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FOUNDATIONS FOR A SUSTAINABLE GROWTH

India’s Constitution and its Supreme Court

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The legal system plays a significant role in any country’s growth trajectory, and within this system, that fundamental of all laws, the Constitution, assumes highest importance. Not only does this document reveal the normative values suffusing the nation’s visualisation but it also puts in place structures of governance to actualise this vision. The preamble to the Indian Constitution envisages a ‘sovereign, secular, socialist, democratic, republic’ and its 400 odd articles and 12 Schedules work together, and sometimes in contradiction, to achieve these five goals. In line with the objectives of this volume on contemporary India, this chapter examines three important constitutional themes essential to the stable and inclusive growth of the nation today, and the Supreme Court’s role in giving them meaning and effect. While one eye is trained on the past, the other keenly awaits the future with predictions in store.

Before embarking on this narrative, a few words on the Constitution’s framing are in order. The Constituent Assembly, responsible for drafting the document, consisted of members elected by the people’s representatives in the provincial assemblies. This indirectly elected body began its first session on 9 December 1946, but became seriously involved with its job after the formal grant of Independence. In January, 1948, a draft Constitution was made available for public response within a period of eight months from then. On 4 November, 1948, the general discussions on the draft commenced in the Constituent Assembly, followed by a clause-centric discussion for about 32 days. This process culminated in the adoption and signing of the Constitution of India on 26 November 1949, and its coming into force on 26 January 1950 (Sridhar n.d.).

It is true that the Constituent Assembly depended substantially on its task of structural design, on the Government of India Act, 1935, passed by the British Parliament. The parliamentary system, the centralised federation, the vast administrative detail for governmental structure and the provision for elections to the provinces, all found presence in the Constitution. Similarly, the document and its framers drew heavily upon the wellspring of ideas offered by the rights discourse in the United States of America. The idea of enumerating a set of non-justiciable directive principles also received impetus due to similar provisions existing elsewhere, including in the Irish Constitution (Austin 1999: 5).

Above all, one indigenous document gave the Indian Constitution its distinctive vision, identity and character, all of which would in turn be instrumental in building the
foundations of the newly born nation state. This was the Objectives Resolution adopted during the December 1946 Constituent Assembly session. This Resolution, drafted by India's first Prime Minister, Jawaharlal Nehru, itself drew from Congress Party documents two decades past. It later found presence in the constitutional text too through the preamble, and can be understood as uncovering three different normative goals: protecting and promoting national unity and integrity, seeding democratic structure and spirit in the polity, and triggering a social revolution to uplift the citizenry, a vast majority of whom personified an impoverished predicament (Sridhar n.d.: 5–6). These three purposes have interacted at cross-purposes to shape the Indian experience of working its Constitution, rendering the Objectives Resolution the most important document in strengthening the foundation of the country's political and legal system.

Because the most unique and original feature of the Indian Constitution over the earlier constitutional documents such as the two Government of India Acts of 1919 and 1935 and ones preceding those is the clear and unequivocal guarantee of fundamental rights, the first part of this chapter examines the signal effect of these provisions in strengthening the foundations of contemporary India. Here, I shall also address specifically the Supreme Court's role in contributing to, and shaping, this rights-based dialogue of citizen–State interaction. The voluminous expanse of literature on fundamental rights makes it impossible to give a comprehensive overview of all provisions. For the purpose of throwing light on the Court's role in strengthening the foundations of a rights-based discourse, I will focus on Articles 14, 19 and 21, referred to often as the golden triumvirate, and show how a largely proactive judicial approach has been instrumental in protecting and nurturing the freedom of citizens.

The next part of the chapter looks into the federal structure of the Constitution and how it attempts, through this design, to bring about a sound system of Centre–State relations. The rationale for introducing a federal system of governance was largely administrative convenience, but post the linguistic division of States, this structure has played an important role in accommodating diversity in the Indian polity. At the same time, concerns abound as to the unequal development of States and increasing regional parochialism, fuelled in most cases by self-seeking political actors. Another worrisome feature lies in the design itself, which carries over the colonial idea of centralisation being a necessary feature to govern and keep united a country this large and diverse. As a consequence, the nation has been witness to unbridled imposition of State emergency on the ground of breakdown of constitutional machinery. The territorial identity of States has also come under attack from internal forces, many of them appealing to the federal structure and the vast powers vested with the Centre to seek separate Statehood. The asymmetric model of federalism, designed to respond to the factum of inequitable development that such claims peg themselves on, has not worked too well either. The second part broadly explores these different ideas and the possibility of the federal structure propelling and hindering, by turns, India's future growth.

An important feature of any constitutional foundation, perhaps the most important when it comes to self-preservation of a democratic polity, is the separation of powers between different branches of Government. Without constitutional provisions that formalise such separation, there is always the danger that any one authority will usurp all power and use the democratic route to eventually put in place a form of despotic governance. Severe onslaught in the 1970s on the separation of powers, especially through the 42nd Constitution (Amendment) Act, 1976, and the practical interference with the judiciary and its functioning, has led to countering responses from the judiciary, enshrining this principle and the related idea of judicial independence as part of the unamendable basic structure of the Constitution.
The last part of the chapter analyses the significance of this principle in providing a sound foundation for India’s future growth.

In addition to the three normative goals mentioned above that present us with a convenient prism to locate and observe the nuances of the doctrinal development and structural features in the three themes chosen for this chapter, there is a bi-dimensional axis of language and practice that drives the analysis here. The strength of any legal foundation depends both on language, namely the conversation that provides meaning to the foundation, and on practice, that is the extent to which such language achieves its objectives through actual implementation. Both are important, yet separate, frames from which the strength of a constitutional foundation can be tested, as this chapter will seek to do.

