INDIA'S CONSTITUTION AND INDIVIDUAL RIGHTS: DIVERSE PERSPECTIVES

ABHISHEK SINGHVI*

I. INTRODUCTION

To address, even superficially, the diverse range of individual rights in one of the world's longest constitutional documents[1] is a daunting task. Considering that India is the world's largest democracy and has arguably the world's greatest aggregation of diversities (of race, color, religion, language, caste, culture, ethnicity, food, and dress), it would be impossible for any author to adequately address every aspect of the Indian legal system.

Despite the breadth of the subject, some generalizations may be made.[2] First, India is perhaps the only example of a large country with an extremely diverse and economically backward population to emerge from imperialism and become a vibrant democratic republic in both real and operational terms. It remains an exception of constitutionalism and rule of law amidst the wrecks and ruins which litter the landscapes of Asia, Africa, South America, Australasia, and even parts of Europe.[3] Second, India's constitutional document is not only one of the most comprehensive in the world, but also one whose every phrase has been animated by vibrant judicial interpretation. It is not a bare text, but rather a living, evolving document.[4] Third, the constitutional scheme has

* Senior Advocate, Supreme Court of India; Member of Parliament; Former Additional Solicitor General of India; National Spokesperson, Congress Party; Chairman, Law & Human Rights Department, Congress; Former Vice President, Supreme Court Bar Association. Ph.D. 1986, CANTAB–Trinity College; M.A. 1981, CANTAB–Trinity College; B.A. 1979, St. Stephen College, Delhi University.

1. India's constitution is the longest constitution of any sovereign nation in the world.

2. This is subject to the caveat that all generalizations are untrue.

3. The explanation behind India's success amidst the failures of other countries could be the subject of a separate treatise. The author's own belief is that while India was singularly fortunate in having a Gandhi who got independence for it, it was also extremely lucky to have a Nehru who institutionalized democracy and exhibited a rare spirit of an innate democrat in India's formative years.

4. *See* State of West Bengal v. Kesoram Indu. Ltd., A.I.R. 2005 S.C. 1646, 1678-79. To use the words of Granville Austin, it "was perhaps the greatest political venture since that originated in Philadelphia in 1787." GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 308 (1966).

been reinforced by one of the most independent and aggressive judiciaries in the world, which has expanded the boundaries of judicial review far beyond the framers' imaginations.[5] Fourth, although constitutional jurisprudence has fluctuated between periods of expansion and retraction, and of self-denial and activism,[6] as a general trend, it struck a balance in favor of perceived social good vis-à-vis individual rights.[7] Well-known legal doctrines have thus been "indigenized" in the context of the legitimate demands of social justice, inclusive growth, and redressal of historical imbalances within India's transforming economy. Fifth, when a conflict arises between individual rights and collective responsibilities, the judiciary traditionally has favored the latter. This stance favoring individual rights has provided a corrective counterbalance to the runaway populism practiced by the state's non-judicial bodies.[8] Sixth, India (and individual rights under its constitution) continues to suffer from the gap between the institutional and the realized or, as an eminent philosopher-economist stated, between "transcendental institutionalism" and "realization-focused comparisons . . . ."[9] Adapting this concept to the Indian Constitution, although India has an impressive charter of individual rights backed by institutional enforcement mechanisms, the promise and the precept are frequently divided by a chasm that almost sixty years of constitutional republicanism has not eliminated.

II. The Nature of Rights

Nineteen constitutional articles capture the basic sweep of individual rights.

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5. The basic structure doctrine and public interest litigation, which regulate and monitor every aspect of executive, legislative and civic life of the country, are but a few of the innumerable examples reflected in a multitude of judgments.

6. *See generally* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation*, *in* The Role of the Judiciary in Plural Societies 32 (Neelan Tiruchelvam & Radhika Coomaraswamy eds., 1987).

7. *See* Consumer Action Group v. State of Tamil Nadu, (2000) 7 S.C.C. 425, 442; Coelho v. State of Tamil Nadu, (2007) 2 S.C.C. 1, 98, 107.

8. *See Coelho*, 2 S.C.C. at 111-12 (the apex court asserting reviewability of the Ninth Schedule, created for judicial immunity and ouster of judicial review).

9. Amartya Sen, Hiren Mukherjee Lecture at Indian Parliament: The Demands of Social Justice (Aug. 11, 2008). Professor Sen also describes the dichotomy in terms of the two Sanskrit words "niti" and "nyaya," both signifying justice, but the first more formal and institutional, and the second more real, comprehensive and realization-based. *See id.*

A. *Pre-Constitutional Evolution of Fundamental Rights*

As in U.S. history, the evolution of individual rights in India is a story of persistence by Indian citizens (especially by the political formation which was in the vanguard of the Indian independence movement)[10] and an equally consistent rejection of this demand by the British. Despite this apparent similarity, the United States-India analogy of both countries seeking independence from the same imperial power and asserting similar aspirations for including individual fundamental rights in the constitution, breaks down on closer scrutiny. The United States fought a war of independence, whereas India gradually achieved independence. The British resisted granting Indians fundamental rights for over fifty years, whereas the opposition in the United States was internal, between the federalists and anti-federalists, with the latter campaigning vigorously for exclusion of such rights.[11] Furthermore, in 1947, India did not have the same nature and degree of preexisting sovereign states ceding power to form a new union as the United States had in the late 18th century, with the consequent over-zealous protection of federalist principles in the United States.

The ideological matrix of constitutionalism—be it Indian, Jewish, Chinese, or Greco Roman—is premised on the notion of the state as a moral institution with reciprocal accountability to those who have individual rights and liberties.[12] Pre-British Mughal and pre-Mughal Indian history contained an old and respectable lineage of reliance on individual rights. Hindu jurisprudence is founded on the concept of Dharma signifying the supremacy of law. The subordination of power to Dharma is an eminent theme of the Indian Scriptures. Indian political theory thus even sanctions regicide and tyranicide.[13] In ancient Hindu republics, the government recognized constitutionalism as its overriding obligation, compositely subsuming the moral supremacy of law, the binding nature of procedure, and the recognition of people's participation and individual rights. Indeed, ancient constitutional documents may well have contained a greater emphasis on individ-

10. The front line of the Indian independence movement was the Indian National Congress. The biographical footnote of this article contains all voluntary disclosures for conflict of interest purposes in this regard.

11. *See* A.K. Ganguli, *Constitutional Law: (Fundamental Rights), in* 41 ANNUAL SURVEY OF INDIAN LAW 89, 91 (2005) (citing ROGER A. BRUNS, A MORE PERFECT UNION: THE CREATION OF THE U.S. CONSTITUTION (1986)).

12. *See* L.M. SINGHVI, FREEDOM ON TRIAL 1-2 (1991).

13. *See id.* at 2.

ual rights than documents of the medieval era.[14] In the British era, the ideal of fundamental rights was inextricably intertwined with the exertions of the Indian National Congress (INC), which played the dominant role in the nationalist and freedom movement for over six decades until independence.[15] Ten years after its birth, in 1895, the INC drafted the "Home Rule Bill," asserting the rights of free speech, free education, freedom from imprisonment except by a competent authority, and so forth.[16] The INC's special Mumbai Session of 1918 submitted a Declaration of Rights for the People of India.[17] Despite rejection by the British, Annie Besant's Commonwealth of India Bill 1925 contained a comprehensive listing of seven fundamental rights.[18] The Nehru Committee report of 1928[19] reiterated a clear demand for fundamental rights.[20] It contained demands for safeguards under nineteen heads, ten of which remained materially unchanged in Part III of the Indian Constitution and another three of which appeared as Directive Principles under Part IV. The Simon Commission of 1927-28 promptly rejected the Nehru Committee demands on the pretext that "abstract declarations are useless," but the essence of the demand for enumerated individual rights was repeated in the Indian Independence Resolution of 1930.[21] Thereafter, the INC Karachi resolution of 1931 conditioned acceptance of any future

14. *See* Ganguli, *supra* note 11, at 91 (referring to documents like the Charter of Medina by Prophet Muhammad in A.D. 600 and the Magna Carta).

15. For a succinct, yet comprehensive, account of this evolution of individual rights during the British era, see S. N. Ray, Judicial Review and Fundamental Rights 93-101, 137 (1974); B. Pattabhi Sitaramayya, 1 History of the Indian National Congress 462-64 (1969).

16. *See* O.P. Chauhan & Lalit Dadwal, Human Rights Promotion and Protection 33-34 (2004).

17. *See* T.S.N. Sastry, India and Human Rights: Reflections 26 (2005).

18. These were: individual liberty; freedom of conscience; free expression; free assembly; equality before law; free elementary education; gender equality; and equal right to the use of roads, courts of justice and other public places.

19. The *Nehru Report* was a memorandum outlining a proposed new constitution for India. It was prepared by a committee of the All Parties Conference chaired by Motilal Nehru with his son Jawaharlal acting as secretary. The Comm. Appointed by the All Parties Conf., The Nehru Report: An Anti-Separatist Manifesto 1 (1928) [hereinafter The Nehru Report].

20. *See id.* at 9-10.

21. The Pledge of Independence, Declaration of Purna Swaraj (India 1930), *available at* http://india.gov.in/myindia/pledge.php. Officially promulgated on January 26, 1930, the Pledge of Independence resolved to fight for complete self-rule. Immediately after this resolution, Mahatma Gandhi and other nationalist leaders planned a nationwide non-violent agitation. The Indian National Congress asked the people of India to observe January 26 as Independence Day.

constitution on adoption of these rights.[22] The Karachi resolution is also seen as the "spiritual" and "direct" antecedent of the Directive Principles and bears a striking similarity to the latter.[23] Despite vigorous demands for inclusion of a bill of rights, the Round Table conference rejected the same, pleading practical difficulties in enforcement and repeating the Simon Commission pretext.

Consequently, the direct predecessor of the Indian Constitution, the Government of India Act, was enacted without any formal bill of rights, though provisions prevented discrimination in limited cases, like employment, owning property, and carrying on trade or business.[24] Interestingly, what later proved to be the weakest fundamental right—the right to property—was included in Section 299. Since the Government of India Act mostly failed to provide effective remedies against executive despotism, the INC repeated its demand for a bill of rights at the Calcutta session of 1937. World War II put an end to all such initiatives, and only the Sapru Committee Report of 1946 demanded fundamental rights as a necessary standard of conduct for all the organs of state.[25] For the first time, the report distinguished between justiciable and non-justiciable rights—an approach which exercised great influence over the Constituent Assembly (CA).

