by the Constitution. Religious orthodoxy has always stifled individual freedom and denied social equality. Where religious doctrines clearly went against those values, they ought to have been considered as non-essential aspects of religion and therefore not entitled to the protection of freedom of religion. This unfortunately did not happen.[28] Although the Court allowed State supervision over the secular matters of a religious trust or an endowment[29], it tilted the balance in favour of religious denominations or establishments where their rights were pitted against the individual's rights. This was evidenced most tellingly in *Saifuddin Saheb v State of Bombay*.[30] The Bombay Legislature has passed a law forbidding ex-communication of a person on the ground of non compliance with certain dictates of the religious denomination. The consequences of ex-communication were total ostracization of a person from the intercourse within that community. Such ostracization resulted in denial of various civil rights of that person and the power to ex-communicate in itself was a draconian power, which could be abused. Such power was vested in the head of the Dawoodi Bohra community and he could use it to the detriment of individual liberty of the people belonging to that sect. The Supreme Court, however, struck down the Bombay law as being violative of the religious denominations' right to manage its affairs in matters of religion. The Constitution also makes n omission in Article 26, which guarantees the rights of the religious denominations. While it says that those rights be subject to public order, morality and health, it does not explicitly make those rights subject to the fundamental rights guaranteed by Part III of the Constitution. In fact, in view of the new interpretational approach which the Supreme Court adopted since *Maneka Gandhi v Union of India*,[31] the Court ought to read the rights given to religious denominations as subject to all those restrictions to which freedom of religion of the individual is subject.

There is no State religion. The State's neutrality vis-à-vis various religions is assured by Article 27 which says that "no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious institutions". The State therefore could give concessions to pilgrims who came for the Eucharistic conference or to those go to *Haj* or those who attend *Kumbh Mela*. The State has to be equidistanced from all religions. *Sarva dharma sambhava* is the purport of the Indian secularism, because unlike in the West it did not come in response to a conflict between the State and the religion However, there are exceptions to this.

[28] See S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Chapter 5 (OUP 2002)

[29] *Commissioner of Hindu Religious Endowments v Laksmindra Swamiar* AIR 1954 SC 282

[30] AIR 1962 SC 853.

[31] AIR 1978 SC 597 : (1978) 1 SCC 248

Article 290A provides that a sum of 46 lakhs and 50 thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund ; and a sum of 13 lakhs and 50 thousand rupees shall be charged on, and paid out of the Consolidate Fund of the State of Tamil Nadu every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956 from the State of Travancore Cochin This provision became necessary as it was a condition precedent to the accession of that State to India. The flexibility of India's secularism is evident from this.

That must have been the reason why the word "secular" was not included in the original Preamble. It was added by the Constitution (Forty-Second Amendment) Act, 1976. The Preamble as amended now says that "We the People of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic" "give to ourselves this Constitution". This does not mean that secularism was a later addition to the Constitution. It inhered in the Constitution through various provisions but the model of Indian secularism was not based on strict separation of religion and the state. It came mainly as a response to pluralism of faiths, ethnicity and languages and cultures. It satisfies the Western model of secularism in so far as it is non discriminatory. The main mandate of Article 25 of the Constitution was, however, to bring the profession and practice of religion in conformity with the values of a modern society based on liberty, equality and justice. The mandate was not to bring in rationalism but to weed out obsolete and inhuman aspects of religious practice such as sati, human sacrifice or caste and gender discrimination. The mandate was to limit the scope of religion and separate faith from social and political life. In other words, the mandate was to secularise the civil society.

We have pointed out above how the Supreme Court failed to read the social reform agenda in Article 25 of the Constitution when it struck down the anti ex-communication law enacted by the Bombay Legislature. The social reform agenda also took a back-seat due to compulsions of electoral politics. Political parties vied with each other in appeasing the voters and one way to appease them was to encourage superstition and religious revivalism. Although legislation were enacted in large numbers, society moved backwards towards greater obscurantism and social regression. *Sati* was revived in Rajasthan; dowry increased despite the Dowry Prohibition Act and took a very barbaric turn leading to increasing of dowry deaths. Although a lot of talk was made about empowerment of women, their conditions continued to deteriorate. The sex ratio has been showing the decreasing number of women as compared to men. Son preference is a common characteristic of all Oriental people including China. Female foeticide has now been facilitated by new sex diagnostic technology.

Recently five *dalits* were lynched to death in Haryana because they were found taking out the skin of a living cow.

The system of criminal justice became more and more ineffective and there were large number of acquittals. People lost the fear of the law. Crimes could be committed with impunity. Rapes of women have increased. Total breakdown of the rule of law was bound to make people more insecure. Corruption increased, young people could not be sure of finding jobs and the educational system became more and more commercialized and devoid of any ideology. It imparted information but no thought. Liberalism, which is the essence of secularism vanished from educational curriculum. All such things were bound to increase fatalism and instead of believing in scientific outlook, people became more and more dependent on astrologers, god men and blind faiths. Secularism was bound to suffer in this process because unless the civil society becomes secular, no secular state could function. The political parties and political leaders had lost their commitment to social reform. They looked to secularism only as a tool of satisfying the minorities and winning their votes. The vote bank politics was bound to have a very deleterious effect on the implementation of the social reform agenda. The failure of the social reform agenda is evident from the core issues that are contested today namely building of the Ram-mandir on the same site which was occupied by a mosque called the Babri masjid which was demolished by Hindutva zealots on 6 December, 1992, a ban on cow slaughter, a ban on religious conversion and installing portraits of various leaders. The issues are no longer regarding poverty, unemployment, women's liberty or scarcity of water and other resources, deterioration in the environment.

The behaviour of the civil society is quite contrary to the fundamental duties which were included in the Constitution by the Constitution (Forty-Second Amendment) Act, 1976. This amendment was enacted during the 1975 emergency and these duties came mainly to camouflage various anti-liberty provisions that were part of it. Prime Minister Indira Gandhi, whose government had brought in these duties into the Constitution, herself had become extremely fatalistic and obscurantist during later period.[32] Some of the duties which are most violated are:

(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the national Anthem;

(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

[32] Katherine Frank, *"Indira: The life of Indira Nehru Gandhi."*

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to remove practices derogatory to the dignity of women;

(f) to value and preserve the rich heritage of our composite culture;

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;

(i) to safeguard public property and to abjure violence;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

Each of these duties and particularly those mentioned in (e), (f) and (h) are being disregarded to the detriment of secularism and pluralism. Harmony and spirit of brotherhood has been lost in view of organised pogroms of extermination against the minorities that were witnessed in recent years, in which the State authorities also collaborated. These have been documented in the Justice Srikrishna Commissions Report on Bombay communal riots in 1992-93[33] as well as in several studies and investigations done in respect of Gujarat carnage of 2002[34].The rich heritage of our composite culture is certainly being jeopardized by insistence on homogenization of culture through what is known as "cultural nationalism". Scientific temper and spirit of inquiry are being eroded through use of muscle power against those who express dissent. Political leaders and political parties are vying with each other in proving that they are religious and are contributing to the influence of god men, superstitions and obscurantism. Even judges are not free from this. They also openly proclaim their pupilage of God men. No wonder that all obsolete and socially irrelevant social practices have perpetuated. Instead of limiting the sphere of religion, it has expanded and has entered politics in a decisive manner. Even today human sacrifices occur. Young children are killed to propitiate the other worldly powers in order to overcome one's own childlessness. Sati, a practice of a widow burning herself on the pyre of her deceased husband has

[33] See *Damning Verdict* (Sarang Communications and Publishing Pvt Ltd)

[34] *Communalism Combat* Vol 1, Issue 1 April-May 2003; *"Crimes Against Humanity"*, Concerned Citizens Tribunal - Gujarat 2002, Vol. 1&2 (Anil Dharkar for Citizens For Justice and Peace, Bombay 2002) There was an adverse report of the National Human Rights Commission, New Delhi also.

resurfaced. Women are killed and then a temple is raised at the place where she died. Such a temple becomes a successful commercial enterprise. One wonders whether India is living in the twenty-first century or she is still in the medieval period. Technologically we are in the Twenty-first century because we can manufacture an atom bomb but culturally we still linger in the medieval period.

Is India more religious? We will have to really understand what being religious means. Were terrorists who in the name of religion killed innumerable number of innocent people and destroyed the World Trade Centre on New York on 11 Sept. 2002 religious people? Were those who demolished the Babri Masjid on 6 December, 1992 religious people? Are those who kill women who do not wear a veil religious people? Are those who in the name of "Islam in danger" or "Hinduism in danger" kill innocent people religious? Were those marauders who inflicted untold suffering on helpless and unarmed people of Gujarat as a revenge for equally brutal acts committed at Godhra by some people, whose identities are yet not known, religious? Are not criminals masquerading as religious? In India, temples and mosques have grown in number but humanism has diminished. Both Hindu as well as Muslim communalists are neither religious nor humanists. Their acts do not bring any honour to their respective religions. If one is religious in a true sense, he cannot be communal. Religion needs to be seen as synonymous with ethics. In fact when religion separates from ethics, it becomes mere bundle of rituals and legitimiser of crime and sin. Vivekanand and Gandhi were religious but not communal. Ambedkar was religious (which is evident from the fact that he embraced Buddhism) but he was a liberal. The conflict therefore is not between religiosity and secularism as is being projected. The conflict is between good and evil. What is secularism after all? It is a code of ethics in which individual liberty, social equality and fraternity are considered as prime values. The Constitution required the transformation of civil society from medieval to modern. Gandhi talked of spiritualization of politics in the sense that politics should become more ethics based. It did not mean total eradication of religion from societal life. If society observes dharma, it is bound to be a more virtuous. How can you be religious and yet corrupt? India is second among the Asian countries in corruption and yet India is most vocal about religions and religious conflicts.

Muslim Question

Gujarat holocaust was cruel and most unfortunate. India will have to carry shame on her face for several years because of it. What is shocking is the insensitivity of the civil society to human suffering and most barbaric ways in which human beings were killed, women raped and children tortured and killed. Brutalization of the civil society was at its height. Why did this happen? How could the communalists of both the communities succeed in creating so much hostility and hatred against each other?

Pakistan, of course, has played a very important role in creating such antagonism. Pakistan has been carrying on cross-border terrorism since 1989 in Jammu and Kashmir. Before that they helped the terrorists in Punjab. So many innocent people of both the communities have died in the violence unleashed by terrorism. Hindu communalists have often used Muslims in India as hostages for Pakistan's misdeeds. *Hindutva* as an ideology has always been anti Muslim. But is it not a fact that *Hindutv*a as an ideology did not appeal to a large number of Hindus until recently? After independence, and particularly because of the partition, ghastly communal carnage took place in both the countries. Innocent people were killed, women raped and children abused. The victims were of both the communities as the butchers also belonged to both the communities. Even after the partition and the creation of the Islamic State of Pakistan, India had a large Muslim population. Today India is next to Indonesia in so far as Muslim population is concerned. India has more Muslims than Pakistan has. Muslim population before partition in the undivided India was 33% and after partition it came down to 10 %. In last 50 years it has grown to 12%. How can these 12% people pose a threat to the majority community? Despite most cruel communal carnages that took place after partition, the majority community in India did not become communalized. Neither the Hindu Maha Sabha nor the Jan Sangh (which was a political incarnation of the RSS) received much of the public support. RSS joined Jay Prakash Narain's movement in 1975 which was against corruption. RSS and Jan Sangh were able to garner some legitimacy due to their association with the JP movement. Jan Sangh joined the Janata party which was formed after the emergency. This was a conglomeration of all non Congress political parties except the communists. The Janata experiment, however, miserably failed because there was nothing except hatred of Indira Gandhi that united them.

In the 1985 Lok Sabha elections, BJP, a post Janata incarnation of Jan Sangh could hardly get 2 seats in the Lok Sabha. It tried to put the mask of liberalism and non communalism by adopting Gandhian socialism as its ideology. It, however, returned to the Hindutva agenda after the Rajiv Gandhi government legislated to undo the effect of the *Shah Bano* decision of the Supreme Court.[35] This decision gave to Muslim divorced woman a right to maintenance from her husband beyond the period of *iddat. Iddat* means a period of three month after divorce mainly to make sure that there is no pregnancy. The Muslim personal law allowed maintenance to be given only to a Muslim divorcee during the period of *Iddat.* There is, however, a provision in Section 125 of the Code of Criminal procedure for giving maintenance to the divorced woman. This provision is not part of the Muslim personal law. In order to appease the Muslim fundamentalists, a provision was made in Section 127 of that Code saying that if a divorced woman had received any amount on divorce as per her personal law, she

[35] *Mohd Ahmed v Shah Bano* AIR 1985 SC 945

would not get any maintenance under S. 125. The Supreme Court held that if the amount paid on divorce under the personal law, which is known as *meher* was not sufficient for the woman's livelihood, she would be entitled to maintenance under S. 125. The Supreme Court decision was quite just and fair to women and was a step in the right direction towards gender justice. The Rajiv Gandhi government, however, knuckled down under pressure of vote-bank politics and in order not to lose Muslim votes enacted a law to undo that decision. The agitation against *Shah Bano* decision was spearheaded by Mullas and Moulvis and other fundamental sections. Syed Shahbuddin a member of the Socialist Party unfortunately led that agitation.

The Muslim Women's' (Rights on Divorce) Act, 1987 was an appeasement of the fundamentalist sections of Muslims. It was not in the interest of large number of Muslim women. It was opposed by several Muslim intellectuals.

Reversal of *Shah Bano* decision by the Congress government came as a great boost to BJP's crusade against appeasement of Muslims by Congress. The passing of the Muslim Women's Rights on Divorce Act, 1985 to undo the most liberal provisions of the law as interpreted by the Supreme Court in *Shah Bano* case was the most retrograde step taken by the Congress government. The Muslim leadership also vehemently opposed the *Shah Bano* decision. In fact they did not realize that their fundamentalism was bound to fuel Hindu fundamentalism. It strengthened the hands of the Hindu communalists. They accused the Congress of appeasement of the minorities. At the same time, the Hindu chauvinists overlook the fact that major challenge to the Muslim Women's Rights on Divorce Act (anti Shah Bano law) came from Muslim intellectuals. It was Daniel Latifi, a senior advocate of the Supreme Court who challenged the Constitutional validity of that law and ultimately succeeded, though posthumously, in securing a judgment which for all practical purposes watered down the pernicious elements of that law and secured even better conditions for a Muslim divorcee[36] The Supreme Court did not strike down the law but interpreted it in such a way that a Muslim husband was made to make an adequate provision for his divorced wife. The Court also made it clear that if the Muslim Women's Act were to be interpreted so as to deny maintenance to a woman, it would be unconstitutional and void as being contrary to the fundamental right to equality.

Muslims have stayed in India of their own sweet will. They have no other country. True, a large number of them are very poor and illiterate. After the partition, they suffered from the majority's prejudice and that led to their ghettoisation. Poverty, illiteracy and insecurity combined to make

[36] *Daniel Latifi v. Union of India* (2001) 7 SCC 740. See S. P. Sathe, "*From Shah Bano to Daniel Latifi*" The Lawyer's Collective, Vol.17 (1), Jan. 2002 p.4-10

them fundamentalists. They sought their distinct identity in their distinct Islamic external manifestations. *Hindutva* lobbies' cry for a uniform civil code was mainly considered by them as an effort to obliterate their different identity. Greater the Hindu chauvinism, greater was the resistance to uniform civil code. Uniform civil code ought to have laid greater stress on gender justice than on uniformity. Although Dr. Ambedkar had opposed the saving of personal laws from the purview of future reformist legislation, as a democrat he knew that possessing power to legislate was different from exercising such power. In the Constituent Assembly he had said:[37]

We must all remember-. that sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must reconcile itself to the sentiments of different communities. No Government can exercise its power in such a manner as to provoke the Muslim community to rise in rebellion. I think it would be a mad government if it did so....

Uniform civil code was essentially an agenda of reform of the personal laws of various communities which essentially included modernization and gender justice. This had to be done in a gradual manner. Even many of the laws enacted for the majority communicated such as Child Marriage Restraint act, 1926 which forbids marriages of persons below 21 years of age if male and 18 years of age if female or the provision in the Hindu Marriage act, 1955 forbidding polygamy have not been satisfactorily implemented. As long as Muslims in India continue to live in fear and insecurity, the fundamentalist leadership among them is bound to motivate them to resist any legal reform. In fact, the communalist and India hating regime of Pakistan, fundamentalist Muslim leadership in India and the Sangh Pariwar have a common aim and that is to keep these two communities divided. While the Sangh pariwar keeps Muslims constantly under threat, it has managed to keep the majority community under fear. Why should 80% people be afraid of 12 % people? Uniform civil code should be seen from the perspective of legal reform not so much for achieving uniformity as for achieving gender justice. Polygamy among Muslims is bad because it offends gender equality. The *Hindutva* propaganda that because of permission for polygamy Muslim population increases has no scientific basis. Population growth is linked to poverty and illiteracy. If the growth rate among Muslims is higher, it is because there is greater poverty and illiteracy and less of women's freedom. It has been found that despite a ban on polygamy among Hindus, the incidence of polygamy among Hindus is higher than that among Muslims. A good deal of *Hindutva* discoure is based on misinformation and hostility towards Muslims. It is not in the interest of the nation to continuously target a minority as large as of 10 crores of people. This is surest way to keep

[37] Supra n 26, p. 406.

India politically unstable, socially backward and economically stagnant. Even from purely utilitarian point of view, such continued embittered relations between Hindus and Muslims is harmful to both.

We must really pity the people of Pakistan that in 50 years they have not received the fruits of democracy. Jinnah talked of a nation of the Muslims but Pakistan has refused to treat even all Muslims alike. There are *mujahirs* (those who migrated from India) who are fighting for justice. Altaf Hussain a Mujahir leader came to India and advised his Muslim brothers and sisters of Jammu and Kashmir not to opt for being part of Pakistan. Pakistan has refused to admit even those Biharis who came to Pakistan and stayed in East Pakistan but today are refuges in Bangladesh because of their active association with the West Pakistan's brutal suppression of Bengali nationalism. They want to come back to Pakistan but are being denied entry. Unlike Israel, where any Jew can go, no Muslim can go to Pakistan as a matter of right. The division of Pakistan with the creation of Bangladesh belied the two nation theory of Jinnah. Pakistan has become a citadel of terrorists and criminals. Let us not imitate Pakistan. In fact we should wish that Pakistanis will one day liberate themselves from the authoritarian military rule. As long as one thinks only in terms of Hindu –Muslim dichotomy, one will not be able to distinguish between the people of Pakistan and the rulers of Pakistan. Pogroms against Muslims and Christians which have been taken up by communalists in India are helping the authoritarian regime of Pakistan. Terrorism cannot be combated by being terrorists yourself but by uniting all against terrorism and bolstering up our security establishment.

By unleashing terrorism against Indian Muslims, the Sangh pariwar helps Pakistan sponsored terrorism. We can fight Pakistan sponsored terrorism successfully only if we close ranks between our own citizens. To the world also India must appear as a more civilized nation. Revenge and violence against unarmed and helpless people creates a very poor image of the country. Our nationalism should be positive and not negative. The present regime in India has unfortunately projected nationalism in negative terms. Our entire nationalism has become adversarial. That is why there is so much jubilation when India wins a cricket match in World Cup against Pakistan. The celebration is not of a victory in a sport but as if we have won a war. In this do we not belittle our country and ourselves? Why should we give so much importance to one country and that too a country which is plagued by terrorism, fundamentalism and drug trafficking? Further, winning of a cricket match against Pakistan is not victory of Hindus against Muslims. The Indian team has always had a good sprinkling of Muslim players whose performance as cricketeers has been significant. How can we forget Pataudi, Syed Kirmani and Azhar Hussain? How can we belittle the performance of Zahir Khan and Mohd Kaif in the World cup matches?

Hindus and Muslims have shared many common features. Our music, our films and our arts show our composite culture. We cannot think of Indian classical music without thinking of Ravi Shankar, Halim Jafar, Vilayat Khan and Nikhil Bannerji, Amjad Ali, Zakir Hussain Bismilla Khan.; Amir Khan, Kumar Gandharva, Bhimsen Joshi, Jasraj, Raiskhan and Jitendra Abhisheki. We still remember nostalgically about Begum Akhtar and Bade Gulam Ali Khan. Even today many of us admire Gulam Ali and Mehdi Hasan who hail from Pakistan. The lives of two communities have fused into each other and they have been polluted only by communalists of both the communities. The challenge before us is how to defeat these communalists. How to usher into a civil, peace loving society free from violence, hatred and distrust?

The political parties are also responsible for the decline of secularism and growth of majority communalism. They must not use Muslims only as a vote bank. It is myth that all Muslims vote to the same party. Even Muslim votes are distributed among several competitors. Why should political parties ask religious heads to issue *farmans* to Muslims to vote in a particular way? Are they also not contributing to communal polarization? The soft *Hindutva* of the Congress party shows its lack of commitment to pluralism. We should tell our Muslim friends also that their resistance to reform of their personal law is not in their interest and it unnecessarily fuels *Hindutva* lobby's pernicious hate campaign.

In developing countries where traditions of democracy have yet to strike roots and where public opinion can be swayed by sentiments and parochial feelings, such counter-majoritarian check on democracy was found to be necessary.[38] That danger has not disappeared even though the coalition governments have come into existence. If the *Hindutva* ideology makes headway, we might face a similar situation as we faced during the emergency of 1975. The Constitution could then be subverted through the process of Constitutional amendment. The basic structure doctrine remains our only hope against such majoritarian dictatorship.

What Jinnah had in mind was a majoritarian democracy. Although in theory there would be no Muslims and no Hindus, in reality, every one would be a Muslim. There is much similarity between what Jinnah said and what the Hindutva protagonists say. They also say that there should be no majority and no minority. But if the minorities are not specially protected through Constitutional guarantees, they would be submerged in the majority. In the United States, there is a boiling pot theory which means that whosoever comes to the United States gets assimilated into the American culture and has no distinct identity. Although he spoke of Hindus and Muslims retaining their religious identities, he held such identities to be

[38] S.P. Sathe, *Judicial Activism: Transcending Borders and Enforcing Limits*, chapter 3 (OUP 2002)

relevant only for their personal lives but not for public affairs. Naturally, where there are permanent majorities, the majority regime is bound to be normatively satisfying the requirement of equality though without equality in results. It is a strange paradox that Jinnah and the Hindutva thought are almost identical on majoritarian nature of democracy. Jinnah is often praised for his above statement and to show that despite his demand for a separate state for Muslims he was secular. We have no doubt that he was secular but he was majoritarian. Savarkar was also secular and actually an atheist, but he was also majoritarian. Hindutva of V. D. Savarkar is very much similar to that concept. If Hindus do not remain Hindus and Muslims do not remain Muslims, as Jinnah suggested, the homogenization occurs. Either people must give up their identities or be prepared to suffer latent and invisible discrimination.

Nationalism and therefore was committed to making special provisions for the religious and cultural minorities so as to help them preserve their distinct identities. The Nehru Committee in 1928 in its report recommended special rights of the minorities[39]. These were essentially seen as counter –majoritarian checks on democracy. In a country where more than 80 % people were going to be Hindus, the minorities would have been wiped out if a mere majority rule were to prevail. India was going to be a nation of various ethnic, religious and cultural groups of people and the numerically smaller groups needed protection of their identities, separate cultures and traditions. All this was provided in the Constitution of India which was made by the Constituent Assembly and became a law in 1950.

Whether there should be prohibition of the consumption of liquor is determined by the support of a majority. Whether the composite Bombay State should be split on linguistic lines into two states, namely Maharashtra and Gujarat was determined by majority opinion. Whether Goa should be merged in Maharashtra was decided by an opinion poll. But where there is permanent majority and permanent minority divided on the basis of religion, will majority rule be democratic? Minority rights are provided in the Constitution mainly to prevent such perversion of democracy. Democracy means rule by majority but not the rule of the majority. When people say that we do not recognize any majority or minority, they take a very superficial view of democracy. Is freedom to dissent, which is part of the freedom of speech and expression not a counter majoritarian value? Freedom of speech is freedom to say unpopular things. There is a famous statement of French thinker Voltaire who said that even if he hated a thought, he would not prohibit the free expression of such a thought. In most of the written Constitutions, the procedure for amendment is given. One important distinction between a rigid Constitution and flexible Constitution is that a rigid Constitution cannot be amended by a simple majority but

[39] B. Shiva Rao, *The Framing of India's Constitution*, Vol.3, 1968

requires a special majority. For example, our Constitution can be amended by a resolution passed with the support of two thirds of the members' present and voting and absolute majority of the total membership in each house of Parliament. This means that one third members plus one member can thwart a Constitutional amendment.[40] This is a veto in the hands of a minority. But again this is not a permanent majority-minority divide. Such a check on majority opinion is installed in order to prevent hasty amendments. It may be possible to obtain the support of the two thirds of the members present and voting and an absolute majority of the total membership in each House.

