Interpreting Constitutions

seen, the Court's approach has been one of balancing rights and duties, on the one hand, and of seeking 'practical concordance' between conflicting rights, on the other. This particular approach to constitutional adjudication has avoided the 'absolutist' or categorical reasoning often typical of American constitutional decisions. And the fact that constitutional interpretation is often the by-product of constructive dialogue between the FCC and parliament is still another reason for the relative stability and acceptability of judicial review in Germany's civilian legal system.

5

India: From Positivism to Structuralism

S. P. Sathe*

Introduction

The Indian Constitution

India won her freedom from British colonial rule through a mainly non-violent mass movement. To prepare a new Constitution for an independent India, a Constituent Assembly for undivided India was elected pursuant to The Government of India Act 1935, enacted by the British Parliament. This Act conferred a limited franchise based on property and educational qualifications, entitling about 28.5 per cent of the adult population to vote. The All India National Congress (Congress), which had led the movement for independence, won 69 per cent of the seats in this Constituent Assembly. In 1947, the British Parliament passed the Indian Independence Act, which created two dominions, India and Pakistan. After this partition, the Constituent Assembly of undivided India was split into two bodies, one for each dominion. Congress's representation in the Constituent Assembly for post-partition India increased to 82 per cent. Congress contained within itself the entire ideological spectrum, from the left to the right, and represented India's religious as well as ethnic pluralism.1 The work of drafting the Constitution was done between 1946 and 1949. The drafters drew heavily on the Government of India Act 1935, the last constitutional statute made by the British Parliament for India. Some provisions of the Constitution came into force on November 23, 1949, and the rest on January 26, 1950.2

The preamble of the Constitution spoke in the name of the 'people of India'. India was declared a republic, and all legal ties with Britain were terminated.3 But Indians had struggled for independence not just to achieve liberation from foreign rule, but also to secure liberty, equality and justice for the people. Independence was the result of a mass movement, of which the Constitution was a continuation.

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2 See Constitution of India at 395.
3 ibid.
to establish a modern, democratic, secular and humanist India. The Constitution became a symbol of national consensus. Its lengthy details and specificity were inevitable, because many interests had to be accommodated, and caution incorporated. It is not merely a law prescribing a division of power, and limits to power, but contains a bill of rights and positive directions to the State to establish a just social order. It incorporates the essential aspects of parliamentary democracy, federalism, provisions regarding inter-state trade, commerce and intercourse, rights of various minorities and disadvantaged sections of society that require special attention, provisions for government servants, officers belonging to the Indian Civil Service and the princes whose kingdoms had acceded to India. It contains the constitution not only of the Federal government but also of the states. Consequently, it is the longest of the six constitutions discussed in this book.

Salient Features

The main features of the Constitution of India are: parliamentary government; federalism; a bill of rights; directive principles of state policy; separation of powers; amendment procedures; and judicial review. These will be briefly described to provide the necessary background for a discussion of constitutional interpretation.

Parliamentary Government

It is an essentially parliamentary form of government. The executive is part of the legislature and responsible to it. The national Parliament consists of the President and two Houses—House of the People and the Council of States. The President is elected by an electoral college consisting of all the elected members of the two Houses and the elected members of the Legislative Assemblies of the states. Unlike other federations, the Constitution does not give the states equal representation in the Council of States. The allocation of seats in the Council to the states and the Union territories is determined by the Fourth Schedule. The House of the People consists of representatives chosen through direct election by the people divided into various constituencies. The House has a tenure of five years, whereas one third of the members of the Council of States are elected every two years. The President appoints the Prime Minister, who holds office during her pleasure, but the Council of Ministers is collectively responsible to the House of the People. There is a similar arrangement in the states, with the Governor as the head and a council of ministers to advise him. Governors are appointed by the President, and hold office during her pleasure. The Legislative Assemblies of the states are elected by the people through direct election, and with a few exceptions, are unicameral.

Federalism

The Government of India Act 1935 provided for British India and the Indian princely states to be joined in a federation. This was deemed necessary due to the country's vast size, and regional and linguistic diversity. It became operational only within British India, because the princely states refused to join. They enjoyed the protection of the British government from external enemies. When they were told by Britain that it could not protect them after its withdrawal from the subcontinent, they had no other option but to join either of the two new dominions. By the time the Constitution of India was finalized, all the contiguous princely states had acceded to it. The state of Jammu and Kashmir acceded subject to certain conditions, which were incorporated in part 370 of the Constitution.

Originally, federalism in undivided India was intended to follow the classical federal model that existed in the United States and Australia, of enumerated powers given to Parliament and residual powers to the state legislatures. But after the partition of the country, the Constitution allocated enumerated powers to both, according to three lists in the Seventh Schedule. The subjects on which Parliament has power to legislate are enumerated in the 101 items of the Union List, 26 those on which the state legislatures may legislate are set out in the 61 items of the State's List, and there is a concurrent list of 32 items on which both may legislate. State legislation repugnant to a valid law made by Parliament is void, and if there is an existing central law, a state legislature cannot enact a law on the same subject in the concurrent list, unless it has obtained the President's assent. Residual legislative power is vested in Parliament, except in the case of Jammu and Kashmir, where it is vested in the state legislature.

The predominance of the federal government pervades various provisions of the Constitution that deal with relations between the Union and the states. The executive power of every state must be exercised in compliance with laws made by
Interpreting Constitutions

Parliament, and also without impeding or prejudicing the exercise of the executive power of the Union. The executive power of the Union includes giving such directions to a state as may appear to the Government of India to be necessary for these purposes.27

The Constitution requires the Union to protect every state against external aggression and internal disturbance, and to ensure that the state governments comply with the provisions of the Constitution.28 One provision, art 356, virtually negates federalism. It provides that if the President is satisfied that the government of a state cannot be carried on in accordance with the Constitution, he may by proclamation (a) assume to himself any of the functions of the government of that state, including the powers of the Governor and any body or authority other than the state legislature; and (b) declare that the powers of the state legislature shall be exercisable by or under the authority of Parliament. A proclamation dismissing a state government must be laid before each House of Parliament, and ceases to operate after two months unless it is approved by resolutions of both Houses.29 This presidential power seemed to be immune to judicial review until 1977, when the Supreme Court of India (thereafter, the Court) held that such a proclamation would be declared invalid if it were issued with malafides.30 In State of Bombay v India,31 the Court held that such a proclamation was subject to judicial review like any other administrative action, and actually held the dismissal of three state governments invalid.32

Bill of Rights

Indians had demanded a bill of rights since 1895.33 But British law-makers did not believe in the utility of a bill of rights: they thought it would either unnecessarily impede law-making, or be a mere string of platitudes.34 Constitutions made by Britain for her former colonies, such as Australia, Canada and New Zealand, did not contain bills of rights. Nevertheless, the Constituent Assembly unanimously decided to incorporate a bill of rights in the Constitution, titled Fundamental Rights.

Unlike the first ten, and the fourteenth, amendments of the United States Constitution, the Constitution of India does not merely list protected rights, but also spells out restrictions that may be imposed on them. Furthermore, it requires the State to take positive actions towards the realization of certain human rights. For example, art 17 declares that 'untouchability' is abolished, that its practice in any form is forbidden, and that the enforcement of any disability arising out of 'untouchability' shall be a punishable offence. Article 23 prohibits traffic in human beings and forced labour, and declares any contravention to be a punishable offence. Article 24 provides that no child below the age of fourteen shall be employed to work in any factory, mine or other hazardous employment. The newly added art 21A requires the State to provide free and compulsory education to all children aged between six and fourteen in such manner as the State may, by law, determine.35 Such provisions are not found in traditional bills of rights, such as that of the United States. They are in the nature of mandatory directions to the State, similar to provisions in international covenants such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, or the International Covenant on Economic, Social and Cultural Rights.

The Fundamental Rights are: the right to equality (art 14); the right to non-discrimination on the grounds of religion, race, caste, sex, or place of birth (art 15); the right to equality and non-discrimination in public employment (art 16); rights to freedom of speech, peaceful assembly, associations, movement and residence within any part of India, the acquisition and enjoyment of property, and the practice of any profession, trade or business (art 19); the right not to be subject to retrospective penal legislation, punishment more than once for the same offence, or compulsion to give evidence against oneself (art 20); the right not to be deprived of life or personal liberty except according to procedure established by law (art 21); the rights of an arrested person to be given the grounds for his arrest, and an opportunity to be defended by a lawyer of her choice (art 22(1)-(2)); the rights of persons held in preventive detention (arts 22(4), (5), (6) and (7)); the right to freedom of religion (art 25); religious denominations (art 26); the right not to be compelled to receive religious instruction in educational institutions (art 28); the right to sustain cultural diversity (art 29(1)); the right not to be denied admission, on the ground of religion, race, caste, or language, to an educational institution maintained or funded by the State (art 29(2)); the right of religious and linguistic minorities to establish and administer educational institutions of their choice (art 30); and the right to move the Court for the enforcement of Fundamental Rights (art 32).

These rights are detailed and specific. While rights such as freedom of religion or of speech are couched in absolute terms in the United States Constitution, the equivalent rights in the Indian Constitution are hedged with potential restrictions, and the courts must ensure that any restrictions imposed by legislation are reasonable and for permissible purposes. The fine detail of the Constitution has helped to avoid several pitfalls. For example, hate speech is not protected by the Constitution, since art 19(2) allows the State to impose reasonable restrictions on freedom of speech in the interests of `public order or security of the State'. The Indian Penal Code punishes acts promoting enmity between different groups; acts
among individuals but also among groups of people residing in different areas or engaged in different vocations. The Directive Principles set a constitutional agenda for the future, which envisions the social, economic and political transformation of Indian society. Some goals had to be achieved within a set time frame, such as compulsory primary education for all children below the age of 14 years. Article 39(b) and (c) require the State to bring about changes in property ownership in order to avoid the concentration of wealth in a few hands, and the use of the means of production to the common detriment.

Separation of powers

The legislative power is vested in the Parliament and the state legislatures, and the executive power in the President and Council of Ministers at the federal level, and the Governor and Council of Ministers at the state level. The executive power is co-extensive with the legislative power. The President or Governors may issue ordinances, when Parliament or the State Legislature respectively is not in session, if satisfied that immediate action is necessary. The Court has held that a legislature may delegate legislative power subject to certain limitations, but may not delegate the ‘essential’ legislative function to the executive. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct. A number of laws have been invalidated on this ground.

Amendment of the Constitution

The Constitution provides for its amendment in three ways: (i) a small number of provisions can be amended by a simple majority; (ii) most of the other provisions can be amended only by a bill passed by two-thirds of the members present and voting in, and an absolute majority of the total membership of, both Houses of Parliament; and (iii) certain provisions concerning matters of federal concern must, in addition to being passed by the special majority, be ratified by not less than half of the state legislatures. These matters include the election of the President of India; the executive power of the Union, and of the states; the Union Judiciary, and the High Courts of the states and territories; legislative relations between the centre and the states; the Lists in the Seventh Schedule; the representation of the states in Parliament; and the provision for constitutional amendment itself.

88 Art 38(2). 89 Art 45. 90 Art 51. 91 Art 154.
94 Art 3, 4, 11, 109, 110, 120, 126(3), 345 and 346. Art 42(6) clearly states that ‘no such law afterwards shall be deemed to be an amendment of this Constitution for the purpose of Article 368.
95 Art 368(2). 96 Proviso to art 368(3).
The Constitution has been amended 92 times. These amendments were passed in order to: (i) clarify the meaning of existing provisions, (ii) override decisions of the Court concerning the right to property, (iii) dilute democratic checks and balances during the 1975 emergency, and to restore them after the emergency lapsed; (iv) enhance democracy, for example, by devolving power on village and district governments (the third tier of federalism), and preventing unprincipled and opportunistic defections from political parties by legislators. The scope of the power of constitutional amendment became a subject of controversy in the late 1960s and early 1970s, in cases that will be discussed below.60

**Judicial review**

Courts in India performed the function of judicial review even before independence. The legislatures created by the Government of India Acts had to function within the ambit of the powers given to them by those Acts. If they exceeded their powers, their acts were held ultra vires.61

Article 131(1) and (2) of the Constitution expressly states that any law inconsistent with a Fundamental Right is void, whether the law was made before or after the Constitution came into force. In *AK Gopal v. State of Madras*, Chief Justice Kania observed that these provisions had been made by way of *abundantia causae* (abundant caution), and that even in their absence, the courts would have had the power to declare laws inconsistent with Fundamental Rights to be void.62 Even without an express provision, if Parliament makes a law on a subject within the exclusive power of a state, or a state legislature makes a law on a matter within the exclusive power of Parliament, the law is deemed to be void.

