ILS Law College, Pune

Centre for Public Law's

Public Law Bulletin

VOLUME V

NOVEMBER 26, 2018

PUBLIC LAW BULLETIN
VOLUME V, NOVEMBER 26, 2018

PUBLIC LAW BULLETIN

CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE, PUNE

Public Law Bulletin Is An Initiative Of
The Centre For Public Law At ILS Law College, Pune.

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INTRODUCTION TO THE SPECIAL ISSUE ON DECIPHERING THE CONSTITUTION

Date: November 26, 2018

Monday

Constitutional Values

Today, 26th November 2018 is a very important day in the history of Endurance of our Constitution as we celebrate, the Constitution day prior to 2015, this day was celebrated as Law Day , however The Government of India declared **26 November** as **Constitution Day** on 19 **November** 2015 by a gazette notification to spread the importance of the **constitution** and disseminate awareness about values underlying its inception. Readers would recall that on 26th November 1949, , the Constituent assembly had met and with loud and prolonged cheers and thumping of desks greeted the passing of the Constitution.

I am very happy to present the Vth issue of Public law bulletin brought out under the auspicious of Centre for Public Law (CPL) ILS Law College and I congratulate the entire editorial team of students for their toil and perseverance in the preparation of this Unique issue which we have dedicated to our cherished document , Constitution of India.

Sensing the significance of the occasion, I have decided to write a slightly longer introduction, In this I would like to grapple with an important issue of Constitutional values and their impact on Constitutional Interpretation and Adjudication. The question is to what extent the so-called **values** underlying the text of Constitution should be invoked as the effective tools of Constitutional interpretation and adjudication?

At the outset it has to be find out a particular constitutional location signifying the constellation of values. Invariably our attention is drawn in this respect to the Preamble. Even a cursory look demonstrates that values like "we the people; sovereignty; socialism; secularism; democracy' republicanism; justice – Social economic and political, Liberty of thought, expression and belief; equality of status and opportunity; fraternity; dignity of individual; unity and integrity of Nation are reflected therein.

Interestingly but for fraternity rest of the values are incorporated in the constitution in one or more provisions. Moreover, it is also to be noted that certain constitutional values like federalism, adult franchise, anti-majoritarianism are located outside the preamble in different provisions of the Constitution. Of course those who engage in formalistic or textual interpretation would argue that since we have adopted a very detail constitution going in depth in all issues, focus must be on actual provisions rather than on any supposed values (**formalist/ extualist** view).

In this connection, I invite the attention of the readers to the memorable observation of Kania CJ in famous "A. K. Gopalan case , "There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the constitution but not expressed in words" (A. K. Gopalan versus State of Madras AIR 1950 Supreme Court 27 . Id at Para 26)

In my submission, although the above argument and observation look very attractive at first blush, it cannot be countenanced fully. Indeed, in respect of creation, composition and powers of various institutions in place in the Constitution, the provisions are sine-qua-none and should generally be assumed as categorical rules. E.g. Article 245 and 246 read with seventh schedule or Articles 148-151 pertaining to office of Comptroller and Auditor General of India. However, we cannot extend this logic to all the provisions of the constitution, particularly to those provisions thickly incorporating the concepts. E.g. Article 14 "equality before law ' and 'Equal protection of the laws'. Article 21' Life and Personal liberty'

Concepts like these do not have any distinct, definitive or central meaning rather the same is determined by the context in which they are employed. In this connection, it is also necessary to find out whether the substance of these concepts is determined by the explicit language of the provisions in which they appear or is it to be determined by going beyond the language of the provision. In this connection, I would like to attract

the attention of the readers towards seminal observation of Venkatchallia J in the famous R.C. Poudayals' case, " In the interpretation of a constitutional document, "words are but the framework of concepts and concepts may change more than words themselves". The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that the intention of a Constitution is rather to outline principles than to engrave details.' (R.C. Poudayal versus Union of India MANU/SC/0292/1993 para 64)

This position was further sharpened metaphorically in his charecteristical vein by Mathew J in the context of fundamental rights in the' Bhagwat Gita, Quran and Bible of constitution' case (Kesavanand Bharati v State of Kerala 1973 (4) SCC Para 1714) "The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement; curtailment, and even abrogation of these rights in circumstances not visualized by the Constitution−makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV. Whether at a particular moment in the history of the nation, a particular Fundamental Right should have priority over the moral claim embodied in Part IV or must yield to them is a matter

which must be left to be decided by each generation in the light of its experience and its values."

This form of reasoning is labeled as constitution as 'living tree' approach. However, it would be erroneous to assume that constitution can be interpreted or should be interpreted by either adopting one of the two approaches or both, we have to still ask ourselves, whether constitutional values would determine the form of the provision i.e. is it a rule or is it merely a declaration of principles? E.g. Article 17, should it be characterized as a rule prohibiting 'untouchability' or by emphasizing on the words 'its practice in any form'. Should it be interpreted as containing the declaration of the principle of Anti-exclusion?

It is not easy to answer this question; it is too difficult a proposition to reach a categorical conclusion in respect of constitutional provisions like Article 17, whether it is rule centric in form or it merely enshrines the broad principle of anti exclusion because of its open texture language. A judge in favor of a very broad interpretation can resolve this ambiguity by superimposing a contextual meaning to the broad principle enshrined therein. Exactly this strategy was adopted by D Y Chandrachud J in the famous Sabrimala case recently. He observed, "Our Constitution has willed that dignity, liberty and equality serve as a guiding light for individuals, the state and this Court. Though our Constitution protects religious freedom and consequent rights and practices essential to religion, this Court will be guided by the pursuit to uphold the

values of the Constitution, based in dignity, liberty and equality. In a constitutional order of priorities, these are values on which the edifice of the Constitution stands. They infuse our constitutional order with a vision for the future – of a just, equal and dignified society. Intrinsic to these values is the anti-exclusion principle.….The individual, as the basic unit, is at the heart of the Constitution. All rights and guarantees of the Constitution are operationalized and are aimed towards the self-realization of the individual. This makes the anti-exclusion principle firmly rooted in the transformative vision of the Constitution, and at the heart of judicial enquiry. Irrespective of the source from which a practice claims legitimacy, this principle enjoins the Court to deny protection to practices that detract from the constitutional vision of an equal citizenship" (Indian young Lawyers Association versus state of Kerala SC dated 28th Sept 2018 Id at Para 56, 81)

On the other hand, another Judge of the same bench Malhotra J refused to be swayed by the position of the Chandrachud J. As an outstanding contrarian, she was reluctant to invoke article 17 in any other form rather than as a categorical rule against social disability based on hierarchy of caste. It would be extremely speculative on anybody's part, who is an objective observer of Indian Constitution to be judgmental about appropriateness of either of the approaches. Both the approaches are justified. Former rests on purposive interpretation, whereas the later leans on historical interpretation of the Constitution. The same makes it imperative therefore, to be very careful in

characterization of provisions as rule oriented or principle oriented. The judgement call on either of the two could be as tricky as the decision of the batsman to misread an in cutter right on his off stump as going outside leg stump resulted in his downfall. However, in the business of engaging with the Constitutional values can be far more perplexing and intricate .E.g. D Y Chandrachud J derived the metaconstitutional value/ Principle of constitutional morality from the Preamble and held that as an 'overarching ' principle/ value, it pervades entire Part III. He observed, "Constitutional morality must have a value of permanence which is not subject to the fleeting fancies of every time and age. If the vision which the founders of the Constitution adopted has to survive, constitutional morality must have a content which is firmly rooted in the fundamental postulates of human liberty, equality, fraternity and dignity. These are the means to secure justice in all its dimensions to the individual citizen. Once these postulates are accepted, the necessary consequence is that the freedom of religion and, likewise, the freedom to manage the affairs of a religious denomination is subject to and must yield to these fundamental notions of constitutional morality."(Id Para 12 of D Y Chandrachud J)

On the other hand, it is equally possible to derive the meta-principle/ value of constitutional morality from the notion of morality enshrined in any particular Articles like articles 19, 25 and 26. Thus, in Dr Ramesh Prabhoo versus Prabhakarkunte (MANU/0982/SC/ 1996), popularly known as Bal Thackrey Case , Supreme Court

categorically refused to confine the expression ' decency and morality' to only 'Sexual morality' and rejecting the argument of Mr. Ram Jethmalani observed, " In view of the expression "in the interest of and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words 'decency or morality' do not require a narrow or pedantic meaning lo be given to these words." (Id at para 28)

Indeed, it is a very difficult ball game to play even by using 'Hawkeye' technology to decide which of the two approaches to the exegesis of Constitutional morality (though in later case the constitutional is not prefixed) is more legitimate. In fact D Y Chandrachud J reached the crescendo of his passion in the engagement of constitutional values by almost completely liquidating the mutual exclusivity between articles of part III. He observed, "..it is well to remind ourselves that the right to freedom of religion which is comprehended in Articles 25, 26, 27 and 28 is not a standalone right. These Articles of the Constitution are an integral element of the entire chapter on fundamental rights. Constitutional articles which recognize fundamental rights have to be understood as a seamless web. Together, they build the edifice of constitutional liberty. Fundamental human freedoms in Part III are not disjunctive or isolated. They exist together. It is only in cohesion that they bring a realistic sense to the life of the individual as the focus of human freedoms. The right of a denomination must then be

balanced with the individual rights to which each of its members has a protected entitlement in Part III." (id at para 109).

With his aforementioned axiomatic observations, he is being revered amongst activists as 'heart throb' of human rights as much as Nani Palkhiwala was perceived by Judges in Kesavananda Bharati to be the messenger of god enchanting the mantra of 'basic structure'. However, as a student of Constitutional law and as a scholar of classical generation, the performance of D Y Chandrachud J appears to me like an innings in 20-20 , where batsman is interested in hitting 4 and 6 , but what about conventional cajoling , in-depth and analytically sound reasoning and adherence to the judicial precedents. To my mind, D. Y. Chandrachud J sounds wanting on all these fronts. E.g. while emphasizing on individual rights, how can he be completely myopic about the group rights. What about the internal structures of each fundamental right? Whether collapsing the internal structure of article 26, from which framers have deliberately dropped the phrase, "subject to ..other provisions of this part" into article 25 is constitutionally permeable? Are we not blurring the distinction between individual rights and group rights carefully delineated in the Constitution? And what about the extraordinary caution voiced by Aiyangar J in ' All India Bank Employees versus not to overlook internal structure and schema of each fundamental right' . He memorably observe, in the context of internal structure of Article 19 "…each of these freedoms being subject to such restrictions as might properly be imposed by clauses (2) to (6) of

Article 19 as might be appropriate in the context. It is one thing to interpret each of the freedoms guaranteed by the several Articles in Part III in a fair and liberal sense, it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to under lie the grant of each of those rights, for that construction would, by a series of ever expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result."(Id at para 22)

Although in Maneka Gandhi the majority emphasized on the constitutional value of reading articles 14,19 and 21 as an 'integrated whole' , by no stretch of imagination, the judges meant to completely negate the mutual exclusivity among articles nor they advocated the total merger of all the articles of part III into a single 'seamless web'. In fact while expounding the scope of Article 19, the judges rightly reminded themselves with the aforementioned dicta propounded by Aiyangar J in Bank employees case.

I have analyzed the issue of constitutional values and their impact on constitutional interpretation and constitutional adjudication with a critical lens and in a test match like batting manner to bring home the point that overuse of Constitutional values without proffering analytical justifications and in absence of any evolved legal praxis may land the constitutional interpretation into ambiguities and perplexities. E.g. it is not easy to find the answer to the question , how formulation of Constitutional Morality in Manlj Narula's case in the context of criminalization of Politics and in Navtej Singh johar in

the domain of rights of LGBTQ communities is relevant in the respect of interpretation of Freedom of religion . Are these three contexts are similar in any way? I would therefore advocate for caution and invocation of doctrine of 'law as an integrity' so elaborately evolved by Ronald Dworkin in his celebrated scholarship to the engagement of constitutional values by the judges during the process of the constitutional interpretation and adjudication.

Indeed, constitutional values are pivotal to augment and revitalize the resilience and sustenance of the Constitution but the same has to come into play systematically and cohesively. I would conclude this piece by briefly analyzing the decision of the Supreme Courtin M Nagraj on Constitutional values to strengthen my contentions.

"The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges." (M Nagraj v. union of India MANU/SC/4560/2006 Para 16)

The above observation of the court clearly shows that the judiciary of a welfare state with a liberal and democratic constitution has to interpret the rules in the constitution in combination with underlying principles and fundamental values. It also demonstrates that the court is inclined to integrate rules with principles and foundational values for teleological interpretation of the Constitution. This approach is more in tune with the classical approach to the functions of principles and foundational values. It approximates with the idea evolved by Dean Pound that 'apart from its positive manifestation law also reflects itself in ideal elements.'

The court also articulated the connection between founding values and contents of fundamental rights by pointing out

> "Every right has content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the article in which the fundamental value is incorporated."(M Nagraj V union of India MANU/SC/4560/2006 Para 17)

The above observation shows that in order to fully comprehend the incorporation of founding value in part III as part of the fundamental rights, not only the structure of the provision must be seen but also the principle underlying such structure. In other words,

for the interpretation of the fundamental rights the language in which they are drafted, their structure and their embodiment as principle underlying such language must also be carefully noticed. Accordingly, the court advocated for constitutionalisation of only those founding values, which have intrinsic significance and are eternal to its spirit. Although the court does not offer much guidance on distinguishing the 'less intrinsic values' from the intrinsic and eternal values, it is possible to contend that right to property was one of the less intrinsic founding values because its deletion from Part III by constitutional amendment was not declared by the court to be violation of basic structure of Constitution.

In the light of these observations the recent pronouncements of the Supreme Court like Navtej, young Lawyers Association are missed opportunities so far as evolving analytical framework to strengthen a cohesive connection between contents of fundamental rights and founding values. The pronouncements are also oblivious to the dicta pertaining to internal structure of every fundamental right.

By Dr. Sanjay Jain

(The views expressed in this article are of the author exclusively and the institution does not subscribe or support the same)

FOREWORD

Dear All,

It brings us immense pleasure that we bring forth the fifth volume of Public Law Bulletin, on the auspicious and momentous occasion of Constitution Day. In this special issue, we focus on 'Deciphering the Indian Constitution' wherein we analyze and deal with ABCs of the Indian Constitution, Doctrines, Standards, Baselines of Fundamental Rights, Parentage of Important Constitutional Articles, Excerpts from Constituent Assembly Debates, Salient Features and Salient Omissions in the Indian Constitution as well as comparison of the Indian Constitution with UDHR, ICCPR and ICESCR.

Public Law Bulletin (PLB), an initiative of the Centre for Public Law, at ILS Law College, Pune constantly requires the student editorial board to toil in its pursuit of excellence, and the of the bulletin is the result of the colossal efforts of the Board. We also express our gratitude for the consistent support and guidance extended by our Editor-in Chief, Principal Ms. Vaijayanti Joshi, Prof. Dr. Sanjay Jain and Prof. D. P. Kendre. We hope to continue providing a platform to debate new ideas and concoct differing views and opinions on the various facets of Constitutional Law. PLB is a relatively a burgeoning young initiative, and we hope to continue to carry rich analysis,

reach out to more jurisdictions and foster debate on contemporary constitutional law issues. To this end, we are keen to receive any comments or criticism and look forward to hearing from anybody who may have something to share with us in this regard.

To effectuate and keep up the tireless and undeterred determination of the editorial team and also for the purposes of utmost transparency, certain acknowledgements are due. We would especially like to thank Arul Kanhere for his contribution to bulletin in the form of a cartoon.

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On this note, we hope that this volume of PLB ignites your interest in the grand constitutional scheme of the largest democracy in the world and all sections of the bulletin satisfy your reading appetite in its entirety.

On behalf of the Student Editorial Team,

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PUBLIC LAW BULLETIN
VOLUME V, NOVEMBER 26, 2018

CELEBRATING INDIA'S CONSTITUTIONAL DAY: NOVEMBER 26, 2018

Original Copy of the Constitution of India as illustrated by Nandalal Bose and scripted by Narain Razada.

However good a Constitution may be, if those who are implementing it are not good, it will prove to be bad. However bad a Constitution may be, if those implementing it are good, it will prove to be good.

~B. R. Ambedkar

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(A.) DECIPHERING THE INDIAN CONSTITUTION

1) ABCs OF THE INDIAN CONSTITUTION

"Constitution is not a mere lawyers document, it is a vehicle of life, and its spirit is always the spirit of the age."

The Constitution of any country, written or otherwise, is the Supreme Law of the Land which determines the fundamental principles on which a system of government and administration of a country is based.

The Republic of India is governed in terms of the Constitution of India (*Bharatiya Samvidhan*) which was adopted on 26th November, 1949 and came into force on 26th January, 1950.

It was framed by the Constituent Assembly set up under the Cabinet Mission Plan of 1946. Dr. Sachchidananda Sinha was the first (temporary) Chairman of the Constituent Assembly. Subsequently, Dr. Rajendra Prasad was elected as the President and its Vice-President was Harendra Coomar Mookerjee.

Jurist B.N. Rau was appointed constitutional adviser to the assembly; who also prepared an initial draft of the Constitution.

The seven-member drafting committee, chaired by Dr. B. R. Ambedkar, presented a detailed draft constitution which was discussed in the Assembly and finally adopted in 1949.

The Indian constitution is the world's longest constitution for a sovereign nation. At present, it has a Preamble and **448** Articles, which are grouped into **25** parts. With **12** Schedules and five appendices, it has been amended **101** times; the latest amendment became effective on **1 July 2017**.

PARTS OF THE INDIAN CONSTITUTION

The Articles of the Constitution are grouped into following parts:

Part I (Art 1 to 4)	The Union and its Territories
Part II (Art 5 to 11)	Citizenship
Part III (Art 12 to 35)	Fundamental Rights
Part IV (Art 36 to 51)	Directive Principles of State Policy
Part IV-A (Art 51A)	Fundamental Duties
Part V (Art 52 to 151)	The Union

Part VI (Art 152 to 237)	The States
Part VII(Art 238)	States in Part B of the First Schedule [*repealed*]
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Part IX(Art 243 to 243 O)	The Panchayats
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Part IX-B (Art 243 ZH to Art 243 ZT)	The Co-operative Societies
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Part XI (Art 245 to 263)	Relations between the Union and the States
Part XII (Art 264 to 300 A)	Finance, Property, Contracts and Suits
Part XIII (Art 301 to 307)	Trade, Commerce and Intercourse within the territories of India
Part XIV (Art 308 to 323)	Services under the Union and States
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THE TWELVE SCHEDULES

First Schedule	Lists the states and territories of India, the

(Articles 1 and 4)	changes (if any) in their borders and the laws used to make that change.
Second Schedule (Articles 59(3), 65(3), 75(6), 97, 125, 148(3), 158(3), 164(5), 186 and 221)	Lists the salaries of President, Governors, Judges, the Comptroller and Auditor General and of other public officials.
Third Schedule (Articles 75(4), 99, 124(6), 148(2), 164(3), 188 and 219)	Lists the forms of oaths of office for elected officials and judges.
Fourth Schedule (Articles 4(1) and 80(2))	Lists the allocation of seats in the Council of States/ Rajya Sabha
Fifth Schedule (Article 244(1))	Makes provisions as to the administration and control of Scheduled Areas and Scheduled Tribes requiring special protection.
Sixth Schedule (Articles 244(2) and 275(1))	Makes provisions for the administration of Tribal Areas in Assam, Meghalaya, Tripura, and Mizoram.