Although the Constitution did not say so the Indian State was conceived as a secular state. It satisfied the three essential criteria of secular state[41] namely (1) the State had no religion;[42] (2) there was guaranteed equality before the law and equal protection of law and prohibition of discrimination on the ground of religion, race, caste, and place of birth or any of them.[43] and (3) the individual had freedom to believe or not to believe and to practise, profess and propagate any religion if he believed in it. [44] In addition, it provided special rights of the religious and cultural minorities. The Constitution purposely did not include the word "secular" in the original preamble of the Constitution. The word "secular" had acquired a very specific meaning in the Western democracies because of the peculiar historical process trough which secularism had evolved. The West had gone through a severe and bitter conflict between the Church and the state and ultimately it had ended in the clear division of the powers of the Church and the State in mutually exclusive spheres of activity

Barrister Jinnah, the author of the two nation theory, to which the Hindutva thought was also a contributory, had to admit after the creation of Pakistan that in independent Pakistan, there would be equality before the law and there would be no Hindus and Muslims but only Pakistanis.[45] In the first speech which Jinnah made, he stated that after the creation of Pakistan, there would be no Hindu and no Muslim. While inaugurating the Constituent Assembly of Pakistan, Jinnah said: "You may belong to any religion or caste or creed- that has nothing to do with the business of the state. We are starting with the fundamental principle, that we are all citizens of one state" He further said that "no matter to what community he belongs, no matter what his colour, caste or creed is, he is first, second and last a

[40] Article 368 of the Constitution

[41] D.E. Smith "*India As A Secular State*", Princetion University Press, New Jersey, 1963.

[42] Unlike the Constitution of the United States, the Indian Constitution does not expressly say that the State shall not establish any religion. See the First Amendment) But in Article 27 it is said that the state shall not impose any tax for the promotion of any particular religion.

[43] Articles 14, 15, 16 and 29(2).

[44] Article 25

[45] See Rafiq Zakaria, *The Widening Divide: An Insight Into Hindu-Muslim Relations* , 1995, Delhi, Viking. p. 48

citizen of this state with equal rights, privileges and obligations."[46] This speech is often cited by Jinnah's admirers as evidence of his commitment to secularism. But it is submitted that it is not an evidence of his secularism but rather it is an evidence of his secular majoritarianism. The Hindutva lobby in India also shares a similar view. They also proclaim secularism but their secularism is majoritarian. It is one thing to say that all shall be treated equal before the law and quite another to say that no one will be Hindu or a Muslim. The latter requires total assimilation of the majority's culture and traditions by the minorities and total abrogation of their separate identities.

But this quotation suggests a majoritarian democracy and not a democracy in which all communities would have equal share. Democracy is a rule by majority when majority and minority is of opinion which can shift from time to time. For example, it allowed every section of society to conserve its distinct script, language and culture. This was a guarantee against majoritarianism. It was also a recognition of diversity of cultures. There cannot be cultural nationalism because India has several cultures.

The word "secular" was added to the preamble of the Constitution in 1976 by the Constitution (Forty-Second Amendment) Act. Why did it not form part of the original preamble? It may be that the makers of the Constitution did not want to bind themselves to a specific meaning which that word had acquired due to its association with the history of Europe. In the West, it meant a complete separation between the State and the Church. This had been the result of a long struggle between these two institutions for supremacy. Ultimately their spheres of activity were divided and while temporal matters were within the exclusive sphere of the State, the spiritual matters came to be within the exclusive sphere of the Church. A secular state was therefore understood as State which will have nothing to do with religion. In India, no history of such conflict between the State and the church existed. The State in India, of whichever religious persuasion, gave grants to religious institutions. This policy was continued by the colonial regime also Religions in India, particularly Hinduism and Islam were so all pervasive that they regulated almost every aspect of public and social life. Religion was not confined to private life and spiritual aspects of life. No modernization of society could have taken place without drawing limits on the sphere of the religion. Further, the practise of religion also conflicted with several libertarian aspects of the Constitution such as equality and personal liberty. The Constitution could not therefore allow freedom of religion without circumscribing the scope of religion. Could the practise of untouchability be allowed as freedom of religion? Could gender inequality be allowed as freedom of religion? Could human sacrifice be allowed as freedom of religion? Could sati which means self immolation of a widow

[46] See Zakaria, *"The Man Who Divided India"*, Popular, 2001. p.160

on the pyre of her dead husband be allowed as freedom of religion?

The political formations other than the Sangh pariwar call themselves secular without meaning secularism as understood in the West. They are secular only in this sense that unlike the Sangh pariwar, they do not define nationalism in majoritarian/communal terms. Since India had not gone through a history of conflict between the state and the church which Europe underwent during the Eighteenth and Nineteenth centuries, and there had not been any significant movements towards renaissance or reform of the religions, namely Hinduism and Islam, secularism as understood in the West had never received acceptance either socially or politically. We often described ourselves as a secular state only because we had developed the concept of pluralistic territorial nationalism. The Indian national Congress opposed Jinnah's demand for a separate Muslim nation by promising that India will be a nation of all communities. It will neither be a theocratic state nor a majoritarian state. This had been the basis of the National Movement for independence since the formation of the Indian national congress in 1885. Even after the partition and the birth of a state called Pakistan, which was an Islamic State, the Indian leaders did not retaliate by saying that the remaining India would be a Hindu State. They continued to subscribe to the concept of pluralistic nationalism in which citizenship and rights of citizens were not dependent on their religion.

The Constitution of India defines citizenship in secular terms. It guarantees equality before the law and equal protection of law to all persons.[47] It guarantees freedom to practise, profess and propagate religion to every individual. It guarantees sanctity of life and liberty and embodies essential ingredients of the rule of law in the system of criminal justice. These rights are not confined to citizens but are available to any person- even a foreigner. Certain rights are given only to citizens. They are that there shall be no discrimination on the ground of religion.

It is such pluralistic nationalism which is now being challenged by Hindutva, which is essentially a majoritarian nationalism. It says that this is a Hindu nation, which means that other communities such as Muslims or Christians or Parsis have to either live here as second class citizens or assimilate themselves in the Hindu tradition and culture and obliterate their distinct ethnic identity. They are not communal. There have been people with various overlaps. Mahatma Gandhi was religious but not communal. Jawaharlal Nehru was agnostic and believed that with economic development, people would forget religious differences and get assimilated in a common mainstream known as India. He was perhaps nearest to what can be described as secular. These two communities have been polarized along communal lines and the Hindu fundamentalists are now vehemently

[47] Article 14

proclaiming that the Hindu State would come in the near future. Gujarat carnage, which has been the most brutal and inhuman in the history of mankind, has shamed India as a democracy and a secular State.[48] The fact that the perpetrators of such carnage could get a massive mandate from the people in the elections held for the assembly showed how deep the poison of communal hatred has penetrated into the psyche of the majority community. If India becomes a Hindu state, which is described by Bharatiya Janata party spokesmen as cultural nationalism, it will mean the death of the existing Constitution made in 1950 The Indian Constitution envisages a pluralistic nationalism in which legitimate interests of the religious and linguistic minorities is safeguarded. Any talk of cultural nationalism is nothing but euphemism for Hindu nationalism. Justice Ruma Pal of the Supreme Court of India recently observed in the *Minorities case* that[49]

The Constitution as it stands does not proceed on the "melting pot" theory. The Indian Constitution, rather represents a salad bowl where there is homogeneity without an obliteration of identity.

India never adopted the melting pot theory of nationalism, which is the basis of the United States nationalism but a nationalism where people preserve their distinctive cultures and traditions despite their allegiance to the same State. Different cultures and traditions are part of the pluralistic Hindu tradition also. The national Movement for independence vehemently opposed the two nation theory which postulated two nations of Hindus and Muslims. Even after the partition of the sub-continent and creation of the Islamic state of Pakistan, the Indian leadership remained steadfast on its resolve to keep India a pluralistic nation. Canada, United Kingdom and post apartheid South Africa are examples of such pluralistic nationalism. Multi-culturalism is now the mainstay of all emerging nations. Only few countries are even now founded on ethnic or religious nationalism and they are all backward in development. The division of Pakistan and emergence of Bangladesh as an independent country revealed the futility of the two nation theory. Religion based nationalism has become obsolete in modern world and is becoming even much more so in a post modern world. Gobalisation of human rights commenced when the United Nations adopted the Universal Declaration of Human Rights in 1948 and has since then advanced with each new international covenant of human rights right up to CEDAW

Emergence of Pluralistic Nationalism.

Before independence and also after it, there were forces which supported the demand for a Hindu nation and a Hindu State. But they did not get any appreciable response from the people. Even after the partition

[48] Sidhartha Vardarajan, *"Gujarat: The Making of A Tragedy"*, (Penguin 2002); Also see *"Crimes Against Humanity"*, Concerned Citizens Tribunal - Gujarat 2002, Vol 1 & 2 (Anil Dharkar for Citizens For Justice and Peace, Bombay 2002)

[49] *T.M.A. Foundation v State of Karnataka* (2002) 8 SCC 481, 653 (para 340)

and particularly after the bloody communal carnage that took place on both sides of the border, the communal forces in India remained marginalized until the late eighties. Bharatiya Janata party and its earlier incarnation, the Jana Sangh remained peripheral till the end of the Seventies. They, however, obtained legitimacy by their association with Jay Prakash Narain's movement against corruption. JP would turn in his grave by the thought that Narendra Modi, a young man whom he admired as a sincere worker was the spirit behind the Gujarat formula of BJP's electoral success. BJP has two faces- one a liberal centrist and another a fascist. Its fascist face became prominent in post Godhra massacre of innocent men, women, children and foetuses. Even the Prime Minister Vajpayee, who is considered by many as a liberal among the Sangh pariwar has shown a tendency to appease the Sangh Pariwar by toning down his liberalism. BJP elated by its victory in Gujarat is now determined to use the same methodology for winning elections in other states and also at the center in the year 2004. The Sangh Pariwar is now insisting on BJP to shed its liberal mask and come into its true colours. The Constitution, the democracy and liberalism are all under serious attack. The strategy is to demolish the Constitution in the same clandestine manner as the Babri masjid was demolished in 1992.

How did the Indian civil society become so brutalized? How did the Sangh Pariwar succeed in deepening the hatred of Muslims in the minds of the people of the majority community? What went wrong with the secular political parties? Why have they become so helpless? Why do minorities feel so much threatened? Why does the majority community feel so insecure? In Gujarat, the BJP leaders did not hesitate to malign the Election Commission. The fact that the chairman of the Election Commission was a Christian was invoked to described him as anti Hindu. This was denigration of a Constitutional authority. That showed their contempt for the Constitution and Constitutionalism. The political parties which spoke of Gujarat massacre were described as being pro Pakistani and therefore anti national. Jingoism against Pakistan is being whipped up and when Pakistan is referred, the real target is the Indian Muslims. If BJP finds that the Gujarat formula cannot work again, it may unleash a war with Pakistan in order to win elections and come to power with a large majority. In the mean time, BJP will continue to talk in different voices to confuse the people. VHP and Bajrang Dal will pour out venom against the minorities and Mr. Vajpayee will speak of taking every body along. Both seem to be working in collusion. The liberal face of BJP is rather misleading. BJP wanted to dismantle the Constitution. Therefore it set up a commission to review the working of the Constitution. This writer had said that instead of objecting to the proposed review commission, we should insist that no changes would be made in the basic structure of the Constitution.[50] But the work of that Commission was most disappointing not only to BJP but also to others. It

[50] S.P. Sathe "Review of the Constitution: Past, Present and Future" in V.R. Krisna Iyer and S.P. Sathe *Review of the Constitution of India* NCAS Working Paper Series No. 16, July 2000.

was disappointing to BJP because it did not take any position against a naturalized Indian citizen being the prime minister of India. It was disappointing to others because it did not bring out any thing worthwhile after spending so much time and money.

What is the Constitutional Ethos?

Religious fundamentalism and majoritarianism have been very explicitly forbidden by the Constitution of India. Unlike the Constitution of the United States which says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" but leaves to the Supreme Court of the United States to detail the ingredients of freedom of conscience and what amounts to establishment of religion,, the Indian Constitution says that no tax shall be imposed for the promotion of any particular religion[51], specifically prohibits the State from causing discrimination on the ground of religion, race, caste, sex etc[52] and guarantees to every person freedom to practise, profess and propagate religion.[53] But the Constitution did not leave to the Supreme Court to articulate restrictions on freedom of religion. The text of the Constitution clearly says that freedom of religion is subject to public order, morality and health and to other provisions of part III which contains enumeration of fundamental rights.[54] Part III in Article 17 clearly declares that the practice of untouchability is abolished and enjoins upon the Parliament to enact a law for providing punishment against every form of untouchability. The freedom of religion is also subject to any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice[55] or a law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus[56]. The Constitution also guarantees rights of religious denominations (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law[57]. These rights are subject to public order, morality and health. The Constitution provides that no religious instruction shall be imparted in any educational institution wholly maintained out of State funds.[58] However, if an institution was established under any endowment or trust which requires that religious instruction shall be imparted, and is administered by the State, such prohibition against the imparting of religious instruction shall not apply[59].

[51] Article 27
[52] See Articles 14, 15, 16, 29(2) and 325
[53] Article 25
[54] Article 25(1)
[55] Article 25(2)(a)
[56] Article 25(2)(b)
[57] Article 26
[58] Article 28(1)
[59] Article 28(2)

But even where religious instruction is imparted in an institution which is recognized by the state or receives aid out of State funds, no person shall be compelled to attend such instruction unless such person or if such person is a minor, her guardian has given her consent.[60] The Constitution also guarantees certain rights to the religious and cultural minorities.[61] These provisions clearly show the anti-fundamentalist and anti majoritarian thrust of the Constitution. They also show the linkage of the Constitution with the National Movement for independence and various social reform movements that had started during colonial period.

Although the majority community was of Hindus, who constituted more than 80% of India's population after the partition, it had several anti-fundamentalist and counter majoritarian checks inbuilt into its social fabric and tradition. Hindus did not worship one God and do not have a holy book. Hinduism stomached diversity ranging from Bhakti to total atheism typified by Charwak. Hindus are divided between various castes and regions and that diversity, it was hoped, would prevent both fundamentalism as well as majoritarianism. India was described as a conglomeration of several minorities. It did not have a monolithic majority. Hindus did show orthodoxy, particularly in the practice of untouchability and the caste system and that inflicted a lot of tyranny on certain sections of the people But during colonial rule, some renaissance had started and leaders like Jyotiba Phule and Dr. B. R. Ambedkar aroused consciousness among the downtrodden sections about the social injustice. Such awakening began during the last decades of the Nineteenth century and continued right till the dawn of independence.

Indians are, however, deeply religious and God believing people. There may be agnostics and atheists among them but they are few. A large number of Hindus as well as people of other religions are religious. Being religious must be distinguished from being fundamentalist or communal. A fundamentalist is he who is dogmatic about adherence to certain rituals and beliefs and does not allow any critique of those rituals or beliefs. A fundamentalist does not allow any reform in religion and is opposed to social renaissance. Hinduism has had a long tradition of religious reform which was brought about by saints as well as by faiths such as Buddhism and Jainism For a large number of people, ethical convictions and religious convictions overlapped. There have been instances of fundamentalism in Hindu tradition which resulted in legitimization of caste and gender oppression. But along with such oppressive tendencies, there have always existed forces fighting against such intolerance and obscurantism. From Raja Ram Mohan Roy a movement for social reform had been going on. Abolition of sati by law was the first success of social reform movement. Although there occurred vigorous opposition to the consent bill which sought

[60] Article 28 (3)
[61] See Articles 29 and 30.

to reduce the age of consent at which a sexual intercourse with a girl was presumed to be rape (forcible sexual intercourse), the move had many supporters also. But social reform did not mean total negation of religion. Gandhi succeeded in his effort to make the society morally more virtuous because he used religious idiom. But he rarely used religion in a sectarian manner. There were prayers but no temples in Sevagram. Gandhi's religious idiom was resisted by secularists and rationalists. They thought that his mixing of religion with politic would be harmful to the country and would obstruct social reform. Gandhi's support to the Khilafat movement of the Indian Muslims was indeed a retrograde step. It nurtured obscurantism and orthodoxy among Muslims. His support of the four caste system among Hindus was also criticized vehemently by social reformers. Both Tilak and Gandhi gave priority to national independence over social reform. Gandhi went a little ahead of Tilak in authoring social reforms such as abolition of untouchability or women's empowerment. But he used religious idiom which baffled many secularists. But Gandhi believed that social reform could come only if it was internalized by society. His crusade for the abolition of untouchability was aimed at changing the hearts of the caste Hindus and makes them realize how unjust that practice was. He believed that such reforms could not come through coercion and therefore the law might not yield results unless some social acceptance had preceded it.

The Constitutional Vision

When India became independent, several social reform movements were on. There had been a long tradition of opposition to the tyranny of the caste system and particularly the caste discrimination, the most visible manifestation of which was the practice of untouchability. While Gandhi tried to bring about change of heart among the savarnas, Ambedkar mobilized the dalits politically and made them conscious of the injustice perpetrated through the caste system. There were several movements for the upliftment of women. In Maharashtra, Jyotiba Phule opened a school for girls and also threw open his private well for the dalits. Dalits had no access to public resources and Phule's action went a long way towards social equality He was the first to take up cudgels on behalf of women. In India, religion pervaded all spheres of social life also. Unlike in the West, no organized movement for social renaissance had taken place in India. Religion therefore was not confined to private lives of the people. Further, religious convictions and ethical convictions did not always overlap. Many oppressions and tyrannies against lower caste people and women masqueraded under the name of religion. Social reform movement therefore had to challenge various dogmas of religions which sought o legitimize social and gender inequality. The national Movement for independence, however, gave higher priority to political independence than social reform. It was thought that once the foreign rule ended, the national government could bring about social change. The subsequent experience showed that it was

easier to mobilize the people against a foreign power than to mobilize them against religious orthodoxy.

The Indian independence had to be followed by social modernism and a new social order based on justice, social, economic and political. The Constitution enjoined upon the State to promote the welfare of the people and strive to bring about the new just social order.[62] The Constitution makers were conscious of the fact that while India gave great importance to religion, religion in the present form could become a source of tyranny and could result in denial of basic human rights. How was freedom of religion to be harmonized with social modernism?

This concern is well reflected in the meticulous drafting of Article 25 of the Constitution, which guarantees freedom of religion. This Article is part of Part III of the Constitution which contains a list of fundamental rights which were limitations and obligations upon the power of the State. Article 13 (1) says that "all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency, be void." Clause (2) of that Article further mandates the State not to make any law "which takes away or abridges the rights conferred by this Part "and further declares that "any law made in contravention of this clause, hall, to the extent of such contravention, be void." While other fundamental rights such as right to equality are without any qualifying clauses, the other rights such as rights to freedoms, rights in respect of fair trials for criminal offences, and the right to life and personal liberty start with the declaration of the rights and then carve out restrictions thereupon Although the right to equality is not hedged by any restrictions, the court has held that different treatment can be given provided the difference is based on reasonable classification. Freedom of religion is one right which starts with a qualification. It is "subject to public order, morality and health and to the other provisions of this Part".[63] This part means the part which contains the fundamental rights. So freedom of religion has been made subject to other fundamental rights. It is subject to right to equality, right to freedom of speech, right to personal liberty and so on and so forth. The state has been given the power to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice."[64] Further the State has been given power to provide for social welfare and reform or for throwing open Hindu religious institutions of a public character to all sections of Hindus.[65] The reading of this Article shows how the makers of the Constitution were conscious of the fact that an unbridled right to religious freedom could hold

[62] Article 38, Constitution of India.
[63] Article 25(1)
[64] Article 25(2)(a)
[65] Article 25(2)(b)

the societal progress towards social modernism. They wanted India to be a country where people enjoyed freedom, social equality and social justice. Religious fundamentalism, whether of the majority or a minority could have fossilized the society.

India also could not be a majoritarian democracy. Its pluralistic nationalism took shape during the struggle against imperialism. While the Hindu as well as Muslim communalists described themselves as nations and therefore subscribed to the theory of two nations, the mainstream Congress party strictly adhered to India being a nation of various ethnic and religious sub-nationalities. The British colonial interests were served by the two nation theory in first postponing the independence and then dividing the country into two nations namely India and Pakistan. While Pakistan became an Islamic Republic, India continued to be a "Sovereign, Democratic Republic"[66] in which there would be equality before the law and equal protection of law[67], the State being without religion[68] and the individual enjoying the freedom of conscience.[69] Although the word "secular" was not used in the original preamble but was inserted by the Constitution (Forty Second Amendment) Act, 1976, the makers of the Constitution were firm on the State being equidistant from all religions and also intervening in favour of social reform and against any fundamentalism. Therefore they made a provision for enacting a uniform civil code.[70] The state was to respect individual's freedom of conscience but had to weed out those practices which negated the libertarian and equalitarian aspects of the Constitution.

No one should be able to claim legitimacy to practices such as untouchability or gender inequality in the name of religion.

While taking precaution against religion holding the social change towards an equalitarian and just society, the makers of the Constitution also were firm that democracy did not mean mere majority rule. There is a difference between rule by majority and a majoritarian rule. Rule by majority is where majority and minority is divided on the basis of opinions on issues of social, economic and political policies Majoritarianism implies rule of a majority which is a majority by ascriptive status. Where majorities and minorities are based on ethnicity, religion, or race, a rule by majority without regard for minorities is a majoritarian rule. The Constituent Assembly voted against such majoritarianism when it decided to incorporate fundamental rights into the Constitution. The right to equality, the right not to be discriminated on the grounds such as religion, race, caste or sex, right to

[66] Preamble as originally enacted.
[67] Articles 14, 15, 16, 17, 29(2) and 324.
[68] Article 27. Unlike the United states, where there is a clear prescription against establishment of a religion, the Constitution forbids the State from imposing tax for the promotion of any particular religion.
[69] Article 25
[70] Article 44.

a fair trial for a person accused of crime, right to personal liberty, right to freedom of religion, rights of religious denominations and rights of minorities were intended to act as counter majoritarian checks on democracy. Judicial review where courts decide whether an act of the legislature is valid was also a counter-majoritarian check on democracy. India can never be a theocratic or majoritarian State There is no place for any cultural nationalism because nationalism contemplated by the Constitution was a pluralistic nationalism. Rights of the religious and cultural minorities given by Article 29 and 30 evidence that there is no one single culture but that this country is an amalgam of diverse cultures and every section of the society has a right to conserve and promote its own distinct culture. These rights were not given to minorities in lieu of their giving up the demand for separate electorates as was suggested by one of the lawyers appearing for one of the states e in *T.M.A. Pai Foundation v State of Karnataka*.[71] In fact, rights of the minorities date back to 1931 since they were included in the Karachi Congress resolution of the Indian National Congress. In the Constituent Assembly, some members suggested that we should draft our minority rights after taking into consideration how minorities were being treated in other countries. They had Pakistan in mind. Dr, Ambedkar strongly rejected that suggestion and declared that minority rights would be absolute and would not depend upon how minorities were treed in any other country.

Counter majoritarian checks on democracy became even stronger when the Supreme Court held in *Kesavananda Bharati v State of Kerala* [72] that Parliament could not use its power of amending the Constitution given by Article 368 so as to destroy the basic structure of the Constitution. Pluralistic nationalism is certainly an aspect of the basic structure of the Constitution because the Court has held that secularism is part of the basic structure of the Constitution.[73] Even if the BJP obtains two thirds seats in each House of Parliament, it will not be able to Constitutionally abolish the present pluralistic nationalism and replace it by majoritarian nationalism If it cannot be done through Constitutional means, the Sangh Pariwar will try to overthrow the Constitution by unleashing violence and creating anarchy. The survival of the Constitution cannot be guaranteed only through Constitutional doctrines such as the basic structure doctrine. BJP will try to repeat what it did in Gujarat in order to obtain clear majority in the Centre and the states. It has to create fear about its own safety and anger against the minority community in the minds of the people of the majority community. Polarization of two communities suits its designs the best.