Unlike other federal constitutions, India has a single unified judiciary. It has no separate Constitutional Court as in Germany or South Africa. The Supreme Court is the highest court of appeal in civil, criminal and all other matters.63 The hierarchy of courts commences with magistrates courts in each state, and goes up to the Court. The High Courts are appellate courts in each state that deal with all laws, whether made by Parliament or the state legislature.64 All appeals from High Courts lie to the Court, subject to conditions laid down under various provisions of the Constitution and other laws.65 Article 131 provides that the Court has original jurisdiction, which excludes the jurisdiction of any other court, in any dispute between states, or between a state and the Government of India, that involves a legal right.66 Parliament has power to provide for the adjudication of any dispute respecting the use of the waters of any inter-state river or river valley, and may provide that neither the Court nor any other court shall exercise jurisdiction in respect of such disputes.67

60 Secs 165-178, below.
62 AIR 1950 SC 27.
63 Ibid 34.
64 Arts 132, 135, 134 and 134-A.
65 Art 214.
66 Arts 123, 133, 134, 134-A, 135 and 136.
67 This jurisdiction, however, does not extend to a dispute concerning certain treaties, agreements and covenants entered into before the Constitution came into force, or that exclude the Court’s jurisdiction.
68 Arts 262(1) and (2).
69 Article 135.
72 Jamali v. President of India (1994) 6 SCC 360. An opinion in art 370 of the Constitution giving special status to the state of Jammu and Kashmir was sought but not responded by the Court. Under an art 370(2), the President may refer a dispute arising out of certain treaties, agreements and covenants entered into before the Constitution commenced for an opinion and the Court is obliged to report on its opinion to the President. But it is for the President to make such orders as are necessary to do complete justice in any cause or matter pending before it.
73 In Canada, the Privy Council upheld the validity of a federal Act that enables the Governor General to obtain the advisory opinion of the Supreme Court. In the United States and Australia, the courts have refused to give advisory opinions.
74 In India, the Court’s advisory jurisdiction was made explicit in art 143(1) of the Government of India Act 1935, which was carried over into art 143(1) of the Constitution. If the President believes that a question of law or fact is of such public importance that it is expedient to obtain the Court’s opinion, she may refer the question to the Court, and the Court may report its opinion to the President. The word ‘may’ means that the Court is free to refuse to give an opinion.
75 Until now, references have been made 12 times to the Court, and the Court has refused to give an opinion only twice. Although opinions given by the Court under art 143(1) are not, strictly speaking, binding, they have been treated as binding by lower courts, governments, and the Court itself.
76 At common law, courts are bound by their previous decisions, and lower courts by the decisions of higher courts. The doctrine of *stare decisis* was applied in British India as part of the common law long before the decisions of the Federal Court of India were made binding on lower courts by s 212 of the Government of India Act 1935. A similar provision now appears in art 141 of the Constitution in respect of law laid down by the Court. The minimum number of judges that may decide a question involving the interpretation of the Constitution is five. When judges find it necessary to reconsider an interpretation given by a bench of five judges, they must refer the matter to a larger bench, which can overrule that decision.77 Decisions are reached by majority.78 Separate concurring as well as dissenting judgments are often published. Likewise, the decisions of the High Courts are binding on lower courts. A *ratio decidendi* is binding, but not an *obiter dictum*. A *ratio* is a legal principle on which a decision was based and without
which it could not have been reached. Obiter dicta are observations ancillary to the ratio, which normally have persuasive authority only. However, it has been held that the Court's obiter dicta are binding on the High Courts. In view of the fact that the Court has issued obiter dicta on broad questions that were not strictly necessary for the disposal of a case, the distinction between ratio and obiter dicta has become rather irrelevant.

The Court once said that it was not bound by its own decisions, and could overrule itself if the circumstances so demanded. Indeed, it actually overruled a previous decision—and with prospective effect—in Gokulnath v Punjab, a case involving the validity of three constitutional amendments. Parliament had amended the Constitution seventeen times until then, and three of those amendments had been designed to override judicial decisions concerning the right to property. Those three amendments excluded judicial review of certain types of laws with reference to specific Fundamental Rights. The constitutional validity of these amendments was questioned, on the ground that a constitutional amendment is a 'law' within the meaning of art 13(2), and is therefore void if it contravenes any Fundamental Right. The Court had rejected that contention in 1951. In a unanimous judgment of five judges, and again in 1965, by a majority of three to two. Yet in Gokulnath, the Court held, by a majority of six to five, that a constitutional amendment made in accordance with art 368 was a 'law' within the meaning of art 13(2), and therefore void if it contravened any of the Fundamental Rights. The Court overruled its previous decisions.

The Court had to soften that blow in view of the fact that, under the impugned amendments, several transactions changing property relations had taken place. It would have caused great havoc economically, socially and politically, if the overruling had retrospective effect. Therefore the majority held that its ruling, that art 13 applied to constitutional amendments, would only operate from the date of its decision. Although the three impugned constitutional amendments would otherwise have been void, they were deemed to be valid since their inception and even into the future. Speaking for himself and four other judges, Chief Justice Subba Rao called this 'propective overruling' of the previous decisions. In his separate concurring judgment, Justice Hidayatullah reasoned that since the Court had previously acquiesced in the validity of those amendments, by upholding them, they could not now be struck down. This endorsement of prospective overruling opened up a new perspective on the judicial process. It flew in the face of the theory that the judges did not make law, but merely interpreted it. Gokulnath was decided by a bench of eleven judges. When the decision in that case was challenged, a larger bench of thirteen judges was convened to consider the

The Judges

Article 124(2) provides that Supreme Court judges are appointed by the President, after consultation with such of the judges of the High Courts as the President may deem necessary. They then hold office until the age of 65 years. The first proviso to this clause provides that in the appointment of a judge other than the Chief Justice, the Chief Justice must always be consulted. Article 124(3) provides that no person shall be appointed as a judge of the Court unless he is a citizen of India, and (a) has for at least five years been a judge of a High Court or of two or more such courts in succession; or (b) has for at least ten years been an advocate of a High Court or two or more such courts in succession; or (c) is, in the opinion of the President, a distinguished jurist. The second proviso to art 124(2) states that a judge may resign or be removed for misbehaviour or incapacity. A resolution for such removal may be introduced in either House of Parliament, but is taken up for consideration only after the judge is found guilty of misbehaviour or incapacity in an inquiry conducted by a committee. A resolution for removal of a judge must be passed in each House of Parliament with the support of two-thirds of the members present and voting, and an absolute majority of all the members of the House. There has been only one attempt to impeach a judge of the Court (Justice Ramaswamy), which failed due to lack of support by the required number of members of Parliament. The judges' salaries, allowances and other privileges are to be determined by law made by Parliament, and until such law is made, are as prescribed in the second schedule. Such privileges cannot be varied to the disadvantage of a judge after her appointment.

Since the Court's inception, the most senior judge has almost always been appointed as the Chief Justice upon a vacancy arising. In 1973 and 1977, however, the most senior judges were passed over (superseded) by the government, because they had decided important cases against it. Since then, the rule of seniority has once again been followed. The Court has had 35 Chief Justices since its inception. While Chandrachud had the longest term, of more than seven years, KN Singh had the shortest term, of seventeen days. The rule of seniority is now applied even in the appointment of the Court's puisne judges. Most of them are appointed after first having served on a High Court, and then as a Chief Justice of another High Court. This delays the elevation of judges to the Court, with the result that they have been some exceptions, for example, appointments to the Supreme Court directly from the Bar. But these preceded the judges cases, discussed in the text to an 281-45, below.
have very short terms before having to retire. This has adversely affected the individual contributions that the judges can make to the development of the law.

The Court draws judges from different states, and as far as possible its composition reflects the entire ethnic, religious and cultural diversity of India. In gender composition is, however, poor. It has only one woman judge. The strength of the Court was seven, excluding the Chief Justice, in 1950. It rose to ten in 1956, thirteen in 1961, seventeen in 1977, and twenty-five (excluding the Chief Justice) in 1980. A cursory glance at the profiles of the judges reveals that out of 136 judges appointed until 1999, thirteen were Muslims, four Christians, two Sikhs, and two Parsis. Of the 115 judges who belonged to the majority Hindu community, 24 were described as Brahmans, the highest caste in the Hindu caste system. The judges come mainly from urban, and higher economic backgrounds; only two have belonged to a Scheduled Caste or Scheduled Tribe.

Problems and Methods of Interpretation

The Choice of Methods

Positivist and structuralist interpretation

There are basically two models of constitutional interpretation. One is legal positivism, which holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else. This model emerges from the 'black letter law' tradition, which seeks to interpret law as a distinct, relatively autonomous reality. Law is separated from morality, and interpreted in accordance with self-contained principles and concepts.

In the second model, which we will call structuralism, the Constitution is interpreted liberally, as a totality, in the light of the spirit pervading it and the philosophy underlying it. A structuralist interpretation aims to articulate the implicit nuances of the Constitution, but may vary according to the ideological or philosophical predilections of the judges. It accords a wider role to the judiciary, which is required to be creative. According to Justice Cardozo, a written constitution 'states or ought to state not rules, but principles for an expanding future'. Structuralist interpretation can also be called teleological, meaning that it understands the Constitution to be intended to achieve certain purposes. It is, in that sense, result-oriented.

The Court began by taking a positivist approach to constitutional interpretation. But judicial review under a written constitution with a bill of rights cannot remain merely positivist, because the expressions used in it are often open-textured and continue to acquire new meanings. Over the years, as Indian democracy grew, the Court gradually moved to a structuralist approach. This movement was not linear, or even chronologically coherent. There were disentanglements during the initial period of positivism, and zig-zag forwards and backwards during later periods.

The colonial heritage

In England, Parliament being supreme, there was no judicial review of Acts of Parliament. Courts in colonial India were steeped in that tradition, and even though the colonial legislatures did not enjoy the sovereignty of the Imperial Parliament, Indian courts were reluctant to strike down statutes. In fact, they tended to construe legislative powers in the widest terms. In Queen v Burnab, the Privy Council rejected the view that Indian legislatures were mere delegates of the Imperial Parliament, and held that they had plenary legislative power as vast as that of the Imperial Parliament itself. Subject only to such restrictions as had been explicitly stated in the Acts of Incorporation. This liberal interpretation of the legislatures' power was based on British tradition, and the premise that a Constitution is a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be. Such a liberal interpretation also entailed maximum deference to the legislatures' will. The Supreme Court later held that legislative power must be construed in the widest possible terms. Unless limited by the Constitution, it includes power to legislate retrospectively and to validate otherwise invalid laws or executive acts, and all ancillary and residual powers.

Liberal interpretation of legislative power was combined with a positivist interpretation of the constitutional limitations imposed on it. HM Seervai, when commenting on constitutional law, stated the principles as follows:

Well established rules of interpretation require that the meaning and intention of the framers of a Constitution—be it a Parliament or a Constituent Assembly—must be ascertained from the language of the Constitution itself with the motives of those who framed it, the Court has no concern.