The fundamental rights story and the Supreme Court’s PIL (public interest litigation) jurisprudence

Part III of the Constitution enumerates the different fundamental rights guaranteed to citizens and other persons. Most of these rights are available only against the State, though a few exceptions exist where rights are horizontally enforced against non-State actors. However, the definition of ‘State’ itself has received a fairly broad interpretation by the Court, resulting in a situation where many fringe actors such as Government companies, cooperative societies and public sector undertakings engaged in pure commercial activity are brought within the purview of State. Thus, in terms of spread, the Supreme Court has been actively responsible for expanding the foundation of the rights-based discourse by including all ‘agencies or instrumentalities’ of the State within the reach of Part III. Apart from a direct guarantee of fundamental rights in many cases, this move by the Court has been responsible in constitutionalising the actions of purely private actors by internalising an expectation of fairness in the minds of the citizen. This is sufficiently borne out by the exercise of writ jurisdiction by various High Courts under Article 226 of the Constitution. These writs being entertainable on the ground of violation of any legal right, Courts have expanded protection to citizens by intervening so long as private actors commit breach of any statutory duty or, sometimes, even a public duty.

It is in the domain of substantive content, though, that the Court has made serious inroads into the initially one-sided State–citizen relationship. The Court has redrawn the terrain to guarantee a better balance and higher protection. The best example of this is the Article 21 jurisprudence and the Court’s expansionism over the years when interpreting this provision and bringing newer rights within its fold. In A.K. Gopalan v. State of Madras, the Supreme Court dismissed a writ filed by a detenu because ‘procedure established by law’, required under Article 21 to deprive a person of his right to life or personal liberty, could include any legally prescribed procedure. Additional considerations such as the fairness, reasonableness or justice behind these statutory mandates were held irrelevant while gauging the constitutionality of the State action. Interestingly, Gopalan called into question a balancing of two of the important normative goals envisaged by the Objectives Resolution. On the one hand, the liberty of a political activist advocating an alternative viewpoint was at stake. On the other, the ability of the State to keep in check possibly divisive ideologies and thus protect national unity was being put to test. This balance is best articulated by Justice Mukherjea in his opinion, as follows:

Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure.
and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers … The society, therefore, has got to exercise certain powers for the protection of these liberties and to arrest, search, imprison and punish those who break the law. If these powers are properly exercised, they themselves are the safeguards of freedom, but they can certainly be abused … What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

The Court leaned in favour of the latter, and the reason could well have been the nascent character of the Indian State. Justice Patanjali Sastri, while explaining the unusual constitutional status conferred on preventive detention by Article 22 of the Constitution, observed:

This sinister-looking feature, so strangely out of place in a democratic constitution which invests personal liberty with the sacrosanctity of a fundamental right and so incompatible with the promises of its preamble is doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic.

Even Justice Fazl Ali, though holding in the petitioner’s favour and striking down the Prevention Detention Act, 1950, as unconstitutional, trod with caution. The learned Judge captured the delicate balance at play here in the last paragraph of his opinion, reproduced below:

I am aware that both in England and in America and also in many other countries, there has been a reorientation of the old notions of individual freedom which is gradually yielding to social control in many matters. I also realise that those who run the State have very onerous responsibilities, and it is not correct to say that emergent conditions have altogether disappeared from this country. Granting then that private rights must often be subordinated to the public good, is it not essential in a free community to strike a just balance in the matter? That a person should be deprived of his personal liberty without a trial is a serious matter, but the needs of society may demand it and the individual may often have to yield to those needs. Still the balance between the maintenance of individual rights and public good can be struck only if the person who is deprived of his liberty is allowed a fair chance to establish his innocence, and I do not see how the establishment of an appropriate machinery giving him such a chance can be an impediment to good and just government.

The perils of tilting the balance towards greater social control were unleashed in full spate during the National Emergency. By then, the nation had fought three major wars, acquired the property of its citizens to bring about social justice, and nationalised important industries to equalise economic wealth. Though all these policies brought the fundamental rights of citizens under direct curtailment, none of them evoked the same sense of injustice as did the Emergency. The proclamation of Emergency at the midnight hours of June 25, 1975 and the excesses that followed were seen as an attempt by Indira Gandhi, India’s then Prime Minister, to unlawfully hold on to power in the face of judicial annulment of her
parliamentary election. The last straw was when the judiciary too failed to protect opposition leaders placed under detention. In what can be termed the worst decision of the Indian Supreme Court in *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, the Court held that once fundamental rights were suspended in the wake of Emergency, no right to life would survive under common law. In other words, citizens were stripped of all their basic human rights during the period of Emergency. The bold Justice Khanna who dissented here was soon superseded from the post of Chief Justice of India, paving the path for the Executive to appoint a more pliant Chief Justice.

There could be no better explanation for what followed than the mystical phenomenon of unintended consequences. The Supreme Court, in an attempt to redeem its glory, started placing greater emphasis on the language of rights (Baxi 1985: 108). The crushing defeat inflicted on the Congress Party in the parliamentary elections of 1977 aided this transformation and soon enough, the nation experienced its first foundational shift in constitutional discourse in *Maneka Gandhi v. Union of India*. The rather simplistic set of facts here – the impounding of the petitioner’s passport by the Union without revealing the reasons thereof – coupled with a concession to grant a post-decisional hearing by the Attorney General of India, lent themselves to a short order disposing the legal action on these very terms. Yet, the Seven Judge Bench of the Court chose to delve in much greater detail on the meaning and scope of the expressions ‘personal liberty’ and ‘procedure established by law’ under Article 21. Justice Bhagwati, in what has gone down in the annals of Indian constitutional law as a defining moment of sorts, sagaciously opined that

[T]he principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be ‘right and just and fair’ and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