Fundamentalism- Communalism and Majoritarianism Distinguished

I would like to explain the conceptual distinction between fundamentalism, communalism and majoritarianism. Fundamentalism is against

[71] (2002) 8 SCC 481, 612, para 224 of Khare J.'s (as he then was) concurring judgment.
[72] AIR 1973 SC 1461
[73] *S.R. Bommai v. Union of India* AIR 1994 SC 1918: (1994) 3 SCC 1

any critique of religion and is dogmatic about adherence to all orthodox practices enjoined by religion. It is opposed to any change in religious behaviour so as to be in tune with the change in social, economic and political conditions. Fundamentalism is essentially oppressive against people of its own religion. It imposes several cubs on their freedom. Women are particularly vulnerable to the fundamentalist oppression. It imposes a code regarding dress as well as behaviour which negates their liberty. Taliban regime in Afghanistan is an example of such fundamentalism. It is against any reform of religion or modernization of society. The Kashmir terrorists are threatening women against moving out without a burkha. They have even killed some women for disobeying their dictate. Fundamentalists are not necessarily communal. Their tyranny is mainly towards the people of their own religion. Communalism involves hatred and distrust of some other community. Fundamentalists are exclusivists and so are communalists. While fundamentalists may or may not hate other religions, communalists do. Both think in terms of "we" and "they". Majoritarianism means a regime which conceives a rule of the majority community. Here majority is not majority as understood in democracy. A majority of opinion is the basis of democratic rule but majority based on ethnicity, religion or culture is the essence of a majoritarian rule. These three concepts are not exclusive and often they overlap. A fundamentalist may be communal and also majoritarian. A communal may not be fundamentalist but is bound to be majoritarian. Savarkar was not a fundamentalist but he was communal and majoritarian. His concept of Hindutva is both majoritarian and communal. Jinnah was not a fundamentalist and not even majoritarian but he was communal. Both Savarkar and Jinnah were atheists and yet believed in communal states.

A religious person may not belong to any of these categories. It is not necessary that she should be fundamentalist or communal or majoritarian. Gandhi was deeply religious but not communal or majoritarian and not even fundamentalist. Ambedkar was religious but neither communal or fundamentalist nor majoritarian. Phule, Ambedkar were believers, so was Gandhi. Jawaharlal Nehru was agnostic. Indira Gandhi was not only a believer but later on became obscurantist. But she was never communal or majoritarian. Hindu Mahasabha, R.S.S., Jan Sangh and BJP have always pursued communal/majoritarian ideology. In a majoritarian State, the majority community plays a hegemonical role. The ethnic, religious or cultural minorities have the status of second class citizens. It may not be a theocratic state but it cannot be an equalitarian State.

Why Has Majoritarianism Become So Acceptable?

We have to really ask ourselves this question. The Hindutva forces never had much of the following among the Hindu community. Even after the partition, when feelings against Pakistan were most bitter and ghastly communal riots had occurred on both sides of the India-Pakistan border,

the Hindus did not become so communal. Gandhi's assassination was mourned by a large number of people even though the communal elements had tried their best to describe him as pro-Muslim and anti Hindu. Till the declaration of emergency in 1975, the Jan Sangh had not been a force in Indian politics. RSS joined Jay Prakash Narain's movement against the Indira Gandhi government on the issue of corruption. This helped them obtain some legitimacy. But that legitimacy was not earned on the plank of Hindutva. That party joined the conglomeration of non Congress parties called the Janata party and became a partner in the coalition government called the Janata Government. That government could not last long. Indira Gandhi came back in 1980 with a landslide majority in Parliament. In 1985, when the Jan Sangh appeared in its new incarnation as BJP, it could capture hardly 2 seats in the Lok Sabha. BJP's rise has been since 1989 and it became a ruling party with the help of several small parties in 1998. It was voted out by a no confidence motion but came back with a stabler coalition called the National democratic Alliance (NDA) in 1999.

BJP's ascendancy has been mainly because of the liberal and centrist mask which it had put on. It was hoped by many, the present speaker included, that on coming to rule, BJP would become moderate and try to function within the four corners of the Constitution. Prime Minister Vajpayee actually took some bold steps such as a journey to Lahore and invitation to General Musharraf of Pakistan for talks. Although the talks failed, the Government of India continued to be conciliatory. After the tragedy of 11th September 2001, when the World Tower was attacked by terrorists belonging to Bin Laden's group, it became obvious that Pakistan was part of the terrorist network. India had hoped that the United States would understand that a fundamentalist regime in Afghanistan and Pakistan could be a source of great threat to world peace. President Musharraf of Pakistan changed overnight and became a party to anti terrorism war embarked upon by the United states. The USA bombed Afghanistan and decimated the Taliban regime But Talibanism had not vanished. It survived and it is causing terrorism in various places including the state of Jammu and Kashmir. The Vajpayee government performed very well and its diplomacy seemed to yield results. Pakistan was put in an embarrassing position. The world opinion had definitely gone in favour of India. Various nations had realized that the cross border terrorism, which Pakistan had unleashed, posed danger of war. Since both India and Pakistan were nuclear powers, Asia became a flash point of nuclear war. India conducted successful elections in Jammu and Kashmir and a government more considerate towards the people came to power. Although BJP as a party still continued its hawkish stance, the Vajpayee government appeared to be much liberal

All this, however, changed on 27th February 2002. On that day a ghastly tragedy occurred. Some miscreants set a compartment of a train

called Sabarmati express on fire. Who were they and why did they do it is yet not known. But whosoever they might be and whatever might be the reason, the act was most heinous and inhuman. But from the next day, the Sangh Pariwar took law into their hands and with support of the Government of the State went on rampage of murder, rape and loot of the Muslim community. BJP traditionally has been anti-Muslim and they have never distinguished between Indian Muslims who chose to stay in India and Pakistan's fundamentalist and communal regime. Gujarat witnessed a worst carnage, greatest human tragedy and a holocaust surpassing in cruelty and barbarism the Nazi cruelties of the Thirties.[74]

Despite having perpetrated such unprecedented inhumanity on helpless people, the BJP won the Assembly elections with landslide majority. The people of Gujarat had endorsed the anti human acts of the Sangh Pariwar. This is what causes greatest anxiety. Gujarat has been ruled by BJP for last 10 years and it had systematically communalized the Hindu society. Why did this happen? Why had the traditional pacifism of the Hindus disappeared? How were they brutalized to that extent? The Sangh pariwar had not only communalized the middle class but had also secured the active participation of tribals and dalits in the carnage against Muslims.

Threat to the Survival of India

Not only democracy but the nation called India was not in danger of going the Yugoslavian way. The Hindu Vishwa Parishad and Bajrang Dal, the two most vociferous organs of the Sangh pariwar have declared that they would create Hindu nation within two years. What is their concept of a Hindu state? It will be a state in which no one other than a Hindu will be a citizen. The minorities will be second class citizens without any rights. They will be for ever at the mercy of the Hindu majority. Whenever tension between India and Pakistan reaches a flash point, the Muslims in India will be targeted. They will be entirely insecure regarding their lives as well as property. Their women would be a perpetual prey of rapists. BJP talks of cultural nationalism, which is totally against the Constitution. Therefore the Hindu State will come only after overthrowing the present Constitution. Such a Hindu State will be for ever unstable and anarchic. Dalits may ask for a Dalitasthan and tribals may ask for a tribal land. The South may want to secede from the North. The division of Pakistan has shown that one religion is not enough to motivate people to live in one nation. India might disintegrate and get splintered into several small nations. This process of disintegration may continue for ever and India will be balkanized.

India abandoning the secularism and becoming a majoritarian Hindu state will be quite retrograde step. When the entire world is moving towards

[74] See Sidhartha Vardarajan, *"Gujarat: The Making of A Tragedy"*, Penguin 2002: *"Crimes Against Humanity"*, Concerned Citizens Tribunal - Gujarat 2002, Vol 1 & 2 (Anil Dharkar for Citizens For Justice and Peace, Bombay 2002)

a pluralistic, democratic polity, going back to majoritarian model will take India back by several centuries.

How can we combat this threat? How can we save secularism and democracy and save our future generations from tragedies which countries like Yugoslavia have endured?

Reasons for the Growth of Hindutva ideology

We will first try to find out why Hindu majoritarianism and fundamentalism has suddenly acquired such a dangerous proportion? According to me, there are the following reasons (1) Erosion of ideology in the Congress party: (2) Erroneous pursuit of Secularism by political parties which called themselves secular: (3) Exclusion of liberalism from education and its becoming entirely materialistic. (4) Support to cross border terrorism by Pakistan and both India- Pakistan becoming super powers.(5) Distancing of political parties from peoples' problems : (6) Growing insecurity due to deteriorating economic conditions. (7) Total breakdown of law an order and the demise of the rule of law.

(1) Erosion of Ideology in the Congress party-

The Indian national Congress led the national Movement and also ruled after independence at the Centre as well as most of the states since independence. Congress was a coalition of diverse ideologies and positions. There were rightists as well as leftists within it. Under Jawaharlal Nehru's leadership, India became known for her independent foreign policy and as a welfare state. Nehru resorted to economic planning to bring about desirable development. The State was bound to play a major role in bringing about development. Immediately after independence Mahatma Gandhi was assassinated by a person who belonged to Hindutva ideology. This invited a ban on RSS and other organizations. Nehru enjoyed such overwhelming support of the people that the Hindutva ideology could not get any significant support of parliament. The Supreme Court of India has held that the basic structure of the Constitution cannot be altered or tampered with through a Constitutional amendment[75] .In the United States, where the amendment of the Constitution is very difficult, perhaps such a judicial check was not required. Judicial decisions obtained finality because of the difficulty of getting a Constitutional amendment passed. In India, where there was a tradition of one party hegemony, the judicial check on the power of amendment became necessary and obtained legitimacy. The emergency of 1975 reveled that such special majority could also be obtained in support of the Constitutional amendments which subvert the spirit of the Constitution. The Supreme Court felt that the basic structure of the Constitution had to be saved from destruction by a temporary majority. In developing countries

[75] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461. See S. P.Sathe, *Judicial Activism: Ttranscending Borders and Enforcing limits*, chapter 3 (OUP 2002)

where traditions of democracy have yet to strike roots and where public opinion can be swayed by sentiments and parochial feelings, such counter-majoritarian check on democracy was found to be necessary.[76] That danger has not disappeared even though the coalition governments have come into existence. If the *Hindutva* ideology makes headway, we might face a similar situation as we faced during the emergency of 1975. The Constitution could then be subverted through the process of Constitutional amendment. The basic structure doctrine remains our only hope against such majoritarian dictatorship.

What Jinnah had in mind was a majoritarian democracy. Although in theory there would be no Muslims and no Hindus, in reality, every one would be a Muslim. There is much similarity between what Jinnah said and what the Hindutva protagonists say. They also say that there should be no majority and no minority. But if the minorities are not specially protected through Constitutional guarantees, they would be submerged in the majority. In the United States, there is a boiling pot theory which means that whosoever comes to the United States, gets assimilated into the American culture and has no distinct identity. Although he spoke of Hindus and Muslims retaining their religious identities, he held such identities to be relevant only for their personal lives but not for public affairs. Naturally, where there are permanent majorities, the majority regime is bound to be normatively satisfying the requirement of equality though without equality in results. It is a strange paradox that Jinnah and the Hindutva thought are almost identical on majoritarian nature of democracy. Jinnah is often praised for his above statement and to show that despite his demand for a separate state for Muslims he was secular. We have no doubt that he was secular but he was majoritarian. Savarkar was also secular and actually an atheist, but he was also majoritarian. Hindutva of V. D. Savarkar is very much similar to that concept. If Hindus do not remain Hindus and Muslims do not remain Muslims, as Jinnah suggested, the homogenization occurs. Either people must give up their identities or be prepared to suffer latent and invisible discrimination. Nationalism and therefore was committed to making special provisions for the religious and cultural minorities so as to help them preserve their distinct identities. The Nehru Committee in 1928 in its report recommended special rights of the minorities[77]. These were essentially seen as counter majoritarian checks on democracy. In a country where more than 80 % people were going to be Hindus, the minorities would have been wiped out if a mere majority rule were to prevail. India was going to be a nation of various ethnic, religious and cultural groups of people and the numerically smaller groups needed protection of their identities, separate cultures and traditions. All this was provided in the Constitution of India which was made by the Constituent Assembly and became a law in 1950.

[76] S.P.Sathe, *Judicial Activism: Transcending Borders and Enforcing Limits*, chapter 3 (OUP 2002)

[77] B. Shiva Rao, *The Framing of India's Constitution*, Vol.3, 1968

Judicial Activism and the Development of Human Rights Jurisprudence*

Professor I.P. Massey

Before I begin I would like to make one comment. Afternoon sessions for academic interactions are supposed to be highly unproductive. After a good lunch everybody would like to have some kind of a nap. So therefore, if you feel like having a nap go ahead and sleep but the rule is you will not snore. Why? Because then you will be waking up the person who is sleeping next to you.

Mr. Sathe, the Chairman of today's session, Principal Joshi, members of the Indian Law Society who are present here, faculty members of ILS, Professor Baxi, other guests present and my dear students.

I am really delighted and consider it a matter of honor that today I am associated with the 'Professor Sathe's memorial event'. Me and Prof. Sathe worked in the same field: Administrative law, and the image that I always carry of him is of an excellent teacher, excellent researcher and above all an excellent human being. It was easy to communicate with him. He was the one person I saw who was never lost in the abstraction of the title of his office or research.

It is said that if a person wants to secure his position in to the pages of history then he must do either of the two things. One he must write something worth reading or he must do something worth writing. On both this criteria I think Professor Sathe has secured his position in the pages of history. I have no doubt that his footprints and directions will always inspire the generations of teachers and students to achieve excellence because lives of all great persons teach only one thing, that we have to make our lives sublime. I am really grateful to the law college for giving me the opportunity where I can pay my personal tributes to a person like Professor Sathe; a jurist in his own right.

Now I would like to share my views with you. After hearing both the presenters my task has become very easy. I would like to share my views on the subject "**Judicial Activism and the growth of normative human jurisprudence".** Why I selected this subject? I think it is a subject, which has now come in very high social visibility area and has generated a hyper sensitive debate. The proponents and opponents of judicial activism have taken extreme positions. Those who support judicial activism are branded as undemocratic and those who oppose as autocratic.

* This presentation was made at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remenbering S.P. Sathe' event held on Professor Sathe's first death anniversary. ipmassey@yahoo.com

Recently a survey was conducted in London in which the Supreme Court of India has been rated as the most activist court in the world and it is true also. It is no denying the fact that today the court is not only quashing legislations and administrative actions, which are void but is issuing exhaustive directions also that how that power is to be exercised. Not only this, in many a situation the court is even making policy choices for the legislature and executive to follow because the Court thinks that it is the only policy by which, you can protect the human rights of the people.

I have in mind the case which was mentioned earlier also, *Prakash Singh v Union of India.*[1] It is a fact that most of the violations of human rights in India are committed by persons who are supposed to protect human rights and when protectors become predators than what can any person do? Government would not move. Nine Police Commissions recommended that police must be taken out from political influence so that they can act in an independent manner and not in the interest of any government and therefore now the Supreme Court, dictates a policy choice and suggests mechanism by which the police may be taken out from political influence so that they becomes the real protectors of human rights of the people. But this kind of activism has generated lot of tension between the government and the judiciary because both have different purposes to achieve. Government wants to use the police for their own personal ends; judiciary wants that the police must be used for the protection of the rights of the people.

I was talking to one person from Bihar and I asked him that why there are lots of violations of human rights when there is a public force available. He said, "Sir, you are wrong. Police is not a public force; police is a private force of some politicians." This kind of scenario exists, even after five decades of independence. The 'state police' have not changed its character into 'people's police' and therefore the directive.

Tension that judicial review generates because of the clash of interest between judiciary and the government becomes very clear and comes to the fore in a case, which was decided in 2007, where on Public Interest Litigation petition, the Supreme Court quashed the constitution of the Forest Advisory Committee. The Forest Advisory Committee is a very important committee. It allots land for the development where there is a lot of scope for manipulation and corruption. So the court said, "Please do not put politicians in it. Put certain persons who are expert in the area." This did not suit the interest of the government and therefore for the first time in judicial history the reaction of government was very sharp. The Additional Solicitor General in the open court said, "My Lords, you are violating the law. You have no respect for the executive. You are treading on the toes of the executive. This is not the function of the judiciary. This

(2006) 8 SCC 1

is the function of the executive." The court asked, "If you are not doing your function properly what can we do?" Reaction from the Court was also very sharp. As reported in the newspapers, the Chief Justice remarked that, he had never heard such blasphemous remarks in his whole life. It was the tension that led to the Chief Justice, on the eve of his retirement to say in a press conference, that tension between the judiciary and other organs of the government is better than the cozy relationship. I am sure, he was very right, especially within the area of human right jurisprudence. Had there been a cozy relationship between the two the danger was that we could have lost even democracy and if we lose democracy believe it or not it will carry in its deluge all the fine values of life, which we so dearly cherish. So therefore, I do not mind tension between the two but I only hope that the tension, of which the Chief Justice was talking, would not grown in to a crisis situation.

What is judicial activism? In a democratic society judiciary can have two role perceptions. One, it can have reactive or proscriptive role. In this role perception the judiciary considers itself a demolition squad. In foreign countries you have demolition companies and you have construction companies. In this role perception, court considers itself a demolition squad. The purpose of judicial review is to declare void what is against the law and the Constitution and in this kind of role perception, the Judge considers himself a mechanic and not an engineer. His tool of interpretation is literal. He will read the law, would literally interpret it and will apply that law. He considers himself a mouthpiece of law and considers litigation as a battle and not a disease to be cured and therefore, acts only as an umpire He is not concerned with the substantive justice. What happens thereafter if he is not concerned? He is simply concerned about justice according to law. This image of this role perception of judiciary is symbolized in the image of the Goddess of Justice we have now; Greek dike holding a balance in one hand and scarf tied around the eyes. Today, Goddess of Justice is not blind the scarf is removed. Judiciary is looking right into the eyes of the people who are before them for the protection of their rights especially the people who are socially and economically disadvantaged.

The second role perception in a democratic society the court can have is a proactive or prescriptive role. Here the court considers itself not only a demolition squad but also a construction squad. It will demolish the house and will construct also. Judge does not consider himself a mason. He considers himself as an architect and that the tool of interpretation is not literal but liberal and therefore, he creatively interprets the law to make the law meaningful for the needs and the aspirations of the people. He tries to bring the law nearer to the lifeline of the people which they daily live. For example recently about three or four days ago Justice Thakker gave a judgment that an unborn child who dies in a motor accident because the mother dies, is a passenger in the car and therefore, entitled to

compensation in the same manner in which any other occupant of the car will be entitled to. This is a creative interpretation to meet the needs and the aspirations of the people. In the same manner when the court is saying that muster roll women will be entitled to maternity benefit the court is performing its proactive role. When the court lays down that even though, the husband is alive but has deserted the family, then in that situation the wife shall be considered to be natural guardian of the child, the Court is trying to be creative to match justice to the needs and the aspirations of the people.

However, this creative role of the judiciary everywhere in the world, has been the subject of intense criticism and the most basic criticism which is generally levied is that how an unelected body which does not represent the people and is not accountable to the people can exercise invigilation over the actions of an elected body which represents the will of the people? This is a very serious charge. I am of the view, may be rightly or wrongly, that in any democracy to assume that the Parliament represents the will for the people all the time is a myth. In many a situation they are prosecuting their own interests. I am sure, if the Parliament is passing, with a voice vote, to increase the salary of the legislators they are not representing the will of the people.

My second argument is that in a society which is a plural society and where many minority groups exist, social, political or economic, which are weak, and whose voice cannot be heard, in that particular situation, I think, the judiciary represents what we call, 'majoritarian consensus'. This is particularly true where the government does not have an absolute mandate; it has a fractured mandate and it is coalition government. However, I would maintain that if the fundamental basis of Judicial Review is constitutionalism, then in India no organ of the government is supreme; supreme is the Constitution. Every organ is supreme within the space allotted to it by the Constitution. Thus there must be some limit for the exercise of power by the judiciary, also. Where that limit is to be set is a very difficult question. Any person who has been a judge throughout his life cannot say with certainty as to where the line is to be drawn. Every case has to be decided on its own merit.

What role the Constitution has prescribed for our judiciary? All the students of Constitution law know that constitutional expectations are three. First, judiciary shall defend the constitution and its value. Thus, Judiciary is the protector of the constitution and constitutional values. The second role expectation is that judiciary will act as the guardian of human rights of the people. The third expectation is that judiciary will act as a balancer in the exercise of power between various organs of the state.

In order, to fulfill these role expectations, so far as the protection of the human rights is concerned, whether judiciary has been given any

activist role? My answer is no. Constitution did not see any activist role of the judiciary. It was for this reason that when Article 21 was being drafted there were two fundamental values, which were competing for recognition, the value of security of the state and the value of liberty of the people. The drafters of the constitution cast their vote in favor of security and not liberty of the people. That is why under Article 21 after a great debate the Constituent Assembly did not agree to the "Due process clause" but simply laid down that the rights and liberties of the people can be curtailed by 'procedure laid down by law'.

So an activist role was not given by the Constitution. The activist role, which the judiciary is performing in my opinion, has been snatched by the judiciary, like the American Supreme Court. Constitution has not given any power of judicial review to the American Supreme Court. The Judiciary has snatched the power. In the same manner, this activist role of the judiciary within the area of human rights is a judicial innovation, in order to discharge its role as the guardian of human rights of the people, which is a constitutional expectation.

You already know that within the area of human rights of the court started on a very passive note; positivist philosophy. In *Gopalan*[2] the Court held that personal liberty simply means absence from arbitrary arrest, noting more. It further said that the 'procedure established by law' means any procedure laid down by the law. The court did not brush aside the idea when the lawyer referred that if the Parliament lays down a procedure that like the cook of Bishop of Worchester all the criminals should be boiled to death, will it be a valid procedure? The impression from the court was that it would be a valid procedure laid down by law. However soon the court realized the mistake and after a brief lapse during emergency which, I may not call lapse, because perhaps in the context it was necessary to save the institution, judicial review started picking up in the post emergency era. Today it has not only become aggressive but has become hyper aggressive. The court is now challenging the government and the legislature in the face where the protection of human rights is concerned. How the court has been able to muster this kind of courage? Now the court has created a fence around itself, which is impregnable, and the Court has secured itself from outside. Parliament cannot reach the court. I see the doctrine of basic structure in this manner. By laying down the basic structure theory, whether rightly or wrongly, the court was trying to secure the institutional identity. There was a fear that constitution may be amended and the court may be harmed. After the second judges case when the court took in to its own hand, the appointments of judges, which many people criticized, the court was securing itself, against "court packaging" to protect its institutional integrity. There was still one source of insecurity

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

looming large for the court. Article 323A and Article 323 B of the Constitution lay down that the Parliament can establish special courts and transfer the jurisdiction of the High Court to these courts. Thus Central Administrative Tribunal was established and jurisdiction of the High Courts was taken away and was given to this special tribunal.

At first blush the court did not realize what is happening. Then in *L. Chandra's case*[3] the court had realized that if in this manner special courts are established and High Courts jurisdiction is taken away the court may be rendered worthless. Therefore, in *L. Chandra's*[4] the court secured itself against institutional redundancy. Now the Constitution cannot be amended to harm the court. Judges cannot be appointed who can be said to be the committed judges. Jurisdiction of the High Court cannot be taken away. So now the court is in a position to challenge the legislature and the government. It is an unfortunate development. It is like as if all the three organs of the government are working at cross purposes and therefore, everybody has to guard against the other.

Democracy simply means that all the three organs must exercise their power in a harmonious manner for the good of the people. However by exercising the power in an activist manner the court has crafted a grand structure of normative human right jurisprudence. You can identify certain fundamentals of this jurisprudence. I would horridly go through it.