Thus, the CA had a continuous lineage of "individual rights" claims before it. In contrast to the U.S. framers of the 18th century writing virtually on a tabula rasa, the Indian framers had to address particularized and flushed-out provisions. The tension between "individual rights" and "individual responsibilities or collective rights" led the Fundamental Rights Sub-Committee to find some refuge in the Irish Constitution and led to the ultimate adoption of the justiciable—non-justiciable dichotomy of Parts III and IV of the constitution.[26]

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22. *See* SITARAMAYYA, *supra* note 15, at 463-64.

23. AUSTIN, *supra* note 4, at 56.

24. *See* Government of India Act, 1935, 26 Geo. 5, c. 2, §§ 275, 297-300 (Eng.).

25. *See* CONSTITUTIONAL PROPOSALS OF THE SAPRU COMMITTEE 256-57 (Tej Bahadur Sapru et al. eds., 1946).

26. *See* W.H. MORRIS-JONES, THE GOVERNMENT AND POLITICS OF INDIA 83-84 (2d ed. 1967); RAY, *supra* note 15, at 100-01.

B. *Secularism and Federalism*

Secularism and federalism[27] are the two pillars of the Indian Constitutional scheme[28] and provide the backdrop for the exercise of individual rights. Although they operate at the macro level, they have direct impact on realization of individual rights. While both constitute part of the Basic Structure of the Indian Constitution,[29] the Indian model of secularism is unique. It is not akin to the U.S. model, where there is a bilateral exclusion of the state from religion and of religion from the state. Nor is it similar to the French or Turkish models of one way exclusion, where religion should not be present in state activity but the state is not per se excluded from all religion. Instead, India has leaned towards an active, affirmative respect for all religions, reflected in the "*Sarva Dharma Sama Bhava*" approach.[30] Professor Bhargav has emphasized the inclusive and pluralist aspect of secularism by focusing on the "of the people" part of the Lincolnian "of, by, and for the people" formulation of democracy. He emphasizes that "of the people" was added deliberately to signify the idea of ownership of democracy by all sections of the population, irrespective of ethnicity and religion and that alone completes and complements the circle of "We the People."[31] In that sense, secularism is a self-protective mechanism reiterated by the Indian Constitution to manage the bewildering diversities of pluralist India. Bhargav also rightly asserts that the Indian State exhibits both respect and disrespect for religion instead of antiseptic disinterest. Thus, the Indian state can and

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27. India is really a semi-federal state, or as Kenneth Wheare described it, "quasi-federal." KENNETH WHEARE, FEDERAL GOVERNMENT 77 (1964). Though the Indian Constitution does not explicitly state this, Parts XIII (Trade, Commerce and Intercourse Within the Territory of India) and XVIII (Emergency Provisions) deal directly and in great detail with the subject. *See generally* INDIA CONST. arts. 301-07, 352-60 (giving substantial powers to India's central government over trade and commerce and granting the Indian president and central government wide discretion to proclaim a state of emergency).

28. In *M. Nagaraj v. Union of India*, the Supreme Court of India declared:

> The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.

M. Nagaraj v. Union of India, (2006) Supp. 7 S.C.R. 336, 372.

29. *See generally* Aruna Roy v. Union of India, (2002) 7 S.C.C. 368 (regarding secularism); State of Rajasthan v. Union of India, (1977) 3 S.C.C. 592 (regarding federalism).

30. *See* Abhishek Singhvi, *One Room, Many Doors*, HINDUSTAN TIMES, Jan. 22, 2008, *available at* http://www.hindustantimes.com/News-Feed/platform/One-room-many-doors/Article1-271147.aspx.

31. *See id.* (referring to Bhargav in detail).

does interfere with religion through reforming its negative aspects, like "sati," where a widow engages in "self-immolation" on the pyre of her deceased husband.

Articles 25-28, and in a more comprehensive sense Articles 25-30, reflect the Indian Constitution's *sui generis* approach to secularism, religious issues, and the rights of minorities. These six Articles illustrate the unique equilibrium of the Indian Constitution on these three issues. These Articles also manifest an unusual amalgam of individual and collective rights.[32] The classic injunction against state exactions used to support any religion is found in Article 27.[33]

Article 25 seeks to accomplish at least four objectives: declare the equal, non-discriminatory right to freedom of conscience and practice of individual religious beliefs; subject it to the police power of the state on the criteria of public order, morality, and health; affirmatively assert the right to regulate all secular aspects of religious practice; and subsume Hindus, Sikhs, Jains, and Buddhists under a common umbrella for the limited purpose of addressing certain socially obnoxious practices historically prevalent in these four religions.[34] It is well-established that the scope of the freedom conferred by the constitution was expanded to areas that are not an integral part of religion, such as rituals, ceremonies, practices, and beliefs.[35] This reference to the core of religion, while consistently asserting and even expanding the boundaries of state regulation of secular aspects of religion, is found in many parts of the Articles[36] and though enunciated for the first time as far back as in 1954,[37] has been consistently reiterated in diverse contexts.[38] While religion remains a matter of faith, what constitutes its essential and non-essential parts is fully subject to judicial review.[39]

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32. Contrast for example INDIA CONST. art. 25 (giving religious rights to individuals) with arts. 26-27 (giving religious rights to groups).

33. The distinction between "tax" and "fee," however, remains. Fees necessary to defray the cost of administrative regulation of the secular aspects of religion are chargeable. *See* Ratilal Panachand Gandhi v. State of Bombay, (1954) S.C.R. 1055, 1065.

34. See INDIA CONST. art. 25, § 2 and corresponding Explanation II.

35. *See generally* Vallamattom v. Union of India, (2003) 6 S.C.C. 611.

36. *See, e.g.*, INDIA CONST. art. 25, § 2.

37. *See Ratilal Panachand Gandhi*, (1954) S.C.R. at 1065.

38. *See, e.g.*, Digyadarsan Rajendra Ramdassji Varu v. State of Andhra Pradesh, (1969) 1 S.C.C. 844 (regulating administration of religious trusts); Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, A.I.R. 1962 S.C. 853 Hindu Religious Endowments v. Lakshmindra, AIR (1954) S.C .282

39. *See id.*; Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, A.I.R. 1962 S.C. 853.

The trinity of words—"profess," "practice," and "propagate"—reflects one of the most comprehensive constitutional declarations upholding freedom of religion. Each word has a different core and a different context, but the problem is more of implementation than of constitutional ideal. While the right to hold and express religious beliefs is well-established, the right to practice connotes the freedom to enjoy and realize those beliefs. Propagation is the right to communicate beliefs or to expound the tenets of one's religion without any forcible conversion. The issue of where propagation ends and forcible conversion[40] begins remains a vexed one in real operational terms. The operational management of this dilemma has been left to individual states. While some have passed anti-conversion statutes,[41] many others have not. The issue is less one of constitutional interpretation and more one of political rhetoric. As such, the state laws rarely have been successfully implemented to secure conviction for forcible conversions.

Article 26 addresses collective rights practiced by establishment of institutions,[42] rather than individual rights to practice religious freedom reflected in Article 25. Judgments under this article follow the same consistent trend of non-interference in the core issues of religion while maintaining the right of administration of such religious institutions.[43] Thus, secular activities, like non-discriminatory imposition of common land revenue levies, do not violate this right,[44] and even the property of religious institutions can be acquired for effecting agrarian reform.[45]

Article 28, like Article 27, contains the other classical model of secularism, that is, prohibiting state support or teaching of religion. Here again, the exception substantially dilutes the general rule. Endowments or trusts requiring religious instruction, even if state-aided, are constitutionally permitted.[46] Indeed, even while

40. *See* Stainislaus v. State of Madhya Pradesh, A.I.R. 1977 S.C. 908, 911-12.

41. For example, Orissa, Himachal Pradesh, Gujarat, Karnataka, and a few other states have anti-conversion laws to check forcible religious conversions.

42. This is subject to the caveat that Article 25 does not cease to apply where religion is practiced not individually but through some institution.

43. *See* Ratilal Panachand Gandhi v. State of Bombay, (1954) S.C.R. 1055, 1065; *Sardar Syedna Taher Saifuddin Saheb*, A.I.R. 1962 S.C. at 854, 864-65.

44. *See* Gov't of Tamil Nabdu v. Ahobila Matam, (1987) 1 S.C.C. 38, 42.

45. *See generally* Narendra v. State of Gujarat, (1975) 1 S.C.C. 11. This judgment also recognizes that Article 26, unlike Article 25, has not been subjected to other sections of Part III. This may have potentially significant consequences. For example, the limitations of Article 25(2)(a)-(b) would be inapplicable. *See id.* at 18-20.

46. *See* INDIA CONST. art. 28, § 2.

asserting the right of a person not to receive religious instruction without his consent, Article 28(3) recognizes that such instruction can be imparted even in state-aided educational institutions. Since only religious education is prohibited, eclectic moral principles, even those with religious origins, may be taught as moral education.[47] Indeed, the teaching and philosophy of any great saint of India would not be considered as religious instruction.[48] This distinction between imparting of religious beliefs as opposed to education about religion, moral principles religious philosophy, or culture,[49] reflects the philosophy of the Indian Constitution towards an affirmative, inclusive, "*sarva dharna sama bhava*" approach to secularism.

The marginal note to Article 29 is probably the result of some constitutional inadvertence by the framers because Article 29 is not limited to minorities but rather clearly grants rights to "any section of the citizens residing in the territory of India . . . ."[50] Article 29(2) addresses admission into educational institutions and grants a right to all citizens to be free from discrimination during the admission process. Article 30 addresses the right to create and run educational institutions. Both Articles 29 and 30 thus manifest aspects of Article 14. Given their differing scope, language, content, and focus, however, it may not be correct to assume that Article 29(2) should more logically fall in one of the sub-classes of Article 30. It is also clear that Article 30 has the widest possible concept of minorities in both linguistic and religious terms. In this sense, the articles reflect the framers' concern to try to cover as wide and diverse a concept of minority as reasonably possible.[51] After many decades of major forensic battles, the right of linguistic and religious minorities to establish and run institutions is fully

47. *See generally* Kidangazhi Manakkal Narayanan Nambudiripad v. State of Madras, A.I.R. 1954 Madras 385.

48. *See* D.A.V. College v. State of Punjab, (1971) Supp. S.C.R. 688, 703.

49. *See* Aruna Roy v. Union of India, (2002) 7 S.C.C. 368, 371-72.

50. India Const. art. 29. Initially, the framers had limited the scope to minorities. After consideration by the Drafting Committee on November 1, 1947, the scope was expanded. *See* B. Shiva Rao, 3 The Framing of India's Constitution: Select Documents 525-26 (1967). Perhaps it is more accurate to conclude that the term "minorities" was used in the widest sense and not limited to religious minorities. It would thus include Maharastrians settled in Bengal. *See generally* 3 Constituent Assembly Debates 922-23 (daily ed. Apr. 29, 1947).

