

**CONSTITUTIONAL CONTROL PRAXIS IN THE PRESENT DAY**

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On

15<sup>th</sup> August, 2008

At

Brazilian Supreme Court

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## **I. The Constitution of India: A document that shaped a nation**

India is described as the world's largest democracy on account of its population. Its independent judiciary is at the heart of the structure of 'constitutional control' which not only ensures a credible system of checks and balances in governance, but also acts as an instrument of social change and development. Since the formation of the independent Indian republic, the nation's Supreme Court has vigorously exercised full checks on the legislative and executive branches. In numerous instances where these limbs of governance have not lived up to the expectations of the people, or have failed to safeguard constitutional guarantees, the higher judiciary has asserted its position not only as a protector of the Constitution but has also interpreted its provisions in a dynamic way to respond to the needs of the times.

With respect to the value of a written constitution, it would be appropriate to reproduce a quotation by Justice Aahron Barak, formerly of the Supreme Court of Israel:

*"To maintain real democracy--and to ensure a delicate balance between its elements--a formal constitution is preferable. To operate effectively, a constitution should enjoy normative supremacy, should not be as easily amendable as a normal statute, and should give judges the power to review the constitutionality of legislation. Without a formal constitution, there is no legal limitation on legislative supremacy, and the supremacy of human rights can exist only by the grace of the majority's self-restraint. A constitution, however, imposes legal limitations on the legislature and guarantees that human rights are protected not only by the self-restraint of the majority, but also by constitutional control over the majority. Hence the need for a formal constitution."*

Since I am speaking here today as a representative of the Indian judicial system, it would be appropriate for me to describe the mechanisms of 'constitutional control' in our country from the standpoint of the judiciary. However, before doing so it is necessary to give a brief background on the framing of the Constitution of India, as well as the overarching objectives that were in the minds of its framers. I will then present an

overview of the judicial structure in India with special emphasis on the jurisdiction of the Supreme Court and the concern with maintaining the independence of the judiciary. I will then proceed to highlight the role of the higher judiciary in safeguarding and advancing the key features of a constitutional democracy such as ‘separation of powers’ and ‘judicial review’. In the concluding segment, I will briefly comment on the ‘activist’ role taken up by the Supreme Court of India in recent decades.

The story of the framing of the Indian Constitution is best captured if one browses through the transcripts of the *Constituent Assembly Debates*.<sup>1</sup> The Constituent Assembly came into being towards the twilight of British rule in the Indian subcontinent and was composed of members elected from the various British Indian provinces as well as those nominated by the various princely states. It began its deliberations in December 1946 and immediately faced the turmoil of the divisive communal politics that was to result in the subsequent partition of the subcontinent. The biggest challenge before the Constituent Assembly was to evolve a document that would address the existing diversity amongst the population and create an independent republic. This diversity amongst the population in our country is based on several parameters, namely those of religion, caste, language and class among others. However, there was also the mantle of making a clear departure from colonial rule and creating public institutions which would ensure accountable governance and respond to the needs and aspirations of the people. In many ways the need for a fresh start can be compared to the motives behind the enactment of the present Brazilian Constitution in 1988 which marked a clear departure from the past experience of military rule. A significant part of the project of creating a democratic government in independent India was to take a stand against existing patterns of social inequality and exploitation such as caste-based discrimination and gender-bias.

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<sup>1</sup> Besides the transcripts of the *Constituent Assembly Debates*, a useful source for research on the same is B. Shiva Rao, *The framing of India's Constitution*, in 5 volumes (New Delhi: Indian Institute of Public Administration, 1968)

In the words of noted scholar Granville Austin,<sup>2</sup> the framers of the Indian Constitution had three broad objectives in mind – namely those of ensuring ‘unity’, ‘democracy’ and creating a ‘social revolution’. While most of the Constituent Assembly members were drawn from the highly educated and elite sections of society at the time, there was a conscious understanding of the need to create a Constitution that would not only safeguard individual rights and liberties against the government machinery but also advance the interests of the weaker and underprivileged sections of society. After nearly three years of substantive discussions and debates on the floor of the Constituent Assembly, the Constitution of India was brought into force on January 26, 1950 which is now marked as India’s ‘Republic Day’.