Going beyond the specific outcome for the petitioner therein, *Maneka* crafted the syntax for a language of rights. Personal liberty soon became the mantra for metamorphosis of the judiciary from a sentinel on the *que vive* to an active benefactor of positive rights. Taking *Maneka* as the foundation for a renewed rights jurisprudence, and building on it by expanding the meaning of both ‘life’ and ‘personal liberty’ in Article 21, the Court set new benchmarks for judicial activism. The Court had the suffering of several millions of people and the degrading human conditions in which they lived in mind as it proclaimed – with the mission of upliftment – that the right to life included the right to live with human dignity. The Court listed within the fold of this expansive interpretation, necessities such as adequate nutrition, clothing and shelter, facilities for reading, writing and expressing oneself in diverse forms, and freely moving about and commingling with fellow human beings. While there is well-justified caution expressed by constitutional theorists about branding *Maneka* an activist decision (Khosla 2009: 87), it certainly ushered in a whole new language of positive rights, and along with it, higher expectations from the judiciary on the citizen welfare front. Article 21, post *Maneka*, has found its way into the judicial conversation on solitary confinement and bar fetters on under-trials, handcuffing of citizens on the way to court, custodial torture, the imposition of the death penalty only in the rarest of rare cases, the delay in execution as an extenuating factor even when the death penalty is ordered under such rare circumstances, right to privacy, right to information, access to legal aid, sexual
harassment at the workplace, the right to die, the award of monetary compensation as relief in cases of torture, the constitutionality of anti-terror legislation containing draconian exceptions to established rules of evidence and criminal procedure, and, most recently, the legality of the inhuman manual scavenging practice going on in several parts of the country and the legal recognition of transgender people.

Even more unconventional than the inclusion of Article 21 in the discourse on civil and political rights is its influence in the fashioning of rights and remedies in the socio-economic realm. However, this trend in judicial reasoning cannot be viewed in isolation and has to necessarily be understood in conjunction with another important part, Part IV, of the Constitution. Though the Directive Principles of State Policy, enumerated in Articles 38 to 51 of this part, were meant to be non-justiciable, the Court has correlated the scope of some of these principles with the expansive content of Article 21 to guarantee their availability as fundamental rights under Part III (Jain 2000: 98). It is when expounding on these socio-economic principles under Part IV and their availability as rights under Part III that the Court has significantly pushed the barriers of thinking that traditionally perceived fundamental rights to be negative liberties against the State. The Court, recognising the importance of primary education in guaranteeing a meaningful life, conferred the directive in Article 45 exalted status as a protected right under Article 21, eventually leading the path to the insertion of Article 21-A and supporting legislation. Along similar lines, the Court has also read in multifarious rights such as to a healthy life, access to medical facilities, shelter and housing, food security, a clean and unpolluted environment, sustainable development, and effective remedies built on the polluter pays principle, the precautionary principle, and the public trust doctrine.

Finally, no narrative on this theme is complete without a look, brief as it may be, into the Supreme Court’s public interest litigation (PIL) jurisdiction and its attempt at inclusion of voices from different walks of life through the relaxation of legal standing. In fact, the Bombay High Court can be considered the pioneer in this area because the first such unconventional relaxation of standing took place in a writ filed before this Court in *Piloo Mody v. State of Maharashtra* (Desai and Muralidhar 2000). The petitioners here were ordinarily placed residents of Mumbai who sought to challenge disposal of Government property at abysmally low prices. The High Court responded to the State’s challenge to the *locus standi* or legal standing of these petitioners by reasoning that the petitioners, as residents of Bombay, had an interest in the orderly development of the city in harmony with a proper layout. Subsequent judicial development in this area, spearheaded by several important decisions of the Supreme Court, essentially build on the same philosophy: discarding the regular bipolar, adversarial structure of a lawsuit to entertain legal challenges by a wider variety of constituents who can be considered ‘interested’ or ‘aggrieved’ persons in the dispute at hand. Three broad trends can be identified even within this common philosophy: first, the trend of allowing special interest groups to advocate the cause of those incapable of defending their own, largely overlapping with the Court’s jurisprudence on expansion of Article 21 to guarantee additional civil and political rights protection to the meek and the downtrodden. Second, the relaxation of *locus standi* to substantially intervene in matters of environmental protection and ensure protection of the rights of citizens to a clean and healthy environment, guaranteed under Article 21. The third is a trend to relax *locus standi* with the instrumental idea of enhancing probity in public affairs, again by reading in a right to corruption-free governance within Article 21 (Sudarshan 2005: 24–25) or by recognising a legally enforceable public interest in matters relating to the three branches of Government. The Court has, while exercising its PIL jurisdiction, devised novel procedures for the purpose of ascertaining facts and overseeing enforcement of its orders.
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It goes without saying that the Court’s expansive PIL jurisdiction and its broadening of Article 21 to cover socio-economic rights has left lawyers and academics divided on the correctness of this approach, both from a conceptual standpoint and in terms of its actual efficacy. Attempts have also been made to cut through the rhetoric and understand the real nature of the discourse, including whether the Court has fashioned broadly available socio-economic rights or merely intervened in a conditional sense, i.e. to enforce a set of benefits already in place but not implemented thus far by the Executive (Khosla 2010 and Tushnet 2011). These and other debates on the Court’s exercise of judicial review and assumption of power over a wide variety of subjects with procedural restrictions ranging from little to none, are outside the scope of this chapter. However, before leaving this part and proceeding to discuss India’s federal structure, an important concern comes to mind. The practice of the Supreme Court over time has given way to practices of different Benches of this Court. This has come at the cost of consistency in outcomes and even worse, in the kind of judicial reasoning to arrive at such outcomes. The same Court that progressively recognised the right to self-determination of transgenders has affirmed the criminalisation of homosexuality, through a different Bench. Similarly, the Court has upheld hard-hitting anti-terror legislation and given imprimatur to the Armed Forces (Special Powers) Act, 1958, while at the same time protecting private citizens from recruitment into private policing organisations such as Salwa Judum. Through these different views and approaches of different Benches, the Court adds much murkiness to the essential line drawing between two core foundational objectives writ large in the Constitution, namely, preservation of national unity and identity, and protection of the individual against State excesses. The Court has to put in place internal mechanisms to avoid such inconsistency on basic and foundational questions, if the Constitution and specifically, Parts III and IV therein, have to continue serving as a dependable bedrock for the country’s future growth in a sustainable manner. Moreover, the Court’s success has largely been in the realm of language, to reference the bi-dimensional axes analysis introduced at the beginning of this chapter. It is important to ensure that the limited success in this axis is not diluted, while the institutions of power work towards a better ordinate on the practise axis.