The constituent assembly and the role of the judiciary

The positivist model of judicial review was preferred by many leaders of the National Movement, including Prime Minister Nehru. They agreed that the
future Indian Constitution should contain a bill of rights, which would assure the
appréciations of minorities, and protect individual liberty against the executive.
But the leading members of the Constituent Assembly were apprehensive of
the wider role thereby given to the judiciary. A debate revolved around the scope
of judicial review, particularly articles 21 and 31 of the draft Constitution.
Article 21 provided that no one shall be deprived of life or personal liberty
without due process of law, and art 31 protected the right to property. The words
‘due process of law’ were strongly opposed by those who recalled the American
experience of judicial review during President Roosevelt’s New Deal program.
Supporters of parliamentary supremacy apprehended that since the words ‘due
process of law’ were vague, they might be used to obstruct the agenda of economic
reconstruction, leading to ‘the future of the country’ being determined not by the
collective wisdom of the representatives of the people but by the whims and
vagaries of lawyers elevated to the judiciary. These members of the Constituent
Assembly wanted judicial review to operate in the same manner as it did in
England. Nehru said:

Within limits, no judge and no Supreme Court can make itself a third chamber (of the
Legislature). No Supreme Court and no judiciary can stand in judgment over the
sovereign will of Parliament representing the will of the entire community. If we go wrong
here and there, it can point it out but in the ultimate analysis, where the future of the
community is concerned, no judiciary can come in the way. And if it comes in the way,
ultimately the whole Constitution is a creature of Parliament.97

On the other hand, some members did have reservations about this conception
of the judicial role. In particular, leaders representing minority groups could not
support the doctrine of parliamentary supremacy, because they felt that it would
ultimately amount to the permanent supremacy of the religious majority.
Dr BR Ambedkar, a leader of the oppressed castes called ‘untouchables’, who had been
an opponent of the Congress Party during the National Movement, was
elected by the Constituent Assembly as the chairman of the Constitution’s
drafting committee. Expressing his apprehensions about the non-inclusion of
the due process clause, he said:

In a federal constitution, it is always open to the judiciary to decide whether any particular
law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation
which are granted by the Constitution to the particular legislature… The ‘due process clause’, in my judgment, would give the judiciary the power to question the law made by
the legislature on another ground. That ground would be whether that law is in keeping
with certain fundamental principles relating to the rights of the individual. In other words,
the judiciary would be endowed with the authority to question the law not merely on the
ground whether it was in excess of the authority of the legislature, but also on the ground
whether the law was good law, apart from the question of the powers of the legislature
making the law.98

Dr Ambedkar expressed the dilemma of whether it was preferable to ‘leave the
question of liberty to a majority in Parliament, which was often motivated by
partisan political considerations, or to leave it to a few judges. He further reflected:

We are therefore placed in two difficult positions. One is to give the judiciary the authority
to sit in judgment over the will of the legislature and to question the law made by the
legislature on the ground that it is not good law, in consonance with fundamental principles. Is
that a desirable principle? The second position is that the legislature ought to be trusted
to make bad laws. It is very difficult to come to any definite conclusion. There are
dangers on both sides. For myself I cannot altogether omit the possibility of a Legislature
packed by party men making laws which may abrogate or violate what we regard as certain
fundamental principles affecting the life and liberty of an individual. At the same time,
I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining
laws made by the Legislature and by virtue of their own individual conscience or their bias or
their prejudices can be trusted to determine which law is good and which law is bad.99

Ultimately the words ‘procedure established by law’ replaced the words ‘due
process of law’ in art 21.

The Legal Positivism of the Early Years

The first judges of the Court either had been judges of the Federal Court of India,
or were elevated from the High Courts. Naturally, they were inheritors of the
colonial legal tradition. In AK Gopalan v India,100 the first constitutional case
heard by the Court, the influence of the black letter law tradition was evident. The
partition of the sub-continent, and consequent communal carnage on both sides
of the new divide, had persuaded the Constituent Assembly to retain provisions
for preventive detention, without trial, in the Constitution. Such provisions had
existed in British India during the War, and had been severely criticized by Indian
freedom fighters, despite having been strictly construed by the Privy Council.101
Article 21 of the Constitution provides that no person shall be deprived of life or
personal liberty except according to procedure established by law. Some required
procedures are laid down in cl 2(1) and (2), which were described previously,
but cl (3) makes these inapplicable to any person who is arrested or detained

95 The Congress had appointed a committee in 1928 under the chairmanship of Motilal Nehru,
father of Jawaharlal Nehru, to suggest reforms in the Constitution. That committee had recom-
mended the inclusion of a bill of rights in the Constitution. A resolution accepting that suggestion
was passed at the Karachi session of the INC held in 1931. See B Shiva Rao The Emerging of Indian
Constitution A Study (The Indian Institute of Public Administration, New Delhi, 1968) 175.
96 BN Rau, the constitutional advisor had met Justice Frankfurter of the United States Supreme
Court, and had been advised by him not to include the due process clause in the Constitution, because
the power of judicial review implied it would be undemocratic. Shiva Rao (n 95) 255, 257.
97 Shiva Rao (n 95) 284.
98 CAD Vol 5, 1159. The Constituent Assembly went on to fraction as a Provisional Parliament
under art 379 of the Constitution.
99 CAD Vol 7 1006.
100 Ibid.
101 AIR 1950 SC 27.
102 Emperor v Shastri Ramchand AIR 1945 SC 156 overruling Keshu Talpade v Emperor AIR 1943 PC 1.
under any law providing for preventive detention. Clauses (4) to (7) prescribe the procedures to be adopted in the case of preventive detention. Article 19 guarantees seven freedoms to the citizen, including freedom of movement throughout India. Power to make a law authorizing preventive detention is given to both Parliament and the state legislatures in the Seventh Schedule.

In the *Gopalas* case, the validity of the Preventive Detention Act 1950 was challenged. Two questions were raised: (i) whether the Act offended art 19, and (ii) whether it offended the freedoms guaranteed by art 19. The petitioner's first objection was that the procedure provided by the Act did not satisfy the words 'procedure established by law' in art 21, which were argued to mean such procedure 'as conform to the principles of natural justice'. The word 'law' in the phrase was held to mean either 'enacted law' or 'law' (just law). If the former meaning was to be held, then the word 'law' as just law would be more consistent with the spirit of the Constitution than if the Court dismissed this argument, and held that 'law' meant enacted law. Kania CJ said:

'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. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument.'

*The Court would not enter into the question of whether the procedure was fair. Kania CJ relied upon the absence of the word 'due' in art 21. By adopting the phrase 'procedure established by law', he said, the Constitution gave the Legislature the final word to determine the law.*

Justice Fazl Ali, in dissent, asked whether 'the principle that no person can be condemned without a hearing by an impartial tribunal, which is well recognized in all modern civilized systems of law, cannot be regarded as part of the law of this country'. The Privy Council had declared in a number of cases that it would interfere with the decisions of lower courts if they committed a breach of the principles of natural justice. The Constituent Assembly had avoided the use of the word 'due process of law' because it wanted to eschew substantive, as opposed to procedural, due process. Procedural due process, according to the learned judge, had long been part of the established law.

The second question before the Court concerned the relationship between articles 19 and 21. Article 19(1)(d) granted citizens seven freedoms, including freedom of movement throughout India. It was contended that the law of preventive detention offended this freedom, and that the Court should examine whether it constituted a reasonable restriction, as permitted by art 19(5). All the judges except Fazl Ali J. held that art 19 and 21 had to be read as mutually exclusive. Only a citizen who was otherwise free was entitled to the freedoms guaranteed by art 19, whereas art 21 provided that life and personal liberty could only be taken away by law. If a person were arrested and detained, the only question the Court could ask was whether her arrest or detention had been authorized by law. The words 'personal liberty' were very narrowly construed to mean freedom from arbitrary arrest. The right to life received no attention. In dissent, Fazl Ali J. laid down a seminal principle of constitutional interpretation, which has since been followed by the Court in several cases. He said:

'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 Arts 19, 20, 21 and 22 do not to some extent overlap each other.'

Fazl Ali J.'s approach to constitutional interpretation stands out as an alternative to the majority's positivism. It seems that the judges were in a dilemma as to the exact nature of their role. They realized that a federal constitution with a bill of rights could not be interpreted in a technocratic manner. Despite its detail and specificity, it contains expressions that are pregnant with various nuances, which must be articulated from time to time. The Constitution entrusts to the Court the responsibility of striking a balance between liberty and authority. This was implicit in art 19, whose sub-clauses allowed reasonable restrictions on freedoms guaranteed by cl (1). Referring to this, Chief Justice Patanjali Sastri once said:

In evaluating such clausal factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judge participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and the majority of elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable.

The learned judge admitted that filling in the leeways of choice left by the constitutional text made the import of a judge's social philosophy inevitable. But cautioned that the judge had to be objective and give maximum deference to the will of the Parliament. The judges were in a dilemma because their tradition required them to be positivist, but the nature of the Constitution required them to look to...
it as an organic law to be interpreted "not simply by taking the words and a dictionary, but by considering their origin and the line of their growth".114

External Aids to Interpretation

Legal positivism, strictly speaking, does not permit the use of external aids, such as debates in Parliament or the Constituent Assembly, to find out what the founders intended. But the Court has held that external aids may be used where the text of the Constitution is unclear.115 The debates in the Constituent Assembly are well documented in 12 volumes published by the Government of India, and these may be referred to when the text of the Constitution is not explicit.116 An example concerns the doctrine of responsible government. Although the Constitution provides that there shall be a Council of Ministers headed by the Prime Minister to aid and advise the President, it did not state that the President was bound to act according to such advice.117 The Court held that the President was bound to act on the Council's advice.118 This decision was based on the debates in the Constituent Assembly and the theory of parliamentary democracy. The Constitution was subsequently amended to explicitly state that the President is bound to act on the advice of the Council of Ministers.119

From the beginning, the Court referred to the decisions of courts in England, Australia, Canada and the United States. Lastly, the Court has also cited decisions of the apex courts of other countries, such as South Africa, Sri Lanka, Pakistan, and Bangladesh. As the Court's judgments have become more structuralist and sociological, the citation of academic writings has also increased.

Interpreting the Federal Distribution of Power

A major concern of judicial review in most federal polities is to keep the federal and state legislatures within their respective limits. The Indian Constitution contains an elaborate division of legislative powers in art 246, read with the three lists in the Seventh Schedule.120 But few legal disputes concerning these powers have arisen, for three reasons. First, the powers in these lists were meticulously drafted, compared with legislative powers in Australia and Canada, which are relatively more abstract and therefore contentious. Secondly, the Indian Constitution is quite explicit about the overwhelming power of the federal legislature and

115 On how the debates in the Constituent Assembly can be referred to as external aids see HM Secre. Constitutional Law of India, Vol 1 (4th edn., NM Tagore, 2000)
117 See Gokhale v I.M. IMA Foundation in Karnataka 2002 SCC 481.
118 Article 74(1).
120 See I.M. IMA Foundation in Karnataka 2002 SCC 481.
121 See Justice Holmes in Gompers v US 238 US 609, 610 (1915).
Parliament has used the entire power in legislating on an item in that list, it is said that the 'held' has been wholly occupied. If, in enacting a law, Parliament intended to cover the entire field, the state law is held to have the same matter is void. 128

Resolving Conflicts between Constitutional Provisions

The rule of harmonious construction is invoked when two provisions of the Constitution conflict. An interpretation is adopted that does not make either of them absolute, but gives effect to both. This methodological rule in, but itself, neither positivist nor structuralist. It can be applied either in a positivist, or in a structuralist, fashion. This accounts for the different conclusions that judges have reached in applying it.

Freedom of religion

A section of the Hindu community called 'untouchables' was denied access to Hindu temples, and reformers had campaigned to give them such access. Article 25(1) guarantees freedom of religion, and cl (2)(b) provides that the State has power to open Hindu religious institutions of a public character to all sections of Hindus. But cl (2)(b) guarantees to religious denominations the right to manage their own affairs in matters of religion. In Sri Venkataramana Desam v. Ayyappa Swamy, 129 the validity of the Madras Temple Entry Authorization Act 1947, which provided access to a temple to all sections of Hindus, was challenged by the temple's trustees on the ground that it restricted their seat's right to manage its own affairs in matters of religion, by derailing the ability to concede access to its members. The Court took the view that the seat's right under cl (2)(b) was in apparent conflict with the states power under cl 25(2)(b) to open Hindu temples of a public character to all Hindus. The apparent conflict was resolved by applying the rule of harmonious construction. The Court held that while the seat could not deny access into the temple to the members of other castes, it could restrict access to the inner space surrounding the deity to its own members. This was because cl 25 begins with the words 'subject to the other provisions of this part', which are absent in cl 26. This positivist treatment of the two articles as being in conflict was due to the Court's practice of reading each article separately, as a code in itself. The Court put cl 25 and 26 on an equal footing. If it had read the Constitution as a whole, the right of the religious denominations to manage their affairs under cl 26 would have been subject to the state's power to open Hindu temples to all Hindus under cl 25(2)(b). These provisions must be read in the context of the social-reform movement that accompanied the national movement for independence. The

129 (1935) SCR 895; AIR 1958 SC 272.