51. These constitutional provisions are borrowed from the *Nehru Report* and the *Sapru Report* of 1945. All addressed, but did not define, minorities. *See* Constitutional Proposals of the Sapru Committee, *supra* note 25, at 257; The Nehru Report, *supra* note 19, at 9-10. Religious and linguistic minorities would cover a very broad spectrum, but the intent is not to give protection to political minorities.

subject to the regulatory police power of the state. Thus, legislation to check mal-administration and providing for other regulatory issues is fully permissible.[52] This regulatory framework, however, cannot intrude upon the autonomous rights of institutions to manage themselves. State aid reduces this autonomy considerably and increases the intrusive power of the state, but the aided character of the institution does not mean that it has ceased to be a minority institution.[53] State aid thus cannot become a pretext for taking over these institutions.[54] The recent trend of judicial decisions, however, indicates that unaided minority institutions are liable to regulatory control so long as it is limited to checking mal-administration and promoting excellence in education.

Secularism, in the sense of a constitutional vehicle for managing pluralities, is thus directly linked to federalism, which is another constitutional vehicle for managing pluralities, multiplicities, and diversities.[55] Federalism operates as a safety valve for dissent, discomfort, and dissatisfaction, channeling these three ideas into relatively more manageable outlets of constitutional structure. Commentators believe that Indian federalism has quarantined conflicts within states or sub-state units and thus successfully prevented national conflagration.[56] "Top down" Indian federalism is a prominently unitary or, at best, a quasi-federal structure, as opposed to a "bottom up" model as in the United States, where virtually sovereign states cede sovereignty to form a union. Surprisingly, over the last sixty years, this quasi-federal entity has become increasingly more federal and considerably more decentralized. It has therefore been correctly described as "inadvertent or unintended federalism."[57] As elaborated elsewhere, this has occurred due to six developments[58]:

a. *Linguistic Federalism*: Several new states have been created on linguistic lines and, over time, successfully managed linguis-

52. *See, e.g.*, St. Stephen's Coll. v. Univ. of Delhi, A.I.R. 1992 S.C. 1630, 1653; Ahmedabad St. Xavier's Coll. Soc'y v. State of Gujarat, (1974) 1 S.C.C. 717, 810-11; *In re* Kerala Educ. Bill, A.I.R. 1958 S.C. 956, 957.

53. *See* P.A. Inamdar v. State of Maharashtra, (2005) Supp. 2 S.C.R. 603, 624; T.M.A. Pai Found. v. State of Karnataka, (2002) 8 S.C.C 481, 492.

54. *See Ahmedabad St. Xavier's Coll. Soc'y*, 1 S.C.C. at 753-54.

55. For a recent, detailed treatment of Indian federalism, see Abhishek Singhvi, *Federalism*, 53 Indian J. Pub. Admin. 742, 742 (2007).

56. *See generally* Niraja Gopal Jayal, *Unity in Diversity: Learning from Each Other: An Indian Perspective*, *in* Unity in Diversity: Learning from Each Other Conference Reader 29 (Rupak Chattopadhyay ed., 2007).

57. Singhvi, *supra* note 55, at 745, 751.

58. These six developments have been discussed in detail in *id.* at 746-53.

tic diversity. The three language formula of the Official Languages Act of 1967 has successfully stood the test of time and prevented recurrence of the language riots of the 1960s.

b. *Independent Constitution and Judicial Review*: The judicial "hands off" policy has been progressively diluted even in respect to exercise of emergency powers under Article 356 to unseat elected state governments. Such judicial activism[59] has brought the violation of the federal principle at least somewhat closer to "one scholar's ideal of a 'rarest of rare' occurrence . . . ."[60]

c. *Panchayai Raj and Local Self Government*: The Panchayai Raj is the largest festival of decentralized grassroots' democracy and self-governance. After Rajiv Gandhi's personal initiative in setting up a High Powered Committee[61] and the passage of the 73rd and 74th Constitutional Amendments[62] on the subject of revitalization of Panchayatiraj, India has about 3 million elected Panchayats involving 3.5 million elected representatives. Almost 1.5 million women have held elected positions in the Panchayats within just over a decade.

Despite some shortcomings, this new revolution of local self-government in rural India, coupled with devolution of power to local authorities and municipalities in urban India, has been the single biggest achievement of decentralizing Indian federalism since independence. "Indeed, its size, scope, and rapid growth [have] falsified the once accurate remark of Justice [Ranjit Singh] Sarkaria (Chairman of the Sarkaria Commission on Federalism) who described the dilemma of Indian federalism as '"blood pressure at the Centre with anaemia at the periphery'."[63]

d. *Regionalism and Regional Parties*: In 2004, 230 state-recognized political parties and six national parties participated in elections. This multiplicity of national political vehicles never-

59. *See* Rameswar Prasad v. Union of India, (2006) 2 S.C.C. 1, 8-10; State of Rajasthan v. Union of India, (1977) 3 S.C.C. 592, 697. *See generally* S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1.

60. Singhvi, *supra* note 55, at 747 (articulated by Ambedkar in the Constituent Assembly).

61. The 1986 High Powered Committee led by L.M. Singhvi recommended immediate constitutional incorporation of provisions for operationalizing local self government.

62. The amendments went into effect April 24, 1993 and June 1, 1993, respectively. INDIA CONST. Parts IX, IXA.

63. Singhvi, *supra* note 55, at 750. The Minster for the newly created Ministry for Panchayati Raj evocatively stated: "This is truly devolution of three F's—Functions, Functionaries and Finances to achieve three E's—Empowerment, Entitlement and Enrichment (of rural poor)." *Id.* at 749.

theless acted as a shock absorber for regional anger and frustration. While the blackmail tactics of regionalism have been severely condemned, critics have ignored this pluralistic inclusive paradigm of participatory democracy that evolved as the unintended consequence of regionalism.

e. *Economic Reform*: The Indian economic reform of 1991, followed by consequential second and third generation reforms, has significantly loosened central control over state decision-making with substantial licensing, tariff, and manufacturing liberalization at the central level.

f. *Fiscal Federalism*: Indian fiscal federalism similarly achieved a higher degree of decentralization in practice, despite a high degree of centripetal constitutional bias in structure. While over 30 percent of the central revenues are transferred from the center to the states (under Article 270 addressing the sharing of tax revenues), the additional 13 percent central grants given to the States (under Article 275) yields a respectable aggregate of approximately 43 percent of monies to the states.

C. *Right to Equality*

Articles 14 to 16 address various facets of the right to equality. Whereas Article 14 grants a general right to equality,[64] Articles 15 and 16 address particularized instances of the same right in special circumstances. Article 14 extends to all persons, whereas Article 15 is limited to citizens. Article 15 addresses discrimination limited to the five factors listed in Article 15(1). More importantly, Article 15 sanctions affirmative derogation through special provisions for women, children, socially and educationally backward classes, Scheduled Castes (SCs), and Scheduled Tribes (STs).[65] Article 16 on the other hand, is limited to equality issues in public employment, but interestingly, has "descent" as an additional ground that

64. Indeed, the word "discrimination" does not appear in Article 14 though its variations are found in Articles 16(1) and 16(2). INDIA CONST. arts. 14, 16; *see* Kathi Raning Rawal v. State of Saurashtra, (1952) 3 S.C.R. 435, 436.

65. Scheduled Castes (SCs) and Scheduled Tribes (STs) are Indian population groupings that are explicitly recognized by the Indian Constitution. The British previously called these groupings the "depressed classes," and they were otherwise known as untouchables. SCs and STs together comprise over 24 percent of India's population, with SCs at over 16 percent and STs over 8 percent as per the latest 2001 Census. *See Census of India: Scheduled Castes and Scheduled Tribes Population*, CENSUS OF INDIA, http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/scst.aspx (last visited Sept. 12, 2010).

is not mentioned in Article 15(1).[66] Finally the word "reservation" is found in Article 16(4) but is absent in Article 15(4).[67]

Unlike other constitutions, the Indian Constitution contemplates affirmative action (not reverse discrimination)[68] for the target groups mentioned in Articles 15(3) through (5), that is, women, children, Socially and Educationally Backward Classes (SEBCs or Other Backward Classes (OBCs)),[69] SCs, and STs. Indian law emphasizes formal equality[70] as well as proportional equality,[71] which upholds the State's right to take affirmative action in favor of disadvantaged sections of society.[72] The seeming derogations from the right to equality found in Articles 15(3) through (5) or 16(3) through (5) are not treated as an exception to the equality principle but instead as a facet of the principle of equality itself. Consequently, judicial scrutiny reaches beyond formal equality and upholds executive and legislative attempts to achieve substantive equality or equality in fact.[73] A recent example of how far the principle of equality has gone is found in the *Nagaraj* judgment.[74] The judgment notes the breadth of the equality principle under Indian law.[75] While the concept started with the issue of discrimination, it expanded to embrace the classification principle.[76] The twin test of classification—that it must be founded on an intelligible differentia distinguishing one group from the other and that such differentia must have a rational nexus to the object sought to be achieved by the act—was first laid down in 1952.[77]

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66. *See* Gazula Dasaratha Rao v. State of Andhra Pradesh, A.I.R. 1961 S.C. 564, 570.

67. *See* M. Nagaraj v. Union of India, (2006) Supp. 7 S.C.R. 336, 380 ("Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4A) is enabling.").

68. *See id.* (stating that if reservation goes beyond cut off, it becomes untenable and unacceptable reverse discrimination). "Cut off" is a numerical benchmark fixed by the larger bench of the Supreme Court in an earlier judgment of Indra Sawhney v. Union of India, (1992) Supp. 3 S.C.C. 217, which is supposed to be the surest immunity against charges of discrimination.

69. Socially and Educationally Backward Classes (SEBCs) are the classes of citizens who are socially and educationally backward and are so determined by the Government of India. They are also referred to as Other Backward Classes (OBCs).

70. This means that the law treats everyone equally and does not favor anyone.

71. *See Nagaraj*, Supp. 7 S.C.R. at 375, 379-80.

72. M.P. Raju, *Constitutional Law - I (Fundamental Rights), in* 42 ANNUAL SURVEY OF INDIAN LAW 75, 80 (2006).

73. *See id.* at 80.

74. *See generally Nagaraj*, Supp. 7 S.C.R. 336.

75. *See id.* at 407-08.

76. *See* State of Bombay v. Balsara, (1951) 2 S.C.R. 682, 708-11.

77. *See* Express Newspaper v. Union of India, A.I.R. 1958 S.C. 578, 630; Ram Krishna Dalmia v. Justice Tendolkar, A.I.R. 1958 S.C. 538, 547; Lachmandas Kewalram Ahuja v.