The federal structure

The federal structure India inherited from the British through the Government of India Act, 1935, was a product of two different instrumental concerns: one, the heady task of administering a large and diverse country, and two, projecting a compromise in the larger theatre called the Indian independence movement by permitting provincial autonomy. When transplanting this structure on to the Indian Constitution, a large part of the ‘colonial hangover’ – to borrow a clichéd phrase – was unfortunately retained. The centrist character of the resultant federal structure has led to the oft used, and sometimes misused, aphorism: ‘federal in character, unitary in spirit’. In this part, I examine how the federal structure has played out, along the multi-dimensional axes of retaining India’s national unity and integrity, while at the same time, securing its diversity and multiculturalism. Clearly, there is a delicate balance at play here because too much assertion of national identity and imposition of ‘Indian-ness’ could arguably result in the collapse of sub-national identities and a backlash. On the contrary, promoting sub-nationalism at the cost of weakening the nation state can be detrimental to the very existence of democratic spirit, and lead to possible anarchy.

This part picks three important themes to try and explain the competing concerns in this legal and political thicket, and the judicial responses and trends therein. While it is wishful to consider that these themes shall capture the complexities of the debate(s) in entirety, they
will show how the foundation is currently set and more ambitiously, propose realignments in the structure that strike an optimal balance between the normative goals of preservation of national identity and respect for the multicultural heartbeat. The three themes are: (i) the Centre’s power to declare emergency in any particular State, (ii) the carving out of separate States, and (iii) India’s asymmetric federalism.

**Article 356 and its unwise use**

The Constitution permits the Centre, in a situation where the Government of the State cannot be carried on in accordance with the provisions of the Constitution, to take over the governance of that State vide a proclamation of emergency that satisfies the requirements laid out in Article 356. There are many issues that this provision presents, but I shall focus on the most important of these: the extent of power vested with the Union to declare such emergency in the first place.

The issue came up before the Supreme Court for its consideration the first time in *State of Rajasthan v. Union of India*.48 This case has an interesting political context to it, being the massive defeat of the Congress Party at the hands of the then opposition – a motley group of parties with ideologies ranging from the left to the right – cobbled hurriedly to face the parliamentary elections held immediately after the infamous National Emergency of 1975. The drubbing faced by the Congress Party at the Centre emboldened the new political dispensation to advise the nine States governed at that point by the Congress Party. The convoluted, yet ingenious, advice went thus: because your party has lost at the Centre, there is a clear misalignment between your Ministry and the people who you govern. This could lead to law and order concerns. Therefore, advise your Governor to consider recommending the imposition of Article 356.

The State Ministries immediately initiated legal proceedings against this advice. So, there was no formal proclamation of emergency under challenge here. Yet, the Court examined the permissibility of judicially reviewing such a proclamation. In an opinion that placed absolute primacy on the Centre’s stand in this matter, the Supreme Court held that the Court would only intervene if the proposed action was ‘so completely outside the purview of Art. 356 or so clearly in conflict with a constitutional provision that a question of excess of power could have apparently arisen’ – a rather weak standard of review once we realise that most political decisions find justification, tenuous or otherwise, in some constitutional principle. Justice Chandrachud, in his concurring opinion, added that it was entirely left to the President to judge whether a situation necessitating the imposition of emergency under Article 356 had arisen, and that the Court, though expectant of his fairness in arriving at this decision, could not sit in judgment over his subjective satisfaction. The only matter for the Court’s consideration was whether the reasons, if any disclosed, for the action proposed or taken, bore a reasonable nexus with the exercise of the particular power. This observation left open the ominous possibility of no reasons being disclosed whatsoever, and the Court, and the State Governments, being left high and dry in such an event. Moreover, even if reasons were disclosed, the President could be subjectively satisfied that such reasons bore reasonable nexus with his decision to invoke Article 356 except in extreme cases – possibly those vitiated by *mala fides* – and the Court would still defer to his decision.

The Court’s abdication of responsibility to safeguard the federal structure inevitably led to unbridled, and often vicious, invocation of Article 356. This ultimately compelled the Supreme Court to intervene in *S.R. Bommai v. Union of India*49 despite the contentious issue of wrongful invocation of Article 356 being rendered infructuous due to intervening
This case too had an interesting background story, as three State Governments were dismissed because of inability to control rioting that followed the Babri Masjid demolition, a watershed event in post-independence India. However, the petitions before the Court were motley and not confined to these three instances of invocation of Article 356. In a classic exercise of its balancing power, the Court broadly found the dismissals connected with the rioting to be constitutionally valid and the rest to be infirm. Though this finding had no practical implication, the Court’s restatement of the law drew the line differently, safeguarding the federal structure way better than its earlier verdict in *Rajasthan*, and possibly placing the clamps on misuse of Article 356. This restatement is best reflected in the following observation of Justice Jeevan Reddy:

> [t]he exercise of power by the President under Article 356(1) to issue Proclamation is subject to judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. Needless to emphasise that it is not any material but material which would lead to the conclusion that the Government of the State cannot be carried on in accordance with the provisions of the Constitution which is relevant for the purpose. It has further to be remembered that the article requires that the President ‘has to be satisfied’ that the situation in question has arisen. Hence the material in question has to be such as would induce a reasonable man to come to the conclusion in question.

*Bommai* had two major implications for the federal scheme. First, though the Court, in accordance with Article 74(2), would not concern itself with the advice tendered to the President by the Council of Ministers, it would still examine the material on the basis of which such advice was given, including the Governor’s report. Second, the subjective satisfaction arrived at by the President would have to independently satisfy the ‘reasonable man’ test, thus in effect being amenable to objective standards of review. Though the Court would not second guess the sufficiency of the material placed before it, it could well question the legitimacy of the inferences drawn by the President from such material.