Framers of the Constitution were apprehensive of the wide sweep of religion in Indian life. If freedom of religion were given a unrestricted scope, practices such as untouchability, sati (the burning of a widow on her husband's funeral pyre), or even human sacrifice, might have masqueraded as religious practices. Article 25 starts with the words 'subject to public order, morality and health and to other provisions of this part', specifically to make religious freedom subordinate to other rights, such as equality, the abolition of untouchability, and freedom of speech, and to the States power under cl 25(2)(b) to make laws for social welfare and reform, including the opening of public Hindu religious institutions to all Hindus. The rights of religious denominations surely cannot be greater than the rights of individuals to freedom of religion. Therefore, the most legitimate interpretation would have been to treat cl 26 as supplementary to cl 25, and subject to the qualifications and restrictive clauses included in cl 25. This structuralist interpretation would have made it unnecessary to invoke the rule of harmonic construction.

Powers and privileges of legislatures

The Constitution provides that the powers, privileges and immunities of each House of Parliament, or of a state legislature, may be defined by Parliament or that legislature by law, and until so defined, are those that were enjoyed by the British Parliament at the time the Constitution commenced. 130 In MSM Sharma v. Sri Ramachandra Sinha, 131 the majority held that the privileges of the legislature were not subject to freedom of speech, which includes freedom of the press, guaranteed by cl 19(1)(a). The majority applied the maxim genusia specialibus non derogat. Since cl 19(1)(a), and the later article dealing with legislatures' privileges, were both part of the Constitution, the latter, being a special provision, prevailed over the former, which is a general principle. This was a highly positivist interpretation. If Parliament or a state legislature were to enact a law defining its own privileges, that law would be subject to the Fundamental Rights. It therefore suits the Parliament and legislatures to leave their powers and privileges uncodified, so that their exercise cannot be challenged by reference to Fundamental Rights. Subha Rao J, in his dissenting judgment, held that legislative privileges must yield to freedom of the press. But although freedom of speech, and legislatures' privileges, are both protected by the Constitution, why should either of them be subordinated to the other? Should the Court not weigh up these competing interests; and decide how they should be balanced in each situation? A more empirical approach to harmonizing them would have been desirable.

The question of priority between Fundamental Rights and legislatures' privileges arose again, when the President sought an advisory opinion from the Court.

130 Art 109(3); Art 194(3); as originally enacted by s 15 of the Constitution (Forty-Fourth Amendment) Act 1976, such powers and privileges remained as they were before the enactment of that Act, until they are redefined by the Parliament or legislature.
131 AIR 1959 SC 395, 409.
concerning a dispute between the Allahabad High Court and the Legislative Assembly of the State of Uttar Pradesh. The Assembly had reprimanded one Keshav Singh for contempt, after finding that he had libeled one of its members and—when brought before it—flaunted his disrespect for it. When Singh then wrote a letter describing the Assembly’s actions as a ‘brutal attack on democracy’, it passed a resolution sentencing him to seven days’ imprisonment. A petition was filed on his behalf to the Allahabad High Court, which ordered his release on bail. The Assembly then issued a notice to Singh, his advocate, and the judges of the High Court who had heard his petition, asking why action should not be taken against them for contempt of the Assembly. The High Court, with all the judges sitting except those against whom notices had been issued, stayed the Assembly’s order.

The President’s reference to the Court’s included questions regarding the competence of the Assembly to proceed against the judges for contempt, and of the courts to entertain petitions against, and to stay, orders made in the Assembly’s exercise of a privilege. The majority held that the courts had power to entertain a petition seeking relief against an order for a person’s arrest, on the ground of its alleged infringement of a Fundamental Right outside the precincts of the legislature. But the Court did not overrule the decision in Sharma, and therefore continued to allow the legislatures’ privileges to override freedom of the press.

Towards Sociological Interpretation

During the early 1960s, the Court started moving towards the model of structuralist interpretation. We will briefly survey some landmarks cases that illustrate this change in its approach.

Affirmative Action for the weaker sections of Society

Article 46 contains a Directive Principle that requires the State to ‘promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and [to] protect them from social injustice and all forms of exploitations’. The Scheduled Castes are those who suffered from the practice of untouchability, and the Scheduled Tribes are indigenous peoples who for centuries were excluded from access to education and gainful employment. In 1951, the Court held that if there is a conflict between a Directive Principle and a Fundamental Right, the latter must prevail. Therefore, a provision for the reservation of places in an educational institution, in purview of art 46, was held void for violating the Fundamental Rights in arts 15(2) and 29(2), which explicitly forbid discrimination on the grounds of religion, caste, race, place of birth, and so on.133 They are species of the general guarantee, in art 14, of equality before the law and equal protection of the law.

The Constitution was immediately amended, and cl (4) was added to art 15, providing that nothing in arts 15(2) or 29(2) shall prevent the State from making any special provision for the advancement of socially and educationallybackward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.134 This extended the principle of affirmative action, already contained in art 16(4), with respect to government employment. Article 16(2) prohibits discrimination on the grounds of religion, race, caste, sex, and so on, in respect of any employment or public service in favour of any backward class of citizens, which, ‘in the opinion of the State’, is not adequately represented in the services under the State.

The term ‘backward classes’ was rather nebulous, and needed to be specified, but the government seemed to be free to decide what they were, and how many reservations were needed for them. But the Court imposed judicial control on the exercise of this power. In Balaji v Mysoor,135 it held that it could decide whether backwardness had been determined on the basis of relevant considerations. It held that although caste might be one of the factors, it could not be the only factor in determining backwardness. The words ‘backward classes’ in art 16(4) have been read by the Court in the same sense in which the words ‘socially and educationally backward classes’ are used in art 15(4). Usually, the Court expects that people whose life conditions are similar to those of the Scheduled Castes and the Scheduled Tribes should be categorized as backward. The Court also imposed criteria on the extent of reservations of places in educational institutions, by holding that not more than fifty percent of the places may be reserved. In Chiranjeev v Mysoor, it extended this formula to the reservation of government jobs under art 16(4).136

These decisions in the early 1960s have stood the test of time. In 1989, when the government reserved 27 per cent of government jobs for the backward classes, it triggered a fierce class conflict between the advanced and the backward classes. The government responsible for this decision collapsed, and the constitutionality of the reservation was challenged in the Supreme Court. In Indira Sawney v India,137 the Court reaffirmed the restrictions on affirmative action laid down in Balaji and Chiranjeevaha. It upheld the criteria of backwardness used in the Mandal Commission’s report, which had been the source of those decisions.138 The Court further held that ‘creamy layers’ among the backward classes—those whose social and economic positions has already been improved—should be gradually
excluded from the benefit of reservations. It also held that there should be no 
reservations in promotion. The logic of these decisions is that the reservations 
contemplated by the above provisions must be interpreted homogeneously with 
the right to equality. In other words, the State’s power to reserve places for dis 
advantaged people has the same goal as the right to equality, and is therefore 
limited by that goal. This is a very good instance of structuralist interpretation.

**Freedom of speech**

Freedom of speech and expression, including freedom of the press, is of vital 
importance in any democracy. These freedoms are protected by art 19(1)(a), 
although cl (2) permits reasonable restrictions in relation to state security, public 
order, public health, and other specific, compelling interests. Article 19(1)(g) 
prohibits restrictions in the interest of the general public. **Sakal Newspapers (Private Ltd) v India** concerned the validity of a price and page schedule, prescribing what 
price newspapers could charge for a given number of pages, how many pages they 
could print, and how much space they could set aside for advertisements. The 
purpose of the schedule was to protect small, special language newspapers 
from being crushed by the economies of scale enjoyed by mass circulation, 
English language newspapers. The schedule was challenged as being an unreason 
able restriction on freedom of the press, protected by art 19(1)(a). The Union 
responded that the press was a trade or business, and the schedule imposed 
reasonable restrictions in the interest of the general public, as permitted by 
art 19(6).

The Court held that the press was not a mere trade or business when it disseminated 
news and opinion to people. It could be considered a trade or business when it dealt 
with its employees, and when the law required it to pay them wages at a 
prescribed rate. But requiring the newspapers to publish more pages, or to 
charge a lower price, than prescribed amounts, was a restriction on freedom of the 
press rather than on freedom to carry on a trade or business. These requirements 
did not come within the restrictions on freedom of speech permitted by art 19(2), 
which are much more specific than the 'interest of the general public' that can 
justify restrictions imposed on a mere trade or business under art 19(6). The 
Court stated that restrictions imposed on freedom of speech would be subjected to greater 
scrutiny than restrictions on freedom of trade or business, which implies that the 
latter enjoy a stronger presumption of constitutionality than the former. This was 
reiterated in a later case. The Court thus accorded a preferred position to freedom of 
speech over freedom to engage in trade or business, even though there 

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139 The Court held in 1956 that freedom of speech and expression includes freedom of the press, 
and that prior censorship of the print media is unconstitutional: **Ramesh Thapar v Madras AIR 1956 
SC 152.**

140 **Bihar v Ramabai AIR 1952 SC 252**

141 The Constitution (First Amendment) Act 1951, s 4. See SF Sathe, Constitutional Amendments 
not be challenged on the ground of their inconsistency with any of the Fundamental Rights. Over the years, this Schedule expanded through additions made by subsequent amendments. While it originally included only 13 statutes, it now lists 284.

Article 31 provided for 'deprivation' in cl (1), and 'acquisition' in cl (2). One can be deprived of one's property, including choses in action, even if that property does not vest in the State. Such deprivation can result from the exercise of public powers, and also from the abolition of certain rights that have become obsolete and socially unjust. For example, if the State temporarily takes over management of a commercial mill or factory, to rectify inefficiency or mismanagement, this amounts to 'deprivation' within the meaning of cl (1), but not to 'acquisition' within the meaning of cl (2). So, too, if the State intervenes to require the waiver of the repayment of certain loans, by money lenders who have already earned and earned usurious interest. Did the State have to pay compensation when it intervened to protect the public interest by way of deprivation, but not acquisition, of property? Parliament maintained that the State must have the freedom to undertake such social engineering without being burdened with this heavy liability. But the Court held that compensation was payable when a person was deprived of her property, even if it was not 'acquired' by the State.

In the Constituent Assembly, it had been agreed that Parliament's decisions regarding the method, the principles, or the quantum of compensation would be final, and that no court could interfere except to prevent a fraud on the Constitution. There was never any intention to expatriate private property without compensation in ordinary cases of 'petty acquisition', that is, acquisition of land for ordinary governmental purposes. Nehru acknowledged that these cases would continue to be governed by the existing Land Acquisition Act 1894, which provided for acquisition of land for public purposes on payment of compensation equivalent to the market value of the property and 15 per cent salutation. Compensation at less than market value was to be reserved for exceptional cases involving the redistribution of large holdings resulting from unjust enrichment. But in spite of this, the Court held that compensation must be equivalent to the market value of the property acquired.

Parliament attempted to overturn these decisions by the Constitution (Fourth Amendment) Act 1955, which clearly stated that compensation would be payable only when property was transferred to the State or a State corporation, and not when one was otherwise deprived of it. 156 and that the adequacy of compensation would not be justiciable. But despite this clear provision, the Court subsequently held that any 'compensation' must not be illusory, and must bear some relation to the value of the property. On this basis it held invalid, in the Bank Nationalization Case, an Ordinance by which the Government had nationalized 14 banks. 157 Had the Court applied the same reasoning to this result, it would have been avoided. In 1971, Parliament responded once again, with a new 'amount.' Article 19(1)(f) guarantees to citizens the right to acquire, hold, and dispose of property, subject to the power of the State to impose reasonable restrictions in the interest of the general public and the Scheduled Tribes. Following the principle laid down in Gopalani, of determining the provisions of arts 19(1)(d) and 21 of the Constitution separately, and treating each as a code by itself, the Court also rejected this approach. Thus, if a person was deprived of his property or if it was acquired by the State, art 21 applied and not art 19(1)(f). When restrictions were imposed on the acquisition, holding or disposal of property that a citizen otherwise continued to possess, art 19(1)(f) could be invoked. But when Parliament amended art 31, to restrict judicial review, the Court changed its previous interpretation, and held that arts 19(1)(f) and 31 could be read together. This enabled a law depriving a person of her property, which could not be challenged for providing inadequate compensation, to be assailed as an unreasonable restriction on the right to hold property granted by art 19(1)(f). This expanded the scope for judicial review, allowing the court to play a more creative role in deciding what constituted an 'reasonable restriction in the interest of the general public,' as permitted by art 19(5), the Court could have paid maximum deference to the will of the Parliament, and taken sociological facts into consideration. But it did not.