Non-arbitrariness was subsumed under Article 14 for the first time in 1974[78] and expanded in 1978.[79] Such judgments expanding the boundaries of law provided no relief to the actual petitioner in the case. The requirement of natural justice was elevated to constitutional status in Article 14.[80] Equality was held to be inherent to the principle of rule of law.[81] The primary concern of Article 14 was held to be not with the nature and content of law but with its enforcement and application. Equality was described as the essence of democracy and part of the basic features of the constitution.[82]

Nagaraj upheld all four of the following constitutional amendments challenged before it: (1) to reintroduce reservation and promotion for SCs and STs; (2) to exclude unfilled carry forward vacancies form those of a particular year while fixing the ceiling of 50 percent; (3) to provide for relaxation in qualifying marks and standards of evaluation for SCs and STs; and (4) to provide for consequential seniority in promotions based on reservation.[83]

Although *Nagaraj* comprises a valuable treatise on the evolution and diverse facets of the right to equality, it was wrong in applying the creamy layer cut-off principle even to reservations for SCs and STs.[84] In an earlier case, the judges in *Indira Sawhney* invented a creamy layer cut-off *only* in respect of backward classes and not SCs or STs. The only office memoranda under challenge in the *Sawhney* case were those providing for backward class reservation and no question of SC/ST reservation arose in that case. The creamy layer cut-off was devised as a composite index for social and educationally backward classes and not for SCs or STs. Indeed the *Sawhney* Court clarified that the creamy layer discussion "is confined to other backward classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes."[85] The five-judge

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State of Bombay, (1952) 3 S.C.R. 710, 733; State of West Bengal v. Anwar Ali Sarkarhabib Mohamed, (1952) S.C.R. 284, 286.

78. *See* Royappa v. State of Tamil Nadu, (1974) 4 S.C.C. 3, 26 (Justice Bhagwati holding equality is antithetic to arbitrariness, and, in fact, equality and arbitrariness are sworn enemies).

79. *See* Pradeep Kumar Biswas v. Indian Inst. of Chem. Biology, (2002) 5 S.C.C. 111, 124; Maneka Gandhi v. Union of India, (1978) 2 S.C.R. 621, 674.

80. *See* Delhi Transp. Corp. v. D.T.C. Mazdoor Congress, (1990) Supp. 1 S.C.R. 142, 149-51.

81. *See Nagaraj*, (2006) Supp. 7 S.C.R. at 412.

82. *See id.* at 375.

83. *Id.* at 414. The constitutional amendments that were upheld were the 77th, 81st, 82nd, and 85th amendments.

84. *See id.* at 413.

85. Indira Sawhney v. Union of India, A.I.R. 1993 S.C. 477.

Nagaraj Court could not have overruled the clear mandate of the nine-judge court.[86]

Ashoka Kumar Thakur,[87] the latest constitutional bench judgment decided on April 10, 2008, clarified *Nagaraj's* transgression. *Thakur* rightly clarifies that the case of SCs and STs was not involved in *Nagaraj* and indeed not in *Thakur* itself. Therefore, neither *Nagaraj* nor *Thakur* should be read to mean that the creamy layer cut-off applies to SCs/STs as well.[88] *Thakur* involved a challenge to the 93rd constitutional amendment of 2005 inserting Article 15(5) and enabling the making of special provisions for socially and educationally backward citizens in relation to their admission to educational institutions. Article 15(5) also applies to SCs and STs. The 22.5 percent reservation for them was not challenged by the petitioner, who only challenged the 27 percent reservation in favor of SEBCs.[89] Similarly, the constitutional amendments sought to cover private educational institutions, both aided or unaided, and only excluded minority educational institutions. The Central Act 5 of 2007 implementing the 2005 constitutional amendment, however, applied the reservation only to state-aided institutions, and not to private, unaided institutions.[90]

The operative court order upheld the 93rd amendment as not violating the basic structure insofar as it is related to state-aided or maintained institutions. The question regarding its validity with regards to private, unaided institutions was expressly left open by four judges. One judge, Judge Bhandari, held it to be constitutionally invalid, even regarding private unaided institutions.[91] The

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86. See Abhishek Singhvi, *Error of Judgments*, HINDUSTAN TIMES, Nov. 8, 2006, which stated:

> Moreover, since independence, our Constitution has recognized SC/STs as a class per se entitled to reservation, without any further enquiry into the level and degree of their backwardness. As judicially noted in the Mandal order itself, SCs/STs are constitutionally deemed to be backward and no further inquiry into their backwardness is justified. The Nagaraj court could hardly have intended that this established legal wisdom be overturned or substituted by an altogether new legal test.

87. *See generally* Ashoka Kumar Thakur v. Union of India, (2008) 6 S.C.C. 1.

88. *See id.* ¶ 53. Judge Bhandari held that the *Nagaraj* holding applying creamy layer cut-off to SCs and STs is not obiter and forms part of the rationale of *Nagaraj*. *See id.* ¶ 29 (Bhandari, J.). Ultimately, however, Judge Bhandari refrained from expressing any view on the matter since *Thakur* involved only OBC and not SCs or STs. *See id.* ¶ 34 (Bhandari, J.).

89. *See id.* ¶ 9.

90. *See id.* ¶¶ 10-11.

91. *See id.* ¶¶ 152-55 (Bhandari, J.).

court unanimously subjected the OBC[92] determination, if done by reference to caste, to exclusion by reference to the creamy layer cut-off. The judgment is also notable for its repeated exhortations for trying to achieve the constitutional goal of a casteless society.[93]

The judgment repeats the old admonition that U.S. decisions ought not be applied to Indian constitutional adjudication on the right to equality.[94] The reasons are varied. The language of the Fourteenth Amendment to the U.S. Constitution is radically different in content and structure from Articles 14 to 18 of the Indian Constitution. Secondly, the Directive Principles of State Policy in the Indian Constitution create a different positive mandate in favor of social justice in India. Thirdly, in view of the mandate for affirmative action in several articles of the Indian Constitution, the U.S. principles of suspect legislation or strict scrutiny are inapplicable.[95]

Limits like the ceiling of 50 percent on total reservations are supposed to be premised on notions of reasonable limits.[96] Thus, those in rural areas would not automatically constitute a socially and educationally backward class merely because they are in a rural area.[97] Similarly, post-graduate courses are treated differently and are normally excluded from the reservation schemes.[98]

Special treatment for a female airline cabin crew has been upheld[99] on a holistic reading of Articles 15 and 16 with special reference to Article 15(3), which enables the state "to make any special provision for women and children." The court held that Article 16(2), which prohibits discrimination based on sex, was infringed only when females would have received the same treatment as men but for their sex, and was not meant to inhibit any special schemes for women.[100] The apex court also has invalidated personal laws conferring inferior status upon women both on the principle that it would be anathema to gender equality and also on

92. As noted in *supra* note 69, Other Backward Classes means such backward classes of citizens other than the Scheduled Castes and the Scheduled Tribes, as may be specified by the Central Government in the lists.

93. *See* Ashoka Kumar Thakur v. Union of India, (2008) 6 S.C.C. 1, ¶¶ 2, 33.

94. *Id.* ¶¶ 165-66. Out of the five judges, Judge Bhandari alone gave some weight to U.S. Supreme Court judgments. *See id.* ¶¶ 183-94 (Bhandari, J.).

95. *See* Narendra Kumar v. Union of India, A.I.R. 1960 S.C. 430, 431.

96. *See* Narayan Sharma v. Pankaj Kr. Lehkar, (2000) 1 S.C.C. 44, 61.

97. *See id.*

98. *See id.*

99. *See* Air India Cabin Crew Ass'n v. Yeshaswinee Merchant, (2003) 5 S.C.C. 277, 301-02 (emphasis omitted).

100. *See id.*; Rajesh Kumar Gupta v. State of Uttar Pradesh, (2005) 5 S.C.C. 172, 178-79.

the basis that such laws, derived from religious scriptures, must be consistent with the constitution or else rendered void.[101]

D. *Abolition of Untouchability*

Article 17 of the Indian Constitution contains a sweeping constitutional declaration against untouchability, not cast in the traditional Hoffeldian[102]mold. The article simultaneously declares the constitutional intent to abolish a known societal evil with immediate effect, creates a constitutional prohibition by forbidding its future practice, and renders it a criminal offense without reference to any specific law or penalty.

Its mandate is not limited to any state or individual actor. While it achieves the object of criminalizing such conduct, it cannot address omissions (as opposed to commissions), and therefore, has rightly been held not to cover social boycotts based on conduct.[103] Courts have read Articles 14 to 17 together, along with Articles 19 and 21, as well as Articles 38, 46, and 51A. They have adopted a teleological approach to the Protection of Civil Rights Act of 1955, enacted to implement Article 17.[104]

E. *Abolition of Titles*

Article 18 follows the form and structure of Article 17. While it is clear that conferment of high Indian National awards,[105] like the Padma awards, would not amount to conferment of title, the language and structure of the article may well need a clarifying constitutional amendment to eliminate abuse. It was enacted as a prohibition against "acknowledgement of allegiance or adherence to a foreign state," also echoed in Article 102(1)(d), providing for disqualification of membership from either House of Parliament. The prohibition undoubtedly does not seek to and should not be read as prohibiting conferment of similar national awards by other countries upon Indian citizens. In the contemporary era of an instantly connected global village, with expanding paradigms of dual citizenship, any sterile or literal interpretation of the article, both for ordinary citizens and members of Parliament, would be

101. *See* Masilamani Mudaliar v. The Idol of Sri Swaminathaswami, (1996) 1 S.C.R. 1068, 1075.

102. *See supra* Part II on the nature of rights.

103. *See* Devarajaiah v. Padmanna, A.I.R. 1961 Madras 35, 39.

104. *See* State of Karnataka v. Appa Balu Ingale, (1995) Supp. 4 S.C.C. 469, 486.

105. *See* Balaji Raghavan v. Union of India, (1996) 1 S.C.C. 361, 374-75 (use of the award name as prefix or suffix may lead to forfeiture of the award).

untenable and self-defeating. The debates suggest that the intent of the framers was to prevent the conferment of heritable titles and not to create any blanket prohibition against giving foreign recognition for creditable social or national service.[106] Indians have received significant foreign honors in the past,[107] and conversely, India has honored several foreigners by conferment of the Padma award.[108] There should not be penal consequences merely because the recipient is a member of Parliament.

F. *Life and Liberty*

Article 21, together with Article 14, constitute the most used provisions of the Indian Constitution. If the Ninth Schedule has been described as the "laundry bag"[109] of suspect laws sought to be immunized from judicial review, Article 21 has become a huge departmental store to proudly showcase innumerable and diverse rights, irrespective of their operational realization. Thus, Article 21 has been invoked in various civil and political rights cases, including pretrial release on bail bond,[110] speedy trial for child offenders,[111] award of compensation in public law writ jurisdiction,[112] prohibition of cruel punishment,[113] custodial excesses and deaths,[114] delayed criminal trials,[115] the requirements of a fair trial,[116] and so forth. It also has been invoked for broader issues, such as housing atomically active substances,[117] the validity of

106. *See* SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION: A STUDY 205-10 (1968).