In pursuance of the objective of political unity, the Constitution of India incorporated provisions for a federal structure with an elaborate division of powers between the Union and the States. Unlike Brazil where each State has its own separate Constitution,<sup>3</sup> the demarcation of legislative competence between the Union and the States in India follows the scheme prescribed in the 7<sup>th</sup> Schedule to the Constitution. The 7<sup>th</sup> schedule consists of three lists – namely the ‘Union’, ‘State’ and ‘Concurrent’ lists that enumerate the various subjects that can be legislated upon by the Parliament (Central Legislature) and the various State legislatures. While the Union List consists of significant areas such as defence, foreign affairs and communications, the State List contemplates subjects such as land revenue, and law and order among others. The Concurrent list enumerates subjects that can be legislated upon by both the Union and the States, but in case of conflicting legislations – the Union’s enactment prevails.<sup>4</sup> The residuary power to legislate on unenumerated subjects is also given to the Union. This preponderance in favour of the Union’s legislative powers has often led to the Indian

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<sup>2</sup> See Granville Austin, *The Indian Constitution: Cornerstone of a nation* (Oxford: Clarendon Press, 1966)

<sup>3</sup> The Constitution of India governs the whole Union consisting of States and Union territories. The only exception is the State of Jammu and Kashmir which was allowed to enact and enforce its own Constitution. Article 371 of the Constitution of India provides for the special status accorded to Jammu and Kashmir.

<sup>4</sup> The Parliament of India consists of two houses – the lower house being the ‘*Lok Sabha*’ (House of the people) and the upper house designated as the ‘*Rajya Sabha*’ (Council of States). Most State legislatures are unicameral with a few larger states having an upper house as well

governmental structure being described as 'quasi-federal' in nature. It is often argued that the framers of the constitution provided for this centralizing feature in light of the experience of partition on religious lines which was fresh in their memory. Even on a purely theoretical level, the prescription of a strong centre can be considered necessary on account of the apprehension of secessionist tendencies in a population of such a diverse profile.

Besides containing several provisions devoted to Centre-State relations, concerns with maintaining the unity and integrity of the country have shaped the evolution of the Constitution. In the 1950's there were popular agitations in several parts of the country against the continuance of state boundaries created during colonial rule. This prompted the reorganization of most States on linguistic lines. In subsequent years special provisions were incorporated by the Parliament to ensure a certain degree of autonomy for the tribal communities in the North-East region of the country. In the 1990's, the cause of 'decentralisation' and 'Local Self-government' received a major boost with the enactment of the 73<sup>rd</sup> and 74<sup>th</sup> amendments to the Constitution which created locally elected bodies at the level of villages (*Panchayats*), towns and cities. Each of these developments can of course be subjects of substantive commentaries in their own right. An important consideration made at the time of the framing of the Constitution was the allowance of religious minorities to continue with the observance of their respective personal laws in private matters such as marriage, adoption and devolution of property among others. This concession did create a field for 'legal pluralism' but was in consonance with guarantees such as the 'freedom of religion'. However, this issue has been extremely controversial with persistent demands for the enactment of a 'Uniform Civil Code' that would effectively do away with the observance of personal laws by religious minorities.

The Constitutional text also facilitated India's transition from a British colony to an independent democratic republic. The most important marker of a constitutional democracy is the conduct of fair elections where all citizens can vote freely in order to determine the composition of government. During the latter stages of colonial rule,

periodic elections had been held for the composition of the provincial assemblies and a Central Legislature but the voting rights were linked to educational qualifications and ownership of property, thereby limiting the same to a miniscule part of the population. Even in the Constituent Assembly, there was some support for the idea of 'limited franchise' based on the reasoning that the illiterate masses were not mature enough for modern democracy. However, the Indian Constitution incorporated the principle of 'universal adult franchise' at a time when even Western democracies had only recently allowed women to vote. In the years since, periodic elections followed by peaceful transitions in government have become the basis for describing India as the world's largest democracy.<sup>5</sup> The lower house of parliament i.e. the '*Lok Sabha*' (House of the People) truly represents all of India's diversity while the upper house i.e. the '*Rajya Sabha*' (Council of States) provides proportional representation to all the States.

The framers of our Constitution consciously emphasized the importance of social justice in the newly independent nation. Dr. B.R. Ambedkar, one of the principal framers of the Constitution of India and our first Union Law Minister, stated the following on the floor of the Constituent Assembly on 25<sup>th</sup> November, 1949:

*"On the 26th January, 1950, we are going to enter upon into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment else those who suffer from inequality will blow up the structure of democracy which this Constituent Assembly has so laboriously built up."*

Pandit Jawaharlal Nehru, India's first Prime Minister, embodied the essence of this

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<sup>5</sup> For an interesting account of the development of democratic institutions in post-independence India, See Ramachandra Guha, *India After Gandhi: The history of the world's largest democracy* (New Delhi: Picador India, 2007)

goal in the following words to the Constituent Assembly:

*“The first task of this Assembly is to free India through a new Constitution, to feed the starving people and to clothe the naked masses and to give every Indian the fullest opportunity to develop himself according to his capacity”.*

While the overarching objectives of ensuring ‘unity’ and ‘democracy’ have been pursued with vigorous support in the history of independent India, it is the policy-choices concerning the third objective of engineering a ‘social revolution’ that have been the subject of intense contestation which have often involved a divergence of opinion between the judiciary and the other wings of government. One such policy-choice was that of agrarian land reforms which were implemented by way of Central as well State legislations that provided for the acquisition of property from large land-owners and its re-distribution among smaller cultivators. I will deal with this issue at length later in this speech, in relation to the idea of ‘separation of powers’. Another policy-choice oriented around the ideal of social justice which has warranted frequent judicial intervention is that of ‘affirmative action’. The framers of the Constitution included the guarantee of ‘equal protection before the law’ under Article 14 of the Constitution, but also permitted ‘differential treatment’ in order to advance the interests of the historically disadvantaged sections which came to be designated as Scheduled Castes(SC) and Scheduled Tribes (ST). The ‘affirmative action’ policies took the form of reservations of seats in legislatures, public employment and educational institutions. While the judiciary has steadfastly supported the principle of ‘affirmative action’, there has been frequent litigation pertaining to the specific application of the same in different settings.<sup>6</sup> A few months ago I had the occasion to sit in a constitution bench to decide on a challenge against the expansion of reservations for candidates belonging to Other Backward Castes (OBC) in selected higher educational institutions.<sup>7</sup> In our judgments, myself and my brother judges supported the government’s policy but had to make some observations in order to streamline the implementation of the same.

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<sup>6</sup> See generally *Balaji v. State of Mysore*, AIR 1963 SC 649; *Indra Sawhney v. Union of India*, AIR 1993 SC 447

<sup>7</sup> *Ashoka Kumar Thakur & Ors. v. Union of India*, 2008 (5) SCALE 1

It will be fair to observe that there has been significant litigation over questions that involve an interface between the fundamental rights enshrined in the Constitution as well as the broad objectives of ensuring social justice. In certain instances there has also been a clash between the understanding of fundamental rights on one hand and the governmental objectives of ensuring social justice on the other hand. In the course of this speech I will refer to a few of these instances where the higher judiciary in India has had to tackle such clashes. However, before doing so it is also important to understand the rationale behind the inclusion of an express declaration of rights in our Constitution.

## **II. The logic behind the declaration of rights**

Some commentators consider the Indian Constitution to be an extremely lengthy document that goes into excessive details about the structure and working of the government machinery. Admittedly, the text of the Constitution liberally grafts in measures from the Constitutions of several foreign countries as well as colonial-era legislations such as the Government of India Act, 1935. However, the framers also took a progressive stand in the form of a declaration of rights – which was inserted as Part III of the Constitution, namely that dealing with the fundamental rights of citizens. The language of many of these rights incorporated that of the Universal Declaration of Human Rights (1948) and also mirrored that of the International Covenants which were adopted at the United Nations several years later. Demands for a declaration of rights had been made during the colonial rule as well, but were rejected on the ground that civil-political rights evolved by common law were sufficient to protect the liberties of individuals against the government. However, in the post-independence scenario the declaration of rights has become an invaluable tool in deepening our constitutional democracy. Most of these rights are enforceable against the State by way of their language, while some others are directed both against the State and private actors. The most important feature however is that the fundamental rights gave the higher judiciary a clear set of criteria to regulate relations between citizens and the government (i.e. ‘vertical application of rights’) as well as among citizens themselves (i.e. ‘horizontal

application of rights'). Furthermore, Indian Courts have interpreted these rights not only in a 'negative' dimension (i.e. in terms of protection against violations) but also in a 'positive' dimension (i.e. in terms of entitlements to benefits).

While Article 14 of the Constitution of India provides a guarantee of 'equal protection before the law', Article 15 prohibits discrimination on the grounds of religion, race, caste, class and gender – but at the same time permits the State to make special provision for the advancement of women as well as 'socially and educationally' backward sections of society. Hence Article 15 forms the basis of 'affirmative action' policies. Article 16 creates obligations on the State to ensure fairness in matters pertaining to public employment. In seeking to mitigate the prevalent social inequalities, Article 17 prohibits the practice of 'untouchability' whereas Article 18 abolished titles (with the exception of military and academic titles). Articles 17 and 18 can be enforced against private parties. Article 19 safeguards the liberties of citizens such as the freedom of speech, assembly, association, movement within the country and the freedom to pursue an occupation. These liberties are however subject to 'reasonable restrictions' by the State on enumerated grounds that mostly pertain to 'public interest'.