There was a third idea that Justice Jeevan Reddy expressed, which went to the structural foundations of the federal structure. He observed that so long as the States were not mere administrative units but constitutional potentates in their own right, the mere labelling of the Constitution as unitary or quasi-federal or a mixture of federal and unitary structure would not vest the President with unrestricted powers to invoke Article 356. However, the Court placed high value on the principle of secularism, thereby signalling that were any State Government to act in contravention of constitutional principles that safeguarded the integrity of the nation – such as the three Governments dismissed post the Babri Masjid incident – its dismissal would be justifiable under the constitutional scheme. That *Bommai* had, in this fashion, struck a balance by distinguishing between acts threatening national integrity or stability, and acts that perhaps went against political morality but were best left to the normal route of trial and error as played out in the State political arena, only became evident much later, when the Court struck down the imposition of Presidential rule in Bihar.

In *Rameshwar Prasad v. Union of India*, Article 356 was invoked when the elections to the Bihar State Legislative Assembly did not produce a decisive winner. The political chicanery
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and unethical practices behind the scene in contravention of the anti-defection provisions in the Tenth Schedule, with the objective of cobbled up a majority, seemingly motivated the Governor to prepare his report advising declaration of emergency. Hence, as Justice Balakrishnan’s dissent stated, there was ample reason on the face of the record to justify invocation of Article 356. The majority still found the invocation unconstitutional, and the best way to understand this is that the unethical conduct alleged was of the kind truly internal to the political system of that State with no ramifications for national unity or integrity. The majority expressly relied on the three proclamations found unconstitutional in Bommai and the factual background therein – each of them involved solely questions of internal political morality – to inductively reason the unconstitutionality of the proclamation here.

Based on the above, rather limited, flashes of reasoning and judicial trends, we can hypothesize an attempt on the part of the Court to realign the centrist posture of the federal structure by instilling a healthy respect for the democratic choices made by the electorate in that State. This may be necessary, but still not sufficient, to consider the foundations of the federal structure strong enough to resist fissiparous tendencies while simultaneously accommodating genuine concerns of diversity. This is evident from the discussion that follows.

Creating separate States: all in the centre’s hands

In the matter of carving out separate States, again the constitutional design displayed strong features of centrist. Article 3 conferred a limited right to the States to ‘express their views’ on the creation of a new State formed through the redrawing or modification of their territory. Parliament remained the final arbiter on the issue as the Bill providing for such a measure had to be voted on only in its two houses. Again, the question of balancing competing considerations loomed large. The important concern of ensuring that the nation’s territorial unity was not left to the mercy of special interest groups at the State level had to be balanced with genuine demands of multiculturalism or administrative efficiency. This is where the Court’s role becomes important, though sadly, as matters currently stand, the whole field is a political mess.

In Babulal Parate v. State of Bombay,51 the Court was called upon for the first time to decide the scope of the proviso to Article 3, which provides for the solicitation of views from the States whose territories stood impacted by the proposal. The nuance here was that the State’s views were sought, and given, the first time but there was a subsequent amendment to the proposal, which was not placed before the State Legislature for its views. The Court’s response to this contention, and its interpretation of Article 3, virtually handed over a carte blanche to the Centre. Interpreting the proviso, the Court held that its underlying purpose was only to furnish an opportunity to the State Legislature to express its views within the time allowed and not to bind Parliament in accepting or acting upon the State Legislature’s views. Parliament was free to deal with the Bill in any manner it thought fit, including a subsequent modification of the proposal without any fresh reference to the State Legislature. The Court, in two strokes, rendered toothless the requirement of referring to the State Legislature. One, it reduced the proviso to a mere procedural formality, instead of compelling the Centre to adduce strong reasons why the views of the State were not accepted. Two, it permitted amendments that may have completely deviated from the original proposal, except that this time, the State Legislature would not even be called upon to express its view. All of this can ultimately be traced to a weak conception of Indian federalism, as evident from the following passage from the decision:
None of the constituent units of the Indian Union were sovereign and independent in the sense the American colonies or the Swiss Cantons were before they formed their federal unions. The Constituent Assembly of India, deriving its power from the sovereign people, was unfettered by any previous commitment in evolving a constitutional pattern suitable to the genius and requirements of the Indian people as a whole. Unlike some other federal legislature, Parliament, representing the people of India as a whole, has been vested with the exclusive power of admitting or establishing new States, increasing or diminishing the area of an existing State or altering its boundaries, the Legislature or Legislatures of the States concerned having only the right to an expression of views on the proposals. It is significant that for making such territorial adjustments it is not necessary even to invoke the provisions governing constitutional amendments.

To summarise, the already centrist design became even more so, post Babulal Parate. The later decisions of the Court stand testimony to this conclusion. For instance, in Pradeep Chaudhary v. Union of India, the Court held that even a substantial amendment to the Bill as originally passed on to the State Legislature for its views, would not in any manner call for a second opinion from the State in question.

As the recent controversies surrounding the creation of the State of Telangana after bifurcation of Andhra Pradesh reveal, the demand for separate Statehood can have extremely divisive implications for the Indian State. Unfortunately, with every new State being created, we see an exponential increase in the demand for many more. Most of these demands are at the behest of special interest groups that perceive the appeal to the Centre as a convenient ploy to get their own private fiefdoms. The Court, by enfeebling the State’s voice in the matter, has indirectly lent more potency to such ploys. Its approach in Babulal Parate has ended up validating the earlier mentioned aphorism about Indian federalism, and resulted in a top-down approach where the Centre, less aware of the ground realities in a particular State, can bypass those administering the State who are better placed to assess the validity of bifurcation claims. Because Article 3 provides no real safeguards against an overarching Central exercise of authority, we need to examine whether the balance of power can still be kept alive through limited reliance on this provision and greater resort to India’s asymmetric model of federalism.