The court has always tried to redefine and enlarge human rights and therefore by giving creative interpretations to open textured expression of human rights in the constitution like free speech, liberty, life, the Supreme Court today has created second entrenched Bill of Rights which contains so many important rights that without them the prescribed right would have become hollow. The second Bill of Right contains rights like free press, right to know, right to information, right to privacy, right to clean environment, right to education and health, right to development, right to livelihood and so many and you can go on. The courts have enlarged the scope of rights.

The second fundamental that you can draw from the performance of the court is that by creative interpretation the court has given another creative meaning to open textured expression "equality". The court interpreted equality as a very dynamic concept. It does not only include prohibition against unreasonable legislative classification, but it can also provide protection against any arbitrary or unreasonable action of the government and therefore, if there is any unreasonable or arbitrary action of the government, which violates the human rights of the people besides other rights, it can be challenged as violation of the equality clause of the constitution.

[3] *L. Chandra Kumar v Union of India* (1997) 3 SCC 261
[4] *Supra* note 3

Thirdly, the court has again through judicial activism increased the breadth of human rights by collapsing the compartmentalization between the civil and political rights on the one hand and social, economic and cultural rights on the other. The boundaries have been collapsed and many rights which were only 'directives' have been given the constitutional status. In the same manner the court has now expanded the protection of the human rights by importing the 'due process' to bring in procedural fairness within the area of personal liberty.

The next fundamental to my mind, which is very important, is 'Justice'. After more than five decades of India's independence, majority of its people are not in a position to reach the court and claim justice. The rights of those persons, who were suffering from socio-economic handicap, were suffering from atrophy and waste. To them 'justice' was nothing but merely an illusion. The court wanted to give them the access and for this they developed an innovative tool, 'Social Action Litigation'. A social program was to be executed though this strategy and through this strategy, justice could be reached to the unreached.

Unfortunately today PIL has been converted in to MIL (Middle Class Interest Litigation). The whole strategy has been highjacked by the middle classes in order to protect their interest and entitlement and my opposition is that the court has very easily allowed it to be so used and therefore, there is need that we must refer this strategy to its original purpose. The court has also increased its capabilities like providing compensation in writ proceedings, ordering investigations, giving directions. Not only giving directions, the important thing is that court has developed a system of monitoring and supervising the implementations of its directions. To do this, the court has developed, a remedy, what is known as 'continuous mandamus' so that they can supervise whether the government is following the directions or not.

Lastly the court has developed norms for enforcing the constitutional morality, purity of political process and good governance. Many people ask that what the relevance of these norms is so far as human rights are concerned. My answer is they are the basic structures of the protection of human rights. They make the society a 'rule of law society' and unless the society is 'rule of law society' human rights cannot be protected.

How one can evaluate the contribution of the Supreme Court so far. Many would say that it is a marvelous normative human rights structure, but the court has not been able to destroy the societal structures behind which the violations take place and therefore, on the ground reality remain the same.

I would like to say that we cannot judge the performance of the court in terms of what it has achieved or what it has not achieved. It's a

wrong way of thinking so far as human rights are concerned because it is rightly said: when the goals are very distant and almost impossible to achieve the essence of life lies, not in achieving those particular goals, the essence of life lies in the constant struggle with the hope that the goals are achievable. Therefore, we have to evaluate the jurisdiction of the Supreme Court not in terms of its achievements but in terms of its struggle to secure human rights of the people.

The Court cannot wipe out tears from every eye but so long as tears are there struggle must continue. In this context, in my opinion, no other human institution has done so much for human redemption as the constitutional judiciary in India has done.

Basic Structure of the Constitution- The Noble fiction of the Supreme Court*

Advocate T.R. Andhyarujina

Professor Upendra Baxi, Chief Justice Y.V. Chandrachud Principal Vaijayanti Joshi, Mrs. Jaya Sagade and dear students of this famous institution.

I have long wanted to speak in an atmosphere where I could unburden myself on the subject of basic structure of the Constitution. Before young fresh minds in an academic atmosphere like this I feel a sense of enlargement where I can speak something which I have wanted to speak for many many years. But first of all I have to say how happy I am to speak in memory of Professor S.P. Sathe. I consider him to be one of the finest academicians this country has produced.

Professor Sathe said in his book that whatever the method by which this doctrine of basic structure was evolved it was a political judgment and has to be exercised with great care and statesmanship and never to be trivialized or as Professor Baxi would say brutalised in the way in which it is happening today. Professor Baxi incidentally is one person whom I greatly respect. His writings throw a fresh air upon the stereotyped commentaries that we get. He is a bit caustic at times but in his methods he brings out the essential truth, the fallacies of dogmas which we are propounding today.

And I am also very happy that we have Chief Justice Chandrachud in our midst . More than anybody else he is the person who could throw the greatest light upon the development of the basic structure of doctrine. He has been its builder in the various ways. In the *Keshavanand Bharati case* he did not subscribe to it, alter in he subscribed to it as he was bound to and he was a party in the attempt to review *Keshavanand Bharati's case* by Chief Justice Ray, he was then the author or judgment in the *Minerva Mills* and *Waman Rao's case*. He has the best insight because he was the first critical dissenter in *Keshavanand Bharati case* of this doctrine. Despite his dissenting view with the traditional discipline expected of him he accepted the *Keshavanand Bharati* doctrine of basic structure in later cases and there afterward built it further. I feel a sense of gratification that he is here but I must confess at the same time a sense of discomfort because I do not agree with much of what he said post *Keshavanand Bharati's case*.

* This presentation was made at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remenbering S.P. Sathe' event held on Professor Sathe's first death anniversary. tandey2008@gmail.com

Now I have chosen the subject as the "**Basic Structure of the Constitution- the Noble Fiction of the Supreme Court**". I am saying it is a fiction because I firmly believe that there was never a juridical basis for what is believed to be the basic structure theory. It was never the decision of the *Keshavanand Bharati* bench. But at the same time, I will tell you that it is a fiction which we require, and we must have. If *Keshavanand Bharati* did not invent it, sooner or later some limitation on the exercise of amending power would have to be recognized perhaps in a better juridical, more understanding way than the 13 judges of *Keshavanand Bharati* did. Therefore, I say that fiction it may be, but it is a noble fiction, and we have to maintain that fiction.

Let me unfold the story:-

Thirty four years ago, on 24th April, 1973, thirteen judges of the Supreme Court assembled in the Chief Justice's Court packed to its capacity with lawyers and laymen. They delivered eleven judgments in India's most celebrated case in Constitutional law- the *Kesavananda Bharati case*. For over three decades we have believed that in that case a majority of judges decided that Parliament has no power to amend the basic structure of the Constitution.

Revelations of how the *Kesavananda* case was decided have been disclosed in later interviews with those who were involved in the case, writings of scholars, and by a revealing autobiography of the late Justice Jaganmohan Reddy, one of the judges in that case. This writer himself was a counsel in the case who kept detail notes of the proceedings of the case but has so far not published them. We can now piece together a collated account of how the case was decided. At the end of it the question arises – was there truly a judicial formulation of the theory of basic structure in that case as it has come to mean today, and was the case decided in an atmosphere conducive to a detached determination of a highly contentious matter with political overtones.

To reverse the *Golak Nath case* (1967) which had held that Parliament had no power to amend fundamental rights, and in anticipation of a major Constitutional battle, we now know that Government carefully selected some judges who would not be obstructive to its reversal. The case became a contest not only between the rival parties, but apparently amongst some of the judges who were committed to their own strong views on Parliament's power to amend the Constitution. Justice Jaganmohan Reddy records of some his colleagues that from the first day, "I got the impression that minds were closed and views were determined".

The case being essentially a political fight in a Court of law with a political background. It was conducted under continuous and intense pressure, the likes of which it is hoped will never be seen again. One

author has described the atmosphere of the Court as "poisonous". A judge on the bench later spoke about the "unusual happenings" in the case. Constraints of space prevent an enumeration here of the several "unusual happenings" in the course of the case. If related in detail, it makes one doubt if the decision in the case was truly a judicial one expected from judges with detachment from the result of the controversy before then.

On 24th April, 1973 the eleven separate judgments were delivered by nine judges- they collectively ran into over thousand printed pages. Six judges, Chief Justice S.M. Sikri and Justices Shelat, Hegde, Jaganmohan Reddy, Grover and Mukherjee were of the opinion that Parliament's power was limited because of implied and inherent limitations in the Constitution including those in Fundamental Rights. Six other judges Justices A.N. Ray, Palekar, Mathews, Dwivedi, Beg and Chandrachud were of the opinion that there were no limitations on Parliament's power to amend the Constitution at all. But one judge, Justice H. R. Khanna took neither side . He held that Parliament had the full power of amending the Constitution but because it had the power only "to amend", it must leave "the basic structure or framework of the Constitution" intact. It was a hopelessly divided verdict after all the labour and contest of five months. No majority, no minority, nobody could say what was the verdict.

How was it then said that the Court by a majority held that Parliament had no power to amend the basic structure of the Constitution? Thereby hangs a tale not generally known. Immediately after the eleven judges finished reading their judgments, CJ Sikri, in whose opinion Parliament's power was limited by inherent and implied limitations, passed on a hastily prepared paper called a "View of the Majority" for signatures of the thirteen judges on the bench. One of the conclusions in the "View of the Majority" was "Parliament did not have the power to amend the basic structure or framework of the Constitution". This was lifted from one of the conclusions in the judgment of Justice H. R. Khanna. Nine judges signed the statement in Court; four others visibly refused to sign it.

This conclusion could not have been the view of the majority by any reading of the eleven judgments. It was only the view of one judge- Justice H.R. Khanna. Some judges had even no time to read all the eleven judgments as they were prepared under great constraints of time due to the retirement of the Chief Justice the next day. Justice Chandrachud confessed he had hurriedly a chance to read only four draft judgments of his colleagues. No conference was called of all judges for finding out the majority view. Only one conference was called by the Chief Justice which excluded those judges who were of the opinion that there were no limitations on the amending powers. Nor was the conclusion debated in Court as it ought to have been. The action the Chief Justice has been described by

some as an act of statesmanship. Others believe it was a manoeuvre to create a majority which did not exist.

The verdict would have remained in this uncertain state but for accidental events following decision. On 1st August, 1975 with lightening speed and by an outrageous abuse of the amending power during the Emergency, Parliament made the 39th Amendment to the Constitution introducing Article 329 A of the Constitution which sought to validate Indira Gandhi's election, which had been set aside by a judge of the Allahabad High Court without any contest including her pending appeal in the Supreme Court.

On 11th August, 1975 Indira Gandhi's election appeal against her disqualification was heard by five judges presided over by Chief Justice A.N. Ray who had been appointed by government the Chief Justice the day after the judgments in the *Kesavanada* case superseding three other judges who had decided against unlimited power of Parliament to amend the Constitution. Government believed that with the amendment to Article 329A of the Constitution, her appeal would simply be allowed. But so outrageous was the amendment that all five judges declared it bad as it violated "the basic structure". But Indira Gandhi's appeal was nevertheless allowed by an amendment made to the Representation of People Act, 1951 which cured all illegalities in her election. The Court could strike down Constitutional law but not an ordinary law which carried out the same purpose. To many this seemed perplexing.

Everyone took it that the Court had now approved the basic structure theory by striking down the amendment to Article 329 A. Everyone, except Chief Justice A.N. Ray. He had stated in *Indira Gandhi's case* that the hearing would proceed "on the assumption that it was not necessary to challenge the majority view in *Kesavananda Bharati* case". Two days after Mrs. Gandhi case was decided on 7th November, 1975 the Chief Justice constituted a new bench of thirteen judges to review the *Kesavananda Bharati case* on 9th November, 1975.

For two days N.A. Palkhivala made the most eloquent and passionate argument against the review. On the third day on 12th November, 1975 at the very outset of hearing the Chief Justice announced suddenly "The bench is dissolved". Thus ended an inglorious attempt to review the *Kesavananda* judgment. Whatever the reasons of the dissolution of the bench, Chief Justice Ray's maladroit attempt to review the basic structure limitation gave it a legitimacy which no subsequent affirmation of it could have given.

But the problem could not be avoided. In 1980 in the *Minerva Mills Case*- the question was raised whether there was indeed a majority view on the limitation of the basic structure. Justice Bhagwati said that

the statement signed by nine judges had no legal effect at all and could not be regarded as the law declared by the Supreme Court. He said the so called majority view was an unusual exercise which could not have been done by judges who had ceased to have any function after delivering their judgments and who had no time to read the judgments. However Justice Bhagwati relieved himself from deciding what he called was "a troublesome question" by saying that Indira Gandhi's case had accepted the majority view that Parliament's power of amendment was limited. Of course, this was not correct as that case was decided on the assumption that it was not necessary to challenge the majority view.

So a single judge's opinion- Justice Khanna's of a limitation of the basic structure on Parliament's power has passed off as the law. But Justice Khanna was responsible for another vital dimension of the basic structure two years after the case was decided. In the *Kesavananda* case, he did not say that fundamental rights were part of the basic structure of the Constitution, though six other judges said that and though the case was entirely about the validity of amending Fundamental Rights by the challenged Constitutional amendments. Three of Justice Khanna's brother judges in the *Kesavananda case* were clearly of the opinion that Justice Khanna had not held that fundamental rights were part of the basic structure in the *Kesavananda Bharati case.*

But in *Indira Gandhi's election case* two years later, Justice Khanna "clarified" his judgment in the *Kesavananda* case. He now said that he had given clear indications in his judgment that fundamental rights were part of the basic structure. By so clarifying his judgment, Justice Khanna did not realize that this clarification rendered his judgment in the *Kesavananda* case hopelessly self-contradictory, as he had held unconditionally valid two constitutional amendments which nullified vital fundamental rights. With that dubious exercise, Justice Khanna's "clarification" is now a vital part of the basic structure. Fundamental rights are now immune to an amendment if it violates the basic structure of the Constitution.

In the latest judgment of nine judges of the Court delivered on 11th January 2007 on the Ninth Schedule to the Constitution, the basic structure limitation has been stated to be " an axiom of our Constitutional Law". An axiom means a self-evident truth. So be it. Whatever its origins, the basic structure theory plays a useful part in our constitutional jurisprudence. Parliament does not and should not have an unlimited power to amend the Constitution. However in the glorification of the basic structure theory it is important to bear in mind its infirm roots and how predilections and prejudices of judges, chance and accidental circumstances have played a greater part in it, rather than any logic or conscious formulation of it.

The Ninth Schedule of the Constitution and the Judicial Review*

Advocate Milind Sathe

Dr. Massey, Principal Joshi, the Members of Faculty of ILS Law College, Professor Baxi and my Student friends,

I feel honoured to be invited this evening to participate and address at the function organized in memory of Dr. S. P. Sathe. With his treatise on administrative law, he has been regarded as Professor Wade of India.

Today's topic for discussion, which I have chosen is : **Ninth Schedule of The Constitution and The Judicial Review**. The importance of this topic, apart from being topical, is the importance of judicial review. In the country, which is governed by a limited Constitution, and limited, I say not in the context of limited amending power, but in the context of separation of powers, the judicial review is very crucial most important. We have three wings of the State – the Judiciary, Executive and the Legislature, with their functions and areas clearly demarcated in the Constitution. Article 13 mandates that : "State shall make no law, which violates, takes away or abridges rights conferred under Part III". Now you do not expect the Parliament or State Legislatures to make a law and also decide whether that law is violative of Part III or not; that function necessarily must vest with some other authority, and that authority can only be the judiciary. And therefore, to maintain the balance between the three wings of the government, and to operate the theory of checks and balance, necessity of the judiciary and the judicial review.

Recent orders of the Supreme Court in the case of Reservations[1] and Delhi Master Plan have once again sparked off debate about confrontation between Judiciary and legislatures. This controversial and sensitive topic was hotly debated in the first three decades of our Republic. Whether any Constitutional amendments and ordinary laws can be put beyond the reach of Judicial scrutiny is the key question in today's context. Recently there were talks about a legislation being enacted to protect illegal structures in Delhi and put the law in the Ninth Schedule of the Constitution.

Friction between the three wings of the State is not something new. Each wing of course attempts to justify its functioning as per the Constitution. However the Judiciary remains the final arbiter on the

* This presentation was made at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remembering S.P. Sathe' event held on Professor Sathe's first death anniversary. milindrsathe@gmail.com

1 *M. Nagaraj and others v. Union of India* (2006) 8 SCC 212

interpretation of the Constitution. The recent Judgment[2] of Nine Judge Bench reasserts this position.

Apart from this Nine Judge Bench Judgment being relatively brief and a welcome unanimous Judgment, it has far reaching consequences in delineating respective spheres of functioning between Judiciary and Legislature. That is the importance of Judgment in *Coelhos'* case and hence the relevance of the topic of Ninth Schedule of the Constitution and Judicial Review.

Rule of law is the essence of any modern democratic society. The importance of rule of law is not required to be over-emphasized. Maintenance of rule of law is essential for preventing the society from turning into an anarchy and being subjected to a tyrant ruler or a despotic monarch. It would be unimaginable state of affairs to live in today's world in a society where there is no rule of law. Several daily routine things which we take for granted like traffic and transport discipline, supplies of essential commodities, supply of power, law and order and functioning civil administration will not be in existence in a society where there is no rule of law. Life without these basic things is unimaginable in today's context.

The rule of law presupposes that the State is constituted in three distinct organs i.e. Executive, Legislature and Judiciary with their roles distinctly defined. One of the important facets of the separation of power in this set-up of governance is the power of judicial review and independence of judiciary. It is this power which gives the teeth to the maintenance of rule of law as it ensures the separation of power.

Judicial review has been recognized, as the basic feature of the Constitution. The importance of rule of law and the judicial review need not be overstated. In fact as a child, most of us would have read a book called Alice in Wonderland. There was a cat called Fury. The cat proclaims the rat guilty and death sentence. The rat questions as to who had found him guilty! The cat relies : I prosecute you. I am the jury, I am the judge, I find you guilty and I will eat you. If we have no judiciary, if we have no separation of power, this is what the rule of law would turn into. It would not be the rule of Constitution; it would be the rule of men or women who govern us; a tyrannic and a despotic rule. That is not what the Constitution has provided for. That is not what we the People have adopted this Constitution for. And who is to maintain this? It is only the judiciary by virtue of judicial review.

Alexander Hamilton in Federalist 78 remarks[3] on the importance of the independence of the Judiciary to preserve the separation of powers and the rights of the people :

2 *I. R. Coelho v Union of India* (2007) 2 SCC 1

3 Quoted by the Supreme Court in *I. R. Coelho v Union of India* (2007) 2 SCC 1

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

Montesquieu finds tyranny pervades when there is no separation of powers:

"There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of typing the causes of individuals."

The Supreme Court of India has held separation of powers as one of the Basic features of the Constitution.[4]

Even before the doctrine of Basic Structure was propounded the importance of separation of powers was illustrated by the Supreme Court in Re – Special Reference No. 1 of 1964.[5] (Legislative Privileges Case)

Ninth Schedule of the Constitution and Article 31B, in which the genesis of Ninth Schedule lies, assumes great significance in this background. The important aspect therefore is whether post Kesavananda Bharati, any use of Article 31B per-se damages and destroys the basic feature of the Constitution i.e. judicial review is the key question.

Article 31B was introduced by the Constitution 1st Amendment Act, 1951 with a Ninth Schedule containing items 1 to 13. These thirteen laws were all relating to land reforms and some of them were pre-constitutional existing laws which would have been rendered void by virtue of Article 13 (1) and Doctrine of Eclipse. The Constitution (First Amendment) Act introduced Article 31B along with Article 31A. The statement of objects and reasons for the first amendment stated thus :

"During the first 15 months of the working of the Constitution certain difficulties have been brought to light by judicial decisions and pronouncements especially in regard to the chapter on fundamental rights. ..... Another Article in regard to which an unanticipated difficulties have arisen is Article 31. The validity of agrarian reform

[4] His Holiness *Kesavananda Bharati Sripadgalvaru v. State of Kerala & Anr.*, (1973) 4 SCC 225.

[5] (1965) 1 SCR 413.

measures by State Legislature in the last three years, in spite of the provisions of clauses 4 and 6 of Article 31 formed the subject matter of dilatory litigation as a result of which the implementation of these important measures affecting large number of people, has been held up."

Jawaharlal Nehru had assured the Parliament while speaking on the First Amendment that there was no desire to add to the 13 items which were being incorporated in the Ninth Schedule simultaneously with the First Amendment and that it was intended that the Schedule should not incorporate laws of any other description than those which fell within items 1 to 13. Even the small list of 13 items was described by the Prime Minister as a long schedule.[6]

Despite the description of Ninth Schedule with 13 items as long schedule, provisions of Article 31B have been used subsequently on 10 more occasions and several Acts and Regulations were added in the Ninth Schedule as follows :

Amendment	Acts / Provisions Added
1st Amendment (1951)	1 – 13
4th Amendment (1955)	14 – 20
17th Amendment (1964)	21 – 64
29th Amendment (1971)	65 – 66
34th Amendment (1974)	67 – 86
39th Amendment (1975)	87 – 124
40th Amendment (1976)	125 – 188
47th Amendment (1984)	189 – 202
66th Amendment (1990)	203 – 257
76th Amendment (1994)	257A
78th Amendment (1995)	258 – 284

Of the above amendments upto 29th Amendment were prior to Keshavanand Bharati's decision. The issue of damaging the basic structure of Judicial Review per se by insertion of laws in the Ninth Schedule therefore arises in respect of 34th Amendment onwards.

The Constitution First Amendment was challenged in *Shankari Prasad v. Union of India*[7]. The Supreme Court held that :

(i) That the First Amendment was not ultra vires or unconstitutional.

(ii) Article 13(2) does not affect amendments made under Article 368.

(iii) Articles 31A and 31B do not in terms make any change in Articles 226 or 136 so as to attract proviso to Article 368.

[6] Quoted by the Supreme Court in *Waman Rao v Union of India*, (1981) 2 SCC 362 at 396

[7] (1950) 2 SCR 89

By Constitution Fourth Amendment Act, 1955 items 14 to 20 were added to the Ninth Schedule of which two were unconnected with land reforms.

The Constitution Seventeenth Amendment Act, 1964 added items 21 to 64 in the Ninth Schedule. Except item 38 Kerala Lands Act and item 45 Madras Public Trust Act, rest related to land reforms.

The Seventeenth Amendment Act was challenged in *Sajjan Singh v State of Rajasthan*[8]. The Supreme Court upheld the Amendment as:

"(i) Assisting State Legislatures to give effect to economic policy of a party in power to bring about much needed agrarian reform.

(ii) No need for ratification since the effect of the Amendment on areas over which the High Court powers prescribed by Article 226 operate was incidental.

(iii) Parliament may consider whether it would be expedient to include provision of Part III in the proviso to Article 368."

In view of doubts expressed in Sajjan Singh's case by two Judges, a Bench of 11 Judges was constituted in the case of *Golaknath v. State of Rajasthan*[9]. The Supreme Court held :

(i) *Shankari Prasad and Sajjan Singh* are reversed.

(ii) Amendment to Constitution is a law within the meaning of Article 13.

(iii) Whether Amendment affecting fundamental right is covered by proviso to Article 368 is not required to be decided.

(iv) From 27.2.1967 Parliament has no power to amend Part III. (so as to abridge or make inroad on existing fundamental rights)

The First, Fourth and Seventeenth Amendments were held valid for reason of acquiescence and earlier decisions.

Despite the judgment in *Golaknath*, the Parliament passed the Twenty Fourth, Twenty Fifth, Twenty Sixth and Twenty Ninth Amendment Acts. The challenge to these Amendments was decided by Supreme Court by Bench of 13 Judges in the case of His Holiness *Kesavananda Bharati v. State of Kerala.*[10] The Court by majority of 7 : 6 held :

(i) *Golaknath's* case is overruled.

(ii) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.

(iii) 24th Amendment Act (Constituent Power) was valid.

[8] (1965) 1 SCR 933.
[9] (1967) 2 SCR 762.
[10] (1973) 4 SCC 225

(iv) 25th Amendment Act (Re-amendment to Article 31) was valid.

(v) First part of Article 31C is valid. Second part of Article 31C *"and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy"* declared invalid.