Seventh Schedule (Article 246)	Distributes powers between the Union and State Legislature as provided in the 3 Lists : List I – Union List, List II – State List, List III – Concurrent List

2) DOCTRINES

SR. NO.	DOCTRINE	MEANING	DERIVED FROM/ APPLIED IN/DISCUSSED IN
1.	Doctrine of Basic Structure	Constitution of India has certain basic features that cannot be altered or destroyed even through amendments.	Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225
2.	Doctrine of Harmonious Construction	When entries in one list overlap with entries in other lists under Schedule VII of the Constitution, words of the entries should be given wide amplitude and the courts shall bring harmony between the different entries and lists.	Tika Ramji v. State of Uttar Pradesh, 1956 SCR 393
3.	Doctrine of	An existing law inconsistent with a	*Bhikaji v. State of*

	Eclipse	Fundamental Right, though becomes inoperative from the date of the commencement of the Constitution, is not dead altogether. It is overshadowed by the Fundamental Right and remain dormant, but is not dead.	*Madhya Pradesh,* 1955 2 SCR 589, extended to post-constitutional laws in *DulareLodh v. III ADJ Kanpur, (1984) SCC 3 99*
4.	Doctrine of Pith and Substance	Where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. This is essentially a Canadian Doctrine now firmly entrenched in the Indian Constitutional Jurisprudence.	State of Bombay v. F. N. Balsara, 1951 SCR 682
5.	Doctrine of Colorable Legislation	If the constitution of a state distributes the legislative spheres marked out by specific legislative	State of Bihar v. Mahrajadhiraja Sir Kameshwar Singh

		entries or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of the constitutional power. The doctrine does not involve any question of bonafides or malafides intention on the part of the legislature. If the legislature is competent enough to enact a particular law, then whatever motive which impelled it to act are irrelevant. Colourable legislation i.e. indirectly doing something which cannot be done directly. What is pivotal is the fact that the legislature (usually this is associated with state	of Darbhanga, 1952 SCR 889

		legislature) does not possess the power to make law upon a particular aspect but nonetheless indirectly makes one.	
6.	Doctrine of Repugnancy	1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy. 2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become	Article 254; M Karunanidhi v. Union of India, (1979) 3 SCC 431

		void provided the State Act has been passed in accordance with clause (2) of Article 254. 3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List, the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential. 4. Where, however, a law made by the State Legislature on a subject	

		covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.	

7.	Doctrine of Ancillary or Incidental Powers	The power to legislate on a subject also includes the power to legislate on ancillary matters that are reasonably connected to that subject.	State of Rajasthan v. G. Chawla, AIR 1959 SC 544
8.	Doctrine of Severability	It is not the whole Act which would be held invalid by being inconsistent with Part III of the Constitution but only such provisions of it which are violative of the fundamental rights.	R.M.D. Chamarabaugwala v. Union of India, 1957 SCR 930
9.	Doctrine of Territorial Nexus	'No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation'. Thus, a legislation cannot be questioned on the ground that it has extra-territorial operation.	Tata Iron & Steel Co. v. State of Bihar, 1989 (2) Supp SCC 413
10.	Doctrine of Laches	"Doctrine of laches" is based upon maxim that equity aids the vigilant and not those who slumber on their	State of Maharashtra v. Digambar,

		rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity.	(1995) 4 SCC 683
11.	Doctrine of Pleasure	The Doctrine of Pleasure says that certain authorities hold office till he or she enjoys the confidence of the President or the Governor is not absolute and unrestricted and cannot be at the authority's sweet will, whim and fancy.	Article 309, 310 & 311 of the Indian Constitution
12.	Doctrine of Precedent	The law declared by the Supreme Court is binding upon all the other Courts of India including High Courts under Article 141 of the Indian Constitution. High Court is the Highest tribunal of the State. The	Article 141 of the Indian Constitution

		decisions of High Court are binding on all the Subordinate Courts.	
13.	Doctrine of Constitutional Trust	The doctrine of constitutional trust is applicable to the Indian Constitution as it lays down the foundation of representative democracy. In constitutional machinery, the doctrine of constitutional trust is every high constitutional functionary, whether it is the legislature, the Prime Minister of Chief Ministers.	Manoj Narula v. Union of India, (2014) 9 SCC 1
14.	Doctrine of Implication	Constitution's 'dark matter' is as appurtenant as express provisions. Therefore, implications can be derived in the absence of expression provisions.	Manoj Narula v. Union of India, (2014) 9 SCC 1; applied in K.S. Puttuswamy v Union of India,

			(2017) 10 SCC 1
15.	Doctrine of Reading Down	The doctrine of reading down is an internal aid to construe the words or phrase in statute to give it a reasonable meaning.	DTC v. Mazdoor Congress, 1991 Supp (1) SCC 600
16.	Doctrine of Waiver	Fundamental rights are underlined by public interest and public policy, hence cannot be waived. In respect of other legal rights however, a man is his best judge and has the liberty to waive the enjoyment of rights conferred upon by the state.	Behram Khurshid Pesikaka v. State of Bombay, (1955) 1 SCR 613
17.	Doctrine of Election	There are three elements to the doctrine of election: existence of two or more remedies; inconsistencies between such remedies and choice of one of them.	Prashant Ramchandra Deshpande v. Maruti Balram Haibatti,

			1995 Supp (2) SCC 539
18.	Doctrine of Unconstitutional Condition	Any stipulation imposed upon the grant of a government privilege which in effect requires the recipient of the privilege to relinquish some constitutional right.	Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717
19.	Doctrine of Public Trust	The principle that certain natural and cultural resources are preserved for public use, and that the government owns and must protect and maintain these resources for the public's use.	State of Tamil Nadu v. State of Kerala, (2014) 12 SCC 696
20.	Doctrine of Prospective Overruling	When the court lays down or fins the correct law, in the process the prevalent understanding of the law undergoes a change on the considerations of justice and fair deal, the operation of new founded	Golak Nath v. State of Punjab, (1967) 2 SCR 762

		law can be restricted to the future only without having its impact on past transactions.	
21.	Doctrine of Judicial Review	The ability of the Court to interpret laws and executive actions in the light of the Constitution. If such law is found to be violative of the Constitution, or the actions taken are beyond the powers granted by the Constitution, it is liable to struck down by the Court as void.	A.K. Gopalan v. State of Madras, 1950 SCR 88
22.	Doctrine of Proportionality	Proportionality is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision.	Lafarge Umiam Mining Co. v. Union of India, (2011) 7 SCC 338
23.	Doctrine of Police Power	Police power is the capacity of the states to regulate behavior and	A.K. Gopalan v. State of Madras,

		enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants.	1950 SCR 88
24.	Doctrine of Res Extra Commercium	*Res extra commercium* means outside commerce. In other words, it refers to things not subject to trade and excluded from the sphere of private transaction by law.	State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699
25.	Doctrine of Separation of Powers	Political doctrine of constitutional law under which the three branches of government (executive, legislative, and judicial) are kept separate to prevent abuse of power. Also known as the system of checks and balances, each branch is given certain powers so as to check and balance the other branches.	Schedule VII of the Indian Constitution

26.	Doctrine of Escheat	A common law doctrine that transfers the real property of a person who died without heirs to the Crown or state. It serves to ensure that property is not left in "limbo" without recognized ownership.	Article 296; Sheo Nand v. Deputy Director of Consolidation, (2000) 3 SCC 103
27.	Doctrine of Margin of Appreciation	The doctrine of margin of appreciation has been applied in India in context of environmental law. It envisages achieving the goal of sustainable development, thus providing for a compromise between the aspirations of any statute and circumstances faced by persons to which the statute applies.	Lafarge Umiam Mining Co. v. Union of India, (2011) 7 SCC 338
28.	Doctrine of Eminent Domain	Doctrine of Eminent domain, in its general meaning means the supreme power of the king or the government under which property of any	Article 300A; K.T. Plantation v. State of Karnataka,

		individual can be taken over in the concern of general public. However, over the years such taking over the property by the king or the government has been made conceivable only after recompensing the land proprietor of such property. Thus, eminent domain clarified as the power of the king or the government to take over the property of a secluded person when it is wanted for a public purpose. Policy of „eminent domain" is founded on two maxims namely "saluspopuli supreme lexesto" which means that the well-being of the people is the supreme law and "necessita public major estquan", which means that public need is greater than the private need.	(2011) 9 SCC 1

29.	Doctrine of Silences in Constitution	The doctrine of basic structure vis-à-vis Article 368 has been derived from the doctrine of silence. To understand the doctrine by an illustration, the principle of grass root democracy cannot be interpreted to exclude the provision of no confidence motion in respect of the office of the Chairperson of Panchayat merely because of its silence on that aspect.	Bhanumati v. State of Uttar Pradesh, (2010) 12 SCC 1
30.	Doctrine of Incidental Encroachment	If the encroachment by the State Legislature is only incidental in nature, it will not affect the Competence of the State Legislature to enact the law in question. Also, if the substance of the enactment falls within the Union List then the incidental encroachment by the	Hoescht Pharmaceuticals v. State of Bihar, (1983) 4 SCC 45

		enactment on the State List would not make it invalid.	
31.	Doctrine of Fraud on the Constitution	Legislature really has the power but does not exercise such power, rather pretends to have exercised that power. In the eyes of law, such an act is not a law at all and courts will not take a notice of such law.	S.S. Bola v. B.D. Sardana, (1997) 8 SCC 522
32.	Doctrine of State Action	Doctrine of State Action is an American doctrine discussed in the Shriram Fertilizers case. It enumerates that private parties outside of government do not have to comply with procedural or substantive due process.	M. C. Mehta v. Union of India, (1987) 1 SCC 395
33.	Doctrine of Overbreadth	A law is invalid if it punishes constitutionally protected speech or conduct along with speech or conduct that the government may	State of Bombay v. F. N. Balsara, 1951 SCR 682

		limit to further a compelling government interest.	
34.	Doctrine Sovereign Function	Sovereign functions are primarily inalienable functions, which the State only can exercise.	Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India, (1861) 5 Bom. H.C.B. Appx. A
35.	Doctrine of Stare Decisis	It lays down the rule that judges must stand by decided matters and not disturb settled points of law. In a common law legal system like ours, the decisions of the higher courts are treated as binding on all the lower courts in the country. It is also	Article 141; The Bengal Immunity Company Limited v. The State of Bihar and Others, AIR 1955 SC 661

		referred to as the doctrine of precedent. The primary rationale behind the usage of this doctrine is to ensure predictability, certainty and consistencyin the application of law.	
36.	Doctrine of obiter dicta	While deciding upon the facts of a case, judges may make certain remarks or observations in the passing, which are not relevant to decision in the case. Though these observations form a part of the judgment, they may not have any bearing whatsoever, on the ultimate outcome of the case. These observations are not considered to be binding on the subordinate courts.	Abhay Singh Chautala v. C.B.I. 2011 (2) ACR 2252 (SC)
37.	Doctrine of Purposive Interpretation	It is an approach of statutory as well as constitutional interpretation through which the courts seek to	Shailesh Dhairyawan v. Mohan Balkrishna

		interpret a particular enactment in light of the purpose for which it was enacted by the Legislature. The court seeks to find the mischief which was sought to be remedied.	Lulla 2016 (1) ABR 63
38.	Doctrine of Occupied Field	Parliament is the supreme law-making authority in this country. When the Parliament enacts a law, wherein it tries to occupy the field of a State law, the Central law will always prevail. In simple terms, it basically refers to those Entries in the State List, which are expressly made subject to a corresponding Entry, either in the Union List or the Concurrent List.	Article. 254(1); State of Kerala & Ors. v. M/S. Mar Appraem Kuri Co. Ltd. & Anr. AIR 2012 SC 2375
39.	Doctrine of Locus Standi	It is a Latin phrase which means "a place to stand". It refers to a person's standing before the court, i.e. the	S. P. Gupta v. Union of India, AIR 1982 SC 149;

		right of a person to bring an action before the court or be heard. Simply, it means the legal standing of a particular person to bring the cause of action.	Bangalore Water Supply and Sewerage Board v. Kantha Chandra and Ors. AIR 1989 Kant. 1
40.	Res judicata	"Res" means subject matter or dispute. "Judicata" means adjudged or decided. No court shall try any suit or issue, in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent	Section 11 C.P.C; Indian Young Lawyers Association and Ors. v. The State of Kerala and Ors. Writ Petition (Civil) No. 373 of 2006 2018 (4) KLT 373

		to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The term is used to bar re-litigation and is conceived in larger public interest.	(Justice Indu Malhotra Dissenting judgment)
41.	Doctrine of ultra vires	It means 'beyond the power'. Thus, if a person or an authority does an act, which is beyond the legal power or scope of authority of the said person or authority, it is said to be ultra vires. Such an act has no force in law.	In Re: The Delhi Laws Act, 1912 AIR 1951 SC 332
42.	Distribution of Powers	In India, there isn't a concentration of powers in the Union. There is rather a distribution of powers between the union and the states. This can be seen through scheme of distribution of legislative powers in the form of	Borrowed from the Government of India Act, 1935; Schedule VII of the Indian Constitution;

		three lists – Union List, State List and the Concurrent List.	Article 245 – 254.
43.	Doctrine of Responsible Government	It envisages a form a parliamentary form of government that embodies the principle of parliamentary accountability and ministerial responsibility. The Council of Ministers are collectively responsible to the House of the People.	Article 75 (3).
44.	Doctrine of Rule of Law	The doctrine of Rule of law was originally propounded by A. V. Dicey. It includes the following aspects: - Supremacy of the law - Equality before law - Predominance of legal spirit Indian Constitution has given due recognition to the concept of rule of	Articles 13 and 14

		law.	
45.	Doctrine of Creamy Layer	The term "creamy layer" was first used by the Supreme Court in the 'Indira Sawhney Judgment'. It is interpreted by the court as 'socially advanced persons and sections from the Other Backward Classes'.	Indira Sawhney v. Union of India AIR 1997 SC 597
46.	Doctrine of Affirmative Action	The policy of affirmative action is resorted to bring forward socially and educationally backward classes of people, by positively discriminating against them. It is undertaken to achieve the ideals of equality. It takes support from the principle that – 'equals should be treated equally	Article 14 – 18; Ashoka Kumar Thakur v. Union of India and Ors. (2008) 6 SCC 1; Indira Sawhney v. Union of India AIR 1997 SC 597

		and unequals unequally.'	
47.	Doctrine of Integrated Approach	Although there are various Fundamental Rights enshrined in the Constitution, they have most often been invoked together to declare certain legislation or state action to be arbitrary. The Courts have also held that the Fundamental Rights should be interpreted, so that they form a part of the integrated scheme of the constitution.	Maneka Gandhi v. Union of India and Ors. AIR 1978 SC 597
48.	Exclusive Code	According to this theory, when different aspects of the same right have been dealt with in various different articles, that by itselfwill make those articles mutually exclusive of each other. It means that that certain articles in the Constitution exclusively deal with	A.K. Gopalan and Ors. v. The State of Madras AIR 1950 SC 27; Rustom Cowasjee Cooper v. Union of India AIR 1970 SC 1318

		specific matters and the theory is based on the assumption that each article is a self-enacting code for the protection of distinct rights, in itself. This theory has however not been accepted in some subsequent cases.	
49.	Doctrine of Inconsistency	If the State makes any law which has the effect of taking away or abridging the fundamental rights guaranteed under the Constitution, then such a law shall be held to be void, to the extent of the contravention.	Article 13
50.	Legitimate Expectation	It was first developed in the English law. A public authority can be made accountable or liable by a person in lieu of a reasonable expectation of being treated in a certain way by such public authority, owing to some	State of Kerala v. K.G. Madhavan Pillai (1988) 4 SCC 669; Navjyoti Coop. Group Housing

		consistent practice or an express promise made in that behalf by the concerned authority.	Society v. Union of India (1992) 4 SCC 477)
51.	Promissory Estoppel	Where one party has, either by his words or conduct, made to the other party, an unequivocal promise, with the intention of creating a legal relationship, and fully knowing that the other party would act upon the promise, and where in fact the other party so acts upon the promise, then the promise would be binding on the party making it. The party making the promise is not entitled to go back on the promise. It is principle evolved to avoid injustice.	Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P and Ors. AIR 1979 SC 621
52.	Doctrine of Dualism	A treaty which is entered into by India, will not become an enforceable law, unless a law in that regard has	Article 253; The State of West Bengal v. Kesoram

		been made and passed in the Parliament. Thus, only the municipal law is binding upon the courts and not an international treaty, unless the provisions of the same are accommodated by passing a law.	Industries Ltd. and Ors. AIR 2005 SC 1646; Jolly George Varghese and Ors. v. The Bank of Cochin AIR 1980 SC 470
53.	Doctrine of Transformative Constitutionalism	The Constitution envisages a transformation in the order of relations not just between the state and the individual, but also between individuals: in a constitutional order characterized by the Rule of Law. Hence, Transformative constitutionalism entails an avoidance of strict legal and judicial methodology in order to achieve social transformation.	Navtej Johar v. Union of India (2018) 1 SCC 791

54.	Principle of Anti - Exclusion	Where a religious practice causes the exclusion of individuals in a manner which impairs their dignity or hampers their access to basic goods, the freedom of religion must give way to the over-arching values of a liberal Constitution	Indian Young Lawyers Association v. State of Kerala Writ Petition (Civil) No. 373 of 2006 2018 (4) KLT 373
55.	Doctrine of Immunity of Instrumentality	In a system of government where there is a clear demarcation of legislative powers, it is necessary that each set of government refrains from interfering with the activities of the other. In India, reference to such immunity can be found as regards the taxing power of the Union and the State. It means that both the Union and the State have immunity	Articles 285, 288, 289.

		from paying taxes which are imposed by the other.	

3) STANDARDS[1]

Standards are incorporated as principles of determining whether the Law under question is just, fair or reasonable. They give the judiciary an opportunity to interpret minutely each and every principle that was thought of while drafting the letter of the law and also helps uphold the spirit of the law. Standards differ from Rules because they have more flexibility which helps them interpret law freely and better. Rules on the other hand, have set parameters within which they operate, without much room for interpretation of law.

For instance, pre-determined fines for breaking traffic laws are Rules and those which give discretion to the judge according to the circumstances of the case, would be Standards.

Certain Standards under the Indian Constitution are as below:

SR. NO	STANDARD	MEANING	USAGE	CASE LAWS
1.	Constitutional Principles	• Constitutional Principles are	• To determine whether	• M. Nagaraj & Ors. V

[1] The student editors are thankful to Rashmi Raghavan (III B.A. LL.B.) for her assistance and contribution to this part of the bulletin on Standards under the Indian Constitution.

		systematic and structural principles underlying and connecting various provisions of the Constitution. They are a part of Constitutional Law even if not expressly mentionedEg. Federalism, Free and Fair elections, Socialism etc.	certain principles are binding on the Legislature	Union of India &Ors. • AIADMK v. State Election Commissioner
2.	Public Morality	• Principle that law cannot run	• Was used earlier to	• Gobind v State of M.P

		contrary to society as it reflects the perceptions of society. • Also known as Popular morality	satisfy the test of compelling State interest. • Rejected because of subjective and changing notions of right and wrong.	• State of Bombay v R.M.D Chamarbaug wala • K.A. Abbas v Union of India
3.	Constitutional Morality	• It is to abide by the values enshrined in the Constitution eg. Fraternity, Freedom of thought and expression etc.	• Where state interferes into Fundamental Rights on the basis of Popular opinion regarding a subject eg.	• Naz Foundation v Govt of NCT • Indian Young Lawyers Assn & Ors

			Homosexuality	v. State of Kerala &Ors.
4.	Presumption of Constitutionality	• Law runs on the presumption of being valid and that lawmakers do not intend to violate provisions of the Constitution during enactment. • Shifts burden of proof from State to citizen alleging violation of Part III by any law	• Occurs when two possible interpretations to a provision are possible- one that's unconstitutional and the other is constitutional. The constitutional provision is valid unless disproved by the one challenging it.	• Kedar Nath Singh v State of Bihar • Sri Ram Krishna Dalmia v Shri Justice H.R. Tendolkar & Ors • Anuj Garg v Hotel Assn of India

			• When provisions of a statute are ambiguous and give diametric meanings	
5.	Strict Scrutiny	• Closer and detailed look into the matter before the Court. • Law must be looked at from its aims, implications and effects. • Law which fulfils "compelling	• If legislation is unreasonable at the outset • If it violates Art.21 • Post Subhas Chandra, application of doctrine even under Art. 14 or Art. 19	• Saurabh Chaudhary v Union of India • Ashok Kumar Thakur v Union of India • Anuj Garg v Hotel Assn.