Articles 20, 21 and 22 together constitute the 'due process' rights, which guarantee certain protections to individuals against arbitrary actions by the State. For instance Article 20 incorporates the rule against 'double-jeopardy' as well as the 'protection against self-incrimination'. Article 21 provides that no person shall be deprived of life or personal liberty except in accordance with 'procedure established by law'. The scope of the protection under Article 21 has been progressively expanded by the Supreme Court of India and towards the end of this speech I will offer several examples of the same. Article 22 protects citizens against unlawful detention and also provides safeguards in instances of 'preventive detention' by the State. Articles 23 and 24 are directed against private actors as well. Article 23 prohibits the trafficking of human beings and other forms of forced labour while Article 24 prohibits the employment of children under the age of fourteen in factories, mines and other forms of hazardous employment.

Articles 25-30 constitute the 'religious guarantees'. Freedom of Religion, freedom of conscience and free profession, practice and propagation of religion as well as the freedom of religious denominations to manage their own affairs have been ensured through Articles 25, 26, 27 and 28 of the Constitution. There is also an obligation placed on the State to not support religious activities financially. Article 29 deals with the rights of religious and linguistic minorities to preserve their culture and language, while Article 30 recognises the freedom of religious minorities to establish and administer educational institutions, free from state interference.

The power of the higher judiciary to enforce these fundamental rights, emanates from Article 32 of the Constitution of India. It gives citizens the right to approach the Supreme Court in order to seek a remedy against the violation of fundamental rights. This 'right to constitutional remedy' is itself a fundamental right and can be enforced in the forms of *writs* evolved in common law – such as *habeas corpus* (to direct the release of a person detained unlawfully), *mandamus* (to direct a public authority to do its duty), *quo warranto* (to direct a person to vacate an office assumed wrongfully), *prohibition* (to prohibit a lower court from proceeding on a case) and *certiorari* (power of the higher court to remove a proceeding from a lower court and bring it before itself). Besides the Supreme Court, the High Courts located in the various States are also designated as constitutional courts and Article 226 permits citizens to file similar writs before the High Courts. Evidently, the Higher Judiciary in India (consisting of the Supreme Court and the various High Courts) performs the key task of protecting and interpreting the fundamental rights under their writ jurisdiction.

While the fundamental rights of citizens enumerated in Part III of the Constitution are justiciable before the higher judiciary, Part IV deals with the 'Directive Principles of State Policy' that largely enumerate objectives pertaining to socio-economic entitlements.<sup>8</sup> The Directive Principles aim at creating an egalitarian society whose citizens are free from the abject physical conditions that had hitherto prevented them from fulfilling their

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<sup>8</sup> The framers included 'Directive Principles of State Policy' following the example of the Irish Constitution.

best selves. They are the creative part of the Constitution, and fundamental to the governance of the country. However, the key feature is that the Directive Principles are 'non-justiciable' (i.e. they cannot be enforced before the Higher Judiciary) but are yet supposed to be the basis of executive and legislative actions. It is interesting to note that at the time of drafting of the Constitution, some of the Directive Principles were part of the declaration of fundamental rights adopted by the Congress party. K.M. Munshi (a noted lawyer and a member of the Constituent Assembly) had even included in his draft list of rights, the 'rights of workers' and 'social rights', which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living.<sup>9</sup> Subsequently, the objective of ensuring these entitlements was included in the Directive Principles. The primordial importance of these principles can be understood by the following words of Dr. B.R Ambedkar, when he insisted on the use of the word "strive" in the language of Article 38 which mentions the governmental objective of an equitable distribution of material resources:

*"We have used it because it is our intention that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these directive principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these directives. ... Otherwise it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go."* [Constituent Assembly Debates, 19-11-1948]

Thus, the enforceability of measures relating to social equality was never envisaged as being dependent only on the availability of state resources. In some instances, the Courts have privileged fundamental rights over directive principles while in others they have creatively drawn a harmonious relationship between the two. An example of this is the expansion of the conception of 'personal liberty' under Article 21 of the Constitution, which I will discuss later in this speech. At the moment, I would like to describe the structure of the Indian judiciary.

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<sup>9</sup> At the same time, even some controversial as well as communally sensitive issues such as the desirability of enacting a Uniform Civil Code and the prohibition of cow-slaughter came to be included in the Directive Principles.