Asymmetric federalism: the case of unequals treated unequally

Though all sub-national entities within the nation are equal, some are more equal than the rest. This is the underlying premise behind the design of asymmetric federal structures within the Constitution. The rationale for such unequal treatment could be either the unique cultural specificities or historical past that necessitates more autonomy to the unit in question, or the unequal development of the unit compared to other units or of parts of the unit compared to the rest of it that necessitates differential treatment of the unit or its less developed parts respectively. The constitutional design of asymmetric federalism is fairly complex and nuanced, and not fitting within one homogenous trend or thought. Hence, this sub-part focuses on two parts of the model, namely the fifth and the sixth Schedules, and the special provisions for differential treatment of regions within the same State. The debates on special status to Jammu and Kashmir and the provisions that purportedly enhance the autonomy of Meghalaya and Nagaland are outside the scope of this chapter.
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The Fifth Schedule, when read with Article 244(1) of the Constitution, provides for the administration and control of scheduled areas and tribes in States other than Mizoram, Tripura, Assam and Meghalaya. The Sixth Schedule provides for the administration and control of the same subject matter in these four States. The reason for a separate schedule was in recognition of the divergence between the religious and cultural practices of the scheduled tribes in these States and in the remaining parts of the country. When debated before the Constituent Assembly, some members expressed worry about the potential of these provisions to create a Tribalstan of sorts but better sense prevailed, in realisation of the truism that special occasions demanded special responses.

There is very little secondary literature on the impact of these provisions in practical terms. A better way of understanding the impact would be to merely look at the scheduled areas and see how far behind the rest of the country they still are, in terms of economic and human development indices. Drawing a direct correlation between such backwardness and the failure of these provisions may be a tad unfair. However, we could safely conclude that the provisions have not promoted the interests of these areas in the manner, and to the extent, imagined by the fathers of the Constitution. To take a simple example from the few that we have with us, consider the decision in Samatha v. State of Andhra Pradesh and its aftermath. The Supreme Court had categorically laid down in Samatha that non-tribals could not acquire land in the tribal areas covered within the Fifth Schedule whether through direct voluntary transfers or through indirect ones effected by the State grant of mining leases in these areas. This was a progressive and protective decision for the tribals, as rampant mining had emerged as a threat to their cultural diversity and way of life. Unfortunately, the accepted national development paradigm soon took over, and the same Court in BALCO Employees' Union v. Union of India questioned the Samatha ruling and resorted to hyper-technical distinctions to distinguish this decision. Over time, land issues have become unmanageable in at least a few of the nine Fifth Schedule States, with this in turn resulting in law and order problems including naxalism (Malhotra 2013). Though the Panchayats (Extension to the Scheduled Areas) Act, 1996 was introduced to ensure that Panchayats and Gram Sabhas are specifically vested with managerial powers over land resources, it has achieved scant results (Upadhyay n.d.).

The story with the Sixth Schedule is marginally better, inspiring some scholars to recommend extension of these set of provisions to the Fifth Schedule Areas as well (Malhotra 2014). Sadly, on closer analysis, the Sixth Schedule is a failure when weighed on the scale of constitutional expectations. The Autonomous District Councils set up thereunder have not succeeded in guaranteeing the optimal level of operational freedom required to address the cultural and historical specificities of the regions covered under the Sixth Schedule (North East India 2012). Some of the problems highlighted in the functioning of these Councils are the concentration of power and capture of the councils’ functioning by a few individuals, poor quality of governance, financial dependency and indiscipline, and inability to protect tribal lands and promote healthy land management systems.

In an unhappy twist, the Schedules have also led to more centralisation of power, including to the point where draconian, rather than beneficial, legislation are crafted for these regions taking umbrage under their special status. This is quite contrary to the original intent, wherein laws passed by Parliament and the State Legislatures were not meant to automatically apply so that the Governor would enjoy the power to adapt the legislation with the specific needs of the scheduled areas in mind. In short, the model of a single legal order which permits differential treatment of regions and groups (Khosla 2012: 84) has just added one more tier to the governance structure at extreme bureaucratic cost and with little results to show.
Now we proceed to examine whether a different model, in which special provisions are carved out for certain regions of the State to tackle specifically articulated problems without as general a sweep as the two Schedules discussed above, has worked. Again, the provisions are a handful, with some less important than others, so it would be best to confine the enquiry to Article 371-D. This special provision relates to the State of Andhra Pradesh prior to its bifurcation, and was introduced with the objective of addressing the backwardness in the Telangana region. This provision was the outcome of dissatisfaction with the earlier constitutional formula of separate development Boards and equitable allocation of development expenditure, prescribed by Article 371 to guarantee intra-State equity when integrating the Telangana region of the former princely State of Hyderabad with parts of the erstwhile Madras province. Part of the dissatisfaction was due to a ‘Gentleman’s Agreement’ signed in 1956 that promised way more in the form of safeguards for the Telangana region when compared with Article 371 (Forrester 1970). To rectify this mismatch between expectations and the provisioning, the Central Government introduced the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, mandating continuous residence of fifteen years to be eligible for appointment to Government jobs in Telangana. The invalidation of these Rules by the Supreme Court in A.V.S Narasimha Rao v. State of Andhra Pradesh was the final nail in the coffin, leading to the 1969 agitation for separate Statehood for Telangana region.

Article 371-D was a compromise solution introduced to resolve the agitation, and vested power with the President to provide for equitable opportunities and facilities for people belonging to different parts of the State, in matters of public employment and education. Having regard to the requirements of the State as a whole, its various parts could receive differential treatment. Subsequently, the Supreme Court has upheld various Presidential orders under Article 371-D providing for public sector recruitment on zonal, rather than intra-State, basis. The Court has also affirmed the inapplicability to Andhra Pradesh, of its earlier decisions restricting the imposition of residence requirements in the matter of medical admissions. Despite this, the compromise solution failed miserably, with the Centre finally granting Telangana’s claims of separate Statehood. In fact, the unfortunate incidents surrounding the creation of this State go to the root of national unity and integrity, forcing us to conclude that the asymmetric model of federalism has done little both in terms of the language and practice of national unity. The failure of the Fifth and the Sixth Schedules, on the other hand, show its failure, again in terms of both language and practice, in the multiculturalism project.