(vi) 29th Amendment Act (Inserting items 65 and 66 of Kerala Land Reform Laws) as valid. (Though there is doubt and dispute about unconditional upholding of the Twenty Ninth Amendment)

In June 1975 election of the then Prime Minister Mrs. Indira Gandhi to Lok Sabha was set aside by Allahabad High Court on the ground of alleged corrupt practices. An appeal was pending before the Supreme Court against the Allahabad High Court decision.

During the pendency of this Appeal of Mrs. Gandhi, 39th Amendment Act, 1975 was passed inserting Article 329A. Sub clauses 4 and 5 expressly dealt with a legislative judgment and ouster of judicial review. The 39th Amendment Act also added items 87 to 124 to the Ninth Schedule many of which were unconnected with the land reforms. A challenge to this Amendment was made in the pending Appeal of Mrs. Indira Gandhi.

Supreme Court in the case of *Indira Gandhi v Raj Narain*,[11] struck down clauses 4 and 5 of Article 329A.

During the emergency i.e. (from 26th June, 1975 to March 1977) Article 19 stood suspended by virtue of Article 358 and Articles 14 and 21 were suspended by virtue of Article 359. During emergency Parliament passed 40th Amendment Act, 1976 adding items 125 to 188 to the Ninth Schedule most of which were unconnected with land reforms.

42nd Amendment Act, 1976 was passed adding clauses 4 and 5 to Article 368 and enlarging Article 31C. From relating to laws for implementing Article 39 (b) and Article 39 (c) to entire part IV.

Challenge to 42nd Amendment Act enlarging Article 31C and amending Article 368 was decided on 31st July, 1980 in *Minerva Mills v. Union of India*.[12]

(i) Clauses 4 and 5 of Article 368 making constitutional amendments non justiciable were struck down unanimously.

(ii) Enlargement of Article 31C was struck down by majority of 4:1.

[11] (1975) Suppl. SCC 1
[12] (1980) 3 SCC 625.

The limited amending power was held to be one of the basic feature of the Constitution in the *Kesavananda Bharati's* Case. The 42nd Amendment sought to enlarge that power. In the words of N. A. Palkhivala[13] the judgment in *Minerva Mills* case can be best summarized thus :

"The limited amending power of Parliament which was limited to preserve and protect the basic structure of the Constitution is itself a fundamental feature of the Constitution. Since Parliament has no right to alter any fundamental feature, it has no right so to amend Art. 368 as to destroy that basic feature by abrogating the fundamental limitation on the amending power.

In other words, the supremacy of the Constitution and the unaltered survival of its basic structure, are themselves fundamental features of the Constitution, and after the Supreme Court had laid down the law that Parliament had no competence to alter the fundamental features, for Parliament to declare that it has that competence is not merely an act of constitutional impertinence but an irrational exercise in futility."

The argument that while Parliament amends the Constitution it reflects the will of the people and hence it must have supremacy is fallacious. Equating Parliament to the will of the people is illogical. The Parliamentary elections are fought on different issues relevant at the time and not on the issue of proposed Constitutional amendments. In several Countries the Constitutional amendments are required to be carried through referendum.

In *Waman Rao v. Union of India,*[14] challenge to constitutional validity of Article 31B was considered.

The same Bench who decided *Waman Rao* also decided *Bhim Singh v Union of India,*[15] and unanimously struck down Section 27 of Urban Land Ceiling Act, 1976 as violative of Articles 14, 19(1)(f) and 31 although this Act was in the Ninth Schedule and protected under Article 31B.

Professor Granville Austin in his book 'Working a Democratic Constitution (1999)'[16] has described Ninth Schedule thus :

"The constitutional vault into which legislation could be put, safeguarded, from judicial review, the Judges being denied the key ....."

The idea of separate schedule was first suggested in the letter by

[13] N. A. Palkhiwala, *'We the People'*, p.210.
[14] (1981) 2 SCC 362.
[15] (1981) 1 SCC 166
[16] Oxford India Paperback 2003, Pages 85 and 98

Madras Advocate General V.K.T. Chari. Granville Austin describes this letter thus :

"Thus the genie of the Ninth Schedule emerged from the bottle, for the schedule, a risky device in any event would come to be used for other than land reform legislation."

There are critics of the doctrine of basic structure that it is vague and it has been trivialized and there is routinization of the basic structure doctrine. In several decisions of the Supreme Court while upholding the validity of the law or considering the challenge even to certain executive actions the Supreme Court has used the doctrine of basic structure. In *Kanugo's* case[17] the doctrine of basic structure was used to uphold the validity of Arbitration (Orissa Second Amendment) Act 1991. In *Bommai's* case[18] the issue of imposition of presidents rule under Article of 352 of the Constitution of India was considered and the basic structure doctrine was discussed. In *Farooqui's*[19] case dealing with the acquisition of lands at Ram Jalma Bhumi Babri Masjid, Secularism has been held to be the basic structure of the Constitution and the ordinary legislation was upheld.

An ordinary legislation as distinguished from a constitutional amendment can be questioned under our constitutional setup on three grounds :

(a) Violation of Part III (Article 13).

(b) Legislative Competence (Article 245). That is law is made by that legislature which had no legislative competence to do so.

(c) Any violation of any other specific provision of the Constitution like Article 301 or 286.

There is no question of an ordinary legislation being challenged on the ground that it violates basic structure of the Constitution. If it violates any of the aforesaid three aspects then law would be struck down but not with reference to basic structure. After *Kesavananda Bharati's* case only constitutional amendments can be challenged on the ground of violation of basic structure.

However after *Waman Rao's* decision for judging the validity of laws and regulations included in the Ninth Schedule this issue arose. Waman Rao held that a constitutional amendment inserting laws in the Ninth Schedule under Article 31B is open for challenge on the ground of damaging the basic structure.

[17] *C. C. Kanugo v. State of Orissa* (1995) 5 SCC 96
[18] *S. R. Bommai v. Union of India* (1994) 3 SCC 1
[19] *M. Ismail Farooqui v. Union of India* AIR (1995) SC 605

There are two illustrations of law in the Ninth Schedule being considered for its validity and struck down. Supreme Court in *Bhim Singh's* case unanimously struck down Section 27 of that Act although the Act was in the Ninth Schedule. Those Section of ULC Act was struck down on the ground of violation of Articles 14, 19 (1) (f) and 31.

The provisions of the Monopolies and Restrictive Trade Practices Act 1969 in so far as they apply to press was held to be unconstitutional. The constitutional amendment by which the MRTP Act (in so far as its application to the press) was held to damage the basic structure of the constitution by the Bombay High Court in the case of *Bennett Coleman v Union of India*.[20] The freedom of press was the basic structure in issue. These are the two illustrations where the law in the Ninth Schedule was struck down as unconstitutional and also on the touchstone of the basic structure.

However declaration in *Waman Rao* created a serious problem as constitutional amendment only says that following laws shall be introduced as specified items in the Ninth Schedule. There is nothing in this Constitutional Amendment Act to find out whether it damages the basic structure or not unless each individual legislation is examined. However legislation cannot be examined with reference to basic structure. This was the issue which arose from interpretation of the decision in *Waman Rao's* case.

This was precisely the issue raised in *Coelho's* case. Post *Kesavananda Bharati* Parliament had no justification in inserting a law in the Ninth Schedule and make a constitutional amendment Act which would damage the basic structure of the constitution but there again the problem arose of test to be applied for examining the constitutional amendment or the legislation which is put in the Ninth Schedule. Unless one examines the legislation in question you can not find out whether there is the damage to the basic structure or not. This dichotomy has been answered by Coelho's case.

For answering the critics of Basic Structure doctrine the same has to be viewed from the political climate and the judicial decisions of that time of 1973. Post *Golak Nath* decision no constitutional amendment could be carried out which would be contrary to Article 13 of the constitution. In other words the constitutional amendment was a law for the purposes of Article 13 and therefore it could not violate part three of the constitution. The issues about validity of Constitutional Amendments from 1950 till 1973 had basically arisen with reference to the property rights which revolved around Article 19 (f) and Article 31. Had this rights that is right to property been deleted as fundamental rights prior to 1973 perhaps there would have

[20] AIR (1987) Bom. 158

been no occasion to reverse *Golak Nath*. The entire debate in *Kesavananda Bharati* whether fundamental rights constitute basic structure or not was revolved around the right to property. This has been clarified by Justice Khanna in *Indira Gandhi's* case. Therefore except the right to property all other rights in fundamental rights chapter would be part of basic structure. Infact the Coelho's decision almost confirms this that all other fundamental rights except right to property which is no more of the fundamental rights are part of the basic structure and therefore to that extent now as far as Article 31B and Ninth Scheduled is concerned *Golak Nath* is probably the correct law.

The Gudalur Janman Estate Act, 1969 vesting forest lands in Janman Estate in State of Tamil Nadu was struck down by Supreme Court in the case of Balmadies Plantations Limited v. State of Tamil Nadu. Section 2(c) of West Bengal Land Holding Review Act was struck down by Calcutta High Court. These Acts were put in the Ninth Schedule by 34th Amendment Act, 1974. This Amendment was challenged and the Constitution Bench made a reference in the case of I.R. Coelho v State of Tamil Nadu,[21] to 9 Judges Bench in the following words :

"The judgment in *Waman Rao* needs to be considered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or a Regulation, or a part of which, is or has been found by this Court to be violative of one or more of the fundamental rights conferred by Article 14, 19 and 31 can be included in the Ninth Schedule or whether it is only a constitutional amendment amending the Ninth Schedule that damages or destroys the basic structure of the Constitution that can be struck down."

This reference has been decided by a unanimous judgment by a Bench of Nine Judges by decision dated 11th January, 2007 in the case of *I.R. Coelho v State of Tamil Nadu*.[22]

The question framed by Nine Judge Bench was *"Whether on and after 24th April, 1973 when basic structure doctrine was propounded it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so what is the effect on the power of judicial review of the Court."* The Court has concluded that constitutional validity of the Ninth Schedule laws on the touchstone of basic structure doctrine can be adjudged by applying the direct impact and effect test i.e. rights test which means the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor.

[21] (1999) 7 SCC 580
[22] (2007) 2 SCC 1

One of the issue arising in this context was lack of guiding factor for putting laws in the Ninth Schedule. Article 31 A deals with specified subjects like Agrarian Reforms. Article 31 C deals with laws to give effect principles contained in Article 39 (b) and 39 (c). However Article 31 B is an uncharted Sea completely open. In fact Article 31 B was used to introduce :

(i) Maintenance of Internal Security Act (Item 92) and,

(ii) Prevention of publication of objectionable Matters Act (Item 130) in the Ninth Schedule. The very nature of these two Acts and making them immune from Part III shows the gravity of the problem.

In this background the Nine Judge Bench has concluded this issue as follows:

"*In conclusion, we hold that* :

(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

(ii) The majority judgment in *Kesavananda Bharati's* case read with *Indira Gandhi's* case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments

shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in *Indira Gandhi's* case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure than such a law (s) will not get the protection of the Ninth Schedule.

(v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such violation / infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21read with Article 14, Article 19 and the principles underlying thereunder.

(vi) Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge."

The Supreme Court has consistently held that judicial review is one of the basic structure of the Constitution and any constitutional amendment or law which damages, destroys or takes away the judicial review would be invalid.

(i) *Indira Gandhi v. Raj Narain*,[23].

39th Amendment Act, Article 329A, Clauses 4 and 5 struck down.

(ii) *Minerva Mills v. Union of India*,[24].

(a) Amendment of Article 368, Clauses 4 and 5 unanimously struck down taking away judicial review.

(b) Enlargement of Article 31C struck down as it impairs the judicial review in respect of unspecified laws stated to be related to Part IV of the Constitution.

(iii) In *Kihotto Hollohon v. Zachilhu*,[25] where the Constitution Bench held that even if there be verbal change in Article 226 or 136, a clause in constitutional amendment excluding judicial review directly and substantially affect the jurisdiction of the High Court under Article 226 of the Constitution and of the Supreme Court under Article 136 and therefore attracts proviso to Article 368.

[23] (1975) Suppl. SCC 1.
[24] (1980) 3 SCC 625.
[25] (1992) Suppl. 2 SCC 651.

(iv) In *L. Chandra Kumar v Union of India*,[26], a unanimous Bench of 7 Judges held :

"(i) We therefore hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and the Supreme Court under Article 32 is an integral and essential feature of the Constitution, constituting part of its basic structure (para 78 page 301).

(ii) *That the jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of the Constitution (para 99 page 311)."*

The judgment in *Coelho's* case thus rekindles the light of the Constitution and restores the supremacy of the Constitution. The delicate balance between the three organs of the State on the anvil of which the constitutional democracy functions has been restored by the judgment of the Supreme Court with faith of the people in the role of the Supreme Court as watchdog of the Constitution.

To confer unlimited, unrestricted power upon even the elected representatives is akin to despotism. Importance and significance of the Supreme Court Judgment can be best summarized in the words of great Constitutional Jurist. N. A. Palkhiwala who had this to say after the Judgment in Minerva Mills Case :

"Thirty years ago the Supreme Court had quoted with approval the dictum : 'A Government which holds the life, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism.' The momentous significance of the Supreme Court's Judgment is that it will save our people from such despotism in the uncertain future."[27]

[26] (1997) 3 SCC 261

[27] 'We the People', N. A. Palkhiwala, Pg. 217.

The Basic Structure Doctrine and a New Constitutional Interpretation – Moving Beyond the Confines of the Existing Debate

Preeti Mohan*

Introduction

A full bench of the Supreme Court in *Kesavananda Bharti Sripadagalvaru v State of Kerala*[1] crafted what was named the "basic structure doctrine" to identify the basic framework and structure of the Indian Constitution.

The judges essentially regarded the basic structure doctrine as an implied limitation upon the power of the Parliament to amend the constitution. The doctrine has however, since *Kesavananda*, been often used to review the legality of legislative and executive actions, in most cases as a matter of course without much enquiry or reasoning. One of such cases, decided by a nine-judge bench of the Supreme Court is *S.R. Bommai v Union of India*[2].

While the decision in *Kesavananda* is most popularly seen as a product of the times in which it came and is justified for this reason, there has been very little enquiry as to where in the scheme of constitutional interpretation it fits.

The author seeks to endorse a point of view, which perceives the decision in *Kesavananda* as a shift in the process of interpretation from one relying on words and framer's intent to one based on structure and principles. According to the author, it is a lack of recognition of this shift that is preventing the evolution of a coherent framework for a new process of constitutional interpretation.

The author also argues that, the courts in India have over the last 5 decades moved away from framer's intent in interpreting the Constitution. These have sometimes been styled as creative interpretations of provisions and on other occasions like *Kesavananda,* a more emphasized departure from provisions. In either case, original intent having been rejected to different degrees, other benchmarks of interpretation become necessary.

There is also a possibility of legislative and executive action

* Student of V B.S.L (at the time when the paper was presented), This paper was presented at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remembering S.P. Sathe,' event held on Professor Sathe's first death anniversary. moh.preeti@gmail.com

1 AIR 1973 SC 1461

2 (1994) 3 SCC 1. The larger topic on which this article is based is *Revisiting Bommai and the subsequent routinization of the charismatic basic structure doctrine.*

conforming to the letter of the Constitution, but violating implicit and essential principles. How then will the judiciary enforce the Constitution? Can principles implicit in the Constitution be resorted to strike down these actions as they have been in the case of constitutional amendments? These are some of the questions sought to be addressed in this article.

The ruling of a nine judge bench of the Supreme Court of India in *S.R. Bommai v. Union of India*[3] emerged a landmark in the study of constitutional law even if for the wrong reasons.

The case before the court dealt with proclamations issued by the President under Article.356 of the Constitution in 6 states. Article 356 of the Constitution deals with the emergency powers of the President. It empowers the President if he is satisfied that the government of a state cannot be carried on in accordance with the provisions of the Constitution, to issue a proclamation by which he can assume the powers of the executive and dissolve the legislature. Of course, subject to a certain procedure being fulfilled. Incidentally, Article.356 intended by the framers of the Constitution to be used as sparingly as possible, has been one of the most frequently invoked provisions of the Indian Constitution.

The instance of such indiscriminate use was in the year 1977 where the assemblies of nearly 9 states were dissolved on the ground that they no longer represented the wishes of the electorate. It was in *State of Rajasthan v. Union of India*[4] wherein, the Court ruled that the President's satisfaction could not be questioned unless it was per se illegal or based on wholly extraneous and malafide grounds.

Strengthened by the position of non-interference of the Supreme Court, Article.356 came to be used routinely by the centre in states controlled by opposing parties. It had by the time *Bommai* was decided, been further invoked in 9 states in 1980, in 1983, 84, 86, 88, 1990-91 and 1992. It was against this state of affairs, where the provision by its misuse had become a real threat to federalism that *Bommai* was decided.

In *Bommai*[5], the nine-judge bench expanded the powers of judicial review of the Court to include the satisfaction of the President under Article 356. The satisfaction, the Court held could be reviewed on the ground of malafide, or that the satisfaction is based on wholly extraneous and irrelevant grounds, or is absurd or perverse. Arguably, its merits apart, since the *Bommai* decision was rendered, it has become more difficult for state governments to be dismissed by invoking Article 356. This, however, can be solely attributed to the increased powers of review of the Court. Now the bench in deciding *Bommai* did not stop with answering the question pertaining to extent of judicial review. It went on to review each of the

3 *Supra*, note. 2
4 AIR 1977 SC 1361
5 *Supra* note 2

six proclamations on their merits.

In reviewing the merits of the proclamations, the Court, quite absurdly and without much by way of support in the form of reasoning, pronounced that a violation of the basic structure doctrine could be grounds for the issue of a proclamation under Article 356. In the three specific cases of Rajasthan, Himachal Pradesh & Madhya Pradesh, secularism was identified as the basic feature that had been violated.

Now how could the judiciary justify the replacement of the well-recognized test of breakdown of constitutional machinery with the violation of the basic structure? Does every violation of a basic feature of the Constitution even if it does not cause a breakdown in constitutional machinery, warrant a proclamation under Article 356? The resort to the principle of secularism and the basic structure doctrine, even in the face of express provisions in the Constitution specifying the obligations of a secular state, was not justified by the Court. Further, the Court which enthusiastically went ahead and declared the violation of secularism as a test did not bother with defining the properties of the principle of secularism[6]. It in effect created a wide range of potential situations where the power under Article 356 can be invoked, countering the prospect of such use however, by arming itself better.

Now the first and perhaps most obvious argument against the decision will be that any action apart from one made in the exercise of the amending power cannot be made subject to the basic structure doctrine.

Considering some of these arguments:

(1) Firstly, there is an argument that constituted power is different from constituent power, the basic structure doctrine being applicable only to the latter[7]. The legal basis for this distinction is for some reason not obvious. First of all, in relation to legislative power i.e. it is not clear why the framers of the constitution should vest two different classes of powers in the same body i.e. the Parliament, distinguishable only in terms of the procedure employed to exercise them. The term constituent power as applied to amendments indicates that the power to make amendments is on the same plane as the power in the exercise of which the Constitution was made. If so, any exercise of the amending power is necessarily not subservient to the Constitution. Indicating that a norm superior to the constitution can emanate from within the Constitution itself.

6 Gary Jeffrey Jacobsohn, "*An Unconstitutional Constitution? A Comparative Perspective*", International Journal of Constitutional Law, at page 16.
7 A majority of the thirteen judges in *Kesavananda* held the basic structure doctrine to be an implied limitation on the amending power of Parliament. The Court drew a distinction between the amending power or constituent power and constituted power. At Para 1424 of the judgment.

(2) Secondly, there is an argument that the basic structure doctrine was crafted to save constitutional identity. This is perhaps more sound and acceptable but only if we regard the Constitution as a document, in theory.

(3) Thirdly, it is often suggested that the basic structure doctrine was provoked by a certain extreme set of circumstances. While this may explain the historical origin of the doctrine, it does not explain the legal quality.

The mindless and indiscriminate use of the doctrine by judges as a device to strike down all and sundry constitutional actions, deserves severe criticism. The *Bommai* judgment was one such instance of an indiscriminate use. But if an executive/legislative action violates an essential constitutional principle, implicit in the Constitution, perhaps identified as a part of the basic structure, can it not be struck down?

Perhaps to understand this better, we need to look beyond the words the "basic structure doctrine" to see what it symbolizes. Evolved in the constitutional landmark of *Kesavananda Bharti*[8], it is essentially a resort to principles implicit in the Constitution as opposed to provisions. It is a shift in the process of constitutional interpretation from reading the Constitution as a written document with reference to the framers intent, to a structural interpretation of the scheme as a whole[9]. Such an interpretation may sometimes invoke principles not reflected in specific constitutional provisions which are nevertheless essential. Now let me rephrase the question, if constitutional principles may be invoked to test the validity of an amendment, why not in the case of legislative or executive action?

Are legislative or executive actions that violate essential principles even while conforming to the letter of the Constitution impossible to conceive? What if we are faced with a situation where they do? Do we let such actions stand simply because the framers did not think of providing an express bar? Implicit in this, is the larger and more crucial question: where do we stand today in the process of constitutional interpretation? How should a constitution be interpreted?

Going back to *Kesavananda* and the amending power for a minute. The provisions of Article 368 contained no restriction as to the extent to which the Constitution could be amended. An interpretation that tried to rest on the word "amend" was not sustained. The Court then went on to expound the basic structure doctrine as a limitation upon the amending power.

8 *Supra,* note 1

9 Anuranjan Sethi, *Basic Structure Doctrine: Some reflections,* http://ssrn.com/abstract=835165, at Page 17.

There was nothing in the framers intent to indicate that such a concept was implicit in the words of Article.368, even though Justice Khanna, by a stretched interpretation tried to trace the doctrine back to the framer's intent while enacting Article 368[10].

The basic structure doctrine was in effect an identification of essential unwritten principles to be found in the Constitution, a definitive shift in constitutional interpretation.

It is the recognition of this shift that can take us forward in understanding and evolving the constitution; and it is precisely the lack of recognition of this shift both in popular and judicial perception that is holding our constitutional process back in a state of inertia. It indicates how uncomfortable we are with moving beyond original intent.

Something that escapes easy explanation. In a rapidly changing democratic republic more than 5 decades old, should the evolution of the Constitution always be referable to the wisdom of a few members of the constituent assembly? The very same reluctance gripped the judges in *Kesavananda*, who did not want to be seen as taking a leap forward in the process of constitutional interpretation even as they did. This may possibly be one of the reasons why the judges failed to elucidate clearly the properties of the doctrine plaguing it with uncertainties even today.

It is interesting to note that the basic structure doctrine is seen as an extra constitutional device introduced only in a particular set of circumstances and to be withdrawn thereafter while the interpretations placed upon Article 14 & Article 21 through *Maneka Gandhi*[11] and a host of other cases are seen as perfectly constitutional and based on the text. In these cases, the very due process requirement which was rejected after deliberation by the constituent assembly was introduced by the judiciary, titled as "reasonableness", styled as a creative interpretation of the relevant provisions.

This brings us back to the obsession with the text and original intent. Assuming the framers in moments of timeless wisdom contemplated every possible situation that may arise. Should judges with great difficulty, assuming it is possible, attempt perfect snapshots of what transpired more than 50 years back? Or are they better off working with a line of development, at the tail end of which they find themselves using other interpretative methods?[12]

10 *Supra,* note 9.

11 *Maneka Gandhi v. Union of India,* AIR 1978 SC 597

12 See *' The Authority of the Framers of the Constitution: Can originalist interpretation be justified'*, Larry G. Simon, California Law Review for a discussion on original intent as an interpretative method.

Let us analyze this a little more. Why is that the basic structure doctrine, perhaps one of the greatest contributions of the Indian judiciary to constitutionalism, the subject of much criticism? To a large extent, not on principle, but on the fact that it has caused uncertainty by moving away from the text. What does relying on the text have that introduces objectivity & certainty? The yardstick of original intent. Without original intent as a point of reference, there is no reason to believe that this objectivity is retained. It's a different issue that even original intent cannot introduce perfect objectivity as two judges may differ on how to interpret the original intent.

Have we in the interpretation of the Constitution moved away from original intent? Most definitely yes; whether through creative interpretations of provisions or through the deduction of constitutional principles. Are all of these constitutional developments to be rejected?[13] Do we then move 5 decades back in time? If not, its time we realized that we have moved away from an interpretation strictly based on the text and original intent and evolved alternative principles of interpretation.