		State purpose" standard would pass the test of Strict Scrutiny.		of India • Subhash Chandra v Delhi Subordinate Services Selection Board
6.	Non-arbitrariness	• Law that is non-arbitrary is right according to political logic and constitutional law, thus upholding Art. 14	• Where orders are passed without an independent rule or an adequate determining principle. • Where is law is ex-facie	• AjaiHasia v Khalid Mujib • K.M SrilekhaVidyarthi v State of U.P

			unreasonable	
7.	Fairness	• Ina general sense, is the maintaining of equity by Courts. • It is recourse to principles on justice against the inroads of legal technicality.	• Where the Courts go beyond the letter of the law to ensure that complete justice is done	• Vishakha v State of Rajastan • GeetaHariharan v Reserve Bank of India • Navtej Singh Johar v Union of India
8.	Equality	• Involves a negation of arbitrariness in State action	• Cases of discrimination • Unintelligible reasons for	• Maneka Gandhi v Union of India

		• Implies that all individuals must be treated equally unless a sufficient reason exists not to	classifying persons into different categories	• R.D. Shetty v International Airport Authority • Randhir Singh v. Union of India • Josephine Shine v Union of India
9.	Reasonableness	• The Law must satisfy in addition to the tests of arbitrariness and rationality the	• Cases of substantive and procedural fairness • Orders by the	• Maneka Gandhi v. Union of India • Mithu v. State of

		test of reason. • Any provision that deprives the court of the use of its wise and beneficient intention is said to be unreasonable.	Executive • General provisions of any law	Punjab • Olga Tellis v Bombay Municipal Corp.
10.	Proportionality Review	• It is the reasonable level of scrutiny applied to test the validity of Law. • Law should be proportionate to the aims sought to be achieved.	• In cases of intelligible differentia, which distinguishes members of a certain group or others left out of the group.	• State of W.B v Anwar Ali Sarkar • E.P Royappa v State of T.N

			• Such classification must have a nexus with the object to be attained.	
11.	Due Process	• Magna Carta- "Law of the land" • Based on "fairness" under Art. 14 and "reasonableness" under Art. 19. • Thus, law should have reasonably enacted procedure and incorporate	• Substantive scrutiny of laws made by legislature. • Deciding on unenumerated fundamental rights not explicitly mentioned in the Constitution.	• Maneka Gandhi v Union of India • Minerva Mills v Union of India • S. R. Bommai v Union of India • Selvi v State

		principles of natural justice to pass the test of Due Process. • It includes Substantive (the enactment of the law itself) and Procedural (methods of carrying out the law) Due Process	• Using certain parts of the Constitution to interpret other parts.	of Karnataka
12.	Essence of Rights Test	• Identity Test: Where the State must identify and measure the problem at hand with its contrasting effect	• Where inteligible differentia is not identified by State • Width test is applied where	• M.Nagaraj &Ors. V Union of India &Ors. • IndraSawhney v Union of India

		on equity, justice and efficiency • Width Test: Whether changes sought affect existing constitutional rights and limitations	quantifiable data, qualitative exclusion and administrative efficiency do not guide law making	
13.	Public Functions Test	• Used to check whether private parties are amenable to writ jurisdiction under the Constitution. • Private entities performing public functions	• Where fundamental rights of parties or public at large has been violated by such institutions	• Zee Telefilms v Union of India • J.P.Unnikrishnan v State of Andhra Pradesh • Ramesh Ahluwalia v

		like providing healthcare or education are said to perform functions of the State , thus, coming under the ambit of Art.12.		State of Punjab
14.	Judicial Review for Amendment to the Constitution	• Earlier portions of law held void could be saved from their judicial scrutiny by placing them under the Ninth Schedule. • This power tries to correct not	• Any law or article which by amendment abridges Part III or the basic structure doctrine should be invalidated.	• Indira Gandhi v Raj Narain • BhimSinghji v Union of India • I.R.Coelho v State of T.N

		only a mere violation under Art.14 but a shocking and unscrupulous travesty of equal justice.	• Includes articles inserted into the Ninth Schedule	
15.	International Fair Trial Standard	• Finds genesis in the Geneva Convention post WWII to combat war crimes • Set to protect right of fair trial before, during and after criminal proceedings • Domestic law	• Cases where there has been breach of conduct by armed officials. • Cases where the accused has not been given right to access legal aid or that to	• Husaainara Khatoon v State of Bihar • Sunil Batra v Delhi Admin • Prem Shankar Shukla v Delhi Admin

		governing such issues must conform to international standards	procure and produce evidence etc.	
16.	Paris Minimum Standards for Declaration of Emergency	• These standards seek to constrain and guide the discretionary power of the State to declare an emergency and to take constitutionally impermissible actions.	• Cases where emergency has been declared without there being a breakdown of constitutional machinery under Art.356 or Art.352 and Art.360. • Those involving	• S.R.Bommai v Union of India • Sh. Harish Chandra Rawat and Anr. V Union of India

			breach of fundamental rights guaranteed even during emergency eg. Art.21	
17.	Obscenity	• Offence against public morals • Done either by indecent publication or conduct that undermines the values and sentiments attached to those morals. • Intends to	• Seen if an average person after reading/watching the entire content is embarrassed or disgusted by it (Community Standard Test).	• Roth v United States • Shristi School of Art, Design & Tech v CBFC • Phantom Films Pvt. Ltd &Anr v CBFC

		corrupt those receiving it	• Cases of Freedom of Speech and Expression under Art.19(1)(a) • Applies with greater force to historically respected personalities	
18.	Judicial Standards	• Means that judges cannot act arbitrarily or with bias and their duty is to apply the law	• To prevent abuse of power by Judges • To protect independence of Judiciary	• Aguirre Roca, Rey Terry and RevoradoMarsano v. Peru • S.P.Gupta v Union of

				India • Supreme Court Advocates on Record Assn. Union of India

4) BASELINE OF FUNDAMENTAL RIGHTS

In the long and illustrious journey of the Supreme Court, it has set precedents and rendered interpretations which constitute a milestone for many cases and disputes in the years to come. As an apex court, it can fill the gaps in law and act as an interpreter of legislature's intention in enacting the law. In doing so, the Supreme Court has sometimes come to conclusions which have altered the course of events and have led to a paradigm shift in the understanding of the law. Such interpretation forms a baseline; for a baseline marks such a deviation from the previous interpretation that it ensures that the law is looked at from a new perspective.

In the interpretation of Fundamental Rights, there are some important baselines. We shall elucidate them in this section.

1. A.K. Gopalan to Maneka Gandhi

From the case of A.K. Gopalan v. State of Madras[2] to the case of Maneka Gandhi v. Union of India, there was a shift in the interpretation of 'procedure established by law'. The litigant, Mr. A.K. Gopalan, was detained under Preventive Detention Act, 1950 and one of the questions which faced the Supreme Court was whether the concept of personal liberty included the freedom of movement under Article 19(1)(d). In this case, the Apex court interpreted Article 21 narrowly holding that it has no

[2] AIR 1950 SC 27

relationship with Article 14 and 19. It also compartmentalised personal liberty from the liberties mentioned under Article 19. It also held that article 14 which talks about reasonableness has also no relationship with Article 21.

Finally on the point of 'procedure established by law', Chief Justice Kania held that, "since the constituent assembly extensively discussed and deliberately dropped the use of the expression, 'due process of law' and instead adopted the expression 'procedure established by law' under Article 21, the concept of due process could not be imported into the article ".

However, making a sharp departure from the Gopalan baseline, Maneka Gandhi v. Union of India, held that there is no difference between liberty and personal liberty. Therefore arrest and detention of an individual has not only to satisfy Art 21 but also Art 19. The mere establishment of some kind of procedure cannot be enough to meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by law which curtails or takes away the personal liberty guaranteed by Art. 21 is reasonable or not has to be considered. Justice Chandrachud, held that reasonableness of procedure was implicit in Article 21 and having regard to the impact of Articles 14 and 19 on Article 21 he observed that the procedure must satisfy the requirement of Articles 14 and 19 also, otherwise, it would be no procedure at all.

2. Right to Privacy

In 2017, a nine-judge bench of the Supreme Court delivered its verdict in Justice K.S. Puttaswamy v. Union of India[3]. The Bench unanimously affirmed right to privacy as a fundamental right under the Indian Constitution. The question whether privacy is a fundamental right, emerged during the Aadhar hearing in 2015. In the light of *M.P. Sharma*[4] (8 judges) and *Kharak Singh*[5] (6 judges) holding that there was no fundamental right to privacy under the Indian Constitution, and all subsequent judgments decided by smaller benches being to the contrary, the Court had to examine the position on the Right to Privacy. This judgment laid the solid and concrete foundation to the decriminalisation of homosexuality in India.[6]

Justice Nariman made an overarching argument, linking the three aspects of privacy i.e. bodily integrity, informational privacy, and the privacy of choice (para 81).

"The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The

[3] WRIT PETITION (CIVIL) NO 494 OF 2012
[4] 1954 SCR 1077
[5] AIR 1963 SC 1295
[6] Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, W. P. (Crl.) No. 76 of 2016; D. No. 14961/2016

constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination." (para 169)

By ruling that the basic idea that privacy encompassed the bodily integrity, the mind including informational self-determination, and intimate choices, all nine judges agreed that privacy was at the heart of individual self-determination, of dignity, autonomy and liberty, and concretely, inseparable from the meaningful exercise of guaranteed freedoms such as speech, association, movement, personal liberty, and freedom of conscience. Privacy, therefore, is both an overarching, foundational value of the Constitution and incorporated into the text of Part III's specific, enforceable rights.

3. Article 14 – Baselines

The evaluation of Article 14 is quite multi-faceted. The understanding of the doctrine of 'equality and equal protection of law' has shaped many principles which have been helpful in evaluating if a certain act or decision meets the threshold of equality. Expanding on the 'reasonable classification doctrine' for evaluating equality under Article 14, in the case of Ajay Hasia v. Khalid Mujib[7], the Court noted that:

> "*If the classification is not reasonable and does not satisfy the two conditions referred to above (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action], the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached*."

This was the traditional approach towards understanding equality. However, this approach is premised on availability of a comparative. It refuses to answer to circumstances in the absence of comparative evaluation.

Marking a shift in the baseline, arbitrariness provides a standard for evaluating violation of equality when no comparative evaluation is possible. [8] "Article 14 strikes, at arbitrariness in State action and ensures fairness and equality of treatment". This

[7] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722
[8] Shivam, *Arbitrariness Analysis Under Article 14 With Special Reference To Review Of Primary Legislation*, ILI Law Review, 2016 available at http://ili.ac.in/pdf/paper11.pdf

was laid down in the case of Maneka Gandhi v. Union of India[9] by Justice Bhagawati. Hence, arbitrariness as a ground to claim violation of equality became a game-changer in the Fundamental Rights jurisprudence.

In case of A.L. Kalra v. Project and Equipment Corporation[10], it was observed that, "*One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of protection by law*." This doctrine found acceptance is many judgments and remains one of the soundest ways to assess equality in law.

The case of Om Kumar v. Union of India stats that[11], "*[W]here, an administrative action is challenged as 'arbitrary' under Article 14 on the basis of Royappa, the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary*."

However, to ensure that arbitrariness is not a vague standard, the rubric of rationality and reasonableness can be applied to assess whether a decision slips into

[9] Maneka Gandhi v. Union of India (1978) 1 SCC 248
[10] (1984) 3 SCC 316, 328
[11] (2001) 2 SCC 386

arbitrariness. 'Irrational' most naturally means 'devoid of reasons' whereas 'unreasonable' means 'devoid of satisfactory reasons.[12] Though they are used interchangeably, many scholars are of the opinion that unreasonableness forms a broader element with rationality being a microcosm of it.

4. Essential Religious Practices Doctrine:

This doctrine was evolved to ascertain the scope of Article 25 of the Constitution. It originated in the case of originated in 1954 judgment of Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt*[13] (Shirur Matt case).

> *"…what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a*

[12] R v. Secretary of State for the Environment ex p Nottinghamshire [1986] AC 240
[13] AIR 1954 SC 282

commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26(b)."

In the case of Acharya Jagadiswaranand Avadhuta v. Comm Of Police Calcutta[14], the Court held that the tandav dance could not be considered as an essential element of the religious denomination. In 2014 the Court refused to vacate an order of the Himachal Pradesh High Court banning animal sacrifice during the festival of Kulu Dushara and in other religious rituals of the Kulu region of the state. However, the recent Sabarimala verdict strengthens the baseline further.

In a PIL filed by Indian Young Lawyers Association, the Constitutional validity of notifications issued by Travancore Devasom Board (TDB) and the Kerela State-made Rules were challenged. The exclusion of a menstruating from the Sabarimala Temple was justified on the basis of ancient custom. This custom found acceptance in Rule 3(b), framed by the Government under the authority of the 1965 Kerala Hindu Places of Worship (Authorisation of Entry Act and the Rules. Section 3 of the Act required that places of public worship be open to all sections and classes of Hindus, subject to special rules for religious denominations. Rule 3(b), however, provided for the exclusion of "*women at such time during which they are not by custom and usage allowed to enter a place of public worship.(menstruating women)" The Court put the Constitutionality of this Article into perspective* along with Article 25(1) (freedom of worship), Article 26

[14] AIR 1984 SC 51

(freedom of religious denominations to regulate their own practices), and Articles 14 and 15(1) (equality and non-discrimination).

Justice Misra and Justice Khanwilkar who were in the 4:1 majority held that the devotees of Lord Ayappa at Sabarimala failed to establish that they constitute a "separate religious denomination". The test for "separate denomination" is rather stringent one, and requires a system of distinctive beliefs, a separate name, and a common organisation. The Sabarimala Temple's public character (where all Hindus, and even people from other faiths) can go and worship, along with other temples to Lord Ayappa where the prohibition of women does not constitute a separate "denomination." Consequently, women have an enforceable Article 25(1) right to entry. This right is not undermined by a contrary right of exclusion because, on facts, excluding women does not constitute an "essential religious practice" that is protected by Article 25(1).

Justice Chandrachud went on to hold that "*prohibition on women is due to non-religious reasons and it is a grim shadow of discrimination going on for centuries*." He further goes on to hold that the exclusion of women from temple premises amounts to untouchability under Article 17. "*The caste system represents a hierarchical order of purity and pollution enforced by social compulsion. Purity and pollution constitute the core of caste*." If the reason for excluding women is to preserve purity, then social exclusion is manifested in 'untouchability'.

5. **Un-enumerated Fundamental Rights**:

In words of great constitutional scholar Prof. Upendra Baxi, "a Constitution is defined by not what is written in it rather what is interpreted out of it". The Supreme Court has expanded the scope of rights by interpreting the enumerated rights more liberally. In the case of M.C. Mehta vs. Union of India,[15] the Supreme Court treated the right to live in pollution free environment as a part of fundamental right to life under Article 21 of the Constitution. In Common Cause v. Union of India[16], the Supreme Court recently ruled that right to die with dignity a Fundamental Right under Article 21 thereby allowing Passive Euthanasia and Living Will.

In F. C. Mullin vs. The Administrator, Union Territory of Delhi & others[17] Justice Bhagwati observed: "*We think that the right to life includes the right to live with human dignity and all that goes with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms freely moving about and mixing and mingling with fellow human beings. Every act which offends against or impairs human dignity would constitute deprivation protanto of this right to life and it would have to be in accordance with reasonable, fair and just procedures established by law which stands the test of other fundamental rights.*"

[15] AIR 1987 SC 1086
[16] WRIT PETITION (CIVIL) NO. 215 OF 2005
[17] 1981 2 SCR 516

To conclude, the Constitution provides a framework by the rights mentioned therein, are not exhaustive. The Supreme Court has interpreted the scope of Constitutional guarantees by stepping outside the textual enumeration of rights thereby ensuring that it remains a living and organic document. Through this process, the Court enables the law to meet the expectations of the people for whom it was framed and creates more decisive baselines for lower courts to pursue while interpreting the Constitution.

5) PARENTAGE OF IMPORTANT CONSTITUTIONAL ARTICLES

The drafting of the Indian Constitution began in the year 1946. At the time, there were a few Constitutions around the world which could provide inspiration to our drafting process. Each of these Constitutions and their peculiarities was rigorously debated and the end result of this debate was the formation of the Indian Constitution which reflected a unique and vibrant adaptation of various provisions from different Constitutions yet, modelled to suit the people of India and their aspirations. This section is called '*parentage*' because in many ways, the conception of the Indian Constitution would have been impossible without the Constitutions of countries like USA and Russia leading the way. Albeit, the Indian Constitution which was birthed through an arduous drafting process was influenced by various ideas, it was completely new and had its own unique philosophy. Let us have a look at the sources of inspiration for our Constitution:

PREAMBLE:

The prelude to the Indian Constitution which has amazed Constitutional law scholars with its ability to remain a vital relevant interpretative tool is inspired by the United States Constitution. The US Constitution begins with the words, "*We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the*

Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

As we can see, the Indian Constitution also begins with the words, "We the People", declaring the Constitutional sovereignty of the people of the country. Like the preamble to the US Constitution, it further lays down the social and economic goals and objectives, which the Indian society must strive to achieve.

PART III – FUNDAMENTAL RIGHTS:

The Chapter on fundamental Rights is significantly inspired by the United States Bill of Rights. Although the nature of protections and guarantees is inspired by the Bill of Rights, the idea of state protecting certain innate rights of its people was not new. These rights were seen to be of divine origin and they were also touted to be natural rights. They were documented in English documents such as the Magna Carta, the Petition of Right, the English Bill of Rights, and the Massachusetts Body of Liberties.

The first 10 Amendments to the US Constitution make up the Bill of Rights. James Madison wrote the amendments, which list specific prohibitions on governmental power, in response to calls from several states for greater constitutional protection for individual liberties. Many of the rights are identically held as fundamental in the Constitution of India. Those rights include freedom of speech and expression, freedom of religion etc

PART IV – DIRECTIVE PRINCIPLES OF STATE POLICY:

Article 45 of the Irish Constitution, lays down the policy of the state to achieve the objectives set out in the preamble or which the drafters of the Constitution envisioned. A duty is cast upon the state to align its policies to the objectives laid down in the directive principles "*The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.*

i. *The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life*."