A strong right to property could not attain legitimacy in a country where a large number of people are poor and marginalized. Those more the Court used its activism to save private property from social engineering, the greater was the loss of legitimacy sustained by the right to property. As interpreted by the Court, this right seemed to frustrate the socialist objectives reflected in the Directive Principles. Ultimately the right to property was deleted from the Fundamental Rights, and became a mere constitutional right without implying any promise of compensation for its loss. A new Art 300 A protects private property only from executive action. Article 19(1)(f) was also repealed by the same constitutional

157 RC Cooper v. India AIR 1970 SC 564.
158 Constitution (Twenty-Fifth Amendment) Act 1971, s 2.
161 Sec 6 of the Constitution (Fifty-Fourth Amendment) Act 1978 repealed art 31(1) of the same Act inserted by the 34th Amendment (See 300-A in Part XII after Art 31 under the title 'Right to Property').
The fact that the ultimate repeal of the right to property as a Fundamental Right was sponsored by the Janata government, which was an alliance of various parties that defeated the Congress party in the 1977 election, shows that the repeal had broad-based political support. This is confirmed by the fact that the validity of the Forty-Fourth Amendment was never challenged, and there have been no further confrontations between the Court and Parliament over the right to property.

Towards Structuralist Interpretation: the Basic Structure Doctrine

The history of the right to property shows how Parliament could override judicial decisions through the exercise of its constituent power contained in article 368. But despite the desirability of the amendments pertaining to the right to property, a broader question concerning the scope of Parliament's power to amend the Constitution became critical. The validity of the Constitution (First Amendment) Act 1951 was challenged in Shankar Prasad v India (1951), on the ground that since a constitutional amendment is a law, it is subject to article 13(2), which forbids the making of any law that takes away or abridge any Fundamental Right. This argument was rejected by a unanimous bench of five judges. The challenge was renewed in Sajjan Singh v Rajawat (1965), when the constitutional validity of the Seventeenth Amendment was challenged. While a three-two majority confirmed the earlier decision, and upheld Parliament's absolute power to amend the Constitution, the dissenting judges went beyond the question of the right to property. Hidayatullah J (as he then was) said:

I would require stronger grounds than those given in Shankar Prasad's case to make me accept the view that Fundamental Rights were not so fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution. 166

He asked whether Fundamental Rights should be 'the plaything of a special majority.' 167 This became the crux of subsequent controversies. Two years later, in Gokhale v Pranab, 168 the Supreme Court by a majority of six to five overruled the previous decisions, and held that the power to amend the Constitution did not extend to the abrogation of any of the Fundamental Rights. The case involved the validity of the first, fourth, and seventeenth amendments, which had foreclosed judicial review of laws for the acquisition of property. As previously noted, the majority held that its decision would only have a prospective effect, and so those amendments were saved from invalidation. 169

Gokhale was a big jolt for Indian constitutional lawyers. Most of them had been brought up in the black letter law tradition, and regarded the majority judgment as unsustainable. H.M. Seervai, author of a leading treatise on Constitutional Law and a former state Advocate-General, condemned the majority judgment as clearly wrong and 'productive of the greatest public mischief,' and called for it to be overruled at the earliest opportunity. 170 Gokhale was in a sense a turning point in the history of the Court, because it amounted to a major change in its interpretive methodology, and an open admission of its law-making role. 171 The majority justices plainly attempted to curb Parliament's amending power, and thereby contain the legislative majority. The sentiment expressed in the judgment was openly counter-majoritarian. It was observed that the Fundamental Rights were the modern name 'for what has been traditionally known as natural rights,' 172 and that 'absolute arbitrary power in defiance of fundamental rights exists nowhere under our Constitution, nor even in the largest majority.' 173 But the majority reached this conclusion by adopting a literal, positivist interpretation of articles 13(2) and 368, which, as we will see, was itself vulnerable to being over-ridden by constitutional amendment.

The government of Prime Minister Indira Gandhi was very unhappy with the decisions of the Court in the Gokhale and Bank Nationalization cases. 174 It complained that the Court would neither allow the Constitution to be amended, nor interpret the Fundamental Rights with a view to accommodating legitimate aspirations reflected in the Directive Principles of state policy. The Court seemed determined to stall the march towards socialism. On the Prime Minister's advice, the President dissolved the lower House of Parliament, and new elections were held. The Congress party's manifesto declared that if it won government, it would make basic changes to the Constitution. The party won a landslide victory, capturing more than two-thirds of the seats in the lower House. It was obvious that the image of the Court, as a friend of the wealthy and defender of the status quo, had galvanized popular support for the ruling party.

Pursuant to its election manifesto, the government sponsored major constitutional amendments to reduce the power of the Court. The Twenty-Fourth Amendment sought to restore to Parliament an unrestricted power of constitutional amendment, the Twenty-Fifth Amendment made changes to the right to property, and the Twenty-sixth Amendment abolished the privy purses of the princes. The
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Pursuant to its election manifesto, the government sponsored major constitutional amendments to reduce the power of the Court. The Twenty-fourth Amendment sought to restore to Parliament an unrestricted power of constitutional amendment, the Twenty-fifth Amendment made changes to the right to property, and the Twenty-sixth Amendment abolished the privy purses of the princes. The
validity of these amendments was challenged, and determined by a bench of 13 judges in Kesavananda Bharati v. Kerala.\footnote{AIR 1973 SC 1475.}

The majority in the Golaknath case had held that art 368 merely provided for the procedure, and not the scope of the power of constitutional amendment. That interpretation was based on the marginal note to art 368, which read: 'Power of Parliament to amend the Constitution and procedure thereof'.\footnote{The Constitution (Twenty-Fourth Amendment) Act, 1971 3.} Given such explicit words, the Court could not subscribe to the interpretation of art 368 as purely procedural. The Golaknath case majority had also held that the word 'law' in art 13(2) included other-\footnote{\textit{ibid} 3.} constitutional amendment. The Twenty-Fourth Amendment declared other-\footnote{Similar provision was made in art 368 clause (3) by 3.} constitutional amendment. All the objections taken in the Golaknath case were therefore disposed of, and the Court upheld the Twenty-Fourth Amendment. It left the question of the Twenty-sixth Amendment to be decided later.

The Court divided seven to six on the question of the scope of the constitutional power under art 368. The majority did not concede to Parliament an unlimited power, but held that although Parliament could power of constitutional amendment. It held that although Parliament could amend any provision, it could not destroy the basic features of the Constitution. Although the text of the Constitution mentions no single clause, the Court held that the Twenty-fourth Amendment, and none was suggested in the Constituent Assembly, was from the permissive necessity to sustain it, the majority seems to have been persuaded to impose limitations on the power of constitutional amendment by the Attorney-General's claim that Parliament could not even destroy democracy and replace it by authoritarianism, or replace the constitutional state with a theocratic one. Could Parliament pass a single clause amendment totally repealing the Constitution? If the power under art 368 were unlimited, the majority also held, it could become the source of its own destruction.\footnote{See See Australin \textit{v.} Quebec, 1400 (Chief Justice Saha), 1566 (Justice Shaha). See Saha (n 86) 69.} The power under art 368 was unlimited totally repealing the Constitution? If the power under art 368 were unlimited, it would be the source of its own destruction.\footnote{\textit{ibid} 3.} The majority also held, it could become the source of its own destruction.\footnote{\textit{ibid} 3.}

The majority, according to the majority, this meant that the dissent of the majority. This 'dissentence' was what the majority described as its 'basic features' or 'basic structure'. The basic structure of the Constitution drew a distinction between the power of making a constitution, and the power of amending it. While the former was\footnote{See the statement by Nehru, at p 98 above.} at least limited, the latter was limited by the basic structure of the Constitution that was sought to be amended.

This reason was of a different constitutional methodology. There was no evidence in the debates of the Constituent Assembly that any limitation on Parliament's constitutional power, other than those expressed in art 368, was ever contemplated.\footnote{AIR 1973 SC 2299.} In fact, the Constitution (First Amendment) Act 1951, which imposed substantive limitations on judicial review with reference to certain Fundamental Rights, was passed by the Constituent Assembly itself, which attempted to be a Provisional Parliament under art 379 of the Constitution. The Court, therefore, did not consider itself bound by the original intentions of the Constituent Assembly.

In Indira Gandhi v. Rajnath Singh,\footnote{The Constitution (Thirty-Ninth Amendment) Act 1975 was challenged, against the backdrop of a draconian state of emergency proclaimed by the President under art 352, supposedly to quell 'internal disturbances', but in reality to resist agitation against Prime Minister Indira Gandhi. See \textit{ibid} 3.} the validity of the Constitution was challenged, against the backdrop of a draconian state of emergency proclaimed by the President under art 352, supposedly to quell 'internal disturbances', but in reality to resist agitation against Prime Minister Indira Gandhi. Her election to Parliament had been set aside. The Allahabad High Court, on the ground that she had indulged in corrupt practices as defined by the Representation of the People Act 1951. The thirty-ninth Amendment provided that disputes regarding the election to Parliament of a person who held the office of Prime Minister at the time of the election, or was appointed as Prime Minister afterwards, should be adjudicated by whatever authority and procedure was prescribed by law. This meant that disputes could not be adjudicated and determined by any court, unless Parliament determined its own election, declaring such an election to be void, should itself be declared null and void.

The Court held that the constitutional power, being legislative in nature, could not be exercised to settle a dispute between two parties in favour of either of them, otherwise than through a judicial procedure. Three judges held that the relevant clause of the amendment was invalid because it offended the basic structure of the Constitution, and two judges held it invalid because it amounted to a usurpation of the judicial function by Parliament.\footnote{In \textit{ibid} 3.}

It was argued on behalf of the Union that a constitutional power is not a mere legislative power, but an amalgam of all three powers of government, legislative, executive, and judicial. Any division into three separate powers takes place only after a constitution is made, if it provides for such a separation (it could provide that the sovereign may exercise all three powers). A constitutional amendment is therefore an exercise of a power anterior to and independent of the separation of powers—a kind of all-embracing super power. The constitutional power could therefore change the system of checks and balances upon which the separation of powers was based.\footnote{\textit{ibid} 3427.}
This argument was rejected. The judges pointed out that whereas the power of making the Constitution might have been anterior to the separation of powers, the power of amendment is subject to it, if the Constitution so provides. The amendment power under the Constitution is a legislative power, and its exercise must result in the making of a rule or policy of general application. Legislative power could not be exercised to determine the rights or liabilities of individuals, although it can declare the basis on which such rights or liabilities may arise.

Parliament had also amended the Representation of the People Act 1951 with retrospective effect, so as to delete those actions that were held to vitiate Indira Gandhi’s election from the definition of corrupt practices. Taking advantage of this statutory amendment, the Court held her election to be invalid. It thus avoided an immediate confrontation with her government, which had declared an emergency, while simultaneously sustaining its power of judicial review of constitutional amendments with reference to the basic structure doctrine. This was an act of subtle statesmanship on the part of the Court, comparable to that of Chief Justice Marshall in Marbury v Madison. 187

A positivist interpretation is vulnerable to changes in the text. An interpretation based on the structure or spirit of the Constitution cannot be as easily dislodged. Therefore, while the Golaknath case’s majority’s interpretation was effectively nullified by the twenty-fourth amendment, no way could be found of circumventing the interpretation adopted by the majority in the Kesavananda case. Although this was also based on the words in art 368 that ‘the Constitution shall stand amended’, it was inestimable to nullification by a subsequent constitutional amendment, because the words ‘the Constitution’ were construed as referring not merely to a document called the Constitution, but to a basic structure of checks and balances intended to sustain certain enduring values essential to a liberal, constitutional democracy.