It is beyond the scope of this paper to actually formulate a theory of constitutional interpretation. But can't interpretative principles be identified so that judges can apply themselves to cases with greater consistency and coherence[14]? Do we reject the idea on the grounds that such an interpretative process is susceptible to being infused with subjective choices of judges? Well, there is no judicial practice that does not advert to subjective values.

It is not suggested that the text of the Constitution be rejected. The author only seeks to submit that there are "hard cases" in which the text of the constitution may be of bare use, situations which can be said to have been within the framers' contemplation only by some fiction. Often enough, it is these "hard cases", for e.g. *Kesavananda* that take the process of constitutional evolution forward. The building of a framework of coherence and consistency, within which such hard cases can be resolved, needs our focus. If the judges today are clearer about where they stand in the process of constitutional interpretation, there is reason to believe that greater clarity and consistency will inform their decisions.

Finally a word to those who believe that I am suggesting the Constitution be completely left to the whims of a bunch of unelected judges. The very idea of this article is to analyze where we are in the process of constitutional interpretation, to see how consistency, perhaps the greatest

13 See Bruce Ackerman's analysis of the legitimacy of the New Deal transformation in the United States in 'We the People: Transformations', Cambridge.

14 See David. A.J. Richards, "The Risks of Interpretation: Toleration and the Constitution", Oxford University Press.

safeguard against the arbitrariness of the judiciary, can be achieved. While at the same time ensuring that the Constitution evolves.

As to whether it will expand the limits of judicial review, as author Pratap Bhanu Mehta succinctly puts it, "judicial review causes itself"[15]. What we can do is to see that this power of judicial review is not exercised in an ad-hoc and unsystematic manner. This makes the debate on constitutional interpretation crucial. This is not to say that the judiciary has the last word on the constitution. If we had a strong parliament with a more coherent voice, we would perhaps understand this better[16].

15 Pratap Bhanu Mehta, *India's Judiciary: the Promise of Uncertainty, The Supreme Court Versus The Constitution – A Challenge To Federalism*, Pran Chopra, at Page 159.

16 *Ibid* at Page 158

Pandora's Box Reopened...

Saswati Acharya*

In the perpetual tug of war for 'supremacy' between the two titans of Indian democracy namely the Judiciary and the Parliament, many a times; the Courts have overstepped the mark. Their role has on several occasions transitioned from 'interpreters' of the constitutional documents to 'lawmakers'. Such assumption of power by the Judiciary has reopened the Pandora's Box raising ad infinitum questions on Indian democracy and polity, most of which have remained unanswered.

This article throws light on the legislative history of Article 356, the application of the basic structure doctrine in the exercise of presidential power in the case of *S.R. Bommai v Union of India*[1] and its ramifications.

Genesis of Article 356....

As per Article 356 of the Constitution, the President is empowered to issue a proclamation declaring his rule in a state if he's satisfied (on the Governor's report or otherwise) that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. The genesis of Article 356 of the Constitution of India lies in section 93 and section 45 of the Government of India Act, 1935.[2] These sections bestowed discretionary and prerogative powers on the Governor General (in relation to a federation) and the Governor (in relation to a province) to counter situations arising out of a failure of the constitutional machinery in the federal government and the provinces. The Governor General and the Governor were empowered to 'assume to themselves' the powers of the federal and provincial legislature respectively and issue proclamations in constitutionally exigent situations.[3]

Deliberations of our Founding Fathers

Our Founding Fathers, the authors of our Constitution, commenced on the fundamental premise that law and order situation in India, was such that, the insertion of a chapter on the emergency provisions in the Constitution was a must. The Provincial Committee constituted to discuss the emergency provisions did not replicate the provisions of the Government of India Act, 1935 *in toto*. In the draft articles, the Governor was stripped off his independent powers and vested with only a recommendatory role,

* Student of V B.S.L (at the time when the paper was presented). This paper was presented at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remenbering S.P. Sathe,' event held on Professor Sathe's first death anniversary. acharyasaswati@gmail.com

1 (1994) 3 SCC

2 Gopal Subramanium *'Emergency Provisions under the Indian Constitution', Supreme but not infallible: Essays in Honour of the Supreme Court of India,* Oxford University Press, Edition 2000, 144

3 *Ibid,* 144.

thus marking a paradigm shift from the provisions of the Government of India act, 1935.

However, Article 356 was inserted with a well - deliberated caveat. The Constituent Assembly expounded that the emergency provision would be invoked with great discernment only in extreme situations and would not be utilized as a 'surgical operation for a mere cold or catarrh.' In the words of Dr. Ambedkar, "the first thing the President will do would be to issue a mere warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution...."[4] The provision, thus, was not meant to be a 'scribe awl' in the hands of the Centre to engrave tombstones for State governments according to its whims and fancies.

But exactly the opposite happened. The chronicles of political history stand testimony to the rampant invocation of the emergency provision by the Centre. The provision, which was envisaged to be dead letter, was invoked at least a hundred times, proving to be a death letter for umpteen number of state governments. Its most flagrant misuse was witnessed during Indira Gandhi's tenure (1966-77) as the Prime Minister of India, when it was invoked on twenty-seven occasions, dampening the hopes and assurances of our founding fathers.

The *Bommai* judgment concurring with the decision of the Supreme Court in *State of Rajasthan v Union of India*[5] laid down that presidential proclamations under Article 356 were not completely beyond judicial review and were questionable on the ground of mala fides,[6] granted respite to many state governments. But this was a half-baked relief, as the judgment failed to define the scope, extent and width of judicial review and the justiciability of presidential proclamation was still contentious.

Basic Structure Doctrine

In April 1973, in the epoch - making decision of *Kesavananda Bharati v State of Kerala*[7], the Supreme Court by a paper – thin majority, curtailed the plenary amendatory power of the Parliament by ruling that the basic features of the Constitution are unalterable. The corollary: a subtle accession of judicial supremacy concomitant with unwieldy power to thwart constitutional amendments, marking a triumphant victory of the judiciary over the Parliament.

4 Soli J Sorabjee, *"Decision of the Supreme Court in S.R. Bommai v Union of India: A Critique.* (1994) 3 SCC (page 2)

5 (1977) 3 SCC 592

6 *Supra,* f.n. 5, at 5

7 (1973) 4 SCC 225

An Obscure Doctrine

The basic structure doctrine could be termed as a piece of judicial skullduggery as its scope and ambit remains an open question till date. In the *Kesavananda* case, the bench differed in elucidating the scope of the doctrine. The basic features of the Constitution were propounded to *inter alia* include: Supremacy of the Constitution, Republican and Democratic form of Government, Secular character of the Constitution, Separation of Powers, Federal Character of the Constitution, Sovereignty and Unity of India, et al. Thus the basic structure conundrum continued as the Apex Court failed to expound the contours of the doctrine precisely.

Application of basic structure doctrine to the Bommai judgment -

The pivotal case of *S.R. Bommai v Union of India* in the backdrop of the Babri Masjid demolition at Ayodhya in 1992 brought out a novel application of the basic structure doctrine. The shamefaced BJP government in Uttar Pradesh resigned. The imposition of President's Rule in the BJP-ruled states of Rajasthan, Madhya Pradesh and Himachal Pradesh on the ground of the anti-secular political philosophy of the party raised hue and cry.

The Supreme Court espousing the dismissal of the state governments declared that secularism is a part of the basic structure of the Constitution and that acts of the state government which tantamount to subversion of secularism as enshrined in the Constitution, can lawfully be deemed to give rise to a situation in which the government of the State is not being carried on in accordance with the provisions of the Constitution. Such an interpretation of the basic structure of the Constitution can be viewed by many as an emergence of Constitutional principles in their own right, transcending literal provisions[8] or perhaps be perceived by many others as unjustified widening of the original scope and function of the basic structure doctrine. What was the justification (if any) for invocation of the basic structure doctrine in the exercise of Presidential power under Article 356, especially in the light of the Supreme Court decision in the case of *Indira Nehru Gandhi v Raj Narain?*[9]

More so, the meaning of the term 'secularism' the very basis for exercise of presidential power in the instant judgment is nebulous. The term 'secularism' which originally did not find a place in the Constitution

[8] Dieter Conrad, *"Basic Structure of the Constitution and Constitutional Principles", Law & Justice*, An Anthology, edited by Soli Sorabjee, [Universal Law Publishing Co. Pvt. Ltd., Edition 2003], 200

[9] (1975) SCC Supp 1- (wherein it was categorically held that the validity of parliamentary legislation cannot be tested on the basic structure theory.)

of India was inserted in the preamble by the Constitution (Forty – Second Amendment) Act, 1976.[10] Though the concept of secularism was inherent in the Constitution, there were no established judicially manageable standards for determining a straight- jacket definition of the term. The Bommai judgment, thus, has been catalytic in reinforcing that any policy of the State government inconsonant with the 'obscure basic structure doctrine' would be a valid ground for exercise of presidential power under Article 356. Such conclusions can lead to a lot of impediments in India's road map to progress. For instance, the emergence of Special Economic Zones (duty free enclaves with state-of-the-art infrastructure providing internationally competitive and hassle free environment for exports)[11] in India can very well be a ground for invocation of Presidential power under Article 356. As these zones, which are, deemed foreign territories are subject to economic laws different from those of the country in which they are situated. Moreover these enclaves enjoy a host of tax and business incentives and are envisioned to include avant-garde infrastructure facilities, better connectivity, residential / industrial and commercial complexes and luxurious lifestyles. The net effect being: creation of a country within a country, widening the gap between haves and the have – nots and increasing regional disparity. All these factors completely erode 'sovereignty', 'equality', 'democracy', 'federalism' and many other features, which have been categorized as 'basic', without justification.

The indeterminate list of 'basic features' is so long and oft extrapolated that many more instances can easily be carved out, justifying exercise of central power under Article 356. This befuddled state of affairs is the consequence of the judicial passivity and unfounded, generalized judicial perceptions. The Court has to learn to draw the line lest the great institution will one day have to eat its own words.

[10] S.P. Sathe, *"Secularism and Judicial Activism", Judicial Activism in India: Transgressing Borders and Enforcing Limits* [Oxford University Press, 2002], 177

[11] 'Special Economic Zones', Nishith Desai and Associates, www. nishithdesai.com

The Ever Expanding Scope of Basic Structure Doctrine

Gunjan Khare*

I. Introduction

The question of limiting the power of Parliament to amend the Constitution has been a constant source of conflict between the Parliament and Judiciary. It is uncertain as to when the controversy will come to an end, since the policy makers of each Parliament would like to implement their promises and assurances they have given, without sometimes going deep into the legal repercussions of such acts.

In order to keep a check on the power given to Parliament, the Supreme Court in *Kesavananda Bharati v State of Kerala*[1] created a fiction known as the basic structure of the Constitution. As is evident, this doctrine was brought forth to ensure that Parliament remains subservient to the Constitution. The doctrine is largely based on judicial perceptions and majorities. *Kesavananda* was itself decided by a majority of one.

In *Kesavananda,* the Twenty Fourth, Twenty Fifth and Twenty Ninth amendments to the Constitution were challenged. Here, the Court laid down that Article 368 does not enable Parliament to alter the basic structure of the Constitution.

It would be pertinent to note that the marginal note to Article 368 which earlier read "Procedure of Parliament to amend the Constitution" was amended by the Twenty Fourth Amendment to read "Power of the Parliament to amend the Constitution and procedure thereof." The power granted under Article 368(1) to amend by way of addition, variation or repeal any provision of the Constitution was clearly an answer to *Golaknath v State of Punjab.*[2]

The basic features as propounded in *Kesavananda* to check the amending power of the Parliament were laid down broadly with the noble hope that *"every Constitution is expected to endure for a long time. Therefore it must necessarily be elastic."*[3]

II. Evolution and Consolidation

In the second and most important part of this paper, I would like to elucidate on the evolution and consolidation of the basic structure doctrine

* Student of V B.S.L (at the time when the paper was presented). This paper was presented at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remembering S.P. Sathe,' event held on Professor Sathe's first death anniversary. gunjankhr@gmail.com

1 AIR 1973 SC 1461.

2 AIR 1967 SC 1643.

3 *Supra* note 1.

in its application to various judgments amidst political bickering, often influencing the decisions of the Courts.

It all started with the Zamindari Abolition Acts that were passed in Bihar, Madhya Pradesh and Uttar Pradesh, which were challenged in various High Courts by landholders on the ground of violation of Fundamental Rights. In 1951, the First Amendment to the Constitution introduced the Ninth Schedule. Laws inserted in this schedule would be accorded absolute immunity even if these statutes violated Fundamental Rights.

Article 31A protected 'estate' laws from challenges on the ground of Fundamental Rights' violations, as a result of which, as rightly summed up by Granville Austin, "the government could less use judges as whipping boys for its own failures in implementation."[4]

Sankari Prasad & Sajjan Singh

Subsequently, the First Amendment was challenged in *Sankari Prasad v. Union of India*[5] as a violation of Article 13(2), which prohibited the State from making any law in derogation of Fundamental Rights. The Court held that there was no limitation whatsoever on the amending power of Parliament. In *Sajjan Singh v. State of Rajasthan*[6] case when the reconsideration of *Sankari Prasad* arose, the Court did not invalidate challenged Constitutional Amendments between 1951 and 1955. The Court felt that such invalidation would set aside several judicial decisions dealing with the validity of the Acts included in the Ninth Schedule since the decision in *Sankari Prasad.*

Golakhnath

After twelve long years in *Golaknath*[7] the court held that the amending power of Parliament was limited, and that a constitutional amendment is law within the meaning of Article 13(2) and therefore could not abridge Fundamental Rights.

To avoid imminent turmoil, the Court applied the principle of *prospective overruling* in order to ensure that the Court's decision would operate only prospectively. M. C Setalvad characterizes the application of this principle as the *"court speaking with two voices."*

Indira Gandhi

Discussion on the basic structure doctrine would be incomplete without examining the decision in *Indira Gandhi v. Raj Narain.*[8] Indira

4 Granville Austin, *The Indian Constitution: Cornerstone of a Nation,* Oxford University Press.

5 AIR 1951 SC 458.

6 AIR 1965 SC 845; AIR 1964 SC 446.

7 *Supra* note 2.

8 AIR 1975 SC 2299.

Gandhi's election was set aside by the Allahabad High Court on 12th June, 1975 for committing a corrupt practice. Subsequently, internal emergency was imposed on 25th June, 1975. She filed an appeal in the Supreme Court. Before the appeal was taken up for hearing the electoral law was amended retrospectively so as to render the High Court's finding nugatory. In addition, the Thirty Ninth Amendment ousted the Supreme Court's jurisdiction to adjudicate upon election disputes and offences.

The aforementioned Amendment provided that the election of the Prime Minister and the Speaker of the Lok Sabha could be decided only by a 'body' or 'authority' established by Parliament. Also, it was provided that all laws prior to the Amendment were valid and any judicial decisions which set aside elections were invalid.

According to Kuldeep Nayar, "elections of the President and the Vice President, and Speaker were included in the Amendment along with the Prime Minister's so it would not appear too obvious that it was to save Mrs. Indira Gandhi's election."

According to Dr. S. P Sathe *"it was a very personalized amendment...to protect one person's interests."*

The basic structure doctrine was applied to invalidate Article 329A. The Court struck down the amendment but upheld the Prime Minister's election.

Minerva Mills

Another instance of the application of the basic structure doctrine was in *Minerva Mills v Union of India*[9] wherein Article 31C as introduced by the Forty Second Amendment was challenged. The Court held that Article 31C violated the basic structure of the Constitution as it gave primacy to Directive Principles over Fundamental Rights.

The Court held that harmony between the two was a basic feature of the Constitution. The Court struck down Section 55 of Constitution of India (42ndAmendment) Act. Section 55 introduced Article 368(4), which fixed Constitutional Amendments beyond the pale of judicial review.

On, Article 368(5), the Court was of the view that Parliament had only limited amending power and Parliament cannot destroy the basic structure by expanding its amending power.

Waman Rao

In *Waman Rao v. Union of India*[10] the Court held that constitutional amendments after *Kesavananda* which included laws in the

[9] AIR 1980 SC 1789.
[10] AIR 1981 SC 271.

Ninth schedule cannot breach the basic structure. The Court applied the basic structure doctrine to uphold the validity of Article 31A and 31C instead of applying the principle of *stare decisis*. Justice Krishna Iyer expressed his views in the following words:

"In constitutional issues over-stress on precedents is inept because we cannot be governed by voices from the grave and it is proper that we are ultimately right rather than be consistently wrong. Even so, great respect and binding value are the normal claim of rulings until reversed by larger benches."

Sampath Kumar & L. Chandra Kumar

The Forty Second Amendment inserted Article 323A for establishing administrative tribunals.

In *Sampath Kumar v. Union of India*[11] the vires of the Administrative Tribunals Act, 1985 was challenged. Indisputably, the Act was framed within the ambit of Article 323A. The Court held that *"effective alternative institutional mechanisms or arrangements for judicial review can be made by Parliament"*. This amendment to the Constitution was not considered as violative of the basic structure.

Ten years after *Sampath Kumar* when the Supreme Court was flooded with special leave petitions against decisions of the Tribunals, it found an occasion in *L. Chandra Kumar v Union of India*[12] to examine the validity of Article 323A and held that the ouster of jurisdiction of the High Courts violated the ambit of Judicial Review which is a basic feature of the Constitution and directed that decisions of the Administrative Tribunals shall henceforth be subject to the writ jurisdiction of the High Courts.

G. C Kunungo and *Ismail Faruqi*

The judgments in *G. C Kunungo v. State of Orissa*[13] and *Ismail Faruqi v Union of India*[14] take us to another plane of the basic structure doctrine. In *Indira Gandhi's* case,[15] it was laid down that the basic structure doctrine cannot be applied to invalidate an ordinary legislation.

The Court in *G. C Kunungo* held that the State Legislature by enacting the impugned Amendment Act had encroached upon judicial authority resulting in infringement of a basic feature of the Constitution- the 'rule of law'.

The arbitral awards sought to be nullified under the 1991 Amendment Act were those made by the Special Arbitration Tribunals

[11] AIR 1987 SC 386.
[12] AIR 1997 SC 1125; (1995) 1 SCC 400.
[13] (1995) 5 SCC 96.
[14] (1994) 6 SCC 360.
[15] *Supra* note 6.

constituted by the State itself under the 1984 Amendment Act to decide arbitral disputes to which state was a party. The Court was of the view that the Parliament cannot be permitted to undo such arbitral awards which have gone against it, by having recourse to its legislative power for grant of such permission could result in allowing the State to abuse its legislative powers. In any event, the 1991 Amendment Act could have been struck down on the ground that it nullified arbitral decisions, and interfered with the propriety of judicial decisions passed by the Special Administrative Tribunals.

Another judgment in which the Supreme Court applied the doctrine to an ordinary legislation was *Ismail Faruqi v. Union of India.*[16] The Act in question was the Acquisition of Certain Areas at Ayodhya Act, 1993 which was struck down on the ground that it violated secularism, a basic feature of the Constitution.

I. R. Coelho

In 2007, the Supreme Court in *I. R. Coelho v State of Tamil Nadu*[17] laid down a new test known as the "direct impact and effect test". The Court held that the constitutional validity of the Ninth Schedule laws, on the touchstone of the basic structure doctrine can be adjudged by applying the *direct impact* and *effect* test i.e., the rights test according to which the form of an amendment is not the relevant factor but consequence thereof would be a determinative factor. The 'actual effect' and 'impact' of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it infringes the basic structure.

New tests have been laid down in *I. R Coelho* and in *Nagaraj v Union of India*[18] in order to further the implementation of an already existing test, i.e., the basic structure doctrine.

Its time that the constituents of the basic structure doctrine are laid down with precision, which are acceptable both to the Parliament as well as the judiciary.

[16] *Supra* note 14.
[17] (2007) 2 SCC 1.
[18] AIR 2007 SC 71.

The Basic Structure: A Fiction Misconstrued?

Suchindran*

The development of the Basic Structure doctrine is a landmark in the development of Indian constitutional law. Indeed, it can be and is often seen as innovative milestone in the history of constitutional law herself. Its growing importance can be evidenced by the fact it has been debated, criticized and praised in other jurisdictions by legal systems and academia alike.

The doctrine is contentious primarily because in the formal separation of powers accepted in Anglo American jurisprudence, the judiciary cannot and should not exercise a final say which is considered the prerogative of the Legislative department. The Judiciary function is only to interpret the laws given to them.

An early answer to this fundamental proposition was given by Chief Justice Marshall in arguably the most famous constitutional law decision of all time in *Marbury v. Madison*.[1] The case conclusively reserved the power to decide the constitutionality of legislation for the judicial department. In India, the framers decided to incorporate this provision by allowing the superior courts to issue the prerogative writs under Article 32 and 226.

The basic structure doctrine goes a step further and allows courts to sit on judgment on even constitutional amendments. It can be rightly said that such a power was never intended to be given to the judiciary by the framers. It was therefore originally seen by many scholars and academics as challenging the very idea of democracy, where the last word is always given to the elected representatives of the people.

Was the judiciary overstepping its boundaries? Or was it within its powers to create such a limitation on the power to amend the Constitution? Is such a power necessary to protect the identity and continuity of the Constitution itself?

These are some of the questions that I have tried answering in this article by placing the doctrine in the context of the times. In the Second part, I shall argue that it has become a fiction that has been stretched beyond the original intent of its creators and the necessity, which led to its creation.

* Student of V[th] Year B.S.L (at the time when the paper was presented). This paper was presented at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remembering S.P. Sathe,' event held on Professor Sathe's first death anniversary. suchindranbn@gmail.com

[1] 5 U.S. 137

The Necessity of the Basic Structure

Almost a hundred years ago, Justice Holmes had remarked that the life of the law was not logic but experience. In that famous passage he had noted that "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices that judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[2]

Similarly, I believe that the basic structure doctrine was a response given by the Supreme Court to meet "the felt necessities of the time." If we glance at the case law relating to the amending power starting with *Shankari Prasad* in 1951 to *Kesavananda Bharati v State of Kerala* in 1973, we can see that all the cases were clearly judicial responses to the surrounding political climate.

In *Shankari Prasad v. Union of India*,[3] the court was faced with a situation where the original framers of the Constitution were manning the executive and legislative departments. Their stature and integrity could not have been challenged even by an activist minded court which was manned by judges often seen as collaborators of Empire. In addition to this, the judges were trained in the English black letter law tradition which gave supremacy to Parliament. This can be evidenced by their early reluctance to go beyond the words actually used in the provision.[4]

In *Sajjan Singh v. State of Rajasthan*,[5] the murmur of dissent can already be heard as Justices Mudholkar and Hidayattullah dissent in the Constitution Bench decision. This case arose in the immediate aftermath of Jawaharlal Nehru's death. His death marked India's first political transition and collided with the rising on India's second generation of leaders. The Obituary pages of this period includes Sardar Vallabhai Patel, Maulana Abdul Kalam Azad, Bhimrao Ambedkar, Rajendra Prasad and many others stalwarts. These were the leaders who were capable of a large mass appeal and whose statements even the judges would have given great credence to.

The next case is *I.C. Golaknath v. State of Punjab*[6] where the court by a narrow majorty of 6-5 held that Parliament's power to amend the Constitution did not extend to amending the fundamental rights contained in Part III. I believe that this case was a reaction to the apprehension that a Parliament devoid of leaders of the stature of Nehru, Patel, Azad

2 Oliver Wendell Holmes Jr., The Common Law, p.1
3 AIR 1951 SC 458
4 *Keshavan Madhava Menon v. Bombay, AIR 1951 SC 128*
5 AIR 1965 SC 845
6 AIR 1967 SC 1643

and company would run roughshod over the basic rights of the people. As long as he and his compatriots were alive, I do not believe that the de facto supremacy of Parliament could ever have been questioned.

The criticism following the *Golaknath* decision from all quarters led to the decision in *Kesavananda Bharati v. State of Kerala*.[7] The Court was made to realise that the extreme rigidity and technicality of *Golaknath* had to be overcome but at the same time it must be ensured that the soul and identity of the Constitution must not allowed to be changed by a fickle and unintelligent majorities at their own whims and fancies. There were legitimate fears of this, in the aftermath of the *Bank Nationalization case*, *the Privy Purse Case* and the related amendments made at the instance of the so-called Socialist Administration under Prime Minister Indira Gandhi.