The principle laid down for law making in furtherance of the same has been incorporated in the Indian Constitution under Article 31C – saving of laws giving effect to certain directive principles. It protects the laws made in furtherance of DPSP from constitutional challenge. Article 37 of the Indian Constitution also lays down the scope of implementation of Directive Principles and furthers the understanding of these provisions. Similarly, point (i) in Irish Constitution mirrors Article 38 under Indian Constitution which carries the objective of social justice. There are many other Articles imbibing objectives in policy making which have inspired the Indian

Constitution such as "*The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength*" which is similar to the objectives laid down under Article 39, 41 and 43 of Indian Constitution. Cathal O'Normain wrote in the Indian Yearbook of International Affairs in 1963, "perhaps the Irish Constitution's greatest claim to future fame will depend on the extraordinary influence which its Directive Principles had on the Constitution of India."

AMENDMENT TO THE CONSTITUTION:

The provision for amending the Constitution has been borrowed from the Constitution of United States of America. Article 5 of the US Constitution gives the exclusive power to amend the Constitution. Amendments can be introduced by either proposal or ratification. Amendments may be proposed either by the Congress with a two-thirds vote in both the House of Representatives and the Senate or by a convention of states called for by two-thirds of the state legislatures.[18] In India Article 368 mirrors Article 5 in the US Constitution. An amendment of the Constitution can be initiated only by the introduction of a Bill in either House of Parliament. Like the US Constitution, the elected body of representatives or the parliament retains the sole

[18] "The Constitutional Amendment Process", The U.S. National Archives and Records Administration, available at https://www.archives.gov/federal-register/constituton last seen on 25/11/2018.

and exclusive power to amend the Constitution. The Bill must then be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. Another striking similarity is that Constitutional Amendment in both jurisdictions requires a minimum ratification threshold to be met.

ELECTION OF PRESIDENT AND ELECTORAL COLLEGE:

The procedure of election of president through the Electoral College is inspired by Section 12 of the Irish Constitution which states that, "the President shall be elected by direct vote of the people." Similarly in India, the manner of election of president is prescribes under Article 52 to 55 of the Constitution. However, the only difference is that in India, we follow an indirect system of electing the president.

According to Article 54, "The President shall be elected by the members of an electoral college consisting of the elected members of both Houses of Parliament".

Article 55 : Manner of election of President

(1) As far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President.

(2) For the purpose of securing such uniformity among the States inter se as well as parity between the States as a whole and the Union, the number of votes which each

elected member of Parliament and of the legislative Assembly of each state is entitled to cast at such election shall be determined in the following manner; –

(a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly;

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

NOMINATING MEMBERS TO THE RAJYA SABHA:

In Ireland, Seanad Éireann is the upper house of the Oireachtas (the Irish legislature). According to Article 18, the Seanad Éireann shall be composed of sixty members, of whom eleven shall be nominated members and forty-nine shall be elected members.

Similarly, in India, out 250 members of the Upper House of the Parliament (Rajya Sabha), 12 are nominated by the President of India from amongst persons who have special knowledge or practical experience in respect of such matters as literature, science, art and social service.

ORGANISATION OF THE SUPREME COURT AND JUDICIAL REVIEW:

The organisation of the Supreme Court of the United States (SCOTUS) and the Supreme Court of India is very similar. Under Article 3 of US Constitution and Article 141 of Indian Constitution, both are established as Apex Federal Courts. Moreover, the original jurisdiction of Supreme Court to resolve disputes between states, appellate jurisdiction of the Court is almost identical in both jurisdictions. However, the most significant influence of the US Constitution in the organisation of the Indian Supreme Court is the power of judicial review. Judicial Review is the ability of the Court to declare a Legislative or Executive act in violation of the Constitution. The SCOTUS established this doctrine in the case of *Marbury v. Madison* (1803). The Indian Supreme Court, as the final arbiter of the Constitution and guardian of fundamental rights, has the power of judicial review over all legislative, executive and quasi-judicial acts.

PREROGATIVE WRITS:

The five prerogative writs available under Article 32 and 226 are borrowed from the English Common law. It was originally available only to the Crown under English law, and reflected the discretionary prerogative and extraordinary power of the monarch.

SINGLE CITIZENSHIP:

The idea of single citizenship has been inspired by the Constitution of Canada.

FUNDAMENTAL DUTIES:

The conferment of fundamental duties has been inspired by the Russian Constitution. The Russian Constitution has enumerated obligation to pay taxes, defence and protection of state, preservation of environment as the duties of the citizens above the age of 18. After the 42nd Constitutional Amendment, Article 51A of the Indian Constitution similarly enumerates duties of Indian citizens.

CONCURRENT LIST:

The idea of concurrent list has been inspired by the Australian Constitution. Under Indian Constitution, The Concurrent List or List-III (Seventh Schedule) is a list of 52 items where both the central and state government have the power to legislate upon. Similarly in Australia, according to the Commonwealth Constitution Act of 1900, the states are allowed to make laws in areas over which the Commonwealth has power (provided that the state laws do not conflict with those of the Commonwealth). This occurs where the states and the Commonwealth have **concurrent** powers—that is, a shared power to legislate. An example of this is in the area of taxation, where state taxation takes the form of stamp duty and federal taxation takes the form of income tax.[19]

[19] The Commonwealth Constitution Act of 1900, available at https://sielearning.tafensw.edu.au/MBA/19194J/commerc_law/lo/u1_t3_parlaw/u1_t3_parlaw_02.htm last seen on 25/11/2018.

6) IMPORTANT EXCERPTS FROM CONSTITUENT ASSEMBLY DEBATES

Excerpts from the Constituent Assembly Debates

"A people without the knowledge of

their past history, origin and culture

is like a tree without roots."

- **Marcus Garvey**

History and Culture shapes human society. As Marcus Garvey so beautifully expressed, it is vital that each individual and through the individuals, the society, identifies its origin, history and culture. It is only then the society can reform to meet the challenges of the changing times. Like everything that holds a place in society, laws also have a history and origin of its own. A proper understanding of any law is possible only through an understanding of the underlying justifications for that law.

The Constitution of India too has a history: The History of India. A history that is poetic, tragic, and magnificent all at the same time. The Constitution was drafted keeping at heart this history, of India's contributions to mankind and its culture, its tragic colonisation and the concomitant atrocities carried out by foreigners and more importantly its ground realities, of caste oppression and widespread inequalities and conflicts. There is no better way to understand the Constitution and its history than by gaining an insight into the minds of its makers. The Constituent Assembly Debates

furnish an opportunity for us to do this to truly understand the justifications for the Constitution and how it came to be shaped.

The following are certain excerpts of the speeches made during the Constituent Assembly proceedings and have been drawn from the Reports made available at CAD India[20]. The following are the excerpts presented below:

1. Excerpts from the Inaugural Address made by Temporary Chairman, Hon'ble Dr. Sachchidananda Sinha on 9th December 1946 at the first meeting of the Constituent Assembly: This address represents the enormity of the task that was presented to the Constituent Assembly.
2. Excerpts from the Address made by by Hon'ble Dr. S. Radhakrishnan on 11th December 1946: These excerpts contain general observations regarding the Constitution that the learned speaker had in his mind, the need for unity and a brief statement of the nature India's history.
3. Excerpts from the Address made by Hon'ble Pandit Jawaharlal Nehru on 22nd January 1947 on the "Objective Resolution": The observations contained therein were made in response to the several remarks made in relation to the Objective Resolution. These excerpts include observations on India's pressing needs, political system, Republicanism and the nature of Indian sovereignty.

[20]http://cadindia.clpr.org.in/constitution_assembly_debates

4. The "Objective Resolution" moved by Hon'ble Pandit Jawaharlal Nehru on 13th December 1946 and adopted by the Assembly on 22nd January 1947: The Objective Resolution formed the basis of the Preamble which has now been recognised as an integral part of the Constitution and as "*a key to the Constitution*". In Pandit Nehru's words, "*The Resolution deals with fundamentals which are commonly held and have been accepted by the people.*"
5. Excerpts from the Address made by Hon'ble Rev. J.J.M. Nichols Roy on 18th December: The Hon'ble Member was highlighting and responding to a remark made by Viscount Simon in the House of Lords. His observationsemphasises that the Constitution is for all the people of India and to protect each and every one of these peoples.
6. Excerpts from the Address made by Hon'ble Mr. Jaipal Singh on 19th December: This address is of significance, both in terms of the history that it reminds us of and more importantly the message that it carries. His address presents to us the need to repose faith in each other as fellow Indians as well as the need to repose faith in and to protect our Constitution.
7. Certain Excerpts relating to the discussion concerning Article 17 of the Constitution (Article 11 of the Draft Constitution): The scope of Article 17 of the Constitution is one that has come to the forefront of discussions on Indian Constitutional Jurisprudence after the opinion authored by Hon'ble Dr. D. Y.

Chamdrachud JJ., in the Sabarimala case. Most of these excerpts were quoted and relied on by the learned Judge and has been produced to further this discussion across forums.

8. Excerpts from the Address made by Hon'ble Dr. B.R. Ambedkar on 25th November 1949:Dr.Ambedkar's final speech in the Constituent Assembly. He expresses the dangers that the Indian Union and its Constitution may be presented with. His thoughts display anxiety for the future of the Union that each student of Constitutional should be aware of.

From the Inaugural Address by Temporary Chairman, Hon'ble Dr. Sachchidananda Sinha on 9th December 1946 at the first meeting of the Constituent Assembly. (Vol. 1, Paragraph 1.1.33):

1.1.33*"Hon'ble Members, I fear I have trespassed long on your patience, and should now bring my remarks to a close. My only justification for having detained you so long is the uniqueness of this great and memorable occasion in the history of India, the enthusiasm with which this Constituent Assembly had been welcomed by large classes of people in this country, the keen interest which matters relating to it had evoked amongst various communities, and the prospect which it holds out for the final settlement of the problem of all problems, and the issue of all issues, namely, the political independence of India, and her economic freedom. I wish your labours success, and invoke Divine blessings that your proceedings may be marked not only by good sense, public spirit, and genuine patriotism, but also by wisdom, toleration, justice, and fairness to all; and above all with a vision which may restore India to her pristine glory, and give her a place of honour and equality amongst the great nations of the world. Let us not forget to justify the pride of the great Indian poet Iqbal, and his faith in the immortality of the destiny of our great, historic, and ancient country, when he summed up in these beautiful lines:*

"Yunan-o-Misr-o-Roma sabmitgayejahan se,

Baqiabhitalakhainam-o-nishanhamara.

Kuch bat haikehastimit-tinahinhamari,

Sadionrahahaidushmandaur-e-zamanhamara.

"Greece, Egypt, and Rome, have all disappeared from the surface of the Earth; but the name and fame of India, our country, has survived the ravages of Time and the cataclysms of ages. Surely, surely, there is an eternal element in us which had frustrated all attempts at our obliteration, in spite of the fact that the heavens themselves had rolled and revolved for centuries, and centuries, in a spirit of hostility and enmity towards us." I particularly ask of you to bring to your task a broad and catholic vision, for as the Bible justly teaches us--

"Where there is no vision the people perish.""

From the Address made by Hon'ble Dr. S. Radhakrishnan on 11th December 1946 while congratulating Hon'ble Dr. Rajendra Prasad on being elected as the Permanent Chairman of the Constituent Assembly. (Vol. 1, Paragraphs 1.3.16 -1.3.22)

1.3.16 *"……A constitution is the fundamental law of the nation. It should embody and express the dreams and passions, the ideals and aspirations of the people. It must be based on the consent of all, and respect the rights of all people who belong to this great land."*

1.3.17 *"….Take the problems from which we suffer; our hunger, our poverty, our disease, our malnutrition-these are common to all. Take the psychological evils from which we suffer-the loss of human dignity, the slavery of the mind, the stunting of sensibility and the shame of subjection,-these are common to all; Hindus or Muslims, Princes or peasants. The Chains may be made of gold but they-are still chains that fetter us. Even the Princes will have to realise that*

they are slaves in this country. If they have a sufficient sense of self-respect and exercise a little self-analysis, they will find how much their freedom is fettered."

1.3.18 *"Again, the, people-Whether they are Hindus or Muslims, Princes or peasants,-belong to this one country. Earth and Heaven have combined to make them belong to one another. If they try to disown it, their gait, their cast of countenance, their modes of, thought, their ways of behaviour, they will all betray them. (Hear, hear). It is not possible for us, to think that we belong to different nationalities. Our whole ancestry is there."*

1.3.19 *"It is essential for any constitution which is drawn up to make all the citizens realise that their basic privileges--education, social and economic are afforded to them; that there will be cultural autonomy; that nobody will be suppressed; that it will be a constitution which will be democratic in the true sense of the term, where, from political freedom we will march on to economic freedom and equity, Every- individual should feel that he is proud to belong to this great land."*

1.3.20 *"Apart from all these, a nation does not depend on identity of race, or sentiment, or on ancestral memories, but it depends on a persistent and continuous way of life that has come down to us. Such a way of life, belongs to the very soil of this land. It is there indigenous to this country as much as the waters of the Ganges or the snows of the Himalayas. From the very roots of our civilization down in the Indus Valley to the present day, the same great culture is represented among Hindus and Muslims, we have stood for the ideal of comprehension and charity all these centuries."*

1.3.21 *"I remember how Anatole France went up to the Musse Guimet on the first of May 1890 in Paris and there in the silence and simplicity, of the gods of Asia reflected on the aim of existence, on the meaning of life, on the values which peoples and Governments are in search of. Then his eyes fell on the statue of the Buddha. France felt like kneeling down and praying to him as to a God, the Buddha, eternally young, clad in ascetic robes, seated on the lotus of purity with hip two fingers upraised admonishing all humanity to develop comprehension, and charity, wisdom and love, prana and karuna.If you have understanding, if you have compassion, you will be able to overcome the problems of this world. Asoka, his great disciple, when he found his Empire inhabited by men of all races and religions said-*

"Samavayaevasadhuh".

"Concord alone is the supreme good"."

1.3.22 *" India is a symphony where there are, as in an orchestra, different instruments, each with its particular sonority, each with its special sound, all combining to interpret one particular score. It is this kind of combination that this country has stood for. It never adopted inquisitorial methods. It never asked the Parsisor the Jews or the Christians or the Muslims who came and took shelter there to change their creeds or become absorbed in what might be called a uniform Hindu humanity. It never did this. "Live and let live"--that has been the spirit of this country. If we are true to that spirit, if that ideal which has dominated our cultural landscape for five or six thousand years and is still operating, I have no doubt that the crisis by which we are faced today will be overcome as many other crises in our previous history have been overcome. Suicide is the*

greatest sin. To murder yourself, to betray yourself, to barter away your spiritual wealth for a mess of pottage, to try to preserve your body at the expense of your spirit-that is the greatest sin. If we therefore stand out for the great ideal for which this country has stood, the ideal which has survived the assaults of invaders, the ideals to which the unheeding world today is turning its attention, if we are able to do it, the flame which has sustained us in overcoming foreign rule, will fire our efforts to build a united and free India."

From the Address made by Hon'blePandit Jawaharlal Nehru on the Objective Resolution made on 22nd January 1947 (Vol. 1, Paragraph 2.14. -14,15, 26 - 29, 34 & 35)

2.14.14 *"Some of us, even though they are in agreement with this Resolution, were in favour of postponing some other business too so that the absentees might not find any obstacle in their way to come in. I am in sympathy with this suggestion but in spite of this I am at a loss to understand how this suggestion could be put forward. That is a question of waiting; not that of postponing the Resolution. We have waited for six long Weeks. This is no matter of weeks; ages have slipped by while we have been waiting. How long are we to wait now? Many of us who waited have since passed away and many are nearing the end of their lives. We have waited enough and now we cannot wait any longer. We are to further the work of the Assembly, speed up the pace and finish our work soon. You should bear in mind that this Assembly is not only to pass Resolutions, I may point out that the Constitution, which we frame, is not an end by itself, but it would be only the basis for further work."*

2.14.15 *"The first task of this Assembly is to free India through a new constitution to feed the starving people and cloth the naked masses and to give every Indian fullest opportunity to develop himself according to his capacity. This is certainly a great task. Look at India today. We, are sitting here and there in despair in many places, and unrest in many cities. The atmosphere is surcharged with these quarrels and feuds which are called communal disturbances, and unfortunately we sometimes cannot avoid them. But at present the greatest and most important question in India is how to solve the problem of the poor and the starving. Wherever we turn, we*

are confronted with this problem. If we cannot solve this problem soon, all our paper constitutions will become useless and purposeless. Keeping this aspect in view, who could suggest to us to postpone and wait?"

2.14.26 *"Another point has been raised: the idea of the sovereignty of the people, which is enshrined in this Resolution, does not commend itself to certain rulers of Indian States. That is a surprising objection and, if I may say so, if that objection is raised in all seriousness by anybody, be he a Ruler or a Minister, it is enough to condemn the Indian States system of every Ruler or Minister that exists in India. It is a scandalous thing for any man to say, however highly placed he may be, that he is here by special divine dispensation to rule over human beings today. That is a thing which is an intolerable presumption on any man's part, and it is a thing which this House will never allow and will repudiate if it is put before it. We have heard a lot about this Divine Right of Kings we had read a lot about of it in past histories and we had thought that we had heard the last of it and that it had been put an end to and buried deep down into the earth long ages ago. If any individual in India or elsewhere raises it today, he would be doing so without any relation to the present in India. So, I would suggest to such persons in all seriousness that, if they want to be respected or considered with any measure of friendliness, no such idea should be even hinted at, much less said. On this there is going to be no compromise."(Hear, hear).*

2.14.27*"But, as I made plain on the previous occasion when I spoke, this Resolution makes it clear that we are not interfering in the internal affairs of the States. I even said that we are not*

interfering with the system of monarchy in the States, if the people of the States so want it. I gave the example of the Irish Republic in the British Commonwealth and it is conceivable to me that within the Indian Republic, there might be monarchies if the people so desire. That is entirely for them to determine. This Resolution and, presumably, the Constitution that we make, will not interfere with that matter. Inevitably it will be necessary to bring about uniformity in the freedom of the various parts of India, because it is inconceivable to me that certain parts of India should have democratic freedom and certain others should be denied it. That cannot be. That will give rise to trouble, just as in the wide world today there is trouble because some countries are free and some are not. Much more trouble will there be if there is freedom in parts of India and lack of freedom in other parts of India."

2.14.28*"But we are not laying down in this Resolution any strict system in regard to the governance of the Indian States. All that we say is this that they, or such of them, as are big enough to form unions or group themselves into small unions, will be autonomous units with a very large measure of freedom to do as they choose, subject no doubt to certain central functions in which they will co-operate with the Centre, in which they will be represented in the Centre and in which the Centre will have control. So that, in a sense, this Resolution does not interfere with the inner working of those Units. They will be autonomous and, as I have said, if those Units choose to have some kind of constitutional monarchy at their head, they would be welcome to do so. For my part, I am for a Republic in India as anywhere else. But whatever my views may be on that subject, it is not my desire to impose my will on others; whatever the views of this*

House may be on this subject, I imagine that it is not the desire of this House to impose its will in these matters."