Several attempts were made to revoke the basic structure doctrine. The Chief Justice constituted a bench of 13 judges to hear objections against it. But since the Government could not show that the doctrine might obstruct legitimate changes to the Constitution, or prevent progress towards social justice, the bench had to be dissolved. 188 Parliament then included provisions to bury the basic structure doctrine in the Constitution (Forty-Second) Amendment Act 1976. Section 55 of that Act sought to add clauses (4) and (5) to art 368, providing respectively that ‘no amendment of the Constitution ... shall be called in question in any court on any ground’, and that ‘there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution’. In Minerva Mills v India, 189 the Court held cl (5) to be ultra vires the power of amendment as interpreted in Kesavananda, and therefore invalid. It was able to save cl (4) by applying the interpretive methodology used by courts to ‘read down’ finality or outer clauses. 190 Interpreting the clause to mean merely that the validity of a constitutional amendment, which did not destroy or tamper with the basic structure of the Constitution, could not be questioned in any court.

Judicial review of a constitutional amendment vests finality in the Court. In other countries, political resistance makes constitutional amendment difficult, but in India, constitutional amendments were for a long time comparatively easy. Since the emergence of a coalition government in 1985, such amendments have had to attract a national consensus. The Court has therefore been able to use its power to strike down amendments with great restraint. Since 1973, when the basic structure doctrine was laid down, the Court has struck down constitutional amendments in only four cases. 191

The exercise of the constituent power during the 1975 emergency opened the eyes of many people who previously thought that the democratic process could be relied on to protect the rights of the people. The emergency showed that the required majority could be mustered to provide legislative sanction for draconian provisions. When Kesavananda was decided, it was widely believed that the majority justices based their decision on fear of a merely imaginary abuse of power by Parliament. But the constitutional amendments enacted during the emergency showed that such abuse was not imaginary. The decision in Indira Gandhi gave legitimacy to the basic structure doctrine. 192 For developing societies, where traditions of individual liberty and the rule of law are not yet deeply entrenched in social values, and democracy is prone to be harshly majoritarian, the safeguard of judicial review is essential.

The Court has used the Preamble of the Constitution as a basis for articulating the basic structure of the Constitution. In SR Bommai v India, 193 the Court held that the President’s dismissal of three state governments of the Bharatiya Janata Party (BJP) under art 356 was valid, because they were incapable of complying with the principle of secularism, which is included in the Preamble to the Constitution. They had been dismissed after the demolition by Hindu extremists of an ancient Muslim mosque. Although this decision was reached by a majority of six to three, all nine judges endorsed an obiter dictum that secularism was part of the basic structure of the Constitution. This unanimous declaration was a warning that even if the required majority for amending the Constitution was mustered in Parliament, any amendment destructive of secularism would be held invalid. This must be seen in the context of the BJP’s ideology of Hindu nationalism.

187 1 Cranch 137 (US 1803).
189 AIR 1980 SC 1789.
191 S F Dube ‘Limitations on Constitutional Amendment—Basic Structure Principle Re-examined’ in Dhavan, Jacob (eds), India Constitution—Trends and Issues (Oxford Law Institute, Tripathi, 1978) 179.
Interpreting Constitutions

'Secularism' did not exist in the Preamble of the original Constitution, but was added by the Forty-second Amendment in 1976.184 How could an addition to the Preamble be part of the Constitution's basic, unalterable structure?185 The Court held that although the principle of secularism was added to the Preamble only in 1976, it existed in its essence in the original Constitution.186 Although the basic structure doctrine was itself unknown to constitutional law when the original Constitution was enacted, it cannot be excluded from subsequent constitutional interpretations. Some constitutional changes occur through the process of formal constitutional amendment, and others through changes in constitutional interpretation. The interpretation of a Constitution that has undergone 92 amendments cannot be governed by reference to the original intentions of its framers.

Emergencies

Many constitutions contain provisions dealing with emergencies arising from the threat of internal or external aggression, war, or internal disorder. Laws concerning sanitation or preventive detention operate even in normal times, but there are extraordinary situations that require an extraordinary response. The State must be empowered to combat threats to its own existence. Article 352 provides that the President, if satisfied that a grave emergency exists, in which external aggression or internal disturbance threatens India's security, may issue a proclamation of emergency. Such a proclamation must be approved by resolution of both Houses of Parliament.189 Article 358(1) provides that on the proclamation of an emergency, the rights granted by art 19 are suspended, and any law that impinges on those rights is valid. Furthermore, art 359 empowers the President for the duration of the emergency. The proclamation continues to have effect in all other courts of the country.

The first proclamation under art 352 was issued in 1962, when war broke out between India and China. The President also issued an order under art 359, suspending the right to seek judicial enforcement of rights under arts 14, 21, and 22. In Makan Singh Tarantika v Punj.188 the Court rejected the argument that the proclamation was issued under art 32 of the Constitution, the provision for habeas corpus in s 491 of the Code of Criminal Procedure 1989, which pre-dates the Constitution, continued to operate. The majority took the view that the suspension of the right to move any court for the enforcement of Fundamental Rights, together with any proceedings pending in any court for the enforcement of such rights.

The second proclamation was issued in 1971, when war broke out between India and Pakistan. This emergency continued for 11 years. Before it expired, the President proclaimed another emergency on June 25, 1975, on the ground of internal disturbance. Parliament then passed a constitutional amendment to permit the President to issue different proclamations on different grounds, which could operate simultaneously.189 This amendment was given retrospective effect so as to save the 1975 proclamation from any challenge to its validity. The amendment also made the President's satisfaction as to the need for a proclamation 'final and conclusive', and beyond challenge in any court on any ground.190 The 1975 emergency was declared to enable the government to survive agitation against Prime Minister Indira Gandhi, whose election to Parliament had been set aside by the Allahabad High Court. Compared to the two previous emergencies, the 1975 emergency unleashed many draconian measures, such as censorship of the press and indiscriminate detention without trial.

The question arose as to whether a person's detention could be challenged on the ground that it was unlawful. Arguably, there was a right to bring such matters to court entitled the complete prohibition of access to any court for the enforcement of a Fundamental Right, whether under the Constitution or any other law. On the other hand, the majority held that the validity of a preventive detention could be examined on some grounds other than an alleged breach of a Fundamental Right. Such grounds could include: (i) that the Act under which the petitioner was detained was ultra vires the powers of the legislature set out in the Seventeenth Schedule, or conferred an excessive delegation of legislative power; (ii) that the detention was ultra vires the Act under which it was made; and (iii) that the order of detention was made mala fide or without due deliberation on the merits.

The majority also observed that while art 358 suspended the rights granted by art 19, art 359 only suspended access to any court concerning breaches of rights, and did not suspend the rights themselves. Therefore, while laws enacted in contravention of art 19 after the proclamation of an emergency would be valid during the emergency, laws and executive acts inconsistent with the rights specified in the Presidential order under art 359 would be void even during the emergency, although no judicial redress was available during that period. In these respects, the Court preserved judicial review insofar as it was not foreclosed by the text of the Constitution. The Constitution was subsequently amended to provide that any law or executive action infringing rights mentioned in a Presidential order pursuant to art 359 would be valid, and would not give rise to any liability.189

The second proclamation was issued on June 25, 1975, which was later extended between India and Pakistan, which led to the emergence of the new nation known as Bangladesh. This emergency continued for a year after the war ended. Before it expired, the President proclaimed another emergency on June 25, 1975, on the ground of internal disturbance. Parliament then passed a constitutional amendment to permit the President to issue different proclamations on different grounds, which could operate simultaneously. This amendment was given retrospective effect so as to save the 1975 proclamation from any challenge to its validity. The amendment also made the President's satisfaction as to the need for a proclamation 'final and conclusive', and beyond challenge in any court on any ground. The 1975 emergency was declared to enable the government to survive agitation against Prime Minister Indira Gandhi, whose election to Parliament had been set aside by the Allahabad High Court. Compared to the two previous emergencies, the 1975 emergency unleashed many draconian measures, such as censorship of the press and indiscriminate detention without trial.

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The 1975 emergency was lifted after Indira Gandhi's government was voted out in elections for the House of the People held in 1977. The new Government repealed many of the constitutional amendments passed during the emergency. It also amended the Constitution so as to impose curbs on the power to declare emergencies, and the power to suspend access to the courts. Henceforth, emergencies could no longer be declared in response to 'internal disturbances', but only

in response to 'armed rebellion', and a Presidential order under art 359 suspending access to courts could not apply to rights granted by articles 20 and 21.

While the emergency regime was reinstated in the 1977 elections, the Court was also stigmatized due to its passivity. The Jhabalpur decision cost it its credibility and legitimacy. The judiciary had to rehabilitate themselves, and this may have inspired their post-emergency activism. They may have realized that the Court might lose its credibility permanently, if it were seen as a mere rubber stamp of the ruling majority. The independence of the judiciary depends on strong public support, as well as constitutional guarantees. The Court's activism in later years was directed towards both the ends.

Post-emergency Judicial Activism

The Court's post-emergency activism concerned the following main themes: (i) liberal interpretation of Fundamental Rights and Directive Principles, so as to empower the people and especially powerless minorities; (ii) procedural innovations to facilitate access to the courts, and the growth of public interest litigation; (iii) transformation of judicial procedures from adversarial to polycentric and quasi-legislative; and (v) enhanced protection of the independence of the judiciary.

Liberal interpretation of fundamental rights and directive principles

Although the Court had previously held that Fundamental Rights would over-ride Directive Principles in any conflict between them, in later years it moved towards a more structuralist interpretation, whereby Directive Principles were often taken into account in determining the scope of Fundamental Rights. However, the real conflict was between the right to property and the Directive Principles contained in art 39(b) and (c). Article 31-C was inserted by the Constitution (Twenty-fifth Amendment) Act 1971 to confer immunity on laws made pursuant to these Directives Principles from being held void on the ground of inconsistency with

204 The Constitution (Forty-fourth Amendment) Act 1978 s 37.
205 U Bai U. The Indian Supreme Court and Police (Lexis Nexis Book Company, 1980) 123.
207 Ram Pratap v Bahadur, AIR 1958 SC 751. Here, the Courts considered the validity of the laws which banned cow slaughters. Article 48 asked the State to organize agriculture and animal husbandry on modern and scientific lines and take steps for banning the slaughter of cows, calves and other Directive Principles. In the opinion of this writer, the interpretation of the Directive Principles was flawed. For a critique, see SP Sathe 'Cow Slaughters: The Legal Aspects' in All Shall ed Cow Slaughter: Forms of a Dilemma (Ludhiana, Bombay, 1967) 69.
208 Art 229 - The State shall, in particular, direct its policy towards ensuring—(b) that the ownership and control of the material resources of the community are distributed as best to subserve the needs of the community, and (d) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.
The Court upheld art 31-C in *Kisan Ram* with the exception of a sub-clause that conferred finality on the President's certificate that the law in question was made pursuant to those Directive Principles. Article 31-C was amended by the Constitution (Forty-second Amendment) Act 1976, to protect any law made in pursuance of any of the Directive Principles from being challenged for alleged inconsistency with any of the Fundamental Rights. In *Minerva Mills v India*, the Court held, by a majority of four to one, that this amendment was void, because the total negation of either Fundamental Rights or Directive Principles would be detrimental to the basic structure of the Constitution. The Court also held that both Fundamental Rights and Directive Principles were of equal importance, and that the latter ought to be taken into account when interpreting the scope of the former. Since *Minerva Mills*, the Court has adopted a policy of treating them as equally important. In fact, it has interpreted Fundamental Rights liberally so as to give effect to Directive Principles. Through liberal interpretation of art 21, the Court incorporated some Directive Principles within the right to life, such as art 45, enshrining the State to provide free and compulsory primary education within ten years. The Court has held that it is no less responsible than the legislature and the executive for implementing the Directive Principles.