107. For example, Biju Pattnaik, former chief minister of Orissa, was awarded Indonesia's highest civilian award, the Bhumiputra Award, and the former prime minister of India, Mr. Morarji Desai, and the eminent actor Dilip Kumar, were awarded the Nishan-e-Imtiaz, Pakistan's highest civilian award, in 1990 and 1998, respectively.

108. Bharat Ratna conferred this award on Nelson Mandela, former president of South Africa.

109. Such was the contention of counsel for the petitioners in Coelho v. State of Tamil Nadu, (2007) 2 S.C.C. 1.

110. *See* Hussainara Khatoon v. State of Bihar, (1980) 1 S.C.C. 93, 111.

111. *See* Sheela Barse v. Union of India, (1986) 3 S.C.C. 443.

112. *See* Rudul Sah v. State of Bihar, (1983) 4 S.C.C. 141, 142.

113. *See* Inderjeet v. State of Uttar Pradesh, (1979) 4 S.C.C. 246, 247.

114. *See* D.K. Basu v. State of West Bengal, (1997) 1 S.C.C. 416, 417-19. The judgment sets forth the eleven commandments required to minimize custodial death and custodial torture. Following the *D.K. Basu* decision, the apex court has closely monitored custodial violence, which has led to *D.K. Basu* sequels. *See generally* D.K. Basu v. State of West Bengal, (2003) 11 S.C.C. 723; D.K. Basu v. State of West Bengal, (1998) 6 S.C.C. 380. The author was appointed amicus curiae by the apex court in 1996 and continues to be so.

115. *See* State of Maharashtra v. Champalal, A.I.R. 1981 S.C. 1675, 1677. *See generally* State of Rajasthan v. Sukhpal Singh, (1983) 2 S.C.C. 53.

116. *See* Comm'r of Police, Delhi v. Registrar, Delhi High Court, (1996) Supp. 7 S.C.C. 432, 445-46.

117. *See* M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965, 966.

beauty contests involving derogatory representation of women,[118] environmental jurisprudence (including the Public Trust doctrine,[119] the "Precautionary Principle,"[120] and the right to clean air and water),[121] the right to health,[122] housing,[123] livelihood,[124] and so forth.

One part of this list has acted as a bulwark against arbitrary deprivation of life and liberty and prevented excesses found in dictatorships or police states, thus playing no small role in India's emergence as a vibrant democracy. The dialectics of frequent abuse of human rights continue to coexist with vigorous recourse to judicial redressal, to the media and to several other institutional structures for protection of human rights.[125] Some parts of this list of rights subsumed under Article 21 may be classified as idealistic, but it is part of the churning process that has gradually moved social and economic or individual and collective rights into the arena of justiciability and enforcement.

The more interesting issue with respect to Article 21 is whether, and to what extent, apex court jurisprudence on the subject has brought back "due process" as used in the U.S. Constitution, an idea that was expressly rejected by the framers. The story of the exclusion of due process is well-known.[126] When Constitutional Advisor B.N. Rau visited the United Kingdom, Ireland, the United States, and Canada in 1947, he was heavily influenced by Justice Felix Frankfurter. Frankfurter, as a student of Harvard Law Professor James Bradley Thayer, conveyed strong views on the pitfalls of

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118. *See* Chandra Rajakumari v. Comm'r of Police, Hyderabad, A.I.R. 1998 Andhra Pradesh 302, 317.

119. *See generally* M.C. Mehta v. Kamal Nath, (1997) 1 S.C.C. 388.

120. *See* M.C. Mehta v. Union of India, (1997) 3 S.C.C. 715, 719.

121. *See* Chameli Singh v. State of Uttar Pradesh, (1996) 2 S.C.C. 549, 555.

122. *See* State of Punjab v. M.S. Chawla, (1996) Supp. 10 S.C.R. 279, 281.

123. *See* U.P Avas Evam Vikas Parishad v. Friends Coop. Hous. Soc'y Ltd., 1995 Supp. 3 S.C.C. 456, 459. The development of the law on this issue has taken a somewhat zigzag course. *See* Ahmedabad Mun. Corp. v. Nawab Khan Gulab Khan, (1997) 11 S.C.C. 121, 125 (emphasizing the need for State bodies to provide accommodation for weaker sections, without declaring any right to housing or shelter). *Compare* Shantistar Builders v. Narayan Khimalal Totame, (1990) 2 S.C.J. 10, 10 (speaking of a right to housing), *with* Gauri Shankar v. Union of India, (1994) 6 S.C.C. 349 (holding that shelter is not a fundamental right).

124. *See* Narendra Kumar Chandla v. State of Haryana, (1994) 4 S.C.C. 460, 461.

125. *See, e.g.*, Nat'l Hum. Rts. Commission, http://nhrc.nic.in (last visited Sept. 12, 2010); Nat'l Commission for Scheduled Tribes, http://ncst.nic.in (last visited Sept. 12, 2010); Nat'l Commission for Minorities, http://ncm.nic.in (last visited Sept. 12, 2010).

126. Austin, *supra* note 4, at 87-105. *See generally* Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 Berkeley J. Int'l L. 216 (2010)

due process, which was seen as weakening the democratic process by creating a super judiciary or a "super-executive."[127] Although the Thayer-Frankfurter view applied to an over-activist U.S. Supreme Court applying substantive due process to undo the New Deal, the idea hit home to Rau. Rau, in turn was able to convince A.K. Ayyar, one of the four members of the drafting committee, initially supported "due process," but later agreed that the latter would impede social legislation. This "defection" of Ayyar allowed the replacement of U.S. "due process" in the original draft of Article 15 (which later became Article 21) by the phrase "according to procedure established by law," apparently borrowed from the Japanese Constitution, ironically also made under heavy U.S. influence.[128]

Post-constitutional jurisprudence, including the virtually limitless bundle of rights gradually read into Article 21, shows that full procedural and even partial substantive due process has been read into the Indian Constitution. The *Gopalan* case[129] took a restrictive view of "law" in Article 21, holding that "law" meant state-made law and not abstract or natural law. So long as any detention was sanctioned, for example, there was no need to additionally establish reasonableness or fairness of that law. *Kharak Singh*[130] established another facet of the same restrictive approach: the court held that "personal liberty" included all rights except those itemized in Article 19(1), which exhaustively addresses the particular attributes of freedom therein.

Transnational "borrowing"[131] of norms from U.S. jurisprudence gradually led to a loosening of the *Gopalan* straight jacket. *Kharak Singh* itself quoted approvingly from an earlier U.S. Supreme Court judgment, which held that liberty involves more than "mere freedom from physical restraint . . . ."[132] The journey from *Gopalan* thus reached *Maneka Gandhi*,[133] reflecting the journey from a more

127. 11 Constituent Assembly Debates 837 (daily ed. Nov. 23, 1949) (statement by Alladi Krishnaswamy Ayyar).

128. *See* Gopalan v. State of Madras, A.I.R. 1950 S.C. 27, 71, 102-03.

129. *Id.* at 39, 72, 102.

130. Kharak Singh v. State of Uttar Pradesh, A.I.R. 1963 S.C. 1295, 1299-1300.

131. *See* Mate, *supra* note 126, at 218.

132. Munn v. Illinois, 94 U.S. 113, 142 (1876).

133. Maneka Gandhi v. Union of India, (1978) 2 S.C.R. 621, 672-73. The journey is truly significant since Chief Justice Kania in Gopalan relied on the structure of the U.S. Constitution to conclude that Article 21 did not provide an expansive interpretation of the fundamental right of personal liberty. He gave great weight to the framers' deliberate dropping of the due process clause and referred to the Irish, Japanese, and U.S. Constitutions to hold that Article 21 did not incorporate principles of natural law and justice but

formal, positivistic approach to an expansive one of enforcing fundamental rights based on a quasi natural law approach. The court took a giant step forward by recognizing "an implied substantive component to the term 'liberty' in article 21 that provides broad protection of individual freedom against unreasonable or arbitrary curtailment."[134] The term "life" was given greater meaning and content in the judgments that followed.[135]

The Indian Constitution does not explicitly guarantee a fundamental right to privacy. Both the *Gopalan* and *Maneka* decisions involved the right to movement, and the same provision has become the basis of inferring a right to privacy. Although *Kharak Singh*,[136] a surveillance case, did not accept it, *Govind*[137] signaled a clear shift to its recognition. Finally, in 1994, *Rajagopal*[138] more clearly established the right to privacy. Relying heavily on U.S. and British precedents, the court inferred a right to privacy under Article 21 in favor of a death row prisoner, Auto Shanker, who wrote his autobiography exposing the unholy nexus between criminals and officials who sought to suppress his book from publication. In another case, the High Court applied the principle and held that a husband's recording of his wife's conversation violated the wife's privacy rights.[139] In *PUCL*,[140] the apex court held the right to hold a telephone conversation in the privacy of one's home without interference to be a basic right.

The grand march of Article 21 has continued. In 1993, the apex court attempted to summarize the different rights incorporated in Article 21 and yielded a list of twelve, though the list is much

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should be construed in a much more limited fashion as per British precedents. Justice Mukherjee, similarly, leveraged foreign precedents to support a restrictive reading of Article 21. Justice Fazal Ali's dissent, endorsing an expansive reading of the article in conjunction with Articles 19 and 22, was reincarnated in *Maneka Gandhi*.

134. Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 480 (2003).

135. *See, e.g.*, Francis Coralie Mullin v. Union Territory of Delhi, A.I.R. 1981 S.C. 746, 753. Justice Bhagwati, who authored both *Maneka Gandhi* and *Francis Mullin*, has said extra-judicially that three basic commitments undergirded the apex court's promotion of Human Rights: (1) the commitment of participation of justice, (2) the commitment against arbitrariness, and (3) the commitment to a just standard of procedure. *See* P.N. Bhagwati, *Human Rights as Evolved by the Jurisprudence of the Supreme Court of India*, 13 COMMONWEALTH L. BULL. 236, 238 (1987).

136. Kharak Singh v. State of Uttar Pradesh, A.I.R. 1963 S.C. 1295, 1302-03.

137. Gobind v. State of Madhya Pradesh, 1975 2 S.C.C. 148, 148-49.

138. Rajagopal v. Tamil Nadu, (1994) 6 S.C.C. 632, 649.

139. *See generally* Rayala M. Bhuvaneswari v. Nagaphanender Rayala, A.I.R. 2008 Andhra Pradesh 1998.