### III. Overview of the Indian judicial structure

Unlike Brazil, where there is a dual judicial system of federal and state courts, India has an integrated judicial system. At the top of the system is the Supreme Court of India which exercises jurisdiction in different forms, namely – writ jurisdiction, appellate, original, advisory and that conferred under several statutes. At the next level are the High Courts in the various states. While most states have their own High Courts, some states have common High Courts. The High Courts also exercise writ jurisdiction, regular appellate jurisdiction as well as the power of supervision over all the Courts and Tribunals located in their respective States. The third tier is that of the subordinate judiciary at the district-level, which in turn consists of many levels of judges (both on the civil and criminal sides) whose jurisdiction is based on territorial and pecuniary limits. In addition to the subordinate judiciary there are specialized courts and tribunals at the district and state levels to hear and decide matters relating to direct and indirect taxes, labour disputes, service disputes in state agencies, family disputes, motor accident claims as well as consumer complaints to name a few. While Brazil has special courts for Labour, Electoral and military related-matters, India has a much wider range of such dispute-resolution bodies. With the exception of the military courts, the decisions of all these special courts and tribunals can be questioned before the Higher Judiciary.

*Jurisdiction of the Supreme Court.* It can be conclusively said that the Supreme Court of India is the final arbiter in all constitutional controversies. Its' writ jurisdiction derived from Article 32 gives it such a status in the matter of enforcing fundamental rights. In its original jurisdiction, the Supreme Court is the only forum where disputes between states and the Union or between States themselves can be heard. The law declared by the Supreme Court is binding on all courts in India, and is the law of the land. The Court is a court of record and has the power to punish for its contempt. Since the Supreme Court of India exercises both constitutional as well as appellate jurisdiction, it is clearly different from the apex courts in Brazil where the Superior Federal Tribunal (STF) acts largely as a constitutional court whereas the Superior Tribunal of Justice (STJ) acts as the court of last resort with respect to appeals from

federal courts. Our High Courts in the various states can be broadly compared to the Federal Regional Tribunals, but they handle the appellate caseload from the subordinate judiciary and tribunals in their respective states, rather than their regions. In this respect, the High Courts are structurally similar to the Tribunals of Justice that operate in each state in Brazil. The key difference of course is that the High Courts in Indian states are also guarantors of constitutional rights.<sup>10</sup>

In the Supreme Court's appellate jurisdiction, any judgment of a High Court can be brought before the Supreme Court, if the High Court certifies that the matter at hand concerns a substantial question of interpretation of law or the Constitution. However, appeal to the Supreme Court is not a matter of right. In cases where a High Court does not issue certificate of appeal, and there exists an important legal question, recourse to 'Special Leave' may be made, as per the Constitution of India. This provision (Article 136 of the Constitution) enables the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in India. This power is extremely wide and enables the Supreme Court to act as a check against improper exercise of jurisdiction by judicial or quasi-judicial bodies as well as maintain a uniformity of legal approach. In certain special circumstances, the Supreme Court can also transfer to itself any case from any of the High Courts. This usually takes place when cases are pending before the Supreme Court and High Court, or before two or more High Courts, involving similar questions of law. If the Supreme Court is satisfied either *suo motu* or on an application made by the attorney general or any party to any case that such questions are of general importance, the Supreme Court may withdraw the cases from the High Courts and dispose them itself. Thus, the Supreme Court possesses the ultimate jurisdiction over all courts and legal proceedings in India and enjoys a wide appellate power. Under Article 143 of the Constitution, The Supreme Court also exercises 'advisory' jurisdiction, under which the President of India may refer any question of law or a question of public importance to the Court for its opinion. The court also has the power to review its own

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<sup>10</sup> Information about the Brazilian legal system has been gathered from: Herbert M. Kritzer (Ed.), *Legal Systems of the World – A political, social and cultural encyclopedia, Vol. I: A-D* (California: ABC-CLIO) at p. 188-196

decisions.

At present, the sanctioned strength of the Supreme Court of India is that of 26 judges, which includes the Chief Justice of India. The court ordinarily sits in the form of benches consisting of two or three judges. When dealing with constitutional matters, larger benches of five or more judges are also constituted. The judges of the Supreme Court serve till the age of 65 and the senior-most judge (with respect to the duration of office in the Supreme Court) serves as the Chief Justice of India. In the High Courts, the age of retirement is fixed at 62 years.

*Independence of the judiciary:* In order to safeguard the independence of judiciary, the appointment of judges to the Supreme Court as well as the High Courts is made on the recommendation of a 'collegium' - which consists of the Chief Justice of India and the next four senior-most judges of the Supreme Court. Appointments to the Supreme Court are made from among sitting judges of the High Courts and in exceptional cases, from amongst experienced legal practitioners as well. Appointments to the High Courts are made both from among the subordinate judiciary as well as practitioners. The subordinate judiciary in turn is constituted under the supervision of the High Courts but the respective State governments also play a role in so far as they conduct competitive examinations for judicial appointments at the lower levels.