Article 21 revisited

In *Maneka Gandhi v India* (1978), the Court adopted a liberal interpretation of art 21, overriding the narrow interpretation laid down in *Gopalan*. Not only did it hold that the words "life", "personal liberty", and "procedure established by law" had wider meanings, thereby incorporating substantive as well as procedural due process, it also held that arts 19 and 21 had to be read together rather than as mutually exclusive. The new interpretation of art 21 was clearly inconsistent with the original intention of the Constitution's framers. The Court has since interpreted the words "life" and "personal liberty" to include several new rights, including a right to privacy, rights of prisoners to be treated according to prison rules, a right to shelter, a right to education, a right to sufficient food to avoid starvation, a right to a healthy environment including fresh air and water, and a right to health. In *Francis Comitee Mulkin v UT of Delhi*, Justice Bhagwati said:

The fundamental right to life which is the most precious human right and which forms the core of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

This very broad right to life justified judicial intervention even to provide the people with food. When government stockpiles were full of grain, but people were starving, the Court intervened and required the government to make the grain available. The Court said:

It is also well settled that interpretation of the Constitution of India or statutes would change from time to time. Being a living organism, it is growing and with the passage of time, law must change. New rights may have to be found out within the constitutional scheme. Horizons of constitutional law are expanding.

The open-textured character of constitutional expressions enabled the Court to fill them with new meanings from time to time. In *India v Association for Democratic Reforms*, the Court held that the Election Commission could solicit, from a candidate offering herself for election, information about her assets and liabilities, previous convictions for criminal offences, and pending criminal prosecutions. The Court based its decision on a broad interpretation of freedom of speech, as including a right to information. Voters were held to be entitled to information regarding the antecedents of a candidate, to help them decide how to vote. Parliament then amended the Election Law to disable the Commission from soliciting any information other than that required by the amendment, and declared that notwithstanding any decision of any court, no further information could be required to be given. That amendment was challenged in *PUCL v India*. The Union contended that the right to information, which was the basis of the Court's decision in the *Association for Democratic Reforms* case, was not an original right given by the Constitution, but a right derived through judicial interpretation, and therefore could be negated by legislative amendment. Rejecting this contention, Justice Shah said:

It should be understood that the fundamental rights enshrined in the Constitution, such as the right to equality and freedom, have no fixed content. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since the last more than 50 years, this Court has interpreted Articles 14, 19 and 21 and given meaning and colour so that the nation can have a truly republican democratic society.

The words 'procedure established by law' also received a liberal interpretation, and the Court insisted that any such procedure must be just and fair. On that basis...
it held that the death sentence could be imposed only in the rarest of rare cases. It delivered several judgments against inordinately long periods of pre-trial detention, on the ground that the words 'procedure established by law' require a speedy trial. The same words were held to exclude cruel and degrading punishment or torture, although no provision expressly prohibits such barbarism. The court also held legal aid to be an essential aspect of criminal justice.

International covenants and fundamental rights

According to English law, which is followed in India, a treaty or international convention does not apply to the domestic sphere until it is incorporated in municipal law by legislation. In Vishaka v. Rajeshwar, the Court broke new ground in constitutional interpretation when it interpreted Fundamental Rights liberally so as to include the State's obligations under the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW). The petitioners had argued for the Court's intervention against sexual harassment of women in the workplace. The Court interpreted arts 14 (right to equality), 19(1)(g) (right to carry on any occupation, trade or business) and 21 (right to personal liberty) as including gender equality and a woman's right to work with dignity. Verma CJ observed:

The international Conventions and norms are to be read into them [Fundamental Rights] in the absence of enacted domestic law occupying the field 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.

The judge further stressed that an interpretation giving effect to international conventions was implicit in the Directive Principle contained in art 51(a), to further protection and development of international law and treaty obligations. The Court laid down a number of guidelines, to be observed by all authorities and bodies, to ensure the protection of women workers from sexual harassment. The Court has since used international conventions to interpret the Constitution in a number of other cases.

Competing values and balancing

Structuralist interpretations vary according to the judges' value choices. Articles 105(1) and 194(1) give members of Parliament and state legislatures freedom of speech within their legislatures, and arts 105(2) and 194(2) protect them from any liability for speeches made within the legislature or for publications produced by its authority. The scope of these articles was considered in PV Narasimha Rao v State (CBI/SPE). A 'no confidence' motion had been moved against the Rao government, which had been in a minority in the House. In order to defeat the motion, the ruling Congress party needed the support of members of another formation called the Jharkhand Mukti Morcha. After the motion was defeated, some members of Parliament were prosecuted for either giving or taking bribes to vote against it. Those prosecuted petitioned the Court, arguing that the prosecution infringed their right to freedom of speech within the House. They contended that this freedom embraced freedom of voting, including secrecy of voting, which would be breached if they were required to admit which way they had voted. The majority held that a member who bribed another member to vote in her favour, and a member who accepted such a bribe but did not vote, could be prosecuted for corruption; but a member who accepted a bribe and did not vote was protected by art 105(2). Such a member could not be prosecuted, because that would involve enquiring into why and how she voted.

Unlike the citizen's freedom of speech protected by art 19(1)(a), which is subject to restrictions permitted under art 19(2), a legislator's freedom is not subject to any such restrictions. She cannot be sued for defamation, or prosecuted for any offence she might commit while exercising her freedom of speech in the House. Nevertheless, it is submitted that she also has a duty to speak fearlessly in the interests of her electorate. In construing the scope of the freedom, that duty must not be overlooked. Can the freedom be harnessed away or traded off? It should be possible to hold her accountable if her exercise of the freedom is influenced by a threat or bribe. The majority's decision was contrary to the spirit of the Constitution. The dissenting judgment stated the law correctly as follows:

An interpretation of the provisions of Article 105(2) which would enable a Member of Parliament to claim immunity from prosecution in a criminal court for an offence of bribery in connection with anything said by him in Parliament or of any committee thereof and thereby place such Members above the law would not only be repugnant to healthy-functioning of parliamentary democracy but would also be subversive of the rule of law which is an essential feature of the basic structure of the Constitution. It is settled law that in interpreting the constitutional provisions the court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution.

The conflicting positions of the majority and the minority judges arise from a conflict between their varying perceptions of the two competing interests, namely...
the member's freedom, and her accountability to the electorate. An interpretation that holds public functionaries liable and accountable is more faithful to the basic structure of the Constitution.

Procedural innovations for access to justice

The Court did not merely expand the scope of Fundamental Rights through liberal interpretation. It also adopted a broad interpretation of arts 32 and 226, which concern the court's jurisdiction to remedy violations of Fundamental Rights, so as to do away with technicalities. Article 32 confers a Fundamental Right on a person to move the Supreme Court by appropriate proceedings if the enforcement of any Fundamental Right has been deprived of or denied to him. The Court has powers to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto or certiorari, as appropriate to enforce any Fundamental Right. Article 226 confers similar powers upon a High Court, for the enforcement of any of the Fundamental Rights or for any other purpose. The Constitution uses the words 'writes in the nature of' to free the courts from technicalities associated with the prerogative writs in England. The courts merely draw analogies with the prerogative writs in England. The courts merely draw analogies with the prerogative writs in England, and issue directions, orders, or writs to mould relief to meet the peculiarity of each situation. The Court has incorporated private remedies and stay orders within the remedies available under these articles. Furthermore, there is no necessity for an applicant in every case to prove that the rights to which the applicant is entitled under the Constitution or any law for the time being in force. The courts have also adopted appropriate proceedings and have enabled the courts to design new remedies, adopt appropriate proceedings, and to liberalise the rules of locus standi and the rules of jurisdiction. Not only those whose interests are adversely affected, but even those who have no personal stake, can move the Court on behalf of poor and dispossessed, provided they have no personal interest in the outcome of the case. This has come to be known as Public Interest Litigation, because the existence of a public interest is the criterion of justiciability.

The Court has entertained petitions seeking protection of the Taj Mahal (a monumental palace built by a Moghul emperor) from demolition and challenging the legality of the actions of the government in the court.

a mental asylum, starvation of the poor due to food being unavailable, and the exploitation of child labour. The Court has also intervened against the appropriation of public assets for private purposes by politicians through abuse of power.

These innovations have made it possible for many down-trodden people to reach the Court, raising matters concerning unorganised labour, bonded labour, the environment, women's rights, human rights, and the rights of children and other disadvantaged people. Decisions upholding the rights of the poor and the other socially disadvantaged people, and giving them improved access to justice, greatly enhanced the Court's image. It was no longer a court for landlords, princes, industrialists, and government servents.

Transformation from adversarial to polycentric—law making through direction

Public Interest Litigation has changed the character of the judicial process from adversarial to polycentric, and from adjudicative to quasi-legislative. Bhagwati J said in PUDR v India.

We wish to point out with all the emphasis at our command that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility areas of humanity is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the Court not for the purpose of enforcing the rights of one individual against another as happens in case of ordinary litigation, but is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of a large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.

The judge observed that the courts existed not only for the rich and well-to-do, but also for the downtrodden and have-nos. In Bandhua Mukti Morcha v India, Bhagwati J pointed out that the problems of the poor who now came to the

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Court 'were qualitatively different from those which [had] hitherto occupied the attention of the Court', and needed a 'different kind of lawyering skill and a different kind of judicial approach'. Public Interest Litigation raised questions of group rights, and issues concerning the environment, governance and human rights. In *Akhil Bhartiya Shoshi Karmachari Sangh (Railway) v Union of India*, Justice Krishna Iyer explained the nature of this people-oriented jurisprudence as follows:

Our current procedural jurisprudence is not of individualistic Anglo Indian mould. It is broad-based and people oriented, and envisions access to justice through 'class actions', public interest litigation and 'representative proceedings'. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolete in some jurisdictions.

The Court started to address, and award compensation to, a wider constituency than the actual litigants, when protecting human rights. It has resorted to quasi-legislation through the issue of directions. The word 'directions' appears in art 32 as one available remedy. But directions are no longer merely mandates to specific respondents in litigation, but are often addressed in rem (against the world at large). Directions have been used to prescribe conditions for processing inter-country and intra-country adoptions, in order to protect children and prevent child trade, and for managing pollution caused by traffic. Directions have also been issued regarding the abolition of child labour. Such directions have the force of law, and are under the law. The Court has not only produced judicial legislation as understood in strict jurisprudence, but has actually legislated. In *Vineet Narain v India*, Chief Justice Verma once again reiterated:

'It is the duty of the executive to fill the vacuum by executive order because its field is congruous with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions (articles 32 and 142) to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.'

The Court abandoned its traditional insularity, and took an active part in settling disputes to achieve just results. *Azad Rashtriya Pulwama Union v Pulwama* concerned a challenge to the validity of the Punjab Cyber Riksha (Regulation of Rikshas) Act 1995, which provided that licences to ply rikshas would be given only to those who owned them. The Act was intended to enhance social justice by eliminating the exploitation of riksha pullers, who were poor, by the riksha owners, who extracted excessive rents from them. But the Act made riksha pullers unemployed, because they did not own their vehicles, while the rikshas remained idle as their owners could not ply them. This was argued to impose an unreasonable restriction on the fundamental right of the riksha pullers to carry on their occupation, and was void under art 19(1)(g). If the Act had been held invalid, the riksha pullers would have retained their livelihood, but then its intended social objective would have been frustrated. Instead of striking down the law, Krishna Iyer J+ arranged a loan from a nationalized bank to the riksha pullers, from which they could buy their rikshas from the owners. The loan was required to be repaid in suitable installments.

The independence of the judiciary

The Court learnt during the 1975 emergency that its independence could not be safely entrusted to the sweet will of the executive government. If the Court were to take up political issues such as the abuse of executive power, it had to be insulated from manipulation by the executive. The Court could be packed, as was attempted through the supersession of sitting judges. And if the judges could be superseded, they could also be humiliated in other ways. The power to appoint them rested with the government, which had already started transferring judges from one High Court to another. Some judges whose political views were disagreeable were relieved after the completion of the first two years of their temporary appointment.

It is in this context that the Court was asked to clarify how judges should be appointed if judicial independence were to be preserved. Article 124(2) provides:

'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose.'

Provided that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted. There is no mention of any restriction on the government's power to appoint judges, except for the requirement that it consult the Chief Justice when appointing other judges. But it was contended that the independence of the judiciary was part of the basic structure of the Constitution. Article 50, one of the directive principles, requires the State to separate the judiciary from the executive. In 1982, Riksha is a motorised vehicle having three wheels. A carriage is attached to a scooter.