Kesavananda marks a paradigm shift from the previous development of Constitutional Law in India. There are many new currents that are expressly given recognition in this case. An example is the growing importance of the Directive Principles of State Policy vis-à-vis the Fundamental Rights. The Socialist tilting of judges can be seen in their reluctance to include the right to property as part of the Basic Structure. The effect of the policy of Court Packing followed by the Indira Gandhi Government after the *Golaknath* decision (defended publicly in Parliament by Mohan Kumaramangalam) can also be seen. However, the *Kesavananda* case seems to have preempted the success of the scheme by coming up a few years before the government would have probably liked.

The basic structure doctrine was further refined and accepted by the Supreme Court in *Indira Gandhi v. Raj Narain*.[8] It was in this case that the basic structure doctrine was culled out of the confusing carcass of *Kesavananda*. It was held that the constituent power, being legislative and not judicial in nature, could not be exercised to settle a private dispute. Three judges held that the relevant clause of the amendment was invalid because it offended the basic structure of the Constitution (Mathew, Khanna, and Chandrachud JJ), and two judges held it invalid because it amounted to usurpation by Parliament of what is essentially a judicial function (Ray C.J. and Beg J). The court however, validated the election on the grounds that the amendment made to the Representation of Peoples Act were valid and had overruled the judgement and reasons given by the Allahabad High Court to invalidate Mrs. Gandhi's election.

Basic Structure: A Fiction Stretched?

In order to truly understand the importance of the Basic Structure doctrine we must see it for what it essentially was – an extraordinary

7 AIR 1973 SC 1461
8 (1975) Supp SCC 1

remedy created to meet the exigencies of an extraordinary time. It is a doctrine that was grown from the text of the Constitution to protect its essential identity from destruction. This is consistent with the theory that Constitutions must be interpreted keeping in mind that they are essentially charters of wide import meant to last for long periods of time and must be construed accordingly.

The usage of the Basic Structure doctrine to invalidate legislation is to equate the constituent power with the legislative power. It will be analogous to erecting a Great Wall in order to prevent boys from throwing stones. I submit that the majority view in the Election case that the Basic Structure Doctrine should be applied only to constitutional amendments was correct and should not have been departed from. This is because the doctrine contains not only certain fundamental provisions but also certain constitutional axioms which are not capable of exact definition. Any limitations on the legislative power must be drawn from the express provisions of Part XI.

I believe that the tendency among the judges of our constitutional courts to use their conceptions of the basic structure to invalidate legislation can be attributed only to a judicial laziness which has resulted in the doctrine becoming very uncertain. Prudence requires that a statute must not be declared as unconstitutional merely because in the subjective opinion of the Court it violates one or more principles of liberty, or the spirit of the Constitution, unless such principles and that spirit are found in the terms of the Constitution. Every judge must while expanding the scope of any term of the Constitution take into account the effect of his or her decision on a future dispute. When breaking new ground the Court must always tread with caution.

The danger with structuralist interpretations is that they vary according to the judges' value choices. The legislative power should be restricted only on the touchstone of the express provisions of the Constitution as provided in Article 245. Here it is important that we realize that the Constitution is a charter of power and not a charter of liberty i.e. it is a charter specifying exactly what the State is empowered to do by the people, who in constitutional democracies like ours are the ultimate sovereigns. The express provisions of the Constitution enunciate the mode of achieving the objectives set out in the preamble.

Another misconception that must be laid to rest is the nature and importance of the fundamental rights vis-à-vis the other provisions in the Constitution. While the fundamental rights can be seen to be politically more important than the other provisions of the Constitution, they cannot be said to be legally more important. The constitutional courts may invalidate legislation for contravention of any Article of the Constitution because all

are of equal importance in relation to the power of judicial review of executive or legislative action.

Seervai notes in his magnum opus on the Constitutional Law of India "the greatest danger to the administration of justice and constitutional interpretation arises from the genuine desire of judges to do justice in each individual case."[9] The aim of the court in interpreting the basic structure must be "justice according to law" and not justice according to the Lord Chancellor's foot. If restraint is not exercised then there is a real danger of an extraordinary constitutional protection being reduced to an excuse for the judiciary to usurp legislative and executive functions, a job that it is inherently incapable of doing.

The correct test for the invocation of the basic structure doctrine is: whether the constitutional amendment attempts to alter or changes the essential identity of the Constitution as it existed prior to the amendment. The widths test given in *Nagaraj*[10] or the effects test in *Coelho*[11] have only served to create more confusion and must be done way with at the earliest.

The Court is not, and more importantly should not see itself, as a panacea for all ills. Certainty is more important to the overall conception of justice than immediate justice in each particular case. In *A.K. Gopalan*, the Court quoted with approval the following observations of Gwyer CJ that any assumption of authority beyond the express constitutional provisions limiting the legislative will would result in putting in the hands of "the judiciary powers too great and too indefinite either for its own security or the protection of private rights."[12]

In conclusion we must note that the judiciary can violate the basic structure as much as any other organ even though they have been designated as the sentinels and final interpreters of the document in our constitutional scheme. The decision to enter the Jharkhand Assembly[13] and the decision to sit in judgement on the speaker's decision to disqualify MP's for taking bribes to table questions in parliament[14] are recent examples of the court's disregard of the lakshman rekha that separates judicial activism from judicial adventurism.

---

9 H.M. Seervai, *Constitutional Law of India*, Vol. 1, p. xxv
10 *M. Nagraj v. Union of India*, (2006) 8 SCC 212
11 *I.C. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1
12 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27
13 *Anil Kumar Jha v. Union of India*, (2005) 3 SCC 150
14 *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*, (2007) 3 SCC 184

Grasping Intangibles
Human Rights and their role in Judicial Review

Dwarkesh Prabhakaran*

The Supreme Court as the Watchdog

We must come to terms with the fact that our Supreme Court was deliberately designed by the Constitution's makers to be a truly formidable force in protecting our Fundamental Rights. The tone of Articles 32 and 142 of the Constitution, even without reference to the voluminous judicial interpretation of the same, make it clear that our Supreme Court has been given extreme flexibility to deliver justice. At the time of attaining independence, India's poverty, population, size, resources, etc. needed an executive and a legislature, which would have full power and control for nation building in our complex quasi-federal setup. Consequentially, democracy required that these two powerful organs of the State must be prevented from abusing their powers. Simply put, India needed and still needs not only a powerful executive and legislature but also a powerful Judiciary. The judiciary has witnessed incalculable controversy over its decisions and choices. Today, it cannot be denied that the Supreme Court and the High Courts have often voiced their interpretations and orders far, wide and fearlessly through the corridors of power.

Human Rights and the Supreme Court

The Supreme Court has been the key to delivering innumerable first-generation human rights. These rights can correctly be regarded as the basics of human life in a democracy. Equal pay for equal work, right to a clean environment, privacy, education, non-arbitrariness in state action, livelihood, health and medical assistance, shelter, protective homes, prisoner's rights, free legal aid, speedy trial, etc. are just, some of the 'basics' the Supreme Court has frequently declared to be compulsorily provided. But State apathy did not end with these declarations and neither did the Supreme Court's urge to give effect to human rights. It became evident that mere declarations left at the mercy of the executive and the legislature were insufficient. Judgments wherein the rights were declared and directions were issued to give effect to these rights became the constructive remedy. The more well-known cases are where guidelines were laid down to protect women from sexual harassment at their work places[1], guidelines regulating

* Student of IV B.S.L (at the time when the paper was presented). This paper was presented at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remembering S.P. Sathe,' event held on Professor Sathe's first death anniversary. dwarakeshp@gmail.com

1 *Visakha v. State of Rajasthan* AIR 1997 SC 3011.

the functioning of blood-banks across the country,[2] guidelines relating to adoption of children from India,[3] directions securing autonomy for the CBI,[4] directions issued to the Election Commission of India[5] and a vast number of cases where comprehensive environment-protection directions[6] have been issued. More recently, the Supreme Court has played more than just an active role in the field of education whereby it has dealt elaborately with how educational institutions are regulated especially relating to fee structure, fee fixation, admissions, academics, etc.[7]

Time and events have proved that this method of rendering justice was more out of necessity than choice thereby rendering any criticism redundant. What started as a creative manner of enforcing Fundamental Rights has now become more the rule than the exception as we will see from how impatient the Supreme Court is when it comes to executive/legislative inaction. Human Rights, it seems, no longer need to be declared but now have to be delivered and not just to the petitioner but to society at large.

To gauge the current attitude of the Supreme Court on the scope of Judicial Review and Activism, certain judgments are important.

Judicial Review/Activism – Rising friction

The functioning of the constitutional mechanism directly affects the growth of human rights. The Judiciary has now come to believe that the executive and the legislative wings need to significantly improve their effectiveness, pending which Human Rights will only be worth the paper they are written on. Simultaneously, the need for a more powerful and able state machinery has resulted in differences between the Judiciary and the other two wings of State frequently. It seems that these differences have now become open and allegedly, an overstepping of borders.

Horse-trading in Jharkhand

In 2005, the Supreme Court gave directions to the Jharkhand Legislature Speaker whereby regulating the agenda of the house and the manner in which the 'floor test' should be conducted.[8] To add to the woes of the legislators, police supervision was also directed. These orders were issued at a time when the common perception amongst society was that of gross mala fide and blatantly illegal horse-trading. The events subsequent

2 *Common Cause v. Union of India* (1996) 1 SCC 753.
3 *Laxmikant Pandey v. Union of India* AIR 1992 SC 118.
4 *Vineet Narain v. Union of India* (1996) 1 SCC 119.
5 *Union of India v. Association for Democratic Reforms*, JT 2002(4) SC 501.
6 *M.C. Mehta v. Union of India* AIR 1988 SC 1037 and several other instances, also cases like *Vellore Citizens Welfare Forum v. Union of India.*
7 *T.M.A Pai Foundation & Ors. V. State of Karnataka* (1995) 5 SCC 220, *Islamic Academy v. State of Karnataka* (2003) 6 SCC 697, *P.A. Inamdar v. State of Mahar ashtra* AIR 2005 SC 3226.
8 *Arjun Munda v. Governor of Jharkhand* (2005) 3 SCC 150.

to the orders add interesting thought to the severe criticism from several Speakers of Legislatures from across the country. While the Speaker of Lok Sabha, Mr. Somnath Chatterje came out strongly against such judicial-supervision and gross breach of the "Laxman Rekha", the Central Government asked their colleagues in Jharkhand to cease any further pursuit of power as the game was up. Ironically, the five "independent" MLA's who gave crucial support to the incumbent government were the reason why the government fell again a year later. In the face of gross constitutional violations, talk of a "Laxman Rekha" could not have prevented the Supreme Court from issuing such directions. Besides, criticism was not uniform, not all Speakers supported the Speaker of the Lok Sabha in his initiative to warn of over-stepping. There have been so many instances like Jharkhand in State legislative assemblies that have only added weight to the orders of the Supreme Court.

Police Reforms and Human Rights

In 2006, while expressing anguish over the inexcusable delay in implementing the National Police Report submitted by the National Police Commission, Chief Justice Sabharwal made it resoundingly clear that the Court itself was fully capable of issuing necessary orders to ensure implementation.[9] Controversy, being part and parcel of judgments like these, kicked itself into gear. How could the Supreme Court consider itself a nation-wide supervising authority and order every State Government [some of whom refused to appear before the Supreme Court during arguments] to implement wide changes in the police machinery? Aren't commission reports best left to the wisdom of the cabinets and legislatures? Does the Court have the power to order State Governments to spend crores on implementing police reforms because it feels that human rights are important? Wasn't policy a part of the Executive/legislative sphere? These are some questions which were raised.

Parliamentary Privileges and Judicial Review: The Infinite Debate

Parliamentary privileges and Judicial Review have historically been on a collision route on and off. Sequentially, the cash-for-query scam case was decided in January 2007 and the Court held that Parliament had the power to expel MP's who had committed gross breach of conduct.[10] Also, it was made clear that the exercise of such power would be subject to judicial review in case of gross breach of constitutional provisions but mere irregularities in procedure cannot be challenged. In coherence with the Supreme Court's previous strict interpretation of provisions relating to parliamentary privileges, parliamentary privileges were held to include

[9] *Prakash Singh v. State of Haryana*, (2006) 8 SCC 1.
[10] *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha and Ors.*, (2007) 3 SCC 184.

everything that the House of Commons had at the time of Independence, which in turn included the power to expel MP's. Fortunately, this dangerous power was made subject to Judicial Review. While firstly I believe that no such power ought to have been given to Parliament[11], credit must be given to the fact that the Court cleared up a long-standing lack of clarity as to how far Judicial Review will extend into parliamentary affairs. Mr. Somnath Chatterjee once again expressed his disapproval of Judicial Review's long arms.

These above cases are just a few of many where it is claimed that the conflict between the judiciary and the other wings of the State has become open and harmful. The need to ensure basic human rights led the Supreme Court to constructive interpretation of Part III of the Constitution. State inaction led to judicial activism and even judicial governance vide Articles 32 and 142. Amongst the various features that may be considered as part of the 'Basic Structure' of the Constitution, none has grown more in its scope than Judicial Review itself. Today's judicial activism is a very bitter pill to swallow. The years of judicial reasoning have enabled the Supreme Court to legitimately reach far into the spheres of the executive and the legislature, the examples are voluminous. But, it seems that any difference of opinion between these two sides is termed as conflict, overstepping, unconstitutional, etc. Reservations in academic institutions may once again see rough seas with the 93rd Amendment on the anvil. The successive judgments in *TMA Pai, Islamic Academy* and *PA Inamdar* have proved how elaborate the Supreme Court can be in imposing its own judicial solutions on problems faced by millions. When dealing on such large scales, it is inevitable that State Policy can no longer be privy to the wisdom of the executive and the legislature alone hence 'conflict' begins. Considering how wide the criteria are for judicial governance today, it is clear that the Court will not shy away only because millions are suffering. Irrespective of bona fide implementation, as Prof. S.P. Sathe would put it, legitimacy is a very powerful and sustainable resource of the Judiciary.

Judicial Activism may have blurred the divide between policy and reviewable matters and will continue to do so. The Supreme Court and the High Courts have in their wisdom still preserved the importance of policy discretion or better known as "play in the joints". Time and again, the Supreme Court has refused to pass orders in matters on the ground that policy decisions and economic matters are best left to the judgment of the executive and the legislature and this has been no rare occurrence.[12]

[11] Appropriate Laws with procedural safeguards exist for punishing errant MP's. This power is a door to circumvent such laws and their formalities.
[12] *Aruna Roy v. Union of India* (2002) 7 SCC 368, *BALCO Employees union v. India* AIR 2002 SC 350, *State of MP v. Nandlal Jaiswal* (1986) 4 SCC 566, *R.K. Garg v. Union of India* (1981) 4 SCC 675, *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India*, (1981) 4 SCC 675.

Intangibility

What started with the growth of human rights in judicial pronouncements has now become a full-blown debate on where Judicial Review/activism will draw the line. Our constitutional setup incorporated a rough-at-the-edges separation of powers. Wide scope for Judicial Review [amongst the widest in the world perhaps] was indeed a natural consequence. The Basic Structure doctrine added more fuel to the Judicial Review powerhouse. Judicial Review will continue to widen its scope as long as State activity and inaction continue. Democracy, judicial review and the separation of powers have a single intangible lifeline running through them. As long as one is alive, the others will be too. In a country of more than a billion, where State Organs are bound to have differences, the differences are living proof of a functioning democracy for better or for worse. But in the end, the Constitution will survive and live the lifetime it was intended for.

Judicial Activism and Development of Human Rights: Positive Judicial Gerrymandering

Bhushan Dhananjay Panse*

"Judicial Activism refers to that phenomenon of the courts dealing with those issues which they have traditionally not touched or which were not in contemplation of the founding fathers." Further the author of this definition emphasises, "It is state of mind, the origin of which lies in the 'in activism' of other two wings of the government."[1] It is very pertinent to note that even if other two organs are efficient, judicial activism will stand on its own virtue.

This definition will suffice to include the basic sense of judicial activism but as the facets of judicial activities are increasing at such a frenetic pace, one has to consider various other aspects of it. As the judiciary spreads its fiefdom, I would like to define judicial activism as a trend of exploring all the laws by dynamic interpretation so as to make 'law' closer to 'justice'.

Henry J. Abraham[2] aptly describes judicial activism as a means of harmonising the constitutional culture, values and democracy. Indian Judiciary is also intended to march on a same path. In quest of achieving this task, the judiciary has redefined its precincts and the followers of technocratic model of judiciary have criticised these attempts as transgression of limits laid down by the Constitution. Through judicial activism judiciary gives new meaning to the provisions of law as to make them more suitable for the call of the time and constantly work as a bulwark against any despotic government action or lethargic inaction. As the Indian judiciary is not only acting as the neutral state organ but also as a power centre of democracy, its role has to be performed carefully.

Krishna Iyer J. rightly observed, "Every judge is an activist either in forward gear or in reverse". Judicial activism can be classified by considering its nature, in positive activism or the negative activism. This legal taxonomy is based upon approach of judiciary related to alteration of existing power relationship or their approach of maintaining the status quo.

By giving forethought to these aspects, it will be easy to enter into

* Student of V BSL LLB (at the time when the paper was presented). This paper was presented at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remembering S.P. Sathe,' event held on Professor Sathe's first death anniversary. bhushanpanse@gmail.com

1 *Surya Dev - "Who will Judge the Judges": A Critical Purview of Judicial Activism, Delhi University law Journal, Vol. 1 1997*

2 *Henry J. Abraham - The Judicial Process, 5th Edition 1986*

realm of Human Rights and their status under the Indian Constitution. "Human Rights are those rights which every individual must have against the state or other public authority, by virtue of his being a member of the human family irrespective of any other consideration."[3] Human rights are the important parameters of a society based upon law and justice and therefore our constitution makers enshrined those in the Indian Constitution.

The United Nations Charter–1945 and the Universal Declaration of Human Rights–1948 performed a vital role in framing of Indian constitution. Human rights can be classified under two important heads as justifiable and non-justifiable, which also can be called as 1st generation human rights (based upon *laissez faire* that state should not intervene in those rights) and 2nd generation human rights (implementation of which is based upon state initiative).[4] On International level two other important conventions have been ratified by India,

1) International Covenant on Civil and Political Rights;

2) International Covenant on Economic, Social and Cultural Rights.

All these international conventions are important to know the whole concept of Human Rights. Indian judiciary has always endeavored to explore the law in consonance with them. Under Indian Constitution we have two different chapters, one is related with Fundamental rights and another states the Directive Principles of State Policy, separation of which is based upon its nature as classified above.[5] Fundamental Rights are strictly enforceable against the state machinery and state should not violate those rights. The Directive Principles of State Policy are the guidelines to which state should give utmost consideration while framing the policies. Though the legal status of both is different, for the enforcement of human rights there is no conflict between them. Bhagawati J. in *Minerva Mills Ltd.* v. *Union of India* clears the position[6]- the Directive Principles of State Policy and Fundamental Rights mainly proceeds on the basis of Human Rights (as position is cleared in *Kesavananda* judgment). He further advocated the harmonised reading of both the chapters for establishment of egalitarian social order informed with political, social and economic justice and ensuring dignity to the entire people of the country including the have-nots and the handicapped, the lowliest and the lost.

To make human rights meaningful for the Indian people, our judiciary started interpreting the law in Indian context considering our social milieu and hence we have various dynamic interpretations. Liberal interpretation of chapter of fundamental rights, expansion of Article 21 of the Constitution,

3 *D.D. Basu - Human Rights in Constitutional Law, 1994*
4 *Classification of Human rights.*
5 *Ibid.*
6 *Minerva Mills Ltd.* v. *Union of India,* AIR 1980 SC 1789

development of Public Interest Litigations (PIL/SAL/PAL) are various vital law points which have to be considered.

The most celebrated device for implementation of human rights is the PIL which got esteem and for the first time Indian judiciary got layman's appreciation. Various epoch-making judgments after '80s gave a fillip to the common man of India to knock the doors of the courts for justice. Indian judiciary started entertaining the petitions not only from aggrieved parties but also from any person acting 'pro bono publico', i.e. the 'public-spirited citizen'. All the formalities were given up and even simple letters[7] were entertained by the courts as PILs. It gave a lot to social activists[8] and social action groups[9] a chance to raise their voice against the despotism or apathy of the government. Those problems hardly got the importance before this legal invention. Through PIL, under- trial prisoners[10] as well as prison inmates[11] were allowed to ask for relief. In the labour sector, unorganized labourers[12] as well as bonded labourers[13] were able to attract the courts' attention. The judiciary addressed many other issues like the problems of pavement dwellers[14], women in protective custody[15], children of prostitutes[16], death of person in police custody because of torture[17] and many more. In the cause of environment protection the judiciary affected almost a sea-change. Due to the efforts of public-spirited lawyers like M.C.Mehta, the court has laid down the principles of 'Polluter Pays' and 'Absolute Liability'[18].

Article 21 of the constitution was expanded to embrace all the human rights, which are necessary for living like a human being.[19] All these activities certainly facilitate making human rights meaningful for Indians. In search of the panacea for problems, judiciary has tried very cautiously to maintain the legal sanctity of such orders. There are various instances in which judiciary has redefined its role which was not tolerable under the traditional law system. We have to give a thought to these.

The most controversial aspect of this is about relaxation of rule of

7 *Sunil Batra* v. *Delhi Administration* AIR 1978 SC 1675
8 *M.C.Mehta, Sheila Barse, Shivsagar Tiwari* etc.
9 *Common Cause, Akhil Bharatiya Shoshit Karmachari Sangha, People's Union for Civil Liberties, People's Union For Democratic Rights, Bandhua Mukti Morcha* etc.
10 *Hussainara Khatoon* v *State of Bihar* AIR 1979 SC 1360: (1980) 1 SCC 81
11 *Sunil Batra* v *Delhi Administration* AIR 1978 SC 1675
12 *People's Union For Democratic Rights* v *Union of India* AIR 1982 SC 1473
13 *Bandhua Mukti Morcha* v *Union of India* AIR 1984 SC 802: (1984) 3 SCC 161 *and for child labour M.C.Mehta* v *State of Tamilnadu* (1996) 6 SCC 645: AIR 1997 SC 699
14 *Olga Tellis* v *Bombay Municipal Corporation* AIR 1986 SC 180: (1985) 3 SCC 545
15 *Dr.Upendra Baxi* v *State of U.P* (1983) 2 SCC 308
16 *Gourav Jain* v *Union of India* (1997) 8 SCC 114
17 *Dilip K. Basu* v *State of W.B.* (1997) 6 SCC 642
18 *M.C.Mehta* v *Union of India* AIR 1987 SC 965
19 *F.C. Mullin* v *The Administrator, Union Territory of Delhi & Others* (1981) 2 SCR 5

locus standi, which is based upon the theory that only an aggrieved person who will be able to raise justiciable issue is allowed to move the court of law for the recourse. This rule presumes that people are conscious of their rights and have the resources to fight against violation of those rights. For finding out the genuine claims this rule is an important one. But by taking into consideration the Indian social milieu, it will be precarious to presume so. Therefore expansion of *locus standi* is not only justifiable but also essential.[20] The apex court has expanded its limits significantly in this respect.[21]

In exercise of writ jurisdiction also judiciary has invented new methodology for making human rights meaningful. The writ jurisdiction is supposed to be used only for preventing a mischief or providing relief if it is already done. There is no provision for giving compensation for such violation of rights. Hon'ble Supreme Court felt that this is not adequate relief so they evolved the system of giving reasonable compensation to the person whose rights have been belied by the government action or inaction.[22] This concept not only expanded to grant relief for violation of first generation human rights but also third generation human rights (collective rights).[23]

Indian judiciary also worked out a paradigm shift in principles of *ratio decidendi* and *obiter dicta*. Traditionally only *ratio decidendi* possess the binding force and *obiter dicta* possess only persuasive value. But for the successful implementation of human rights judiciary changed its approach and hence in *Visaka* v. *State of Rajasthan*[24] *the h*on'ble apex court not only stated that the guidelines issued are binding as per the Article 141 of the constitution (though traditionally considered as *obiter dicta*) but also asked the government machinery to include those in the standing orders of the Industrial Disputes Act, 1947 as to make them applicable in private industries also.