To sum up the federalism story, the design has not proven very strong in balancing the normative goals of national unification and preservation of multicultural identities. While the Supreme Court has attempted to provide some strength to the foundation, as seen from the shifting judicial approach with respect to the invocation of Article 356, such efforts have not borne much fruit overall. A rethink of the federal structure is necessary to resolve the competing considerations that prop up from time to time, if contemporary, and young, India has to emerge a global superpower in the years to come.

**Self-preservation and an independent judiciary**

If there is an area in Indian constitutional law where the Supreme Court has met with remarkable success on both the axes, namely of language and practice, it is where matters of constitutional self-preservation are involved. The Court has guarded its independence quite strongly in the last couple of decades and prevented the Constitution from being attacked from within, that is through amendments to the document, using the basic structure doctrine.
Judicial independence is constitutionally enshrined as a directive principle in Article 50, but that is quite an understatement of the prominence it has assumed in the constitutional discourse. Judges today appoint their own, and they enjoy wide powers to enforce their orders, including the power to haul up bureaucrats and Ministers for contempt of court in the event of non-compliance with their orders. Their salaries are drawn from the Consolidated Fund of India and hence not open to a vote in Parliament. Their conduct is not open to discussion in Parliament except when a motion for impeachment, seeking the removal of any particular judge, is pending before the Parliament. The Supreme Court and the various High Courts can strike down any legislation passed by any of the legislative bodies as being unconstitutional, and the law would then have no effect whatsoever. And last but most important of all, the constitutional courts can stop Parliament from amending the Constitution if such amendment falls foul of the basic structure doctrine. And this is where we start the story of judicial independence in India.

In the path taken by the principle of judicial independence in India, Indira Gandhi v. Raj Narain is a landmark moment. But its implications cannot be understood without a brief word about the earlier, and by far the most groundbreaking, decision of the Supreme Court: Kesavananda Bharati v. State of Kerala. Shorn of all technical detail, Kesavananda asked one question of the greatest constitutional significance, and this was whether there existed any substantive limitations on the amending power of Parliament once the procedure prescribed in Article 368 had been satisfied. The Court answered in the affirmative. It held that the power to amend the Constitution cannot take a destructive turn. Therefore, the basic structure of the Constitution would not be open to change. Simple as this sounds, the basic structure doctrine befuddled legal scholars and invited strong criticism. There was considerable confusion even among the judges forming the majority in Kesavananda as to what the basic structure really was. The Constitution did not expressly brand some of its provisions or features as part of its ‘basic structure’ while leaving out the others. Facialy, all provisions were important with the only distinction being that ratification by half of the State Legislatures was required for amendments to some of the provisions, notably the ones touching upon the federal structure and powers of the higher judiciary. Also, the doctrine was seen as an attempt at judicial usurpation of power; especially so because the Court had seemingly been antagonistic to the social welfare agenda pushed by the Executive and declared quite a few legislations as unconstitutional and falling foul of the right to property, a fundamental right prior to 1978. Therefore, the basic structure doctrine was perceived as a last ditch attempt on the part of the Court to assert its dominance over the other two branches of Government.

However, the doctrine has come to stay and assumed stellar status in terms of the Court’s contribution to the growth of constitutional law both domestically and from a comparative law perspective. And Indira Gandhi is an important chapter in this narrative. For this decision exposed the nation to the ominous possibilities surrounding the grant of unbridled powers to amend the Constitution. The facts of this case were indeed stark, and revealed complete disrespect for constitutionalism and a healthy institutional separation of powers. The constitutional amendment under challenge here was effected with the ulterior objective of overriding the judicial annulment of Indira Gandhi’s election to the Parliament by the Allahabad High Court. This was already served by the retrospective modification to the Representation of Peoples Act. But the constitutional amendment went far beyond and attempted to immunise the Prime Minister’s election to the Parliament from judicial scrutiny for posterity, and regardless of the egregiousness of the electoral misconduct. Clearly, this overreach of power shocked the conscience of the Court and it used the basic
structure doctrine to hold the amendment unconstitutional. Judicial review was held to be an important guarantee of judicial independence, and as a result, part of the unamendable basic structure. Justice Mathew considered the original scheme formulated in the Constitution, under which the validity of elections had to be adjudicated using the judicial process, to be a part of the basic structure. Justice Khanna reasoned that the amendment violated the principle of free and fair elections, a major structural feature fashioned to preserve the democratic character of the Constitution. Justice Chandrachud found the amendment to violate the basic feature of the right to equality, sequestering as it did the election of the Prime Minister for differential and favourable treatment. Thus, though three of the five judges in *Indira Gandhi* relied on different conceptions of the basic structure to invalidate the amendment, all three were unanimous in the acceptance of this doctrine as an important safeguard against the abuse of power and an essential vehicle of self-preservation.

The Court has expanded on this doctrine to bring in other features of judicial independence within its purview. Here too, the beginning of the tale is beset with judicial deference, as the Court in *S.P. Gupta v. Union of India* gave a virtual carte blanche to the Executive in the matter of transfer and appointment of judges to the higher judiciary. Article 124, the constitutional provision dealing with the appointment of judges to the Supreme Court, and Article 217, the *pari materia* provision for appointment to the High Courts, came up for interpretation here. Both these provisions required the President to consult the Chief Justice of India and the vexing interpretive question was whether concurrence with the Chief Justice’s choices had to necessarily follow from this consultative process. In other words, who had the final say in the matter of judicial appointments, the Executive or the Chief Justice of India? *S.P. Gupta* responded that consultation would not require concurrence, thereby placing the last word with the Executive, which could freely differ with the Chief Justice’s recommendation of candidates for the high judicial office.