It may appear anomalous that the higher judiciary itself decides on its own composition, but the same has been considered necessary on account of undue interference by the executive in judicial appointments in the past. Such interference was quite pronounced in the years leading up to the imposition of internal emergency between June 1975 and March 1977. For example, in 1973 three judges of the Supreme Court were superseded in the matter of the appointment to the position of the Chief Justice of India. These developments prompted a debate on whether the Executive was bound by the recommendations of the judiciary in the matter of appointment of new judges. In *S.P. Gupta's case*,<sup>11</sup> the Supreme Court itself held that

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<sup>11</sup> *S.P. Gupta v. Union of India*, AIR 1982 SC 149

even though the framers of the constitution provided for the executive to consult with the judiciary in these matters, their concurrence was not necessary. This ruling gave the executive substantial leeway in the matter of appointments to the higher judiciary and it was widely perceived that political connections were playing a big role in the same. Subsequently, this position was overturned in a 1993 judgment,<sup>12</sup> wherein it was held that the recommendations made by the Chief Justice of India alongwith the two senior-most judges of the Supreme Court were binding on the executive in respect of the appointment of judges to the High Courts and Supreme Courts as well as with respect to transfers of judges between High Courts. In the *Third Judges case*,<sup>13</sup> this position was modified to confer the power of appointments and transfers on the Chief Justice of India, acting alongwith the four senior-most judges of the Supreme Court. Thus, at present it is this 'collegium' of judges which decides on appointments and transfers in the higher judiciary.

Keeping in mind the paramount concern with preserving judicial independence, the Constitution itself prescribed a difficult process for the removal of judges of the Supreme Court and the High Courts. In instances of 'misconduct', 'proven misbehaviour' or 'incapacity' the judges at this level can be impeached if the Union Parliament passes a resolution to this effect by a two-thirds majority of members present and voting. This implies that a member of the higher judiciary can only be removed if there is substantial political will for the same. Furthermore, judges are given security of tenure as well as service-conditions, and disciplinary proceedings are supervised by the higher judiciary itself. Even the administration of the subordinate judiciary at the district level is supervised by the High Courts of the various states.

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<sup>12</sup> *Supreme Court Advocates- On-Record Association (SCAORA) v. Union of India*, (1993) 4 SCC 441

<sup>13</sup> A Nine-judge bench of the Supreme Court delivered its opinion on a Presidential reference in the *Third Judges Case*, (1998) 7 SCC 739

#### **IV. The higher judiciary as the protector of the Constitution**

The Indian higher judiciary has an impressive record of ensuring constitutional control over all other organs of governance viz. the legislature and the executive. Through this, the confidence of the people in the judicial system and the Constitution is constantly reinforced. It also conveys the message that mechanisms geared towards the 'rule of law' are better alternatives to violence and extremism. Such progressive methods of constitutional control are necessary to attain two goals: that each citizen believes in the worth and fairness of the Constitution and secondly, that the citizens are assured that the Courts, as guardians of all Constitutional freedoms, are going to impartially and effectively enforce those freedoms

The concern with maintaining the independence of the judiciary is also interlinked with two core features of a constitutional democracy – i.e. the 'separation of powers' between the wings of government and the vigorous exercise of 'judicial review' over executive and legislative action. The fundamental rights enumerated in the Indian Constitution hence equip the constitutional courts with tangible criterion to exercise such 'judicial review' over governmental action and maintain the 'separation of powers'. The doctrine of 'separation of powers' entails that there ought to be a distribution of governmental powers between the three branches of the state, i.e. the executive, the legislative, and the judiciary, so that no sole authority controls the entire government. Neither of the three branches has absolute autonomy or ascendancy over the others, but rather each branch is given the ability to oversee the exercise of powers of the others.

There is an express provision for 'judicial review' in Article 13 of the Constitution of India. Clause (1) says that all laws that were in force in the territory of India immediately before the adoption of the Constitution, in so far as they are inconsistent with the provisions containing the fundamental rights, shall, to the extent of such inconsistency, be void. Clause (2) of that article further says that the states shall not make any law that takes away or abridges any of the fundamental rights, and any law made in

contravention of the aforementioned mandate shall, to the extent of the contravention, be void. The courts decide whether a legislature or an executive has acted in excess of its powers or in contradiction to any of the constitutional restrictions on its power. In the words of Dr. B.R. Ambedkar, this provision forms the heart and soul of the Constitution<sup>14</sup>.