Many times, the hon'ble apex Court relied upon the *Wednesbury Principles* of judicial review under which, the court does not substitute its own judgment for that of the authority to whom the power of taking decisions is entrusted by the legislature. The court does not look at whether the decision is right or wrong, but only whether it's duly taken according to procedure laid down and considering relevant facts. However, this rule has been diluted by the apex Court in the matters relating to violation of fundamental rights[25].

20 *Fertilizers Corporation Kamagar Union* v *Union of India* AIR 1981 SC 344; (1981) 1 SCC 568
21 *D.C.Wadhava* v *Union of India* AIR 1987 SC 579
22 *Rudal Shaha* v *State of Bihar* AIR 1983 SC 1086
23 *M.C.Mehta* v *Union of India* AIR 1987 SC 1086
24 *Visaka* v *State of Rajasthan* AIR 1997 SC 3011; (1997) 6 SCC 241
25 *M.C. Mehta* v *Union of India* (1999) 2 SCC 92

Michael Perry has given the most potent explanation of the function of judicial activism thus- ".. *elaboration and enforcement by the courts of values, pertaining to human rights, even if not constitutionalised...it is the function of deciding what rights, beyond those specified by the framers, individuals should and shall have against government*".[26] (emphasis supplied)

Considering all these innovations and inventions by the judiciary, I would like to utter a parting word of caution. Judicial activism has broken the earlier mould considerably. Due to this, the soundness of the system is being tested. We have come a long way from the traditional common law jurisprudence. Now there is no looking back, for the better or for the worse. Thus, the judiciary should take care to strengthen the efficacy of the system for imparting justice, for and in, the times to come. It should not become a dome of steel on pillars of straw. The judiciary should decide- 'thus far and no further', and, more importantly, stick to it. The cause of human rights stands only to prosper in that case.

Bibliography-

1. S.P.Sathe, *"Judicial Activism in India: Transgressing Borders and Enforcing Limits"*, Oxford University Press, 2002
2. P.L.Mehata & Neena Verma, "*Human Rights under the Indian Constitution: The Philosophy and Judicial Gerrymandering"*,
3. *"Human Rights and the Indian Constitution: Vision and the Reality*" ed. K.P.Saxena, Gyan Publishing House, 2003
4. K.L.Bhatia, *"Judicial Review and Judicial Activism: A Comparative Study of India and Germany from an Indian Perspective*", Deep and Deep Publications, New Delhi, 1997

26 *"Human Rights and Judicial Activism: Challenges and Opportunities"*, Prof.M.C.Sharma, *'Human Rights and The Constitution' Vision and the Reality* ed. K.P.Saxena Gyan Publishing House, 2003

Article 31-B and Judicial Review: A Study

Shreenivas Satishchandra Joshi*

Introduction

The First Amendment to the Constitution of India inserted Article 31B[1] in Part III. This amendment was passed by the Constituent Assembly acting as the Provisional Parliament. It was intended to save certain reform legislations from litigations, which may have affected their efficiency. Article 31A, also inserted by the same amendment, gives certain specific areas of reform, which are saved, but Article 31B gives a blanket protection to statutes included in the Ninth Schedule. The Ninth Schedule, thus, is merely a list of Acts saved from judicial review relating to violation of fundamental rights.

The First Amendment

The First Amendment was promptly challenged in the case of *Sankari Prasad*[2]. Then came the cases of *Sajjan Singh*[3], *Golak Nath*[4] and the celebrated *Kesavananda Bharati*[5]. However, all these cases were directly connected to the power of the Parliament to amend the Constitution under Article 368. The validity of the First Amendment was never really questioned in any other light.

Waman Rao's Case

The First Amendment was again challenged in *Waman Rao*'s[6] case, for the first time post- *Kesavananda.* The Articles 31A, 31B and 31C (as unamended) were challenged. It is very pertinent to note that the First Amendment was hailed to be a "mirror reflecting the ideals of the Constitution". It was said that "it is not the destroyer of the basic structure". The Supreme Court also stated that the First Amendment to the Constitution should be considered as a part and parcel of the Constitution itself, as it was made by the Constituent Assembly acting as the Provisional Parliament. The Court upheld the validity of Article 31A on merits. However, a question

* Student of Vth year BSL LLB (at the time when this paper was presented). This paper was presented at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remembering S.P. Sathe,' event held on Professor Sathe's first death anniversary. joshi.shreenivas@gmail.com

1 **Article 31B.** Validation of certain Acts and Regulations- Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

2 *Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar* (1952) SCR 89

3 *Sajjan Singh v. State of Rajasthan* (1965) 1 SCR 933

4 *I.C. Golak Nath & Ors. v. State of Punjab & Anr.* (1967) 2 SCR 762

5 *His Holiness Kesavananda Bharati, Sripadagalvaru & Ors. v. State of Kerala & Anr.* (1973) 4 SCC 225

6 *Waman Rao & Ors. v. Union of India & Ors.* (1981) 2 SCC 362

was raised in that case as to whether Article 31A could be held valid on the ground of *stare decisis*, irrespective of merits. The Court stated that it was unnecessary to say anything in the matter as it has already held Article 31A valid on merits, but as the question was raised and heavily argued, the Court went on to put down its observations regarding the same.

Then, while considering the application of *stare decisis* to Article 31B, which was also challenged, the Court gave a very interesting explanation. It stated that the Acts included in the Ninth Schedule could be held valid if they had been held valid for a long time (i.e. *stare decisis)*, but the 'device' of Article 31B cannot be held valid on the same ground.

The Court held that statutes included in the Ninth Schedule after 24.3.1973, which is the date of the *Keshavanand* decision, were open to judicial review.

The Court arrived at this conclusion in two parts –

1) The Parliament was putting acts into the Ninth Schedule under the supposition of an unlimited amending power. However, after the *Kesavananda* decision, the Parliament can no longer feign ignorance of its limited amending power. It can no longer say that it was unaware of its limited amending power and so it was including statutes in the Ninth Schedule, which were violative of Part III. It obviously had a limited amending power in so far as that it could amend the Constitution only to the extent that its basic structure is not damaged or altered. The Court held that statutes included in the Ninth Schedule after 24.3.1973, which is the date of the *Kesavananda* decision, were open to judicial review.
2) Statutes included in the Ninth Schedule before *Kesavananda* were mostly related to agrarian reforms. That was the reason why those Acts were not touched by the earlier Courts. However, after *Kesavananda* the Acts put into the Ninth Schedule would have to stand the test of the basic structure.

Regarding the first point, it is submitted that the Parliament was not putting Acts into the Ninth Schedule under the supposition of an unlimited amending power, but in pursuance of a constitutional power to shut out certain Acts from judicial review. Article 31B does not have the limitation of the basic structure that has been imposed upon the amending power under Article 368. The power of the Parliament is not the unlimited amending power, but the power to validly shut out certain Acts from judicial review. The argument that the Parliament can insert Acts into the Ninth Schedule only by a Constitutional amendment through Article 368 and so the basic structure applies is repelled by the fact that Article 31B is still valid. The limitation of the basic structure is applicable to a Constitutional amendment, but if it is coupled with Article 31B, there can be no application of that limitation. This means that Article 368 plus Article 31B negate the

application of the basic structure. So long as Article 31B is valid, Acts put into the Ninth Schedule cannot be touched.

Here, a piquant observation of Bhagwati J. in the case of *Minerva Mills*[7] is very relevant. It is regarding Clause 4[8] of Article 368, which was challenged. He stated that so long as the clause stands, an amendment of the Constitution, though unconstitutional and void, as transgressing the limitation on amending power of the Parliament as laid down in *Kesavananda Bharati's* case, would be unchallengeable in a Court of law. What is more important is the fact that the Court went on to strike down that clause from Article 368. This position must be applied to Article 31B. So long as it stands, the Courts cannot review the statutes included in the Ninth Schedule. It is a constitutional provision, quoted as being part of the original Constitution itself. If it is valid, there can be no question of any Court reviewing Acts in the Ninth Schedule.

The emphasis given to the Ninth Schedule is misplaced as the governing provision is Article 31B. The Ninth Schedule has no separate existence independent of Article 31B. It is only because Article 31B says so that Acts in the Ninth Schedule are saved from judicial review. The Ninth Schedule is merely a list of those Acts. It could not have mattered if Article 31B itself had enlisted those Acts there and then.

Further, a distinction was drawn between Article 31B and the device of including statutes to be out of judicial review. It was held that though Article 31B is valid; the 'device' can no longer be "permissible". A plain reading of Article 31B clarifies that it is the sole repository of the constitutional device of the Parliament being able to include acts out of judicial review. If it is valid, the device is equally valid. A thing cannot be legal and impermissible simultaneously.

Regarding the second point, the language of Article 31B is so clear that it does not require any specific indicia to be followed for insertions into the Ninth Schedule. The Parliament is under no obligation to have any sort of cataloguing for Acts being put into the Ninth Schedule. It has been given the leeway to put into the Ninth Schedule Acts solely upon its discretion, and this cannot be denied to the Parliament.

Therefore, it is submitted that Article 31B is a bar on judicial review relating to violation of Part III, and, as a matter of fact, is still valid.

Coelho's Case

This brings us to a recent decision of the Supreme Court in *I.R.Coelho*[9]. The facts of the case are very intriguing. Certain parts of

7 *Minerva Mills Ltd. & Ors. v. Union of India & Ors.* (1980) 3 SCC 625)

8 368(4) - No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

9 *I.R. Coelho (Dead) By LRs v. State of Tamil Nadu & Ors.* AIR 1999 SC 3179

two Acts were struck down by the Courts, one by the High Court and another by the Supreme Court itself. These Acts were put into the Ninth Schedule thereafter. The validity of this amendment was challenged. The following explanation could have been given by the Court- the Acts have been checked for the violation of fundamental rights, which is a stricter test than that of the basic structure. Those parts found in violation have been struck down. Putting those Acts into the Ninth Schedule thereafter will not bring those parts back to life. The protection of Article 31B is available to Acts already in the Ninth Schedule. An Act cannot be saved if it is challenged, struck down and then put into the Ninth Schedule, as when it was challenged and struck down, it did not have the cover of Article 31B. Therefore, the amendment is valid.

The issue that was framed in this case was- whether immunization of Acts from judicial review is permissible if they violate the basic structure? If so, what is the effect on judicial review?

However, the issue that eventually got decided was that whether fundamental rights are part of the basic structure. The Court relied upon the development of law regarding fundamental rights post-emergency, for example *Maneka Gandhi*[10] etc.

The Court has laid down a "synoptic view" of fundamental rights. This means that fundamental rights can no longer be viewed in isolation. They must be viewed as a compendium of rights forming a guarantee against executive and legislative action. Therefore, now virtually violation of any one fundamental right results in the violation of several other fundamental rights.

Two levels of review were laid down by the Court-

1) Rights test and essence of the rights test

a) The Court will look at whether an Act infringes any one fundamental right. This is the 'rights test'.

b) Then the Court will check whether the Act has infringed the essence of that right. This is the 'essence of the rights test'.

2) Impact test

The Court will look at what is the overall effect of the infringement. If it violates other rights in its wake, it is liable to be struck down.

Owing to the "synoptic view", it is a foregone conclusion that an

10 *Maneka Gandhi v. Union of India* (1978) 1 SCC 248

Act cannot violate rights singly, but necessarily in a compendium. Therefore, once an Act comes under the first level of scrutiny, it is highly improbable that it escapes the second level. Further, due to the same synoptic view, no amendment to Part III can amend the fundamental rights without damaging the basic structure.

This brings us to a very interesting point. The *Golak Nath*[11] decision on the amending power was clear. The Parliament cannot at all touch Part III, as a constitutional amendment is law under Article 13 (2). However, this was overruled by *Kesavananda* to the effect that the Parliament can amend any Article in the Constitution, whether in Part III or not, provided it does not damage its basic structure. This means that there is something in Part III, which is not the basic structure. Amending an Article in Part III and damaging the basic structure are admittedly two different things. But, amending the basic structure and damaging the basic structure is one and the same thing. Therefore, the position after the *Coelho* decision is analogous to the position after *Golak Nath*. However, the position has been attained without overruling the *Kesavananda* decision, but by bypassing it.

Article.31B has also been said to be valid, but it was not challenged in *Coelho*'s case. This cannot be called a valid exercise of judicial review. The Court has relied upon the decision in *Waman Rao*, which has been discussed at length above. However, in effect, the Court in *Coelho* has done nothing different regarding Article 31B than *Waman Rao*. What it has done differently is that it has dexterously expanded the scope of the basic structure by expounding the "synoptic view" and the two levels of review.

Also, a few aspects of the *Coelho* decision are worth mentioning. Firstly, just like in the *Kesavananda* decision, without a final order the petitions were remitted back to the Constitution benches to be decided according to the principles laid down therein. Secondly, Rule of Law was said to be "encapsulated in Article 14". This is a difficult proposition to digest or explain, as Article 14 is, at best, one indication of the Rule of Law, and not the only. Thirdly, the Court said that it is bound by all the constitutional provisions "and" the basic structure doctrine.

Whether these two stands as parallels in importance is a point to be further examined.

Article 31B and Judicial Review

It is said that facts are stubborn things, and that a single fact can destroy a good argument. That fact here is the validity of Article 31B. In the face of this glaring fact, the Court, which itself has admitted it, could

[11] *Supra* note.4

not have done what it has. Any provision of law, leave alone of the Constitution, cannot be rendered useless while upholding its validity. It is a travesty upon the Constitution that a provision, hailed by all and sundry as a "part of the constitutional scheme", is now held valid but no longer permissible. If Article 31B is valid, there can be no "full judicial review", which can also be called "unlimited judicial review". Article 31B constitutes a bar on judicial review of Acts on the ground of violation of fundamental rights. However, it does not totally exclude judicial review. Acts in the Ninth Schedule can be challenged on any other grounds than violation of fundamental rights, for e.g. *Bhim Singhji*'s[12] case, where the Act was challenged vis-a- vis Article 39 of the Constitution.

Conclusion

To sum up, what has transpired regarding Article 31B can only be said to be an act of upholding the Constitution neither in "spirit" nor in "letter". Given that we do in fact have a written Constitution, we must give utmost respect to the written word. This may seem as harking back to the black-letter tradition, but we are to ignore what has been written by us only at our own peril. Acres of print have been devoted to the importance of judicial self-restraint, which cannot be emphasized more. However, restraint comes only if one has the power to do a thing in the first place. Thus, when the Supreme Court does not have the power to review the statutes included in the Ninth Schedule, the fact remains that now it has acquired it by means, which can only be called usurpation.

[12] *Maharao Sahib Shri Bhim Singhji v. Union of India and Ors.* 1985 AIR SC 1650

Ninth Schedule – Where Will the Line be Drawn?

Gowtham Kumar K.*

"Millions wait and have been waiting for decades. Are we to submit to things and wait till some great revolution comes to change the condition of things?"

These were the words of Pandit Jawaharlal Nehru when he opened the First Amendment for debate in the Parliament. I can't stop wondering if he would've thought that the schedule would be a matter of controversy till date.

Ninth Schedule - A list of Acts given immunity from judicial challenge, usually seen as the legislature's sword to prevent the reach of judiciary's wings. Hence it has to have that element of controversy about it. So I thought it would be relevant to look into the history of Ninth schedule and judicial decisions on it at a time when the most significant and probably the last of the judgments on the schedule has been pronounced by the Supreme Court.

Ninth Schedule - A Short History

The ninth schedule was placed into the Constitution by the First amendment. The root of this schedule can be traced into various Constitutions including the American and Irish. The Fifth Amendment to the American Constitution was when the Government was accorded power to take over lands for public good at market price. This was challenged on various instances and the American Courts always held it in the state's favour. Whereas, Indian proposition is different in as much as it is not necessary for the government to pay the market price. This is provided for by Article 31B. Such an act by the government was to achieve the ends of social justice. With this background, the reading of the schedule and the concerned Articles would provide for a better picture. Statement of Reasons relating to its induction said: *"Challenges to agrarian laws and laws relating to the land reforms were pending in courts and were holding up large schemes of land legislation through dilatory and wasteful litigation"*.

* Student of V B.S.L (at the time when the paper was presented). This paper was presented at the conference on "Discussions on Current Constitutional Issues" organised during the 'Remenbering S.P. Sathe,' event held on Professor Sathe's first death anniversary.

So essentially, the ninth schedule was an aim to put an end to the unwarranted delay due to loads of pending litigation on the validity of various reform acts. The acts in the schedule pertained to Agrarian reforms. Such a protection meant that socialism proclaimed in the constitution would be given life.

The ninth schedule when introduced had 13 Acts in total. All these Acts pertained to the land reforms. The additions to Ninth schedule, whether relating to the land reforms, were made time-to-time. Some examples of the additional Acts that was not directly related to the land reforms but still in ninth schedule included, MRTP Act, Industries (D&R) Act, The Bonded Labour System (Abolition) Act etc,. So from being a schedule of a list of land reform or agrarian reform laws, the ninth schedule now includes laws, which are for other purposes also. The uniformity that is expected of in such an immunized schedule is absent in the ninth schedule. Pandit Nehru had referred to the list of 13 Acts as a long list and had to justify its lengthiness. Government after government and judgments after judgments has resulted in additions to the schedule. After all these inclusions now the list boasts of 284 Acts. Wonder what Pandit Nehru would have reacted to the list today?

Challenges To Ninth Schedule

Judicial challenges bring out the exact sync, whether good or bad, that prevailed between the legislature and the judiciary at that particular point of time.

The first amendment that incorporated the ninth schedule into the Constitution was challenged in *Sankari Prasad v Union of India*[1]. The Supreme Court upheld the validity of the amendment by absolute majority. The argument that constitutional amendments are laws under Article 13 was rejected totally. This view taken by the Supreme Court was criticised as a *dead end* choice later.

The next case where an amendment pertaining to the Ninth schedule was challenged was in 1965 in *Sajjan Singh v State of Rajasthan*[2]. There was a murmur of dissent in this case to the amendment but the validity was upheld based on the *pith and substance rule*. The dissent was quieter than a whisper but holds great significance as it is this dissent that paved the way for future developments.

Then came *Golaknath*[3], wherein the 17th amendment was challenged. This case reversed the effects of *Shankari Prasad* and *Sajjan Singh*. The Bench headed by Justice Subba Rao, who was always known to be a dissenting judge in the property cases, pronounced that nothing in

1 (1952) 1 SCR 89
2 AIR 1965 SC 845
3 AIR 1967 SC 1643

part III of the Constitution can be amended. The decision (6:5) therein brought about further discussions on amendments to the Constitution. Though initially criticized by jurists around the country, the decision was later hailed to have started a discussion, which could have led to an ultimate answer. The legislature then brought about major changes vides the 24th - 29th amendments to Article 368 and 13(4) of the Constitution.

It was by now the time for the all-important day of 24th April 1973 when the judgment in *His Holiness Kesavananda Bharati, Sripadagalvaru & ors v. State of Kerala*,[4] was pronounced. A 7:6 majority propounded the Basic Structure Doctrine. The 24th, 25th and 29th amendments were challenged in that case. The Basic Structure Doctrine was held to be the sole test for the Acts in the Schedule. Though it laid down the test of basic structure, what was the basic structure was not answered clearly. The judgment turned out to be monumental, setting the boundaries for the judicial review of the Ninth schedule.

The case that gave legitimacy to the basic structure doctrine was *Indira Nehru Gandhi v. Raj Narain*.[5] Certain electoral laws had been added to the Ninth schedule after the election of the then Prime Minister was put on hold by the Allahabad High Court. The amendment in its entirety was challenged. The bench struck down the amendment to the extent it contravened the basic structure of the Constitution.

The case that has led to the latest of the ninth schedule case is *Waman Rao's case*.[6] The judgment in *I.R. Coelho v. State of Tamil Nadu*[7] was delivered on 11th January 2007. The nine judges bench has provided the "rights test" and "the essence of the right" test to test the validity of the Ninth Schedule Acts. The individual acts which have been incorporated after 24th April 1973 have been opened up for challenge if they violate the rights under part III of the Constitution and such a violation shall be treated as violation of the basic structure of the Constitution.

Judicial review – a bird's view

As Dr. Sathe would always put it, 'learning constitutional law without analyzing the surrounding political scenario is a futile exercise'. Similarly all the above-mentioned judgments owe a lot to the prevailing socio-political scenario at their respective times.

The majority in *Kesavananda Bharati* when propounding the basic structure doctrine had made it clear that it shall be applied based on the circumstances governing each and every case. The scope of Basic Structure as mentioned in *Kesavananda Bharati* has been expanding from time to time.

4 AIR 1973 SC 1461
5 AIR 1975 SC 2299
6 (1981) 2 SCR 1
7 AIR 2007 SC 861

When the First amendment was made, it was widely believed to be an act to overcome the impatience prevailing due to the conservatism in Judiciary. The legislature felt the need for putting the reforms in place at the earliest to avoid the parentage of judiciary. The *Golaknath* judgment summed up the nature of the judges and the changing horizon in the thought process within the judiciary. *Kesavananda Bharati* was the need of the hour. The overwhelming call to bring about a test was put forth there. *Indira Gandhi's* case was the apt example as to how a political move would form an important part in the development of a doctrine.

An interesting observation could be made into the use of this judicial review by the Honorable Supreme Court. There have been so far only four amendments that were struck down. Of these four, the case has always been that only a clause or two against the Basic structure that has been struck down.

One more interesting comment that could be made is that the last time an amendment was carried out in the ninth schedule was in 1995 and the last time India had a single party rule was 1991-96.

Where do we stand?

The recent judgment in *I.R. Coelho* has led to a stage where in every single act in the schedule can be challenged as violative of Part III of the Constitution. This actually abrogates the very right given to legislature under Article 31B.

By opening up all the statutes (included in the schedule after April 24, 1973) to judicial review the Supreme Court has pulled the reverse gear to the reform laws. In a situation where Article 31B is not challenged, a judgment of such nature is actually creating an impression that the Supreme Court is getting into "Political Thicket". The judiciary should not become the policy-making machinery.

The importance of Basic Structure Doctrine cannot be rejected nor can it be scrutinized but what is to be maintained is that it should not be diluted. There should not be additions that actually create cracks in its foundation. For example, the scope of judicial review shall not be extended to the extent that separation of powers should find its existence in jeopardy.

The legislature also has been using the Schedule to its whims and fancies. What was essentially for agrarian reforms started posing with electoral laws, and other laws, which by no extent of imagination would bring about any reform.

The ninth schedule was essentially introduced to protect reform laws from being delayed due to unwanted litigation. This lays down the actual role of judiciary and legislature when it comes to ninth schedule. The legislature shall include only reform laws into the schedule and the judiciary

shall entertain a challenge only when the laws therein affect the very soul of the Constitution.

Conclusion

Ninth schedule was a creation to restrict the collision between two wings of our union, the judiciary and the legislature. But, the truth is entirely different. The judiciary and legislature has always run into a collision course and the latest judgment is also furthering the opinion.

Then, where should the line be drawn? I think the line that is referred is that line of authority that the legislature and judiciary try to impose on each other. Both the wings are quiet distinct in their functions and when there is conflict of this thought in either of the wings the line is crossed. So the only solution for all the arguments on this subject would be legislature strictly sticking to making policy for the good of the people and the judiciary remaining to be an independent and not a supervisory body. But its not easy as long as legislators remain politicians and judiciary is in the mood for judicial adventurism.

Statement of ownership and other particulars about the ILS Law Review as required under Rule 8 of Newspaper (Central Rules, 1956)

FORM IV
(See Rule 8)

Place of Publication	ILS Law College, Law College Road, Pune 411 004 (India)
Language	English
Periodicity	Annual
Printer's Name, Nationality and Address	Shree J Printers Pvt. Ltd 1416, Sadashiv Peth, Pune 411 030 Tel. 020 2447 4762
Publisher's Name, Nationality and Address	Vaijayanti Joshi Principal, ILS Law College, Pune 411 004
Editor's Name, Nationality and Address	Ms. Sathya Narayan Joint Director Institute of Advanced Legal Studies ILS Law College Campus Law College Road Pune 411 004
Owner's Name	ILS Law College Pune

I, Principal, Vaijayanti Joshi, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Vaijayanti Joshi
Principal
ILS Law College, Pune