2.14.29*"So, the object of the Ruler of an Indian State to this Resolution becomes an objection, in theory, to the theoretical implications and the practical implications of the doctrine of sovereignty of the people. To nothing else does anyone object. That is an objection which cannot stand for an instant. We claim in this Resolution to frame a constitution for a Sovereign, Independent, IndianRepublic--necessarily Republic. What else can we have in India? Whatever the States may have or may not have, it is impossible and inconceivable and undesirable to think in any other terms but in terms of the Republic in India."*

2.14.34*"Therefore, I commend this Resolution to the House and I commend this Resolution, if I may say so, not only to this House but to the world at large so that it can be perfectly clear that it is a gesture of friendship to all, and, that behind it there lies no hostility. We have suffered enough in the past. We have struggled sufficiently, we may have to struggle again, but under the leadership of a very great personality we have sought always to think in terms of friendship and goodwill towards others, even those who opposed us. How far we have succeeded, we do not know, because we are weak human beings. Nevertheless, the impress of that message has found a place in the hearts of millions of people of this country, and even when we err and go astray, we cannot forget it. Some of us may be little men, some may be big, but whether we are small men or big, for the moment we represent a great cause and therefore something of the shadow of greatness falls upon us. Today in this Assembly we represent a mighty cause and this Resolution*

that I have placed before you gives some semblance of that cause. We shall pass this Resolution, and I hope that this Resolution will lead us to a constitution on the lines suggested by this Resolution. I trust that the Constitution itself will lead us to the real freedom that we have clamoured for and that real freedom in turn will bring food to our starving peoples, clothing for them, housing for them and all manner of opportunities of progress, that it will lead also to the freedom of the other countries of Asia, because in a sense, however unworthy we have become--let us recognise it--the leaders of the freedom movement of Asia, and whatever we do, we should think of ourselves in these larger terms. When some petty matter divides us and we have difficulties and conflicts amongst ourselves over these small matters, let us remember not only this Resolution, but this great responsibility that we shoulder, the responsibility of the freedom of 400 million people of India, the responsibility of the leadership of a large part of Asia, the responsibility of being some kind of guide to vast numbers of people all over the world. It is a tremendous responsibility. If we remember it, perhaps we may not bicker so much over this seat or that post, over some small gain for this group or that. The one thing that should be obvious to all of us is this that there is no group in India, no party, no religious community, which can prosper if India does not prosper if India goes down, we go down, all of us, whether we have a few seats more or less, whether we get a slight advantage or we do not. But if it is well with India if India lives as a vital free country, then it is well with all of us to whatever community or religion we might belong."

2.14.35*"We shall frame the Constitution, and I hope it will be a good constitution, but does anyone in this House imagine that, when a free India emerges, it will be bound down by*

anything that even this House might lay down for it? A free India will see the bursting forth of the energy of a mighty nation. What it will do and what it will not, I do not know, that it will not consent to be bound down by anything. Some people imagine, that what we do now, may not be touched for 10 years or 20 years, if we do not do it today, we will not be able to do it later. That seems to me a complete misapprehension. I am not placing before the House what I want done and what I do not want done, but I should like the House to consider that we are on the eve of revolutionary changes, revolutionary in every sense of the word, because when the spirit of a nation breaks its bonds, it functions in peculiar ways and it should function in strange ways. It may be that the Constitution, this House may frame, may not satisfy that free India. This House cannot bind down the next generation, or the people who will dully succeed us in this task. Therefore, let us not trouble ourselves too much about the petty details of what we do, those details will not survive for long, if they are achieved in conflict. What we achieve in unanimity, what we achieve by co-operation is likely to survive. What we gain here and there by conflict and by overbearing manners and by threats will not survive long. It will only leave a trail of bad blood. And so now I commend this Resolution to the House and may I read the last para of this Resolution? But one or more, Sir, before I read it. India is a great country, great in her resources, great in her man-power, great in her potential, in every way. I have little doubt that a Free India on every plane will play, a big part on the world stage, even on the narrow-west plane of material power, and I should like India to play that great part in that plane. Nevertheless today there is a conflict in the world between forces, in different planes. We hear a lot about the atom bomb and the various kinds of energy that it represents and in essence today there is a conflict in the world

between two things, that atom bomb and what it represents and the spirit of humanity. I hope that while India will no doubt play a great part in all the material spheres, she will always lay stress on that spirit of humanity, and I have no doubt in my mind, that ultimately in this conflict, that is confronting the world, the human spirit will prevail over the atom bomb. May this Resolution bear fruit and may the time come when in the words of this Resolution, this ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind."

The Objective Resolution adopted by the Constitution on 22nd January 1947 (Vol. 2. Paragraph 2.14.37)

"*This Constituent Assembly declares its firm and solemn resolve to proclaim India as an independent Sovereign Republic and to draw up for her future governance a Constitution:*

(2)WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India shall be a Union of them all; and

(3)WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration, save an except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

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

(5)WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic, and political; equality of status, of opportunity, and before the law; freedom of thought,

expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

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

(7)WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of civilised nations; and

(8) thisancient land attain its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."

From the Address made by Hon'ble Rev. J.J.M. Nichols Roy on 18th December while discussing the Objective Resolution moved by Hon'ble Pandit Jawaharlal Nehru. (Vol. 1, Paragraph 1.18. – 23&25)

1.8.23*"I would like to speak on other points of this Resolution but, I don't think I need dwell on them at all. There are difficulties and hindrances before us. India is not an exception to difficulties of this nature; such difficulties confronted Canada, Australia and even the United States-when they were engaged in the work of framing their constitutions, and some parts of those countries did not come into the constitution at the beginning, although they came in afterwards. That very same thing may be repeated here in India. We shall have to go on framing the constitution and then when that is placed before the world and before this country, it will then and then only be the proper time for the people of England or the British Government to say that it is not a constitution according to their Declaration. Before that happens, they should not try to prejudge what this Constituent Assembly will do and thus cause obstruction to its work."*

1.8.25*"I want to speak on only one more point, which has impressed me from the speech of Viscount Simon in the House of Lords. Viscount Simon has said that this Constituent Assembly, if it carries on the work of framing a constitution for India, will "threaten" India "with a Hindu Raj". I was very much surprised when I saw these words in a newspaper this morning. When I was in Western countries-in England and also America, I was impressed by the fact that some people in those countries had an idea that a Hindu is a man who is steeped in his caste system and who worships a cow. If this is the idea which Viscount Simon has when he*

refers to a 'Hindu Raj' i.e., that the people of India will be forced to perpetuate the caste system and to worship a cow, then he is entirely wrong. If the people who are assembled here,-whether they be Hindus, Muslims, or Christians, or whatever other religion they may profess--if they frame a constitution which will be a democratic constitution, which will do justice to everybody, why should that constitution be called a Hindu Raj? And if by 'Hindu' is meant people who live in India, surely we should have constitution for the people of India. That is exactly what we want: we want a constitution to be made by the people of India, but if some people in India do not want to come into the constitution just now, they will come afterwards and I envisage a time when they will all enter into this constitution and make India one country--one united country,-with a democratic form of government. I have faith that all these hindrances will be removed by prayer to God. Let us follow the example of Mahatma Gandhiji – our Bapujiand pray to God. Let us pray to God that all these hindrances may be removed from our way and that we may be able to carry on the work of framing a constitution which will be a blessing to our whole country."

From the Address made by Hon'ble Mr. Jaipal Singh on 19th December while discussing the Objective Resolution (Vol. 1, Paragraphs 1.9. – 66, 71, 73 & 74)

1.9.66*"Mr. Chairman, Sir, I rise to speak on behalf of millions of unknown hordes--yet very important – of unrecognised warriors of freedom, the original people of India who have variously been known as backward tribes, primitive tribes, criminal tribes and everything else, Sir, I am proud to be a Jungli, that is the name by which we are known in my part of the country. Living as we do in the jungles, we know what it means to support this Resolution. On behalf of more than 30 millions of the Adibasis(cheers), I support it not merely because it may have been sponsored by a leader of the Indian National Congress. I support it because it is a resolution which gives expression to sentiments that throb in every heart in this country. I have no quarrel with the wording of, this Resolution at all. As a jungli, as an Adibasi, I am not expected to understand the legal intricacies of the Resolution. But my common sense tells me, the common sense of my people tells me that every one of us should march in that road of freedom and fight together. Sir, if there is any group of Indian people that has been shabbily treated it is my people. They have been disgracefully treated, neglected for the last 6,000 years. The history of the Indus Valley civilization, a child of which I am, shows quite clearly that it is the new comers--most of you here are intruders as far as I am concerned--it is the new comers who have driven away my people from the Indus Valley to the jungle fastnesses. This Resolution is not going to teach Adibasis democracy. You cannot teach democracy to the tribal people; you have to learn democratic ways from them. They are the most democratic people on earth. What my people require, Sir, is not adequate safeguards as Pandit Jawahar Lal Nehru has put it. They require*

protection from Ministers that is in position today. We do not ask for any special protection. We want to be treated like every other Indian. There is the problem of Hindusthan. There is position of Pakistan. There is the problem of Adibasis. If we all shout in different militant directions, feel in different ways, we shall end up in Kabarasthan. The whole history of my people is one of continuous exploitation and dispossession by the non-aboriginals of India punctuated by rebellions and disorder, and yet I take Pandit Jawahar Lal Nehru at his word. I take you all at your word that now we are going to start a new chapter, a new chapter of Independent India where there is equality of opportunity, where no one would be neglected. There is no question of caste in my society. We are all equal. Have we not been casually treated by the Cabinet Mission, more than 30 million people completely ignored? It is only a matter of political widow-dressing that today we find six tribal members in this Constituent Assembly. How is it? What has the Indian National Congress done for our fair representation? Is there going to be any provision in the rules whereby it may be possible to bring in more Adibasis and by Adibasis. I mean, Sir, not only men but women also? There are too many men in the Constituent Assembly. We want more women, more women of the type of Mrs. Vijayalakshmi Pandit who has already won a victory in America by destroying this racialism. My people have been suffering for 6,000 years because of your racialism, racialism of the Hindus and everybody else. ……..”

1.9.71*”….I have heard of resolutions and speeches galore assuring Adibasis of a fair deal. If history had to teach me' anything at all, I should distrust this Resolution, but I do not. Now we are on a new road. Now we have simply got to learn to trust each other. And I ask friends who are not present with us today that they should come in, they should trust us and we, in turn*

must learn to trust them. We must create a new atmosphere of confidence among ourselves. I regret there has been too much talk in this House in terms of parties and minorities. Sir, I do not consider my people a minority. We have already heard on the floor of the House this morning that the Depressed Classes also consider themselves as Adibasis, the original inhabitants of this country. If you go on adding people like the exterior castes and others who are socially in no man's land, we are not a minority. In any case we have prescriptive rights that no one dare deny. I need say no more. I am convinced that not only the Mover of this Resolution, Pandit Jawahar Lal Nehru, but everyone here will deal with us justly. It is only by dealing justly, and not by a proclamation of empty words, that we will be able to shape a constitution which will mean real freedom"

1.9.73*"Sir, I say you cannot teach my people democracy. May I repeat that it is the advent of Indo--Aryan hordes that has been destroying that vestiges of democracy, Pandit Jawahar Lal Nehru in his latest book puts the case very nicely and I think I may quote it. In his Discovery of India' he says, talking of the Indus Valley Civilisation, and later centuries."*

"There were many tribal republics, some of them covering large areas."

1.9.74*"Sir, there will again be many tribal republics, republics which will be in the vanguard of the battle for Indian freedom. I heartily support the Resolution and hope that the members who are now outside will have the same faith in their fellow countrymen. Let us fight for freedom together, sitting together and working together. Then alone, we shall have real freedom". (Applause).*

Public Law Bulletin Is An Initiative Of
The Centre For Public Law At ILS Law College, Pune.

Certain Excerpts relating to the discussion concerning Article 17 of the Constitution(Article 11 of the Draft Constitution)

Discussions held on 29th April 1947 (Vol. 3, Paragraphs 3.18. 98 -101,280-283, 288)

Hon'ble Mr. Rohini Kumar Chaudhury

3.18.98*"The second part of my amendment is, for defining untouchability, it may be clearly stated that."*

"'Untouchability' means any act committed in exercise of discrimination on, grounds of religion, caste or lawful vocation of life mentioned in clause 4."

"Sir, in the fundamental rights, it has been laid down that untouchability in any form should be an offence punishable by law. That being so it is necessary that the offence should be properly defined. As it stands, the word 'untouchability' is very vague. It should be defined in the manner in which I have put it, or in some other better form. which may be decided upon by the House."

Hon'ble Mr. S. C. Banerjee

3.18.99*"Mr. President, the word 'untouchability' actually requires clarification. We have been accustomed to this word for the last 25 years, still there is a lot of confusion as to what it connotes. Sometimes it means merely taking a glass of water and sometimes it has been used in the sense of admission of 'Harijans' into temples, sometimes it meant inter-caste dinner, sometimes inter-caste marriage. Mahatma Gandhi who is the main exponent of 'untouchability',*

has used it in various ways and on different occasions with different meanings. So when we are going to use the word 'untouchability', we should be very clear in our mind as to what we really mean by it. What is the real implication of this word? I think we should make no distinction between untouchability and caste distinction, because as Mr. Thakur has said, untouchability is merely a symptom, the root cause is caste distinction and unless and until the root cause, that is caste distinction is removed, untouchability in some form or other is bound to exist and when we are going to have an independent India, we should expect everyone to be enjoying equal social conditions. It is incumbent on us that we should be very clear as to make it explicit that in the future independent India, there should be no distinction between man and man in the social field. In other words, caste distinction must be abolished. Of course there is difficulty as to whether we can make it justiciable or not. I have thought over it for a long time. I do really believe that in place of untouchability, some other word, such as, 'caste distinction' should be used or the word 'untouchability' should be clearly defined so as to leave no doubt in the mind of any one as to what we really mean by it."

Hon'ble Dr. K. M. Munshi

3.18.100"*Sir, I oppose this amendment. The definition is so, worded that if it is accepted. it will make any discrimination even on the ground of place of birth or 'caste or even sex Untouchability. What does the definition say?*

"'Untouchability' means any act committed in exercise of discrimination on grounds of religion, caste or lawful vocation of life mentioned in clause 4.""

3.18.101 *"Now, Sir, clause 4 does not deal with untouchability at all. It deals with discrimination regarding services and various other things. It may mean discrimination even between touchables and untouchables, between people of one province and another. The word 'untouchability' is mentioned in clause 6. The word 'untouchability' is put purposely within inverted commas in order to indicate that the Union legislature when it defines 'untouchability' will be able to deal with it in the sense in which it is normally understood."*

Hon'ble Sardar Vallabhai J Patel

3.18.280 Sir, I request that clause 5 may be held over because it requires some further consideration and I may be allowed to move clause 6 which runs thus:

"6. 'Untouchability' in any form is abolished and the imposition of any disability on that account shall be an offence."

3.18.281*"There can be no difference of opinion on this question. This is now an accepted proposition all over and should be provided for in the fundamental rights, and anyone who suffers a disability on this account should have the right to go to a court of law and have redress. I hope there will be no amendment on this."*

Hon'ble Mr. H.V. Kamath

3.18.282*"Sir, I move that in clause 6, after the word "Untouchability" the word "unapproachability" be inserted, and after the word "any" the words "and every" be inserted."*

3.18.283*"By this amendment I want to make the clause more comprehensive because in some parts of India the practice of unapproachability besides untouchability used to obtain some years ago, to my own knowledge, in some places like Malabar specially; I do not know what it is now. So I though it that if you include the word "unapproachability" it would make the clause more comprehensive. The other small amendment that I propose is purely verbal. It does not change the meaning but only emphasises the clause."*

Hon'ble Sardar Vallabhai J Patel

3.18.288*"The first amendment is by Mr. Kamath. He wants the addition of the word 'unapproachability'. If untouchability is provided for in the fundamental rights as an offence, all necessary adjustments will be made in the law that may be passed by the Legislature. I do not think it is right or wise to provide for such necessary corollaries and, therefore, I do not accept this amendment."*

Discussions held on 29th November 1948 (Vol. 7, Paragraphs 7.62. 163, 164, 176-185)

Hon'ble Mr.Naziruddin Ahmad

7.62.163*" Sir, I move:*

"That for article 11, the following article be substituted:--

'11. No one shall on account of his religion or caste be treated or regarded as an 'untouchable'; and its observance in any form may be made punishable by law.' "

(Article 17of the Constitution was Article 11 in the Draft Constitution**)**

7.62.164 *"I submit that the original article 11 is a little vague. The word "untouchability"has no legal meaning, although politically we are all well aware of it; but it may lead to a considerable amount of misunderstanding as in ale gal expression. The word 'untouchable' can be applied to so many variety of things that we cannot leave it at that. It may be that a man suffering from an epidemic or contagious disease is an untouchable; then certain kinds of food are untouchable to Hindus and Muslims. According to certain ideas women of other families are untouchables. Then according to PanditThakurdas Bhargava, a wife below 15 would be untouchable to her loving husband on the ground that it would be 'marital misbehaviour'. I beg to submit, Sir, that the word 'untouchable'is rather loose. That is why I have attempted to give it a better shape; that no one on account of his religion or caste be regarded as untouchable. Untouchability on the ground of religion or caste is what is prohibited."*

Hon'ble Mr. K. T. Shah

7.62.176*"Mr. Vice-President, Sir, lest I be misunderstood on the remarks that will follow, may I say at the very outset that I am not against the spirit of this article, or even its actual wording. I think, however, that the wording is open to some correction; and if the Honourable the Chairman of the Drafting Committee will consider what I am going to place before him just now, and before the House, I believe he might find room for some amendment himself of this article."*

7.62.177*"In the first place I would like to point out that the term 'untouchability' is nowhere defined. This Constitution lacks very much in a definition clause; and consequently we are at a great loss in understanding what is meant by a given clause and how it is going to be given effect to. You follow up the general proposition about abolishing untouchability, by saying that it will be in any form an offence and will be punished at law. Now I want to give the House some instances of recognised and permitted untouchability whereby particular communities or individuals are for a time placed under disability, which is actually untouchability. We all know that at certain periods women are regarded as untouchables. Is that supposed to be, will it be regarded as an offence under this article? I think if I am not mistaken, I am speaking from memory, but I believe I am right that in the Quran in a certain 'Sura', this is mentioned specifically and categorically. Will you make the practice of their religion by the followers of the Prophetan offence? Again there are many ceremonies in connection with funerals and obsequies which make those who have taken part in them untouchables for a while. I do not wish to inflict a lecture upon this House on anthropological or connected matters; but I would like it to be brought to the notice that the lack of any definition of the term 'untouchability' makes it open for busy bodies and lawyers to make capital out of a clause like this, which I am sure was not the intention of the Drafting Committee to make."*

7.62.178*"One more example I will give, Sir, which is of a hygienic, or rather sanitary, character, that seems to be completely overlooked by the draftsman. What about those diseases, and people who suffer from, which are communicable, and so necessarily to be excluded and made untouchables while they suffer? I remember, Sir, the case of a very well-known personage who*

was suffering from leprosy, and whom consequently a Public Carrier Company refused to carry from a particular place to another place. All the wheels of Government were moved to obtain a certificate that he may be carried in the plane without any harm to other passengers. I do not know whether it was his cheque-book or his munificence that helped him to get over that particular disability. But I am sure the example should be a warning to our Drafting Committee. Again, if a municipality, for instance, makes a temporary regulation about Quarantine, and makes it necessary that people suffering from communicable diseases or infectious or contagious diseases shall be segregated for a while until they are cured, and shall be regarded as untouchables, will it be an offence under this article? Surely it ought not to be possible for anybody to say that the action of that particular municipality is "unconstitutional" and so an offence at law. I trust the Chairman of the Drafting Committee will find that there is some sense in the suggestion I have put forward; and that he will not deal with it as a common opposition."