Undoubtedly, this power of the higher judiciary to scrutinize governmental action in order to protect the rights of citizens exists in several other countries as well. However, the conception of 'judicial review' has developed some unique contours through the decisions of the Supreme Court of India. The most prominent challenge to the scope of 'judicial review' came in the wake of contestation over the proper place of the 'right to property' in the Indian Constitution. It must be borne in mind that there was immense inequality in the patterns of land-ownership in pre-independence India, much of it corresponding to caste-divisions. In the rural setting, most agricultural lands were owned and controlled by upper castes who received the patronage of the colonial government in return for ensuring the prompt collection of land revenue. Elaborate institutions of intermediaries (such as the *Zamindari* system) had become entrenched while cultivators from the lower castes either had very small landholdings or were forced to work as bonded labour under the control of these *Zamindars*. In many ways, this unjust system was similar to the inequality in land ownership between '*Latifundios*' (large land-owners) and '*minifundios*' (small cultivators) which has historically been a problem in Brazil as well. In independent India, the Parliament and the state legislatures thus initiated a policy of agrarian land reforms with a considerable degree of urgency, which often overlooked questions such as the payment of adequate compensation to the landowners whose property was acquired for public purposes as well as for redistribution among smaller cultivators. Such governmental excesses prompted the land-owning classes to repeatedly approach the Courts to protect their 'right to acquire, hold and dispose of property' which had been enumerated in Article 19(1)(f) of the Constitution. While the higher judiciary repeatedly defended the rights of landowners against acquisition by the State, the Parliament responded with legislative changes as

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<sup>14</sup> See, *Constitutional Assembly Debates*, C.A.D., Vol. 7, p. 953.

well as Constitutional amendments to address the same. In fact, legislations pertaining to agrarian land reforms were placed in the Ninth Schedule to the Constitution,<sup>15</sup> a part which was immunised from scrutiny by the Courts, and thus formed an exception to the power of 'judicial review' provided under Article 13. However, the Supreme Court repeatedly upheld challenges against these legislations which questioned the procedural fairness of land acquisition.

Since the Union Parliament was dominated by the ruling Congress Party till the mid-1960's, it virtually became a tussle between the Executive and the Judiciary. Matters came to a head in the *Golaknath* case,<sup>16</sup> where the Supreme Court ruled by a narrow majority (6-5) that the power of the parliament to amend the constitution was limited, and that the Courts were within their power to inquire into such amendments. The Parliament responded with a Constitutional amendment that extended its own power to amend any part of the Constitution by means of the process prescribed under Article 368. This amendment in turn was questioned in the much-cited *Keshavananda Bharati* case,<sup>17</sup> where the Supreme Court laid down the doctrine of the inviolable 'Basic structure' of the Constitution which limited the power of the parliament to amend the Constitution. In separate but concurring opinions, a narrow majority of the judges (7-6) ruled that certain features of the Constitution were integral to its existence and could not be altered by way of amendments by the legislature. They also defended the power of the judiciary to inquire into legislative actions for safeguarding this 'Basic Structure'. However, there was some inconsistency in identifying all the provisions that constituted this 'Basic structure'. While later decisions<sup>18</sup> identified basic features such as democracy, secularism, federalism and some of the fundamental rights, many commentators have opined on the 'open-textured' nature of this doctrine. However, the *Keshavananda Bharati* decision holds immense significance since it re-asserted the role

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<sup>15</sup> The 'Ninth Schedule' was inserted into the Constitution in 1951, originally to shield agrarian land reform laws from judicial scrutiny. However, this scheme, which originally comprised of thirteen legislations in 1951, had mushroomed to include 284 laws by 2006, many unrelated to land reform or ending feudalism. It was thus a subject of frequent criticism since it curtails the power of 'judicial review'.

<sup>16</sup> *Golaknath v. State of Punjab*, AIR 1967 SC 1643

<sup>17</sup> *Keshavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

<sup>18</sup> *Minerva Mills v. Union of India*, AIR 1980 SC 1789

of the judiciary as the protector of the Constitution. It is pertinent to note that by way of the 44<sup>th</sup> amendment in 1978, the 'right to property' was removed from Part III of the Constitution (which deals with the fundamental rights) and given the status of a legal right under Article 300A.

In recent years, two cases involving the power of the courts to review Parliament's legislative and non-legislative functions- i.e. the *Coelho*<sup>19</sup> and *Raja Ram Pal*<sup>20</sup> cases- have demonstrated that the Indian Supreme Court is embarking on a new era of judicial review. The *Coelho* case decided whether the Supreme Court could review acts of Parliament placed within the Ninth Schedule, and the *Raja Ram Pal* case, passed judgment on whether Parliament's internal procedures (in this case, expulsion of Members of Parliament on account of corruption charges) were justiciable.