140. People's Union for Civ. Liberties v. Union of India, (1997) 1 S.C.C. 301, 311.

longer.[141] *Unnikrishnan*[142] itself, which judicially declared education as a fundamental right, could not achieve even the original constitutional promise of universal elementary education in real terms.[143] Even the 86th constitutional amendment in 2002 incorporating the fundamental right to free and compulsory education to all children between the ages of six and fourteen,[144] has had to await statutory implementation, even after being made a fundamental right. The bill to operationalize this right is still pending in parliament and, when passed, is likely to generate a significant momentum to realize a constitutional ideal. This underscores the historical delay between promise and realization, which is at the heart of the Indian constitutional debate.

G. *Right to Constitutional Remedies*

Article 32 grants a fundamental right to move the apex court directly, which is not found in many constitutions.[145] The original exalted status[146] given to this constitutional guarantee of direct access to the apex court, however, has suffered an eclipse and is now available more as an exception than as a norm. In a country the size of India, with its enormous case backlog problems in all courts,[147] Article 32, read literally, would have overwhelmed the apex court with a flood of cases, rendering the situation unman-

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141. *See* Unni Krishnan v. State of Andhra Pradesh, (1993) 1 S.C.R. 594, 700-701. These rights included the rights to go abroad, to privacy, to legal aid, to speedy trial, to doctor's assistance, to shelter, and the rights against solitary confinement, against bar fetters, against handcuffing, against delayed execution, against custodial violence, and against public hanging. *Id.*

142. *Id.* at 719.

143. *See* INDIA CONST. art. 41.

144. *See id.* § 21(A), *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002.

145. "No similar provision exists in the Constitution of the United States . . . ." Romesh Thappar v. State of Madras, (1950) 1 S.C.R. 594, 597. The South African and Canadian constitutions refer to access to courts, but do not address any guaranteed right to directly approach the apex court. In its recent constitution, Nepal has a provision identical to Article 32. *See* NEPAL CONST. art. 32.

146. In *Romesh Thappar*, the Supreme Court of India declared:

> This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking the protection of this Court against infringements of such rights.

Romesh Thappar, 1 S.C.R. at 597. In the Constituent Assembly, Dr. Ambedkar, Chairman of the Drafting Committee, described Article 32 as "the very soul of the Constitution and the very heart of it" without which the Constitution would be a "nullity." 7 CONSTITUENT ASSEMBLY DEBATES 953 (daily ed. Dec. 9, 1948). Article 32 is also part of the Constitution's basic structure.

147. *See generally* Abhishek Singhvi, *Beating the Backlog: Less Talk More Work*, 2 S.C.C. J. 9 (2007).

ageable and virtually allowing leapfrogging over the High Courts in every case. It would have made the apex court a court of first instance, at least in the realm of public law. That "flooding syndrome" is not a theoretical apprehension, especially in view of the exponential expansion of each of the provisions of Part III and the limitless width of Articles 14 and 21 in particular.[148]

The process of contraction started early. Despite an initial aberrative expansion,[149] the court started the process of self-denial and refused to entertain Article 32 petitions unless the petitioner had first approached the High Court under Article 226.[150] Article 32 writs (involving fundamental rights) thus normally are not entertained by the apex court unless either the petitioner shows the existence of some supervening disability in approaching the High Court under Article 226[151] or the High Courts are unable to entertain a 226 writ. Alternatively, if the relevant High Court has taken a view directly covering the issue against the petitioner, he may approach the apex court, since going to the High Court would be futile. A third way to bypass this judicially-imposed rule of self-denial by the apex court is to show the pendency of a batch of cases raising an important issue of law already pending at the apex court. The latter may then join the new petition to the existing batch, though the apex court is normally loath to do so and prefers to relegate those aggrieved to the High Court.

This constitutional promise and its restrictive application have one significant exception. Public interest litigations on diverse subjects are frequently entertained directly by the apex court. The court's jurisdiction in that regard is the most informal, cheapest, and quickest access to any apex court globally.[152]

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148. *See supra* Parts II(C), (F) on equality and liberty.

149. *See* Kavalappara Kottarathil Kochunni Moopil Nayar v. Madras, (1959) 2 Supp. S.C.R. 316, 317.

150. *See* Daryao v. State of Uttar Pradesh, A.I.R. 1961 S.C. 1457, 1458; Ujjam Bai v. State of Uttar Pradesh, (1963) S.C.R. 778, 781.

151. *See* Kanubhai Brahmbhatt v. State of Gujarat, (1989) Supp. 2 S.C.C. 310, 310-11; P.N. Kumar v. Mun. Corp. of Delhi, (1987) 4 S.C.C. 609, 609-10.

152. Taking a cue from the U.S. Supreme Court decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), where a postcard from a prisoner was treated as a petition, the Indian Supreme Court said in *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149, 177, that a public spirited person can move the court even by a letter. The court has accepted letters as petitions, *see* Ram Kumar v. State of Bihar, (1983) 3 S.C.R. 1011, 1012, and telegrams, *see* Paramjit Kaur v. State of Punjab, (1995) Supp. 5 S.C.R. 250, 253. Much of the early public interest litigation (PIL) commenced with petitioners sending letters to the Supreme Court. *See, e.g.*, Upendra Bakshi v. State of Uttar Pradesh, (1983) 2 S.C.C. 308, 309; Veena Sethi v. State of Bihar, (1982) 2 S.C.C. 583, 584; People's Union for Democratic Rights v. Union of India, (1982) 2 S.C.C. 494, 497; Sunil Batra (II) v. New Delhi Admin., (1980) 3 S.C.C. 488,

H. *The "Fundamentalness" of Fundamental Rights, the Basic Structure Doctrine, and the Right to Property Issues*

These seemingly disparate issues are sufficiently linked to be addressed jointly. The Basic Structure Doctrine is probably the most remarkable invention of the Indian judiciary.[153] Its very ambiguity and amorphousness is its great strength. Although born in the dialectics of the debate between immutable and unalterable fundamental rights on the one hand and collective rights symbolic of society's larger claims on the other, the basic doctrine has not only stood the test of time but remains a "Weapon of Mass Protection" (WMP) for the eternal values of any constitutional republic in times of stress and strain. It is an interesting corollary that the context of the debate frequently involved issues relating to the right to property.

Part IV of the Indian Constitution, providing for Directive Principles of State Policy (DPSP), was directly modeled on the Irish Constitution. Although the framers accorded the DPSP a very high position as far as constitutional text is concerned,[154] in the initial years, the judicial approach to them was lukewarm. The court imparted great emphasis on the first part of Article 37, relating to non-enforceability of DPSP, and less importance on the second part, which declared them to be "nevertheless fundamental in the governance of the country" in the same Article 37.[155] DPSP issues usually invoked some fundamental rights, and whenever that happened, the courts were quick to emphasize the subsidiary and subordinate nature of DPSP to fundamental rights.

Over the years, the Supreme Court's approach to DPSP has progressively become much more liberal and all-inclusive. *Quarashi*[156] started the shift by emphasizing the principle of harmonious interpretation of both DPSP and fundamental rights, and the *Kerala*

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489. In order to permit fuller access to courts, PIL has been marked by a departure from procedural rules extending to the form and manner of filing a writ petition, appointing of commissions for carrying out investigation, giving a report to court, and appointing lawyers as amicus curiae to assist the court.

153. The Indian apex court was the first to adopt the Basic Structure Doctrine. The Bangladesh Supreme Court later adopted it as well.

154. *See* INDIA CONST. art. 37 (declaring that the DPSP are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.").

155. *See, e.g.*, State of Madras v. Srimathi Champakam Dorairajan, (1951) S.C.R. 525, 531.

156. Hanif Quareshi v. State of Bihar, (1959) S.C.R. 629, 648.

Education Bill Case[157] reinforced it. Ironically, it was the eleven-judge ruling in *Golaknath*,[158] which strongly favored fundamental rights, that also adumbrated the seminal principle in favor of DPSP. Although *Golaknath* was overruled more than thirty-five years ago, the approach of treating DPSP as a coequal constitutional partner to fundamental rights in constitutional adjudication has remained the abiding constitutional principle. It was most recently reiterated by the Constitution Bench in *Ashoka Kumar Thakur,* where the Chief Justice emphasized that "no distinction can be made between . . . Fundamental Rights . . . [and the] Directive Principles of State Policy," and, secondly, that "[m]erely because the Directive Principles are non-justiciable by the judicial process does not mean that they are of subordinate importance."[159] The Indian Constitution is thus unique in putting great importance upon individual rights, but not at the cost of collective rights as reflected in DPSP.

The birth of the WMP basic structure doctrine was directly related to the issues of individual rights and, more frequently than not, to the right to property. *Shankari Prasad*[160] involved a challenge to the constitutional validity of the First Constitutional Amendment. The issue was whether the term "law" in Article 13(2) included a constitutional amendment. If it did, it would mean that a constitutional amendment itself would be declared void if it contravened a fundamental right. The *Shankari* Court held that constitutional amendments made under the amending power of Article 368 could not be tested under Part III, since they were in the exercise of constituent amending power and were not "law" under Article 13. *Sajjan Singh*[161] clearly upheld the power to take away even the fundamental rights under Part III. The seed for the "transcendental" or "unalterable" nature of fundamental rights was laid in the judgments of the two dissentients in *Sajjan Singh.*[162] Within two years, this view would become the majority view of *Golaknath.*[163] This "transcendental view" was based upon the word "fundamental" in Part III and the fact that Article 13 did not seek

157. In re Kerala Educ. Bill, A.I.R. 1957 S.C. 956, 986. For another judgment reflecting the same spirit of harmonious construction of fundamental rights and DPSP, see Express Newspaper v. Union of India, A.I.R. 1958 S.C. 578, 634.

158. Golak Nath v. State of Punjab, A.I.R. 1967 S.C. 1643.

159. Ashoka Kumar Thakur v. Union of India, (2008) 6 S.C.C. 1, ¶ 173.

160. Shankari Singh Deo v. Union of India, A.I.R. 1951 S.C. 458, 460.

161. Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845, 854.

162. *See id.* at 860, 862, 864 (Hidayatullah, J. and Madhulkar, J., dissenting).

163. *See generally Golak Nath*, A.I.R. 1967 S.C. 1643.

to exclude constitutional amendments. Furthermore, this view held that Article 368 did not contain language permitting amendment of any or all parts of the constitution.