Hon'ble Dr. B.R. Ambedkar

7.62.179*"I cannot accept the amendment ofMr. Naziruddin Ahmad."*

Hon'ble Vice-President

7.62.180*"Dr. Ambedkar, do you wish to reply to Mr. Shah's suggestion?"*

Hon'ble Dr. B.R. Ambedkar

7.62.181 No.

Hon'ble Vice-President

*7.62.182*I now put amendment No. 372 to vote.

7.62.183The question is:

"That for article 11, the following article be substituted:--

'11. No one shall on account of his religion or caste be treated or regarded as an 'untouchable'; and its observance in any form may be made punishable by law.' "

The amendment was negatived.

7.62.184I now put article No. 11.

7.62.185The question is:

"That article 11 stand part of the Constitution."

The motion was adopted.

Article 11 was added to the Constitution.

From the Address made by Hon'ble Dr. B.R. Ambedkar on 25th November 1949

11.165.309*"As much defence as could be offered to the constitution has been offered by my friends Sri Alladi Krishnaswami Ayyar and Mr. T. T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their purposes or will they prefer revolutionary methods of achieving them? If they adopt the prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to pay."*

11.165.318*"Here I could have ended. But my mind is so full of the future of our country that I feel I ought to take this occasion to give expression to some of my reflections thereon. On 26thJanuary 1950, India will be an independent country (Cheers). What would happen to her independence? Will she maintain her independence or will she lose it again? This is the first thought that comes to my mind. It is not that India was never an independent country. The point is that she once lost the independence she had. Will she lost it a second time? It is this*

thought which makes me most anxious for the future. What perturbs me greatly is the fact that not only India has once before lost her independence, but she lost it by the infidelity and treachery of some of her own people. In the invasion of Sind by Mahommed-Bin-Kasim, the military commanders of King Dahar accepted bribes from the agents of Mahommed-Bin-Kasim and refused to fight on the side of their King. It was Jaichand who invited MahommedGohri to invade India and fight against Prithvi Raj and promised him the help of himself and the Solanki Kings. When Shivaji was fighting for the liberation of Hindus, the other Maratha noblemen and the Rajput Kings were fighting the battle on the side of Moghul Emperors. When the British were trying to destroy the Sikh Rulers, Gulab Singh, their principal commander sat silent and did not help to save the Sikh Kingdom. In 1857, when a large part of India had declared a war of independence against the British, the Sikhs stood and watched the event as silent spectators."

11.165.319 *"Will history repeat itself? It is this thought which fills me with anxiety. This anxiety is deepened by the realization of the fact that in addition to our old enemies in the form of castes and creeds we are going to have many political parties with diverse and opposing political creeds. Will Indian place the country above their creed or will they place creed above country? I do not know. But this much is certain that if the parties place creed above country, our independence will be put in jeopardy a second time and probably be lost for ever. This eventuality we must all resolutely guard against. We must be determined to defend our independence with the last drop of our blood." (Cheers)*

11.165.320 *"On the 26th of January 1950, India would be a democratic country in the sense that India from that day would have a government of the people, by the people and for the people. The same thought comes to my mind. What would happen to her democratic Constitution? Will she be able to maintain it or will she lose it again. This is the second thought that comes to my mind and makes me as anxious as the first."*

11.165.321 *"It is not that India did not know what is Democracy. There was a time when India was studded with republics, and even where there were monarchies, they were either elected or limited. They were never absolute. It is not that India did not know Parliaments or Parliamentary Procedure. A study of the Buddhist BhikshuSanghas discloses that not only there were Parliaments-for the Sanghas were nothing but Parliaments – but the Sanghas knew and observed all the rules of Parliamentary Procedure known to modern times. They had rules regarding seating arrangements, rules regarding Motions, Resolutions, Quorum, Whip, Counting of Votes, Voting by Ballot, Censure Motion, Regularization, Res Judicata, etc. Although these rules of Parliamentary Procedure were applied by the Buddha to the meetings of the Sanghas, he must have borrowed them from the rules of the Political Assemblies functioning in the country in his time."*

11.165.322 *"This democratic system India lost. Will she lost it a second time? I do not know. But it is quite possible in a country like India – where democracy from its long disuse must be regarded as something quite new – there is danger of democracy giving place to dictatorship. It is*

quite possible for this new born democracy to retain its form but give place to dictatorship in fact. If there is a landslide, the danger of the second possibility becoming actuality is much greater."

11.165.322 *"If we wish to maintain democracy not merely in form, but also in fact, what must we do? The first thing in my judgment we must do is to hold fast to constitutional methods of achieving our social and economic objectives. It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us."*

11.165.323 *"The second thing we must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not "to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions". There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness. As has been well said by the Irish Patriot Daniel O'Connel, no man can be grateful at the cost of his honour, no woman can be grateful at the cost of her chastity and no nation can be grateful at the cost of its liberty. This caution is far more necessary in the case of India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its*

politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship."

11.165.324 *"The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic*

life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which is Assembly has to laboriously built up."

11.165.325"The second thing we are wanting in is recognition of the principle of fraternity. what does fraternity mean? Fraternity means a sense of common brotherhood of all Indians-if Indians being one people. It is the principle which gives unity and solidarity to social life. It is a difficult thing to achieve. How difficult it is, can be realized from the story related by James Bryce in his volume on American Commonwealth about the United States of America."

11.165.326 "*The story is- I propose to recount it in the words of Bryce himself- that-*

"Some years ago the American Protestant Episcopal Church was occupied at its triennial Convention in revising its liturgy. It was thought desirable to introduce among the short sentence prayers a prayer for the whole people, and an eminent New England divine proposed the words `O Lord, bless our nation'. Accepted one afternoon, on the spur of the moment, the sentence was brought up next day for reconsideration, when so many objections were raised by the laity to the word nation' as importing too definite a recognition of national unity, that it was dropped, and instead there were adopted the words `O Lord, bless these United States.""

11.165.327 *"There was so little solidarity in the U.S.A. at the time when this incident occurred that the people of America did not think that they were a nation. If the people of the United States could not feel that they were a nation, how difficult it is for Indians to think that they are a nation. I remember the days when politically-minded Indians, resented the expression "the people of India". They preferred the expression "the Indian nation." I am of opinion that in believing that we are a nation, we are cherishing a great delusion. How can people divided into several thousands of castes be a nation? The sooner we realize that we are not as yet a nation in the social and psychological sense of the world, the better for us. For then only we shall realize the necessity of becoming a nation and seriously think of ways and means of realizing the goal. The realization of this goal is going to be very difficult – far more difficult than it has been in the United States. The United States has no caste problem. In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are antinational also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For fraternity can be a fact only when there is a nation. Without fraternity equality and liberty will be no deeper than coats of paint."*

11.165.328*"These are my reflections about the tasks that lie ahead of us. They may not be very pleasant to some. But there can be no gainsaying that political power in this country has too long been the monopoly of a few and the many are only beasts of burden, but also beasts of prey. This monopoly has not merely deprived them of their chance of betterment, it has sapped them of what may be called the significance of life. These down-trodden classes are tired of being governed.*

They are impatient to govern themselves. This urge for self-realization in the down-trodden classes must no be allowed to devolve into a class struggle or class war. It would lead to a division of the House. That would indeed be a day of disaster. For, as has been well said by Abraham Lincoln, a House divided against itself cannot stand very long. Therefore the sooner room is made for the realization of their aspiration, the better for the few, the better for the country, the better for the maintenance for its independence and the better for the continuance of its democratic structure. This can only be done by the establishment of equality and fraternity in all spheres of life. That is why I have laid so much stresses on them."

11.165.329*"I do not wish to weary the House any further. Independence is no doubt a matter of joy. But let us not forget that this independence has thrown on us great responsibilities. By independence, we have lost the excuse of blaming the British for anything going wrong. If hereafter things go wrong, we will have nobody to blame except ourselves. There is great danger of things going wrong. Times are fast changing. People including our own are being moved by new ideologies. They are getting tired of Government by the people. They are prepared to have Governments for the people and are indifferent whether it is Government of the people and by the people. If we wish to preserve the Constitution in which we have sought to enshrine the principle of Government of the people, for the people and by the people, let us resolve not to be tardy in the recognition of the evils that lie across our path and which induce people to prefer Government for the people to Government by the people, nor to be weak in our initiative to remove them. That is the only way to serve the country. I know of no better."*

7) SALIENT FEATURES OF THE INDIAN CONSTITUTION

Indian Constitution is not merely a legal and political document but is an embodiment of the aspiration of the people. It was drafted, adopted and enacted at the turn of an age when colonisation across the world by the European powers was coming to an end. It embodies a rich culture of constitutional values. Similar to all other constitutions, the history of India's evolution as a sovereign, socialist, secular and democratic republic has seeped into the Constitution's very being. The Indian Constitution has certain salient features which may be analysed as follows:

Written Constitution

The Indian Constitution, like all modern constitutions, is a written Constitution. It has been adopted and enacted by a Constituent Assembly on behalf of the people of India, indirectly elected under the Cabinet Mission Plan. It is a comprehensive legal and political document that extensively deals with the relation between the people and the State and State organs inter se. It is a synthesis of varying elements of Constitutional law borrowed from different sources. For instance, Part III of the Constitution of India resembles the Bill of Rights in force in USA and contains most of the rights mentioned in the ICCPR. Similarly, Part IV of the Constitution is borrowed from the Irish Constitution and recognises many of the social and economic rights mentioned in ICESCR. Part IV-A inserted vide the 42nd Amendment is drawn from the Soviet

Constitution and Article 301 dealing with inter-state trade and commerce is inspired by the Australian Constitution. The division of legislative competency/power vide Article 246 read with Seventh Schedule emulates the Canadian example and the Parliamentary form of governance has been adopted in consequence of the British tradition. The Constitution has adopted the basic structure and form of the Government of India Act, 1935 and is the result of Britain's constitutional experiments in India beginning from the Indian Councils Act, 1861 to Government of India Act, 1919 and beyond.

Supremacy of the Constitution

The Constitution of India is the fundamental law of the land. The State and the people are mandated to remain within the confines established by the Constitution. For instance, a person in India cannot act in violation of Article 15(2) and the State cannot make laws violating any of the fundamental rights. The Supremacy of the Indian Constitution also relates to the allied concept of basic structure of the Constitution. The basic structure doctrine as propounded by the Supreme Court bars the Parliament in the exercise of its Constituent power from altering those features of the Constitution that forms its basic structure. The elements constituting the basic structure have not been exhaustively laid down.

Supremacy however does not mean that there cannot be other laws or conventions on the matters covered by the Constitution. For instance, Article 32 and the machinery

under the Protection of Human Rights Act, 1995 both relates to the enforcement of Fundamental Rights and remedial actions for its infringement. Similarly, the erstwhile Planning Commission developed as a Constitutional convention and the Finance Commission equally influenced Centre-State financial relations. As evident from these instances, Supremacy of Constitution does not prohibit the evolution of supplementary mechanism but means that such laws and conventions cannot conflict with the matters enunciated therein. It also means that the Constitution can only be amended through a process both legal and within recognised limitations. The basic structure doctrine and the procedure laid down in Article 368 of the Constitution in addition to the mandate to comply with the Constitution as mentioned above ensures the supremacy of the Indian Constitution. This concept of supremacy of the constitution has to be contrasted with the concept of supremacy of Parliament that prevails in the UK. The significance of constitutional supremacy is understood only in such light when one understands that the Parliament of UK has absolute power to make and unmake laws whether forming parting of its unwritten Constitution or not. A supreme constitution thus is an important check against arbitrariness.

Preamble

The text of the Indian Constitution begins with a Preamble which declares,

(i) the source of Constitution;

(ii) the nature of the Indian state;

(iii) the ideals to be achieved; and

(iv) the date of adoption of the Constitution.

The Preamble is an integral part of the Constitution[21] and was adopted and enacted by the Constituent Assembly in the same manner as all other parts of the Constitution. The Preamble has been described as "*the key to the Constitution* and "*the proper yardstick with which one can measure the worth of the Constitution*". It indicates and summarises some of the features constituting the basic structure of the Constitution[22] and most of the salient features of the Indian Constitution can be identified from the Preamble. The Preamble adopted on November 2nd 1949, was the last part of the Constitution to be adopted. The Preamble is an important interpretative tool and may be used to resolve ambiguities in the text of the Constitution[23]. However where the text is clear and unambiguous it cannot be used to extend or restrict the scope of the text as it is neither a source of power or limitation of the same[24]. It is neither justiciable nor enforceable.

Popular Sovereignty: India as a Sovereign Democratic Republic

[21] Constituent Assembly Debates, Date _____, Motion moved by Dr.Rajendra Prasad, Chairman, Constituent Assembly of India stating "That the Preamble stands part of the Constitution" and adopted by the Assembly; *KesavanandaBharati v. State of Kerala*, AIR 1973 SC 1461.
Previously the Supreme Court had *in Re Berubari Union and Exchange of Enclaves*, (AIR 1960 SC 845) and *Golaknath v. State of Punjab*, AIR 1967 SC 1643 had held that the Preamble was not a part of the Constitution.
[22] *S.R. Bommai v. UOI*, AIR 1994 SC 1918.
[23] AIR 1973 SC 1461.
[24] *id*

The Indian Constitution espouses the principle of popular sovereignty and creates a State which is a Democratic Republic. Popular Sovereignty means sovereignty of the "people" in contrast to the sovereignty of an individual or a restricted group of individuals. It does not mean each person individually is sovereign but identifies that sovereignty resides in the people, collectively expressed through a Parliament or any other democratic organisation whatsoever called. The doctrine of popular sovereignty was developed in the 18th Century through the Social Contract theories propounded by John Locke and Jean Jacques Rousseau in contrast to the Hobbesian theory of absolute sovereignty of the King as the divine right. Popular sovereignty posits that the authority of the State and its organs is drawn from the will of the people and not from any abstract right.

The concept of popular sovereignty can only be exemplified in a democracy, where the people directly or through their representatives govern themselves, and is best exemplified in a Democratic Republic. A Republican State is one in which the head of the State is elected directly or indirectly by the people and which is not hereditary. The Supreme Court of India in *Indira Nehru Gandhi v. Raj Narain* has held that "*Sovereign Democratic Republic*" status constitutes a part of the basic structure of the Constitution.

Welfare State: India as a Socialist Democratic Republic

The Preamble declares that India is a Socialist Democratic Republic. The terms Socialist and Secular were not part of the Preamble as it was adopted by the Constituent Assembly and was inserted vide the 42nd Amendment of the Constitution. The term socialist as mentioned in the Preamble does not mean Socialism as applied in the erstwhile Soviet Union and in the Indian context does not mean complete state ownership of resources as it does in political philosophy. It has a narrower and restrictive meaning to be discerned in light of the provisions contained in Part III and particularly in Part IV of the Constitution.Socialism in the Indian context means "*Democratic Socialism*"embedded in the various provisions of the Constitution and not Communistic Socialism. Democratic Socialism employs democratic means to ensure social justice. The phrase "Socialist Democratic Republic"only conveys India's commitment to ensure social and economic justice through democratic politics and peaceful constitutional means. It reflects the State's commitment to prevent exploitation of the underprivileged and in ensuring their empowerment. It merely reflects and provides that India is to be a Welfare State.

A Welfare State is one in which the State undertakes to ensure the material wellbeing of its citizens in addition to its police functions of maintaining law and order and protecting person and property. A Welfare State is always contrasted with a Police State and requires the State to carry out social and economic policies ensuring the development of all. The Constitution of India contains several provisions indicating that

the Constitution mandates and establishes a Welfare State. The provisions in Part IV, for instance Articles 38, 39 and 46 among others, can leave no other inference. While it is true that this Part is unenforceable and not justiciable, they still are fundamental postulates meant to guide legislative action. Their importance is so fundamental that the Supreme Court has over the years interpreted Article 21 of the Constitution in light of these directives. In addition to these provisions, Part III, in particular Articles 14, 15(1) and (2), 16(1) and (2), 18, 21A, 23 and 24, in addition to the all-encompassing Article 21 mandates the establishment of a Welfare State. This conclusion is strengthened even more so as the preamble clearly requires the State to secure to all its citizens "Justice, social, economic and political" and "Equality of status and of opportunity".

Special Provisions and Affirmative Action

In addition to the general obligation of the State to be a Welfare State, the Indian Constitution has provided for special provisions and affirmative action for the underprivileged and disadvantages classes or communities as well as women. They have been enacted as part of the positive obligation to ensure equality and to bring those stakeholders historically disadvantaged to be equal citizens of this country. These provisions include in particular Articles 15(3) to 15(5), 16(3) to (6), 17, Part XVI among others.

Secular Constitution

The Preamble declares that India is a Secular State and expresses the need to secure liberty of belief, faith and worship. Secularism as a political philosophy has different shades and the treatment of the term Secularism across Supreme Court cases has not been strictly uniform. It has been understood as religious tolerance and has also to be said to have more active implications by the Supreme Court in different cases. An analysis of these judgments is for another time, but for the time being it will be prudent to confine ourselves to what it is generally understood as.

It is widely understood as the separation of State from Religion. It includes the liberty to practice religion without State compulsion or prohibition. It means equal justice to all citizens without distinction as to religion and also means freedom from compulsory religious education. Indian Society's secular character is one which is presently controversial but regardless of what character the society holds today, the Indian Constitution is a Secular Constitution and envisages or rather mandates a secular society. The scheme of the rights granted in Part III buttresses this conclusion. Article 14 and specifically Articles 15(1), 15(2), 16(1) and 16(2) militates all forms of religious discrimination. While it is sometimes argued that treating certain religious communities as Backward Classes thereby granting benefits is against the notion of secularism, such an argument fails to consider the State's mandate to ensure equality also as a positive obligation. A negative obligation requires only abstinence whereas positive obligations

requires coordinated effort. Article 14 mandates a positive obligation on the part of the State to treat those unequal, unequally. Thus disadvantaged religious communities referred to as Minorities or Backward Classes have to be treated differently if circumstances that disadvantage them persists.

In addition to the above Fundamental Rights, Articles 25 to 30 also firmly establish the Indian Constitution's secular character. The Constitution ever since 26th November 1949 when it was adopted has been a secular Constitution. The 44th Amendment only expressed what was always implied. The concept of Secularism has been held by the Supreme Court to a part of the basic structure of the Constitution[25].

Fundamental Rights and the Directive Principles

It has been remarked by constitutional scholars that Fundamental Rights and Directive Principles collectively constitutes the conscience of the Constitution. They are complementary and supplementary to one another and have to be harmoniously applied. They encapsulate the constitutional vision of liberty, equality and justice the founding fathers held. Most of the Fundamental Rights mentioned in Part III and Directives mentioned in Part IV have been treated above and reference maybe made herein to the others.

[25]AIR 1973 SC 1461; AIR 1994 SC 1918.

The Preamble of the Constitution mandates the securing of liberty of thought and expression under Article 21 read with Articles 19 and 14 (known as the Golden Triangle) guarantees liberty from all forms of arbitrary state action and requires the presence of due process in all State action. Article 19 guarantees rights relating to freedom of speech and expression, to reside in any part of India, to carry on any trade, business or occupation among others subject to the reasonable restrictions mentioned therein. Article 20 guarantees protection from self-incrimination, Ex-Posto laws and double jeopardy. Article 21 is the fountainhead for a number of unspecified fundamental rights interpreted as part of the right to life including Right to pollution free and wholesome environment, Right to privacy etc. Article 22 guarantees protection against arbitrary arrests and unlawful detentions. Part IV lays down fundamental postulates and aspirations relating to governance. Article 44 envisages a Uniform Civil Code, Article 51 relates to promotion of International Peace and Security etc. This part is however not justiciable and is not directly enforceable.