The majority of *Rashwanad* consisted of Chief Justice and six judges. The Chief Justice retired immediately, and three judges retired on being superseded. Another judge died, and yet another was to retire soon. Only one judge would have continued. A practical judge had developed: a judge was appointed as an additional judge for two years, to be made permanent as soon as a vacancy arose. No additional judge was ever discontinued. This happened only during the emergency.

See text to note 83-84 above.
in *SP Gupta v India* (known as the First Judges case), the Court held that consultation with the Chief Justice concerning the appointment of a judge did not require her concurrence: the government was free to make the ultimate decision. But in 1993, in *Supreme Court Advocates on Record Association v India* (the Second Judges case), the Court held that the Chief Justice’s opinion was binding on the Government, although before providing her advice, she was required to seek the opinion of at least two of the Court’s most senior judges. On a reference by the President under art 143, the Court in a third case reiterated this view, but added that the Chief Justice must consult a collegium of four of the most senior judges.

The judges acknowledged that in all democratic countries, including the United Kingdom, the United States, Australia and Canada, the appointment of judges to superior courts is in the hands of the executive and not the judiciary. But the Indian Constitution, while conferring this power on the executive, had conditioned it by requiring prior consultation with certain constitutional functionaries. According to Verma J:

> When the Constitution was being drafted, there was general agreement that the appointees of judges in the superior judiciary should not be left to the absolute discretion of the executive, and this was the reason for the provision made in the Constitution imposing the obligation to consult the Chief Justice of India and the Chief Justice of the High Court. This was done to achieve independence of the Judges of the superior judiciary even at the time of their appointment. It was realised that the independence of the judiciary had to be safeguarded not merely by providing security of tenure and other conditions of service after the appointment, but also by preventing the influence of political considerations in making the appointments. It is this reason which impelled the incorporation of the obligation of consultation with the Chief Justice of India.

Justice Verma also observed that the primary aim was to encourage decisions about judicial appointments to be made by consensus, in which case, no question of primary would arise. But when opinions conflicted, the question of whose opinion had primary arose. Since primary could not be given to the executive, unless very good reasons existed, the opinion of the Chief Justice, in consultation with other senior judges, had to be binding. Justice Verma reasoned that the greatest significance should be attached to the opinion of the Chief Justice, who is best qualified to assess the true worth and suitability of candidates. His opinion—really a collective opinion, formed after taking into account the views of senior colleagues—would be a better way of ensuring proper appointments. This would help to achieve the constitutional purpose, without conferring an absolute discretion or veto on either the judiciary or the executive, much less on an individual such as the Chief Justice or the Prime Minister.

This unprecedented example of judicial activism must be understood in the context of the political events that preceded it. As long as India’s politics remain fractured, and its democratic culture fragile, independent judicial review remains the only bulwark against majoritarianism. However, contrary to Verma J’s opinion, a power of veto has in effect been conferred on the Chief Justice and four most senior judges, which does not seem desirable.

The Court as a Political Institution

The positivist, black letter law tradition held that judges should be completely insulated from politics, and that courts should not be concerned with policy. Structuralist interpretation requires courts to deal with politics more openly. Indian judges now have a substantial involvement in matters of social policy, as they have acknowledged in a number of cases. An example is judicial review of the President’s power to dismiss state governments under art 356. This power seemed to be immune to judicial review until 1977, when in *Rajasthan v India*, the Court held that such a proclamation would be declared invalid if it was issued with *malafide*. In that case, the Court did not strike down the President’s proclamation, dismissing nine state governments on the ground that the ruling party had lost in elections for the lower House of Parliament, even though that ground was totally opposed to the spirit of federalism.

In *SP Bhemar v India*, the Court held valid the President’s dismissal of three state governments controlled by the *Bharatiya Janata Party* (BJP) on the ground that they were incapable of acting in accordance with the basic constitutional principle of representative democracy. The Court simultaneously struck down the President’s dismissal of three other state governments. The Court thus acquired the power to review the act of the President under art 356, to the same extent that it could examine the validity of ordinary administrative actions. This undoubtedly enhanced the Court’s role in sustaining the federal equilibrium. The case did not involve any amendment of the Constitution, and so the basic structure doctrine need not have been invoked. By raising the doctrine, the Court expanded the scope of its application: even an executive action, such as the President’s under art 356, could be measured on the touchstone of the basic structure doctrine. It should be noted that these judgments did not support the decision to uphold the dismissal of the three BJP governments. They objected that there were no judicially manageable standards for determining the validity of the President’s action. By declining jurisdiction to decide the validity of the President’s action, they too would, in effect, have allowed it to stay. They perhaps wanted to avoid

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284 Second Judges Case 1993 4 SCC 441, 596 (Janaki Ahmadi).
286 AIR 1977 SC 1361.
288 See text to 173 above.
289 Ahmadi CI, Verma and Davar JJ.
making a manifestly political decision. Indeed, the majority’s decision was rather intuitive. How could they be sure that the BDP could not abide by the principle of secularism? The BDP led government at the federal level from 1999 until 2004.

Since then, government actions have sometimes been challenged not with reference to any specific constitutional provision, but with reference to abstract principles such as secularism.280 The Court’s interpretation of secularism has not always been sound.291 But it is no longer reluctant to admit that it deals with political issues, and has a political role. In Indira Gandhi v. India, Sawant J said:

The Constitution, being essentially a political document, has to be interpreted to meet the felt necessities of the time. To interpret it ignoring the social, political, economic and cultural realities, is to interpret it not as a vibrant document alive to the social situation but as an immobile cold letter of law unconditioned with the realities.292

The Court has shown great courage in protecting minorities from the tyranny of fundamentalist, majoritarian forces. The victims of the communal carnage in Gujarat, in 2001, approached the Court when they could not obtain justice against the murders and rapes committed by the goons of the majority community. When all the accused were acquitted, because of a dishonest police investigation, threats to witnesses, and the lower courts’ lackadaisical attitude, the Court ordered their re-trial in another state.293

The Court’s activism on social policy issues has co-existed with judicial restraint on economic issues. Since 1991, the government of India has changed its economic policy from a command economy to a market economy. This has required two policy changes: (1) weeding out unnecessary controls and regulations over freedom of enterprises; and (2) throwing open to private initiative, enterprises that were previously within the exclusive domain of the public sector. This has entailed disinvestment by the government in enterprises that incurred losses, or could be more efficiently managed by the private sector. Responding to these policy changes, in State Employees Union v. India, Chief Justice Kirpal said

It is a demonstrable fact that the prerogative of such elected Government to follow its own policy. Often a change in Government may result in a shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or ultra vires, a decision bringing about change cannot per se be interfered with by the court.

Wisdom and advisability of economic policies are ordinarily not amenable in judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved.294

In this case, the Court upheld the privatisation of a government company that had incurred losses. While art 19(6) expressly permits the state to operate any trade or business to the exclusion of any private individual, it does not oblige the state to do so. But in another case the Court objected to such disinvestment where the original investment had been authorized by an Act of Parliament. It held that disinvestment from such an enterprise could be achieved only with legislative sanction.295

Institutional and Cultural Factors

With a few exceptions, the judges have lacked political experience.296 Most have been professional lawyers. Although an eminent jurist could be appointed as a judge, so far none have been. The judges are products of a legal education that emphasizes what the law is, rather than the process by which it is continuously developed. Law is depicted through rote learning as a body of fixed and immutable rules, rather than as something that, in the hands of a creative judiciary, always has evolutionary potential. Until recently, even academic writings in India were merely expository, consisting of section by section commentaries on statutory law with very little criticism of either the law itself or judicial decisions interpreting it.

The early generations of Supreme Court judges were trained in the English positivist tradition, and were reluctant to assume wider powers for the Court. A majority of the leaders of the Constituent Assembly agreed with their view of the proper judicial role. Therefore, there was no dispute between the political establishment and the judiciary over the Court’s function. Both sides perceived it as a technocratic institution dealing with strictly legal questions. This made it easy for the political establishment to manage the Court: it simply amended the Constitution, and expected the Court to comply. During the entire Nehru period, Parliament held the initiative, and the Court merely responded. Parliament could always use its power to amend the Constitution to override the Court’s decisions.

In addition, when the Constitution was first enacted, judges were compared unfavourably with politicians. The politicians had participated in the national movement for independence, and thereby acquired a halo of self-sacrifice, whereas the judges had been part of the colonial establishment. Moreover, the judges acquired a reputation for defending the rights of the wealthy classes, particularly in cases involving property rights. But since the late 1970s, the politicians have suffered a loss of public esteem. Their increasing opportunism, corruption, and populism emanating from ballot box politics, have sullied their image. The Court’s activist jurisprudence during the late 1970s and 1980s, on the other hand, has earned it a greater degree of respect and trust among the people.

280. [Reference to case]
291. [Reference to case]
292. [Reference to case]
293. [Reference to case]
294. [Reference to case]
295. [Reference to case]
296. [Reference to case]
In the late 1960s, the Court asserted its power to review constitutional amendments, and in the 1970s, that power was legitimized by the government's abuse of the constituent power during the 1975 emergency. The Court's decision in the Kesavananda case was very unorthodox, and initially seemed contrary to established, majoritarian notions of democracy. But those notions of democracy came under challenge throughout the world, as societies became more pluralistic. Even Britain, the home of parliamentary sovereignty, became a signatory to the European Convention on Human Rights, which was subsequently incorporated in the Human Rights Act 1998, thereby eroding the supremacy of Parliament. The Court assumed a much greater responsibility for strengthening constitutionalism in the 1970s. While earlier invalidations of laws had been based on traditional positivist reasoning, subsequent ones were often based on structuralist reasoning. During the post-emergency period, the Court gave liberal and expansive interpretations to Fundamental Rights and Directive Principles, so as to expand the scope of individual liberty and include some positive social and economic rights within the canvas of the Fundamental Rights. It liberalized the rules of locus standi and justiciability to facilitate access by the poor to the judicial process. The growth of Public Interest Litigation, through which breaches of human rights could be remedied, increased public esteem for the Court.

Nevertheless, the Court's record has been far from perfect. The judges have mainly come from urban, and higher economic, backgrounds. Their class bias has been reflected in the early right to property cases, but also in more recent cases, such as those approving a paltry sum of compensation for victims of the Bhopal gas disaster, and refusing to delay the construction of a dam until the residents of villages to be submerged by it were rehoused. The Court has not been successful in realizing many social and economic rights: in particular, its declarations of the rights of the poor have not been converted into reality. It has also lacked the resources to bring about systemic changes such as speedier trials of criminal cases, and prison reforms.

In recent years, the Court seems to have been backsliding in protecting rights. Its decision on educational institutions, giving them freedom to charge any fee without regard to its effect on access to education by the poor, its declaration that workers have no right to strike, its approval of the two child norm as a condition of eligibility for contesting elections to panchayats, are all examples of this backward slide. Its approval of laws such as the Terrorist and Disruptive Activities Act and the Prevention of Terrorism Act, which dispense with important attributes of the due process of law, on the ground that they are necessary to combat terrorism, shows that the judges share the security concerns of the middle class. All these decisions reflect their class bias.

Conclusion

Despite its shortcomings, the Court can be proud of its record. The main responsibility for defending constitutionalism in India has fallen on non-elected authorities, such as the President, the Election Commission, the National Human Rights Commission, and the judiciary. The Supreme Court, as the apex court with the power of judicial review over all other authorities, has shouldeRed the heaviest burden. Its assumption of power to review constitutional amendments has made it the most powerful court in the world. It has evolved from a timid, positivist court into a very activist one. Its more prominent role may have stemmed from its expansive interpretations of Fundamental Rights and Directive Principles, and its liberalization of procedural rules governing access to justice. Through its development of that role, the Court has earned widespread legitimacy, which has helped to ensure that its decisions have been generally obeyed.

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797 Union Carbide Corporation v India (1991) 4 SCC 584. A poisonous gas leaked out from the factory owned by a multinational company resulting in deaths of large numbers of people, and those who survived suffered from various debilitating diseases. The Court approved a settlement between the UCC and the Govt. of India which provided for a paltry sum as compensation. In the earlier decision, criminal proceedings against the officials of the UCC were dropped. They were resumed only after a writ petition was made against that decision. See (n 80) 301. Also see U Bhai and A Dhandha Valliani Victims and Legal Litigation: The Bhopal Case (Indian Law Institute, NM Tripathi, Bombay, 1980).