Regarding the framers' intent, commentators, after analyzing the Constituent Assembly Debates have concluded that "the intention of the framers is not clear from a perusal of the proceedings of the Constituent Assembly, . . . and, though, very generally speaking, the tendency was 'against' fundamentalness, this was not reflected in the actual drafting."[164]

By a majority of six to five, *Golaknath* overruled both *Shankari Prasad* and *Sajjan Singh*. By applying the doctrine of prospective overruling, the court held that Parliament did not have the power to amend any part of Part III or to abridge the fundamental rights therein. By the Twenty Ninth Constitutional Amendment Act in 1972, the Kerala Land Reforms Acts were sought to be immunized from judicial scrutiny by putting them in the Ninth Schedule of the constitution. The Twenty Ninth Amendment and the Kerala Acts were challenged in *Kesavanand Bharati*[165] which, by a seven-six majority, overruled *Golaknath* and held that while Article 368 permitted amendment to the Fundamental Rights Chapter, it did not enable parliament to alter the basic structure of the constitution.[166]

The significance of the basic structure doctrine lies in the fact that regimes all over the world use constitutional amendments to legitimize a diverse array of otherwise illegal actions, including army takeovers, coups, and dictatorships. The basic structure doctrine is a "Brahmastra,"[167] which enables the judiciary to declare constitutional amendments as unconstitutional. This weapon has been used repeatedly and in diverse situations,[168] the judicial retention of this residual right adds to its momentous reach and potency. The list is not exhaustive and is growing continuously. The following ideals are part of the basic structure of the Indian Constitution: republicanism; democracy; free speech and expression; equality; life and liberty; free and fair elections; secularism; federalism; and judicial review. Using the potency of this doctrine, the recent Coelho Bench[169] held that each time any law is added to

164. RAY, *supra* note 15, at 137 (emphasis omitted).

165. Kesavananda v. State of Kerala, A.I.R. 1973 S.C. 1461, 1563.

166. For a succinct sequence of events, see Coelho v. State of Tamil Nadu, (2007) 2 S.C.C. 1, 23-24.

167. "Brahmastra" is a divine weapon of mass destruction in Hindu mythology.

168. *See* Minerva Mills v. Union of India, (1981) 1 S.C.R. 206, 207; Waman Rao v. Union of India, (1980) 3 S.C.C. 587, 588.

169. *See Coelho*, 2 S.C.C. at 209.

the Ninth Schedule, the court would have full power to examine whether the law and/or its inclusion in the Ninth Schedule violates the basic structure of the Indian Constitution. Sometimes the most landmark decisions are born amidst chaos and confusion but yet go on to become seminal path-finders. The basic structure doctrine may well be one such example.[170]

The immense reach and potency of the basic structure doctrine was invoked in February 2009 by a notice by the apex court on a fresh petition that sought the return of the right to property as a fundamental right.[171] The right to property was deleted as Article 19(1)(f) in June 1979 and simultaneously reincarnated as a constitutional right under Article 300A.[172] This deletion was challenged in the recent public interest litigation on the ground that the 44th amendment carrying out this deletion violated the basic structure doctrine. The court relied on Justice Khanna's clarification after the *Keshavananda Bharati* judgment that he had not intended to hold in *Bharati* that a fundamental right could not be part of the basic structure.[173] The petition asserts that while the original deletion of the right to property may have been justifiable because it prevented the government from acquiring land for legitimate public purpose, recently, the government has been acquiring large tracts from poor or smaller agriculturists to redistribute it to rich multinational companies or builders in the name of creation of a special economic zone. The view that the right to property, even as a constitutional non-fundamental right, would be able to invalidate any statutory mandate in the same manner as Article 19(1)(f) ignores the positioning of the earlier right in Article 19(1)(f) as against that currently found in Article 300A. The former conferred a substantive right and was subject only to the reasonable restrictions provision, then existing under Article 19(5). Moreover, it would require the term "law" under Article 13 to attenuate it. The Article 300A right is couched only in terms of sanction of law and hence, as long as some legal sanction exists, property rights are more easily violable since the earlier stricter tests found in Article

170. See T.R. Andhyarujina, *Basic Structure of the Constitution Revisited*, THE HINDU, May 21, 2007, in which Andhyarujina demonstrates the "infirm roots [of the basic structure doctrine] and how predilections and prejudices of judges, chance, and accidental circumstances have played a greater part rather than any logic or conscious formulation of it."

171. *See* Dhananjay Mahapatra, *Should Right to Property Return?*, TIMES OF INDIA, Feb. 28, 2009.

172. The Constitution (Fourth-Fourth Amendment) Act, 1978, No. 88, Acts of Parliament, 1978, §§ 2, 34 (took effect June 20, 1979).

173. *See, e.g.*, Indira Nehru Gandhi v. Raj Narian, A.I.R. 1975 S.C. 2299 (quoted extensively in *Coelho*, 2 S.C.C. at 104-06).

19(5) when property was a fundamental right under Article 19(1)(f) is now missing. Article 300A has not received the same or similar treatment in terms of content, fairness, and due process as has Article 21. In that sense, Article 300A awaits its *Maneka*. Hence, the right to property under Article 300A has not been held as part of the basic structure.

I. *Free Speech and Expression*

Telecom and media have changed dramatically in India in the last two decades. In a sense, both are founded on the information technology revolution, but the bedrock of the 400,000,000 viewers, approximately 300 channels, the multibillion dollar industry,[174] as well as some of the world's largest circulated print media[175] in English, Hindi, and in several regional languages, is undoubtedly the constitutional right to free speech and expression.

Free speech has been one of the most remarkably secure rights and has created a vibrant, frequently cacophonous, sometimes chaotic, but always fiercely independent visual and print media industry in India. The bare six words of Article 19(1)(a) have been interpreted, understood, and applied to subsume every possible facet of free speech and expression regarding the right to know, receive, transmit, speak, write, express, and so forth.[176] A free press, not mentioned in the constitutional text, was judicially read into this article fifty years ago.[177]

The old approach—that advertisements constituting commercial free speech are not subsumed under Article 19(1)(a)—was jettisoned in the landmark *Tata Yellow Pages* case.[178] The court noted that the earlier Indian apex court Constitution Bench judgment in Hamdard Dawakhana,[179] which had disallowed commercial free speech as a part of 19(1)(a), was based on an earlier, overruled

174. As per the report of FICCI – PricewaterhouseCoopers on Indian Entertainment and Media Industry, (2008), at present, there are 119 million TV households with a viewership of 415 million served by more than 30 channels in India. The entertainment and media industry reached an estimated size of 513 billion rupees and has grown cumulatively at 19 percent in the last four years. *Id.*

175. More than 99 million newspapers are sold every day in India, the second largest market in the world for newspapers. *See World Press Trends: Newspapers are a Growth Business*, World Ass'n Newspapers, http://www.wan-press.org/article17377.html (last visited Sept. 12, 2010).

176. *See* Ministry of Info. & Broad. v. Cricket Ass'n of Bengal, A.I.R. 1995 S.C. 123, 126, 228.

177. *See* Express Newspaper v. Union of India, A.I.R. 1958 S.C. 578, 615-16.

178. *See* Tata Press Ltd. v. Mahanagar Tel. Nigam Ltd., (1995) Supp. 2 S.C.R. 467, 490.

179. *See* Hamdard Dawkhana v. Union of India, A.I.R. 1960 S.C. 554, 563.

U.S. Supreme Court case.[180] Commercial free speech is thus a direct import into India from the United States.

Another similar import has been the incorporation of the Sullivan Rule by the Indian Supreme Court into the Indian law of defamation.[181] Consequently, where the claimant in a defamation action is a "public official," the court requires a demonstration of malice by the defendants in addition to the satisfaction of the normal test of defamation before holding for the plaintiff.[182]

Each of these precedents has consistently expanded the contour and content of the right to free speech. For example, where Article 21 applies, the right under Article 19(1)(a) is not suspended or extinguished. A person legitimately detained under Article 22 is entitled to write and publish so long as his publications are not prejudicial to the reasons for his detention.[183] The approach has thus been to give the constitutional right its maximum possible scope and effect.

There can hardly be a more visible pillar of vibrant Indian democracy than the free press—both print and visual—found in India. Contemporary debate on the subject is not about fortifying or expanding this right but frequent lamentation about its misuse. The "subjudice rule" stands significantly diluted, if not reduced to its vanishing point.[184] Trial by media is a significant area of debate, not only in the media itself, but in all parts of civil society. The reasonable restrictions on Article 19(1)(a) in Article 19(1)(2)—sovereignty and integrity of India, security of state, decency, morality, contempt of court, defamation or incitement to an offense—hardly have played any significant role in diminishing free speech and expression.[185] Many correctly believe that the boundaries of reasonableness have been exceeded in the exercise of this valuable right. Fortunately, India has decided to err in favor of the citizen, with an expansive interpretation of this provision in the citizen's favor.

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180. Valentine v. Chrestensen, 316 U.S. 52 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

181. *See* Rajagopal v. Tamil Nadu, (1994) 6 S.C.C. 632, 645-50.

182. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964), in which the U.S. Supreme Court focused on the defendant's intent and established a malice requirement for defamation. The test applies to public officials and shifts the burden of proof to the plaintiff, in contrast to the traditional common law defenses cited in *Rajagopal*, 6 S.C.C. at 647.

183. *See* State of Maharastra v. Prabhakar Pandurang Sanzgiri, A.I.R. 1966 S.C. 424, 425.

184. *See* M.P. Lohia v. State of West Bengal, (2005) 2 S.C.C. 686, 688-89.

185. *See id.* at 689.

J. *Terrorism*

India is more affected by terrorism than any other place on earth, except Iraq. This is true on all counts—number of terror incidents, number of deaths, and number of people injured. The number of hostages taken in India comes in third, after Nepal and Iraq.[186] Given the grave provocation and the acute national anger at the loss of innocent lives due to terrorism, India has shown remarkable maturity and restraint in broadly maintaining a reasonable balance between the scope of individual human rights and the exigencies of the war against terror.

Unlike in the United States, legislative and other initiatives in India to combat terrorism have not been restricted to non-citizens or aliens. The Terrorist Activities Disruptive (Prevention) Act (TADA)[187] was born in the wake of Punjab terrorism. When the then-government found that conviction rates under the act were low and that it was used more against Gujarat farmers, it was repealed in 1995. The Prevention of Terrorist Activities Act (POTA)[188] was born as an ordinance in 2001, continued as an Act in 2002, and a new government, as per its election platform, repealed it in 2004.[189]

Although the debate about anti-terror law unfortunately has been mixed up with politics, it is frequently forgotten that most of

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186. One wonders whether this will continue to be true after the November 26, 2008, Mumbai hostage crisis.

187. The Terrorist Activities Disruptive (Prevention) Act of 1987, which was repealed in May 1995, provided the following:

> [T]he act was the first and only legislative effort by the [Indian] government to define and counter terrorist activities. It was formulated in the back drop of growing terrorist violence in Punjab [in the eighties and] had its violent effects in other parts of the country too, including capital New Delhi. [The Terrorist Activities Disruptive (Prevention) Act of 1987], which was criticized on various counts by human rights organizations and political parties, was permitted to lapse in May 1995 though cases initiated while it was in force continue to hold legal validity.