In similar fashion to the abuse of power that followed the meek subservience in *State of Rajasthan*, discussed above in the section ‘the federal structure’, *S.P. Gupta* threw open the doors wide to rampant interference with the functioning of the higher judiciary. Again, akin to the Court finding its *Bommai* to clamp down on improper invocation of Article 356, about a decade later came along the decision in *Supreme Court Advocates-on-Record Association v. Union of India*. Here, the Court used the basic structure doctrine and the principle of judicial independence to preserve its institutional health. Justice Verma acknowledged the self-preservation at play here, right in the beginning of his lead opinion, by observing thus:

> These questions have to be considered in the context of the independence of the judiciary, as a part of the basic structure of the Constitution, to secure the ‘rule of law’ essential for the preservation of the democratic system. The broad scheme of separation of powers adopted in the Constitution, together with the directive principle of ‘separation of judiciary from executive’ even at the lowest strata, provides some insight to the true meaning of the relevant provisions in the Constitution relating to the composition of the judiciary. The construction of those provisions must accord with these fundamental concepts in the constitutional scheme to preserve the vitality and promote the growth essential for retaining the Constitution as a vibrant organism.

With this agenda, the Court rolled out an elaborate framework for appointment of judges, and heralded the collegium system to replace the Executive’s primacy in this realm. Though this decision envisaged a collegium consisting of the Chief Justice and his two seniormost
colleagues in the Court, a subsequent Presidential reference under Article 143 has expanded the strength of the collegium to include the four seniormost judges along with the Chief Justice, who would recommend candidates to the Executive. The Executive, in turn, would be bound by the choices of the collegium. The concerns with the collegium system, and the recent, and not-so-recent, attempts at streamlining the process to introduce higher transparency and accountability, are outside the purview of this chapter. It would suffice, therefore, to conclude the discussion by observing that the Court has had, at its heart, the objective of preserving itself and, through such an act of self-preservation, protecting the Constitution from ending up as a one-sided document with all significant powers in the hands of the Executive. Thus far, the basic structure doctrine and the principle of judicial independence have been areas where the Court’s attempts have met with moderate success both along the language and the practice axes. Of course, some aberrations exist, such as the Court’s approach to tribunalisation, where it has, in many ways, responded with an attempt to make the best of a bad situation rather than take a principled stand on the constitutionality of such bodies against the anvil of judicial independence. In such instances, both the language and the practice of self-preservation through the basic structure doctrine suffer. Yet, overall, the basic structure doctrine, subsuming within it the dual principles of separation of powers and judicial independence, has played a significant role in ensuring that the constitutional foundations passed on to us have remained preserved in their most essential form, readying the country to face new challenges.

Conclusion

The narrative that has unfolded through this chapter speaks of a country, and its apex Court, struggling to negotiate the several challenges thrown up by its diversity. The response mechanisms have worked in varying degrees, when we look back and analyse their efficacy using the bi-axial frame of language and practice. In a dominant sense, national unity and the self-preservation of the Constitution have emerged as extremely important normative concerns for the Court to keep in mind when laying the bricks and setting the mortar for the constitutional foundations. At the same time, the Supreme Court has also succeeded in infusing fundamental values such as individual freedom, self-development and sustainable growth into the constitutionalism conversation. How much of this has translated into reality is a separate issue, and one very important for the growth path of the country. Yet, that is a question best responded to by those entrusted with the working of the Constitution. There are certainly flaws in the constitutional model too, as seen from the discussion on India’s federal structure, but they are relatively less egregious than those in the realpolitik model of governance that pervades contemporary India. If reform is needed, it has to start with the latter, and with the rise of an attitude that respects constitutional values rather than degrade them. Having said so, it is still imperative to relook, from time to time, the three important themes addressed in this chapter, and several more, to see how much of the Constitution, and the Court’s practices with respect to the same, provide a linguistic and operational framework much required for the future growth of the nation.

Notes

1 Article 12 reads: ‘In this Part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.’
Gopalan

Article 21 reads: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

AIR 1950 SC 27. Hereinafter referred to as Gopalan.

AIR 1976 SC 1207; AIR 1978 SC 597.


Ibid.


Safai Karamchari Andolan v. Union of India, 2014 (4) SCALE 165.


Murli Deora v. Union of India, AIR 2002 SC 40; Consumer Education and Research Centre v. Union of India, AIR 1992 SC 922.


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41 Narmada Bachao Andolan v. State of Madhya Pradesh, AIR 2011 SC 1989 (strict rules of pleading not applicable); Rural Litigation and Entitlement Kendra, Dehra Dun v. State of Uttar Pradesh, AIR 1988 SC 2187 (letter sufficient to entertain a PIL without a formal writ petition being filed); Ratlam Municipality v. Varadchand, AIR 1980 SC 1622 (judicial visits to the site); Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802 (appointing judicial commissions); Indian Council for Environmental Action v. Union of India, AIR 1996 SC 1446 (reliance placed on reports prepared by National Environment Engineering Research Institute, Nagpur); T.N. Godavarman Thirumulpad v. Union of India, AIR 1997 SC 1228 (the Central Empowered Committee used as a mechanism to assist the Court in its ‘green bench’ jurisdiction); Shivarao Shantaram Wagle v. Union of India, AIR 1988 SCC 952 (independent scientific expert committee).


54 Instead of going with the spirit of the Fifth Schedule protections, the Court reasoned that the grant of a mining lease to BALCO in a scheduled area of Chhattisgarh was permissible because it was governed (at that point in time) by the law of Madhya Pradesh and not Andhra Pradesh (whose law governed the situation in Samatha).


56 Ibid.

57 For instance, the beneficial provisions of the Code of Criminal Procedure, 1973, have not been extended to the scheduled areas in Andhra Pradesh, which continue to be governed by the colonial criminal procedure code of 1898. See K. Bojji Reddy v. State of Andhra Pradesh, 1995 (1) ALT (Cri.) 43.

58 AIR 1970 SC 422.


64 (1993) 4 SCC 441.


References