Part III on the other hand is both justiciable and directly enforceable. All laws made in contravention of the Fundamental Rights are void to the extent of contravention. Any person can directly approach the Supreme Court under Article 32 for remedying any infringement of fundamental rights and this right to approach the Supreme Court is itself a fundamental right. In addition to Article 32, every person also has a

constitutional right under Article 226 to approach the appropriate High Courts for remedying violations of legal, constitutional and fundamental rights.

Fundamental Duties

Part IV-A was added to the Constitution by the 42nd Amendment. They enumerate the fundamental duties that every citizen of the country is expected to fulfil. This chapter was inspired and motivated by the soviet tradition and seeks to remind every citizen that with fundamental rights also comes fundamental duties. They include developing scientific temper, protecting public property, respecting the national anthem and flag among others.

Parliamentary System of Governance

The Indian Constitution inspired by the Westminster Model has adopted the Parliamentary system of Governance. There is a President and a Governor as nominal executives of the Union and the States respectively and the Prime Minister of the Union and the Chief Ministers of the States as the real executives. The council of ministers are composed of the Parliamentarians or the members of the Legislative Assembly as the case may be and are collectively responsible to the legislatures. The President and the Governor acts in accordance with the advice and counsel of the council of ministers. The Parliament and certain states have bicameral legislatures emulating the British Parliament. The Upper House of the Parliament is composed of representatives of the

States and the Lower House is composed of the representatives of the people. This choice of the Parliamentary system was a result of India's familiarity to the same and the principle of collective responsibility.

Constitutional Bodies and Functionaries

The Constitution establishes a number of Constitutional bodies with specialised functions. An Election Commission headed by a Chief Election Commissioner is established to ensure free and fair elections. The office of the Comptroller and Auditor General of India audits and scrutinises the financial activities of the Union and the States. The Finance Commission is established to advise the President on division of finance between Centre and States and on the general principles of the Central State financial relations. Commissions for the Scheduled Caste and the Scheduled Tribes also trace their origin to the Constitution as well as the Public Service Commissions and the Administrative Tribunals. Also included in the Constitution are the offices of the Attorney General and Advocate Generals.

Panchayats, Municipalities and Co-operative Societies

The provisions relating to Panchayats, Municipalities and Co-operative Societies deserves special mention as salient features of the Constitution. They exemplify the noble vision of local self-governance and collective strength of the people. These provisions recognise people as the fundamental units of the State and in pursuance of

the decentralising scheme of the Constitution vests rights in these ultimate stakeholders.

Independent Judiciary

The Constitution of India mandates the establishment of an Independent Judiciary separate from the influences of the Executive and the legislatures. It establishes a Supreme Court as the highest court of the land clothing it with vast constitutional powers and establishes High Courts in the States as repositories of supplementary and complementary powers. It grants the High Courts the powers of supervision over all subordinate courts and lays down the procedure for the appointments to District Courts and other Subordinate Courts. It recognises the Supreme Court and the High Courts as courts of record and constitutionally recognises the theory of precedents. The Constitution has conferred such powers including the power of judicial review on the Supreme Court and the High Courts as the Constitutional or writ courts to exercise their mandate independently.

Emergency Provisions

The Constitution of India has detailed provisions relating to what is referred to as an Emergency by the Constitution. There exists three kinds of Emergency, the National Emergency proclaimed under Article 352, the State Emergency proclaimed under Article 356 and the Financial Emergency proclaimed under Article 360 (the terms

National Emergency and State Emergency are not used in the constitution's text but has been referred to as such). The proclamation of these Emergencies have varying effects on Centre-State relations and in case of National Emergencies on fundamental rights under Part III as well. Both National Emergency and State Emergency has been invoked under the Constitution and the provision relating to the Financial Emergency have fortunately not been invoked.

Unique blend of Rigidity and Flexibility

The Indian Constitution in Article 368 has adopted a unique blend of rigidity and flexibility in amending the Constitution. As far as amendments are concerned, there are three kinds of provisions in the Constitution. Amendments that can be carried out without applying Article 368 such as those contemplated in Article 4, Non-Entrenched provisions of the Constitution that can be amended solely by the Parliament and the entrenched provisions relating to Centre-State relations, the Supreme Court and High Court etc. specifically mentioned in Article 368 that can be amended only after State participation. This scheme is in contrast to the extremely rigid formulations in the United States and even more rigid scheme in Australia. In practice, however, the Constitution of India has been more flexible than rigid with over a hundred amendments.

Federal Constitution with Unitary Tendencies.

The federal nature of the Indian Constitution has been a matter of controversy. Many scholars do not hold to the view that the Indian Constitution is a federal constitution. Instead the Indian Constitution is termed as Quasi-Federal. The reasons for so terming the Constitution is by virtue of a number of provisions present in the Constitution. The oft quoted of these provisions are those relating to the Emergencies mentioned above and Article 3 of the Constitution. Also quoted are Articles 155, 156, 200, 201, 248, 249, 250, 251, 253. Before analysing the compatibility of these provisions with the federal principle it is necessary to understand what the federal principle is.

The Federal Principle simply put postulates a scheme of governance with two levels of government, a Federal Government and a Provincial Government with clearly defined and demarcated jurisdictions, where both are independent and co-ordinate within their own respective jurisdictions. Independent within one's jurisdiction only means that the power to legislate is not dependent on or granted by the other government as the case may be by way of delegation and is derived from an independent source such as a Constitution. This scheme to be understood fully has to be contrasted with the Unitary form of governance where there exists only one central government which governs both provinces and the country as a whole by means of delegation or otherwise.

The following are generally accepted as fundamental conditions for a government to be a Federal Government. They are:

(a) Clear definition and division of powers between the Centre and the provinces.

(b) Written Constitution, to ensure that the demarcation and division of powers is concretely established in text and is not left to ambiguity and interpretations put forth by the different Governments

(c) Supremacy of the Constitution, to ensure that the division of power is adhered to and is not violated.

(d) Independent Judiciary as an Arbiter, to adjudicate on claims of violations of the above division of powers and all other matters of Centre-Province relations and relations between provinces inter se.

(e) Rigidity of Constitution, to ensure that the obligations accepted are not varied at the whims and fancies of the Governments and the politicians.

In light of the above formulation of the Federal Principle we can now determine the true nature of the Indian system of governance. Article 246 of the Constitution read with the Seventh Schedule of the Constitution clearly defines and divides the power of the Union and the States with necessary demarcation. Article 246-A recently introduced also does the same as regards the power to impose Goods and Services Tax. The Indian Constitution is written, has Supremacy and adopts a unique blend of rigidity and flexibility as discussed above. There also exists an independent arbiter which is the

Supreme Court with exclusive jurisdiction in matters of Centre-State relations and relations of States inter se subject to Article 262. The Indian system satisfies all the above fundamental conditions but is still referred to as Quasi-Federal because of its unitary tendencies.

These unitary tendencies however have cogent reasons for their existence. As regards the Emergency provisions it is to be noted that even States considered as completely federal have in times of aggression and war displayed unitary tendencies. The US and Australian practice during the Second World War where the Central Government exercised as a matter of exigency such powers characterising a unitary government is testament to this submission. The inclusion of these Emergency provisions with clear guidelines to protect the national interest have to be appreciated for having been left out of the cloud of ambiguity. In so far as State Emergencies are concerned, it has been enacted to ensure that the Centre is not powerless at times of maladministration of States. While the provision has been misused such misuse cannot be seen as a departure from the federal principle.

The provisions relating to the Governors of the States does not also undermine the federal character. Even though the Governor is appointed by and also holds his office during the pleasure of the Central Government, the Constitution mandates that he act in accordance with the advice and counsel of the Council of Ministers of the State. The Governor has been conferred certain discretionary powers which history has shown to

have been misused for the benefit of the Central Government. However this is not a flaw in the Constitution but has more to do with a lack of constitutional morality among those sworn to protect the Constitution. As regards the need of the assent of the President for a State law, the proviso in Article 200 has a limited nature relating to the status of the High Court under the Constitution.

Moving on to the provisions relating to legislative competencies mentioned above, their application have been limited bywell-defined constraints. Article 249 applies only when national interest is involved and that too only after a declaration from the Council of States sanctioning such legislation. Article 250 is a necessary element to ensure unity of action across the nation at times of crisis and Article 251 clearly lays down the limits to which such laws made under Article 249 and 250 applies. As regards Article 252, the power is derived from the consent of the States itself. Article 253 is only a consequence of the need to ensure that the entire nation complies with the international obligations that it has agreed to. The practice of subordinating the legislation of the States to international obligations is not alien and is prevalent in other jurisdictions as well. The incidence of vesting residuary power on the Union under Article 248 only tends to ensure uniformity of law on such residuary subjects in place of divergent laws across the nation.

Article 3 however presents a picture that cannot be explained as in the above manner. Indian Union by virtue of Article 3 is *"an indestructible Union destructible States"*. The

Article confers power on the Union to change the territorial dimensions of the States without the need for State consensus. Today, after 60 years of Independence, this provision is naught but a repository of excessive power. It can however be argued that at the time of Independence there was a historical justification for its enactment. Back then, there was a need for reorganisation of States to ensure efficacy of administration and the coherence of the society within the States. Such reorganisation would not have been possible if it had been left to the consent of the States. The term Quasi Federal does not unambiguously describe the federal nature of Indian Constitution and it can be more appropriately described as a Federal Constitution with justified unitary tendencies.

Single Citizenship and Single Constitution

Despite being a Union of States, coordinate and independent, the Constitution sets up an Indian State with only Single Citizenship and a Single Constitution. This is unlike the practice in other federal jurisdictions. The reason for the same is that the Constitution makers saw division of the territory into States as a matter of administrative and governance convenience while recognising the importance of ensuring national unity and integrity.

8) SALIENT OMISSIONS OF THE INDIAN CONSTITUTION

"*I have had on many occasions to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all better if he cannot pretend to misunderstand it.*"

\- **SIR JAMES FITZJAMES STEPHEN.**

(*in re Castioni*)

In Plato's Republic, Socrates describes State as arising out of the association of human beings. As a consequence, all rights develop from these mutual relations, which ultimately results in vesting of conflicting rights among the people. Ergo there arises a need for reference to a regulative standard applicable to all. But the concepts of moral and social philosophy differ from country to country; therefore it is difficult to formulate a fixed schedule of the rights of men. The *United States Declaration of Independence, (1776)* found them in men's rights of liberty and equality whereas the *French Declaration of the Rights of Man and Citizen, (1789)* found them in the inalienable natural rights of men. The *Indian Constitution (1950)* imbibed these rights under the name of Fundamental Rights in its Part III.

Although, the Constitution of India is the lengthiest constitution of a sovereign country in the world which encompasses all inalienable fundamental rights, yet there are some gaps and omissions in the Constitution.

Firstly, The Preamble to our constitution proclaims that India is a Democratic Republic, but is it really? The extra-constitutional practice of party system tangled in bitter party rivalry and monopoly of power violates democracy. Influenced by the political agendas of their parties the legislators are representatives of their parties rather than representatives of people. **Article 161** of the *Federal Constitution of the Swiss Confederation* provides that the members of the Federal Assembly shall vote without "instructions," which implies without party mandates and according to their conscience. The Indian Constitution has omitted to formulate such safeguards which would regulate the biased and politically motivated State actions and protect democracy at all costs.

Secondly, **Article 75** of the Constitution of India empowers the President to appoint the Prime Minister but the Constitution omits to provide for a procedure for the same. Thus conventionally, the leader of the majority party can claim the chair of Prime Minister.

Thirdly, **Article 124** of the Constitution of India, states that "there shall be a Supreme Court of India consisting of a Chief Justice of India" but yet again fails to formulate a

procedure for his appointment. In the absence of such provision, it relies on the custom and convention of appointing the senior-most judge of the Supreme Court as the Chief Justice of India.

Fourthly, with the increasing multifarious functions of the State it is necessary that there should be a standard to measure the extent of liability of the State. Yet, Constitution fails to provide for an accurate yardstick to assess the extent of State liability. **Article 300** of the Constitution deals with the extent of liability which, instead of laying down the liability in specific terms, makes reference to *Government of India Act, 1935*, which in turn refers to *Government of India Act, 1915*, which further refers to the *Act of 1858*. **Section 65** of the *Act of 1858*lays down that the Secretary of State for India would be liable to the same extent as the East India Company was liable. Therefore, in order to determine the extent of liability, one has to find out the extent of liability of the East India Company. In the pre- Constitutional era the Courts while drawing a distinction between Sovereign and Non-Sovereign functions held that liability will arise only in case of Non Sovereign functions (*see P. and O. Steam Navigation Co. v. Secy. of the State for India*). In the post-Constitutional era, Courts have evolved the concept of *Constitutional Tort* which implies that violation of a constitutional right can give rise to an action for unliquidated damages in a civil court. This concept is based on strict liability made by resorting to the constitutional remedy provided for the enforcement of fundamental right in addition to the remedy in

private law damages for tort. The Court in *Nilabati Behra v. State of Orissa* expressly held that, "principle of sovereign immunity does not apply to the public law remedies under Article 32 and Article 226 for the enforcement of fundamental rights."Ergo, even though the Constitution has omitted to define the extent of State's Liability, the Courts through *Judicial Activism* have attempted to fill this gap in the Constitution.

Lastly, the Constitution, consist of various provisions which were made contemplating plethora of situations, yetthere is no effective provision enablinga framework for space laws which will regulate State activities in the space. India has ratified four out of five United Nations treaties relating to activities in outer space yet no law has been enacted to give effect to the same. Although, **Article 51** and **Article 73** of the Constitution foster respect for international law and treaty obligations, and strives for the promotion of international peace and security, there is no legal obligation attached to them. With India increasing its expeditions to the space there is a dire need for a structure of space laws which will regulate the outer space activities and its consequences.

*Hidayatullah, J.*in *Golaknath v. State of Punjab* observed that:

"It is an error to view our Constitution as if it were a mere organisational document by which the people established the structure and mechanism of their government. Our Constitution is intended to be much more because it aims at being a social

document in which the relationship of society to the individual and of the Government to both is clearly laid down."

Even with these gaps, this organic social document, that is the Indian Constitution,has been the protector of each individual and the regulator of State activities owing to the overzealous activism of the Judiciary as its watchdog. *Dr. D.Y. Chandrachud, J.* rightly observed in *Krishna Kumar Singh v. State of Bihar,* "The silences of the Constitution must be imbued with substantive content by infusing them with a meaning which enhances the rule of law."

9) COMPARISON OF INDIAN CONSTITUTION WITH UDHR, ICCPR & ICESCR

Human Rights can be broadly divided into

- civil and political rights (rights of first generation), e.g. the right to life, peaceful assembly and religious freedom
- economic, social and cultural rights(rights of second generation), e.g. the right to work, to education, and to social security
- rights of the third generation, e.g. the right to development and to a clean and healthy environment[26]

The International Bill of Human Rights consists of the Universal Declaration of Human Rights[27] (UDHR), the International Covenant on Economic, Social and Cultural Rights[28] (ICESCR), and the International Covenant on Civil and Political Rights[29] (ICCPR) and its two Optional Protocols. India was a signatory to the UDHR. India ratified the ICCPR and the ICESCR on March 27, 1979. The Optional Protocol to the ICCPR, 1989, however, was not ratified by lndia.

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[26] https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/un-human-rights-treaties.html

[27] Adopted 10 December 1948(General Assembly resolution 217 A)

[28] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976

[29] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976

A number of rights conferred by the Constitution are similar to provisions of the above mentioned documents and are tabulated below.

Rights/Freedoms	**Indian Constitution**	**UDHR[30]**	**ICCPR[31]**	**ICESCR[32]**
Equality Before Law	Article14	Article7	Article 14(1)	
Prohibition of discrimination on ground of religion, race, caste, sex or place of birth	Article 15	Article 7	Article 26	
Equal opportunity in matters of public employment	Article16(1)	Article21(2)	Article25(c)	
Protection of certain rights	Article19(1)(a)	Article19	Article 19(1) and 19(2)	

[30] http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)
[31]https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[32]https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx

regarding freedoms of speech				
Freedom to assemble peaceably and without arms	Article 19(1)(b)	Article 20(1)	Article 21	
Freedom to form association or unions	Article 19(1)(c)	Article 23(4)	Article 22(1)	Article 8
Freedom to move freely throughout the territory of India	Article 19(1)(d)	Article 13(1)	Article 12(1)	
Protection in respect of conviction for offences	Article20(1) and 20(2)	Article11(2)	Article 15(1) Article 14 (7)	
No person accused	Article 20(3)		Article 14(3)(g)	

of any offence shall be compelled to be a witness against himself				
Protection of life and liberty	Article21	Article 3	Article 6(1) and 9(1)	
Protection against arrest and detention in certain cases	Article 22	Article 9	Article 9 (2), (3) and (4)	
Prohibition of trafficking in human beings and forced labour	Article23	Article14	Article 8(3)	
Freedom of conscience and free profession, practice and propagation of	Article25(1)	Article18	Article 18(1)	

religion				
Protection of interests of minorities	Article29(1)	Article22		
Right of minorities to establish and administer educational institutions	Article30(1)	Article20(3)		
Remedies for enforcement of rights conferred by this part	Article32	Article8		
Right to proper social order	Article 38	Article 28		
Right to adequate means of livelihood	Article 39(a)			

Equal pay for equal work	Article39(d)	Article 23(2)		Article 7(a)(i)
Right to work, to education and public assistance in certain cases	Article 41	Article 26(1)		Article 6(1)
Provision for just and humane conditions of work and maternity relief	Article 42			Article 7(b)
Living wage, etc, for workers	Article 43			Article 7(a)(ii) Article 7(d)
Compulsory education for children	Article 45	Article 26(1)		Article 13(2)(a)

Nutrition and standard of living	Article 39A and 47	Article 25(1)		Article 11 and 12
Right to property	Article 300A	Article 17(2)		

(B.) VITAL CONSTITUTIONAL QUESTIONS

Incessant Use of the Sealed Cover Procedure by Supreme Court: A Detriment to the Principle of Open Justice and Bellwether for Secret Justice[33]

Introduction

At the beginning of this year, four Supreme Court judges, by what was termed by them as a 'discharge of debt to the nation' and 'an attempt to save democracy', warned about against the concentration of power in the hands of single individual, mounting a virtual revolt against the chief justice, listing a litany of problems that they said are afflicting the country's court of last resort. This unprecedented move at a joint news conference left the judiciary and observers stunned, leaving uncertain how this open dissension in the hallowed institution would be resolved. One of the four judges providing an unvarnished self reflection of the Supreme Court in this news conference was also Justice Ranjan Gogoi, the present Chief Justice of India.

However, his judicial conduct off late seems to portray and suggest that it is from Justice Gogoi of the press conference that Chief Justice Gogoi must ascertain and take

[33] This essay is authored by Neha Deshmukh (V B.A. LL.B.) and Varad S. Kolhe (IV B.A. LL.B.), influenced by recent turn of events in the Supreme Court of India. The views above are purely personal and errors, if any, are to be solely attributed to the authors.

note of the most appurtenant warnings i.e. 'ensuring transparency in the administration of justice.'