The Terrorist Activities Disruptive (Prevention) Act, 1987, No. 28, Acts of Parliament, 1987, *available at* http://www.satp.org/satporgtp/countries/india/document/actandordinances/TADA.htm.

188. The Prevention of Terrorist Activities Act (POTA) was an anti-terrorism legislation enacted by the Parliament of India in 2002. Once POTA became law, many reports surfaced of the law being grossly abused. Human rights and civil liberty groups fought against it. On October 7, 2004, the United Progressive Alliance government in India approved the repeal of POTA. After the President of India repealed POTA through an Ordinance in 2004, the Unlawful Activities (Prevention) Act of 1967 was amended in 2004 and again in 2008 in the aftermath of the Mumbai Terror attack to make it more effective to counter terrorism. *See generally Acts and Ordinances of India*, SOUTH ASIA TERRORISM PORTAL, http://www.satp.org/satporgtp/countries/india/document/actandordinances/index.html (last visited Sept. 12, 2010).

189. *See id.*

the legal provisions necessary to prevent terror incidents have never been eliminated from Indian law. They comprise approximately 75 percent of POTA and were reincarnated in the Unlawful Activities Amendment Act in 2004. These provisions address infiltration, intelligence, surveillance, interception, and funding of terror activities. These provisions form the core of the preventive war against terror and exclude only the more draconian amendments on the issues of bail, admissibility of confessions, and period of remand of an accused addressing the more intrusive aspects of individual rights.

POTA was clearly a more severe dispensation. The regard for individual rights despite the current anger in India is reflected in the continued admissibility of confessions, even after the December 2008 amendment to the Unlawful Activities Act in 1967. India's commitment to protection against extracted confessions and potential custodial torture is reflected in this restraint exercised even throughout the 2008 attack in Mumbai. The political hype about the weakening of the war against terror in the absence of admissible confessions is highly exaggerated. An old and established provision—Section 164 of the Criminal Procedure Code—permits the admissibility of confessions recorded under controlled circumstances before a magistrate, and this provision can be used in cases where the exigencies so require. The Administrative Reforms Commission recommended the inclusion of admissibility of confessions, with the significant caveat that this should be done only after extensive police reform, sensitizing the constabulary to human rights issues, and considerably enhancing their status and perquisites.[190] There is no doubt that *Kartar Singh*[191] upheld the TADA provision holding confessions admissible, but a subsequent Supreme Court judgment[192] doubted the narrow three-two majority of *Kartar Singh.* The *Navjot Sandhu* Court held as follows:

> The Constitution Bench judgment is binding on us. In fact, the ratio of that judgment applies with greater force to POTA, as the guidelines set out by the Constitution Bench are substantially incorporated into Section 32. It is perhaps too late to seek reconsideration of the view taken by a majority of the Judges in the Constitution Bench. But as we see Section 32, a formidable doubt lingers in our minds despite the pronouncement in *Kartar Singh* case. That pertains to the rationale and the reason

190. *See* Second Admin. Reforms Comm'n, Combatting Terrorism: Protecting by Righteousness 62 (2008), *available at* http://arc.gov.in/8threport/ARC_8th_report.htm.

191. *See* Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569, 570.

192. *See* State v. Navjot Sandhu, (2005) 11 S.C.C. 600, 675-76 (citation omitted).

> behind drastic provision, making the confession to a police officer admissible in evidence in a trial for the POTA offences.

Extrajudicially, the Chief Justice of India has emphasized the importance of guarding against the tendency of using terrorist attacks "as a justification for undue curtailment of individual rights and liberty."[193] The country's Prime Minister has agreed, stating as follows:

> We need to understand the relationship between human rights and the fight against terrorism. The two concepts are not mutually exclusive. They can and should go hand in hand. When in conflict, it is possible to resolve them. Systematic terrorist acts qualify as they must as crimes against humanity. They sometimes threaten national security. In certain circumstances, States are both entitled and obliged to take steps that seems to derogate from human rights principles. But we should not feel

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193. K.G. Balakrishnan, Chief Justice, Supreme Court of India, Address at the International Conference of Jurists on Terrorism, Rule of Law and Human Rights (Dec. 13, 2008), *available at* http://www.outlookindia.com/article.aspx?239260. In his speech, which was given only weeks after the Mumbai attacks of November 26, 2008, Chief Justice Balakrishnan went on to say the following:

> Instead of offering a considered response to the growth of terrorism, a country may resort to questionable methods such as permitting indefinite detention of terror suspects, the use of coercive interrogation techniques and the denial of the right to fair trial. Outside the criminal justice system, the fear generated by terrorist attacks may also be linked to increasing governmental surveillance over citizens and unfair restrictions on immigration.
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> In recent years, the most prominent example of this "slippery-slope" for the curtailment of individual rights is the treatment of the detainees in Guantanamo Bay who were arrested by U.S. authorities in the wake of the 9/11 attacks. It is alleged that they have detained hundreds of suspects for long periods, often without the filing of charges or access to independent judicial remedies. For its part the US Administration has defended these practices by asserting that the detainees at Guantanamo Bay have safeguards such as appeals before Military Commissions, Administrative Review Boards and Combatant Status Review Tribunals. A follow up to the same in Hamdan v. Rumseld, led to the ruling that the terror suspects could not be denied the right of habeas corpus and should be granted access to civilian courts. The rationale for this was that various military tribunals did not possess the requisite degree of independence to try suspects who had been apprehended and detained by the military authorities themselves. . . . In India, those who subscribe to this view also demand changes in our criminal and evidence law—such as provisions for longer periods of preventive detention and confessions made before police officials to be made admissible in court. While the ultimate choice in this regard lies with the legislature, we must be careful not to trample upon constitutional principles such as "substantive due process." This guarantee was read into the conception of "personal liberty" under Article 21 of the Constitution of India by our Supreme Court. The necessary implication of the same is that all governmental action, even in exceptional times must meet the standards of reasonableness, non-arbitrariness and non-discrimination. This implies that we must be wary of the use of torture and other forms of coercive interrogation techniques by law enforcement agencies. Coercive interrogation techniques mostly induce false confessions and do not help in preventing terrorist attacks. Furthermore, the tolerance of the same can breed a sense of complacency if they are viewed as an easy way out by investigation agencies.

Id. (citations omitted).

> discouraged. Certain rights and freedoms can be derogated from, but only to the extent necessary to meet the security treat. The fight against terrorism should not result in brutalization of our society. We must also ensure that no group or section of society gets targeted in our commitment to fight terrorism. What is required is flexibility.[194]

The bail provision in POTA had been reduced to its vanishing point by providing that no bail may be granted unless the court is satisfied that grounds exist that the accused is not guilty of committing an offense. The 2008 amendment makes it somewhat easier to get bail in deserving cases by providing that bail may be granted on the reasonable basis that the accusation is prima facie true. The 2008 amendment has thus made the provision considerably more stringent in comparison to the ordinary law of bail applicable to non-terrorist offenses, but has nevertheless made it less stringent than the POTA provision.

Similarly as against the normal legal rule limiting any accused's remand to ninety days, the 2008 anti-terror amendment allows this period to be extended up to 180 days. It consciously dilutes the stringent provision of the similar POTA provision which provided that upon an application by the public prosecutor in this regard "the court shall grant extension." By contrast, the 2008 Act provides "if the court is satisfied that investigating agencies have done whatever they could, it may grant extension."[195]

The non-legislative initiatives taken after Mumbai 2008 are significant as well. The National Investigating Agency Act of 2008 created a federal agency to address the investigation of terrorist offenses and provides the legal framework for a unified command structure about which previous government had frequently talked, but on which those governments never enacted. Police reforms, provision of the latest anti-terror equipment, and the creation of regional and sub-regional, rapid-response, anti-terror teams reflect the pragmatic facet of the war on terror.

III. Concluding Remarks

This Article is not intended to be an exhaustive treatment of each provision of the Indian Constitution addressing individual rights. It addresses the Indian courts' jurisprudence with respect

194. Prime Minister Manmohan Singh, Address at International Conference of Jurists on Terrorism, Rule of Law and Human Rights (Dec. 13, 2008), *available at* http://pib.nic.in/release/release.asp?relid=45618.

195. The Unlawful Activities (Prevention) Amendment Act, 2008, No. 35, Acts of Parliament, § 43D(2)(b).

to some of the major provisions of Part III of the Indian Constitution and attempts to delineate the nature, content, and boundaries of individual rights by reference to a few sample provisions. The development of constitutional law in India shows a marked trend towards consistent enforcement of individual rights and significant expansion of constitutional protection of social rights.[196] This expansion is manifested in several areas, including the apex court's conclusion that there is a balance between fundamental rights and DPSP, and this harmony is itself part of the basic structure of the constitution.[197] The apex court has similarly imparted protection for a host of social rights including rights to food,[198] education, and health.[199] The radical change from the seventies was summed up in *Unni Krishnan*,[200] when the apex court unequivocally stated that "the provisions of Parts III and IV are supplementary and complementary of each other" and not exclusionary of each other, "and that Fundamental Rights are but a means to achieve the goal indicated in Part IV."[201]

A country the size of India with its well-known issues of development cannot afford to ignore distributive equities or inclusive growth. The apex court has made that political choice somewhat easier by rejecting the notion of non-enforceability of social rights. It has thus virtually bridged the gap between supposedly superior civil and political rights as opposed to supposedly inferior social and economic rights. To its credit, the court has done this broadly without sacrificing one type of right at the altar of another. Indeed, the apex court's achievements in interpreting social rights in this manner has encouraged the executive to slowly but surely start moving some rights from Part IV to Part III.[202] The true achievement of the Indian polity would lie not only in gradually transposing the more important social rights from Part IV to Part III, but in minimizing the gap between constitutional promise and reality.

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196. *See* Jayna Kothari, *Social Rights and the Indian Constitution*, L. Soc. Just. & Global Dev. J., Feb. 28, 2005, at 1.

197. *See* Minerva Mills v. Union of India, (1981) 1 S.C.R. 206, 209. *See generally* T.K. Tope, *Supreme Court of India and Social Jurisprudence*, 1 S.C.C. J. 8 (1988).

198. *See* People's Union for Civil Liberties v. Union of India, Civ. App. No. 196/2001 (Dec. 16, 2003).

199. *See* Consumer Educ. & Research Ctr. v. Union of India, (1995) 3 S.C.C. 42, 70 ("The right to health . . . is an integral facet of a meaningful right to life . . . .").

200. *See generally* Unni Krishnan v. State of Andhra Pradesh, (1993) 1 S.C.R. 594.

201. *Id.* at 652.

202. *See, e.g.*, India Const. art. 21(A) (making the right to education a fundamental right).