Incessant Use of the Sealed Cover Procedure

Three glaring instances of the utilization of the sealed covers in courtroom hearings clearly establish that the present Chief Justice of India has a particular taste for sealed envelopes. We will discuss all these three instances one by one here:

National Register of Citizens Case (NRC)

Section 6A of the Citizenship Act was challenged by a range of public interest litigations in the Supreme Court filed between 2009 and 2012, one of them also asking for the updating of National Register of Citizens for the state of Assam, as per the Assam Accord. At the outset, the court only monitored government's progress, asked for status reports and prodded government authorities.

However, tables turned in late 2014. First, a bench of the court headed by Justice Gogoi directed the State Coordinator of the NRC to submit a report indication "steps and measures" taken by him to complete his task of updating the NRC in a "sealed cover envelope." Second, going a little ahead in time, in February, 2017, the NRC Coordinator placed a "power point presentation" before the Court, which set out the "steps involved" (both present and future) in the preparation and updating of the NRC. Even

more so, it was on the basis of this power point presentation that the court approved an entirely novel method of ascertaining citizenship i.e. 'Family Tree Verification' method.

Lastly, on the publication of the final draft of NRC at the end of July 2018, the State Coordinator submitted to the court "modalities' for the process of filing objections, including a new list of ten documents to be relied upon, in addition to five base documents. Even here, the court refused to make the Coordinator's reports public. It even declined to share the reports with the Union of India citing reasons of 'sensitivity.' However, this was just the tip of the iceberg.

The Rafale Deal Issue

In the Rafale case, the challenge presented is to the government's decision making process with respect to public procurement in a defence deal. Upon hearing the government's contention specifications of price at which fighter jets were acquired cannot be revealed at that would in essence compromise the deal itself. Rather, the determination of price is a core executive function and is not something that the court should dwell into. However, the Chief Justice of India ordered that pricing details be produced to him and his brother judges on the bench in a sealed cover, even though such details may not be entirely or even fleetingly relevant.

CBI Corruption Case

Once again, the bench had directed that report of the Central Vigilance Commissioner (CVC) in respect of conduct of CBI Director Alok Verma was to be given in a sealed cover envelope. However, this time, leaks of the content of the report in the media fumed the Chief Justice of India who postponed the hearing by 10 days and made his displeasure quite evident by saying "Yesterday, we refused the mentioning and we expressed that the highest degree of confidentiality will be maintained, but for some strange reason the papers were taken away and given to everyone. The court is not a platform. It is a place for adjudication. We intend to set it right."

Thus, what may have begun as a ripple in the lake has now transformed into what may be termed as a regime of 'secret justice' evolving through jurisprudence of sealed covers and confidential reports where even the government is not kept in the loop, let alone the parties to the proceedings.

Ramifications of the Constant Use of Sealed Covers and Confidential Reports

The apex court in the PIL-era has been praised stimulating and nudging inefficient governments into action and stepping in to fill in the legislative and executive vacuum. Before we move on the discuss the ramifications, emphasis must be laid on the following paragraph by Gautam Bhatia,

"*That Indians are too immature to exercise their own rights, and must be governed from above by wiser and benevolent rulers, was the logic of the old colonial regime. This logic was*

repudiated when India attained independence, and the Constitution came into being. The framers of the Constitution reposed their faith in the people of India: not only did they recognise a right of universal adult suffrage (thus making the people the guardians of their own destiny), but the Constitution as a whole replaced a culture of authority with a culture of justification, where every exercise of public power must be justified to its citizens.[34]"

While clouds still loom over whether reading of prices at which fighter jets were obtained in a sealed envelope will assist the judges in reaching at a conclusion on a crucial public issue of effectuation or non-effectuation of corruption in Rafale deal, the NRC case has far more overarching implications as it touches upon the fundamental rights of citizens. Depriving an individual of his/her citizenship is not a cakewalk procedure. Our Constitution envisages a system of checks and balances before depriving a citizen of her/his very right to have rights. First, Parliament must pass a law. Second, the executive must implement it and last, the courts may review the legislative and executive action for constitutional compliance. However, the apex court in NRC case followed its own volition, implementing, updating and reviewing its own implementation. This leads to the deprivation of a vital constitutional remedy. Where is the individual to go if she/he wants to challenge the contents of reports filed in sealed covers? Which body can she/he approach to demand making public the content of confidential and sealed cover reports that may ultimately lead to her/his deportation?

[34] https://www.hindustantimes.com/analysis/justice-must-be-open-not-opaque/story-uOIfNMAKfX0sijzmkAETnM.html

Is delaying a hearing by ten days for leak of information in sealed cover envelopes a paradigm to restore public confidence in the CBI? All these questions invariably streamline to a straight conclusion: incessant use of sealed cover envelopes and confidential reports is gravely undemocratic.

Conclusion: An uprising Detriment to the Principle of Open Justice

In India, the constitutional scheme is designed to provide to its citizens a system of open justice, where courts are public forums characterized by transparency and openness to public scrutiny and not opaqueness. Of course, the principle of open justice is subject to exceptions wherein secrecy may be observed in courts. The names of sexual assault survivors are often redacted to protect their privacy, and in-camera trials perform the same function. In those cases, however, there are powerful, counterveiling individual rights at stake: the rights to privacy and a fair trial. There might also be cases of necessity: for example, when the outcome of an election is challenged, the court often asks the parties to hand over the results of the election in a sealed cover, until the final judgment. State secrets may provide for another exception to the rule of open justice.[35]

What lies at the core of the problem of the incessant reference by Chief Justice of India to sealed cover envelopes and confidential reports is that such references are by their very nature, arbitrary based on his own whims and fantasies, rather than on a meticulous application of the principle of open justice and its aligned exceptions. The

[35] https://en.wikipedia.org/wiki/New_York_Times_Co._v._United_States

most supreme constitutional court in the country is ringing the bell of autocracy, and the Chief Justice of India has both the power and the responsibility to curtail the setting up of a secret dialogue between the court and the state.

(C.) INTERSECTION(S) OF PUBLIC LAW

Tracing the Legal Tenability of SEBC Reservation: Was Maharashtra CMs promise sound in law?[36]

Introduction

The Maratha community comprises 32 per cent of the population of Maharashtra. A community with members ranging from powerful sugar barons and landlords to distressed farmers and unemployed youth, once took pride in identifying itself as a caste, but is now united by an undeterred determination to prove itself to be socially backward.

For the uninitiated, Prithviraj Chavan led Congress-NCP government had announced 16 per cent reservations to the Maratha community in 2014. This left a few people dissatisfied and they approached the Bombay High Court against it. The court had then stayed the entire issue asking the Maharashtra government to conduct a detailed study of the economic and social status of the Maratha community.

Between August 2016 and August 2017, it organized a total of 58 silent marches. Over the last two weeks, however, Maratha protests demanding for reservations in

[36] This short note is authored by Varad S. Kolhe (IV B.A. LL.B.). All views in the note are purely personal and errors, if any, are to be attributed to the author only.

government jobs and education resurfaced, but this time with a violent tone, with many attempting suicide to emphasize their demand.

Report of the Maharashtra State Backward Commission

The Maharashtra State Backward Class Commission, which submitted its report on the social and economic conditions of the Maratha community in the last week, recommended that reservation be given to them, leaving the quota granted to Other Backward Classes (OBC) unperturbed.

According to the panel's report, which is yet to be made public, the Commission has laid down 25 parameters to determine whether the Marathas can be termed as backward and concluded that Maratha community is backward on three fronts - social, economic and educational. It has conducted a survey of around 43,000 Maratha families to know their educational, financial and social status. Moreover, 25 per cent of the state's 32 per cent Maratha population qualified the criteria for backwardness. The panel was headed by a retired high court judge.

CM Devendra Fadnavis' Promise of Celebration

In light of the report, CM Devendra Fadnavis said that the state was liable to take action considering the 'extraordinary and exceptional conditions.' Addressing a gathering in Ahmednagar district of Maharashtra, Fadnavis added, "Today, we have received the report from the Backward Commission. The constitutional procedure regarding

Maratha reservation will be completed soon. Those planning agitation for the demand on 25th, 26th should now plan a celebration on December 1." After an assurance from the CM that all the legal procedures will be completed by November end, after months of protests, the Maratha community has received another promise of reservation in government jobs and educational institutions.

This short note seeks to describe the legal pathways available to the State government to effectuate the reservation and consequences that may follow, under the constitutional scheme of India. In essence, I intend to discuss was CM Fadnavis right in asking the Marathas to celebrate on December 01 when legal course of events is yet remains to be streamlined.

Relevant Constitutional Provisions: Art. 31B and Art. 31C

At the outset, the most prominent feature of these articles is that they are hybrid in nature, though their common objective is to constitute exception to the fundamental rights, wholly or in part.

However, Art. 31B has lost its original character altogether after the Constitution (39th Amendment) Act, 1975 and Constitution (40th Amendment) Act, 1976, which have added approximately 101 Acts to Schedule IX of the Constitution. Hence, it is amply clear Art. 31B is now utlilized to give complete coverage to any law as against any of the fundamental rights, by simply specifying it in Schedule IX of the Constitution.

On that note, the SEBC category created by the Maratha Reservation Bill, 2018 which was passed by the Maharashtra Legislative Assembly in the last week is unconstitutional for two reasons. First, the very genesis of such a classification i.e. SEBC category is has been declared unconstitutional by the Supreme Court of India in the *Mandal Commission Case*.[37] Second, for a law to be inserted into Schedule IX of the Constitution, it is to be paved for by a constitutional amendment proliferated by the Parliament. The question which the state government should really ponder over then is whether there is a way out of the abiding by the constitutional amendment procedure?

Twist in the Tale: Art. 31C > Art. 31B

The Constitution indeed answers the above question in the affirmative by putting forth Art. 31C of the Constitution. The ambit of Art. 31C, as introduced in 1971, protected laws giving effect to the Directives in Art. 39(b)-(c) from unconstitutionality on the ground of contravention of Arts. 14, 19 and 31. By the Constitution (42nd Amendment), this protection was further extended to legislation for implementation of any of the Directives enumerated in Part IV of the Constitution.[38] The power to give effect to such Directives vests in both Union and State Legislatures,[39] according to the distribution of legislative power over the subjects of the Directives under Schedule VII of the Constitution. Thus, by taking recourse to Article 31C of the Constitution, the state

[37] Indira Sawhney v. Union of India, AIR 1993 SC 447
[38] The amendment extending such protection has been held to be invalid in Minerva Mills v. Union of India, AIR 1980 SC 1789
[39] Asst. Commr. v. B&C Co., AIR 1959 SC 648

government can effectuate the 68% percent reservation by enacting a law providing for reservation to the Maratha Community by acquiring Presidential assent to the same.

Conclusion: What Happens Next is Owed to the Future

It will be intriguing to see how Maharashtra government treads to implement its promise of providing reservation to the Marathas. Furthermore, it will also be equally intriguing to see how courts respond to the legal strategy adopted by the Maharashtra government as many political thinkers term this promise to be a mere political fiat in light of upcoming Lok Sabha elections.

(D.) MESMERIZING QUOTES

DR. D.Y. CHANDRACHUD J.

in Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690

The Indian Constitution is marked by a transformative vision. Its transformative potential lies in recognizing its supremacy over all bodies of law and practices that claim the continuation of a past which militates against its vision of a just society. At the heart of transformative constitutionalism, is a recognition of change

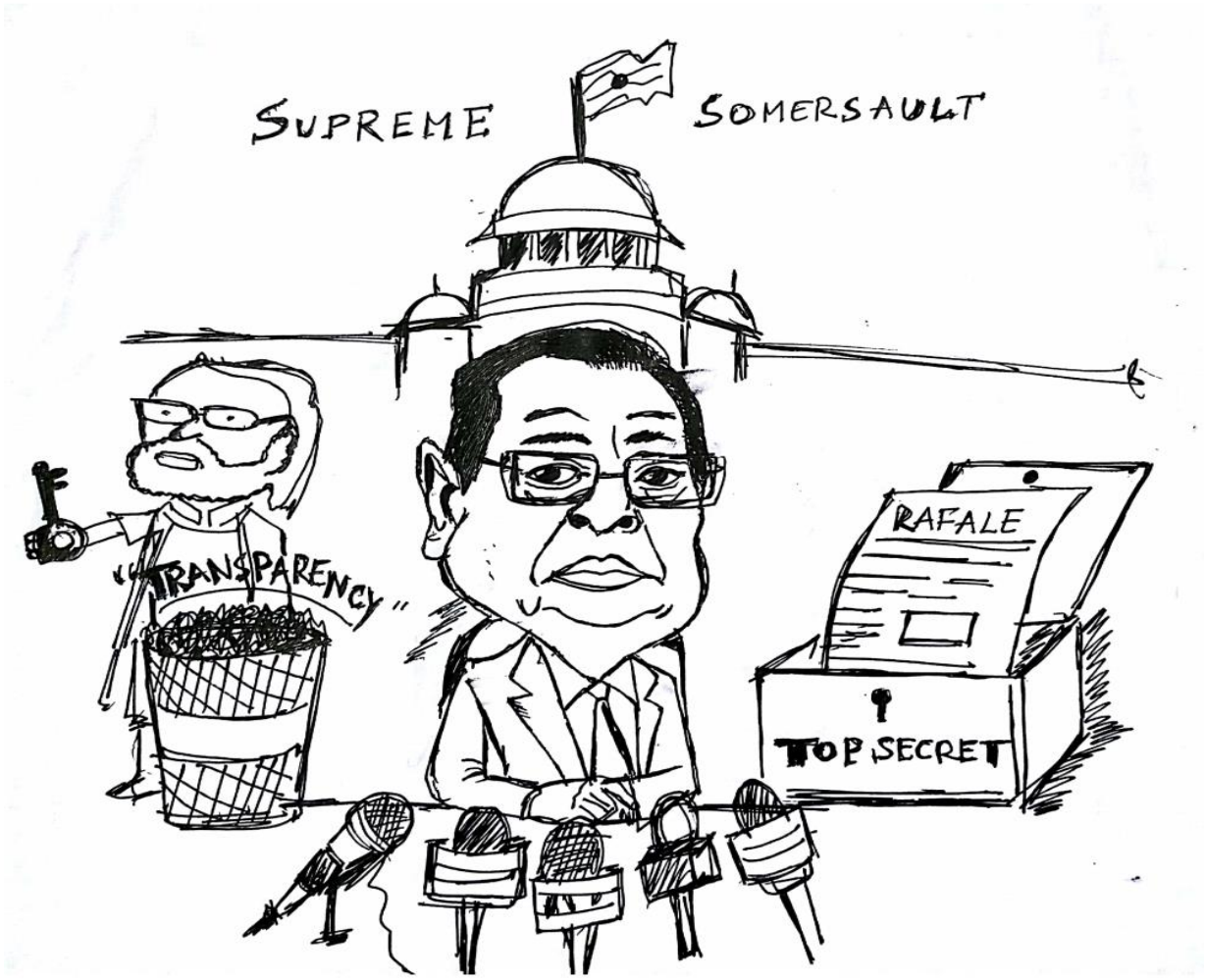
B.R. AMBEDKAR

However good a Constitution may be, if those who are implementing it are not good, it will prove to be bad. However bad a Constitution may be, if those implementing it are good, it will prove to be good.

HENRY WARD BEECHER

Laws are not masters but servants, and he rules them who obeys them.

(E.) CARTOON[40]



UNPRECEDENTED
PRESS CONFERENCE

[40] This cartoon is an artistic work of Arul Kanhere (III B.A. LL.B.), a student of ILS Law College, Pune.

(F.) CONTEST

The following are excerpts from landmark Supreme Court Judgments. The contestants are expected to identify the Judgment, the Judge making the observation and the relevance of the observation and the Judgment in relation to the larger public interest.

Excerpt No. 1

"*This Court has a solemn duty, as a high sentinel authorized by Art. 141, to declare what our law of the Constitution is, how our supremalex has designed a project of power. The major instrumentalities must work in comity and avoid a collision course, ensuring the ultimate authority and continuous control of We, the People of India' through the House of elected members. In essaying this task we must keep away from ideological slants and imaginary apprehensions and should not import personal predilections-but inform ourselves of the grand design of our Constitution and the great models inspiring it.*"

Excerpt No. 2

"*In a constitutional democracy like ours, the national assets belong to the people*."

Excerpt No. 3

"*It was contended that the rights declared by Article 19 are the rights of a free citizen and if he has already been deprived of his liberty in the circumstances referred to in articles 20, 21 and 22,*

then it would be idle to say that he still enjoys the right referred to in Article 19. After giving my fullest consideration to this argument, I have not been able to appreciate how it arises in this case. There is nothing in Article 19 go suggest that it applies only to those cases which do not fall under articles 20, 21 and 22. To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others....."

"..... In my opinion, it cannot be said that articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19 (1) (d). That there are other instances of overlapping of articles in the Constitution may be illustrated by reference to Article 19 (1) (f) and article 31 both of which deal with the right to property and to some extent overlap each other."

Excerpt No. 4

"History owes an apology to LGBT persons for ostracism, discrimination.

Excerpt No. 5

"Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally and philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence"

Excerpt No. 6

"This leads us to the second question, namely, whether the petitioner's fundamental right under Art. 19 (1) (d) is also infringed. What is the content of the said fundamental right? It is argued for the State that it means only that a person can move physically from one point to another without any restraint. This argument ignores the adverb "freely" in cl. (d). If that adverb is not in the clause, there may be some justification for this contention; but the adverb "freely" gives a larger content to the freedom Mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automation. How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail. The freedom of movement in cl. (d) therefore must be a movement in a free country, ie., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived

of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do."

Excerpt No. 7

"Our quest for technology should not be oblivious to the country's real problems: social exclusion, impoverishment and marginalisation...Dignity and rights of individuals cannot be based on algorithms or probabilities."

Excerpt No. 8

"It's time to say husband is not the master of woman. Any provision treating women with inequality is not constitutional."

Excerpt No.9

"It is urged that Article 21 is the sole repository of one's right to life or personal liberty. The moment the right to move any court for enforcement of Article 21 is suspended, no one can, according to the submission, complain to the court of deprivation of life or personal liberty for any redress sought from the court on that score would be enforcement of Article 21. Petition under Article 226 for the issue of a writ of habeas corpus, it is contended by learned Attorney General, is essentially a petition to enforce the right of personal liberty and as the right to move any court for the enforcement of the right conferred by Article 21 is suspended, no relief can be granted to the petitioner in such petition....."

".... After giving the matter my earnest consideration, I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law..... "

"..... Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a fact of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty; it existed and was in force before the coming into force of the Constitution.... "

".... I am unable to subscribe to the view that when right to enforce the right under article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making article 21 to be the sole repository of that right."

Excerpt No. 10

"Devotion cannot be subjected to gender discrimination."

Excerpt No. 11

"Law, has consequences. And the consequences of law brook no exceptions.

Excerpt No. 12

"Differentiation or classifications for special preference must not be unduly unfair for the persons left out of the favoured groups."

Excerpt No. 13

"The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to compass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."

Excerpt No. 14

"Re-promulgation of ordinances is constitutionally impermissible since it represents an effort to overreach the legislative body which is a primary source of law making authority in a

parliamentary democracy. Re- promulgation defeats the constitutional scheme under which a limited power to frame ordinances has been conferred upon the President and the Governors. The danger of re-promulgation lies in the threat which it poses to the sovereignty of Parliament and the state legislatures which have been constituted as primary law givers under the Constitution. Open legislative debate and discussion provides sunshine which separates secrecy of ordinance making from transparent and accountable governance through law making."

Excerpt No. 15

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty..... "

".....This Article (Article 39A) also emphasises that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just, procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal

services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer."

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