In the *Coelho* decision, the Supreme Court held that it could strike down any law inserted into the Ninth Schedule if it were contrary to Constitutional provisions. It stated:

*The jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power.*

It also stated that, *"It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution."*

In the *Raja Ram Pal* case, the Supreme Court disposed of the arguments regarding the unconstitutionality of the expulsion of Members of Parliament while simultaneously

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<sup>19</sup> *I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu & Others*, (2007) 2 SCC 1 [hereinafter *Coelho*]

<sup>20</sup> *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha & Others*, (2007) 3 SCC 184 [hereinafter *Raja Ram Pal*]

upholding the principles of judicial review. The court began by stating that the Constitution was the “supreme *lex* in this country” and went on to state that:

*“Parliament is a coordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny ... mere co-ordinate constitutional status ... does not disentitle this Court from exercising its jurisdiction of judicial review”.*

The court also acknowledged that although it may not question the *truth or correctness of the material ... [nor] substitute its opinion for that of the legislature,* proceedings of Parliament *which may be tainted on account of substantive or gross illegality or unconstitutionality* could still be reviewed by the judiciary. These two decisions reassert the Constitutional scheme of a balance of power between the legislative and judicial branches, and also ensure that politicians will now no longer be able to evade the scrutiny of a watchful judiciary.

## **V. The ‘Activist’ character of the Indian judiciary**

While the higher judiciary in India enjoys an exalted status on account of its powers of ‘Judicial review’ over governmental action, since the late 1970’s it has further broadened the ambit of its role. Beginning with the efforts of ‘activist’ judges such as Justice P.N. Bhagwati, Justice V.R. Krishna Iyer and Justice Chinnapa Reddy, the Supreme Court has fashioned two broad strategies that have transformed it from a positivist dispute-resolution body into a catalyst for social change. One such strategy has been the continuing expansion of the scope of the protection given to ‘life’ and ‘personal liberty’ under Article 21 of the Constitution. The other strategy which has drawn significant attention overseas is that of the evolution of Public Interest Litigation (PIL).<sup>21</sup> It may be useful here to briefly comment on both these strategies.

*Expansion of the scope of Article 21:* Article 21 of the Constitution of India reads as follows: “No person shall be deprived of his life or personal liberty except according

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<sup>21</sup> See generally: S.P. Sathe, ‘Judicial Activism: The Indian experience’, 6 *Washington University Journal of Law and Policy* 29, 2001

*to procedure established by law.*” The interpretation of Article 21 in the early years of the Supreme Court was that ‘personal liberty’ could be curtailed as long as there was a legal prescription for the same. In *A.K. Gopalan’s* case,<sup>22</sup> the Supreme Court had ruled that ‘preventive detention’ was permissible as long as it was provided for under a governmental measure (e.g. legislation or an ordinance) and the Court could not inquire into the fairness of such a measure. It was held that the words ‘procedure established by law’ were different from the substantive ‘due process’ guarantee provided under the 14<sup>th</sup> amendment to the US Constitution. It was also reasoned that the framers of the Indian Constitution would’ve expressly included the requirement of ‘substantive due process’ if they had intended the same. This position prevailed for several years until it was changed in *Maneka Gandhi’s* case.<sup>23</sup> In that case, it was held that restraints on ‘personal liberty’ protected under Article 21 should also be tested against the guarantees of non-arbitrariness, justice and fairness that were included in Articles 14, 19 and 21 of the Constitution. The Court developed a theory of ‘inter-relationship of rights’ to hold that governmental action which curtailed either of these rights should meet the designated threshold for restraints on all of them. In this manner, the Courts incorporated the guarantee of ‘substantive due process’ into the language of Article 21. This was followed by a series of decisions, where the conceptions of ‘life’ and ‘personal liberty’ were interpreted liberally to include rights which had not been enumerated in Part III. In the words of Justice Bhagwati:<sup>24</sup>

*“we think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms.”*

Moreover, through innovative and creative strategies, the Courts have expanded the scope of the Fundamental Rights, in order to render justice to women, children, bonded laborers and other oppressed sections of society. Notably, over the decades, the Supreme Court has affirmed that both the Fundamental Rights and Directive Principles

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<sup>22</sup> *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

<sup>23</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

<sup>24</sup> Observations in *Francis Coralie v. Union Territory of Delhi*, (1981) 1 SCC 688

must be interpreted harmoniously. It was observed in the *Kesavananda Bharati* case,<sup>25</sup> that the directive principles and the fundamental rights supplement each other and aim at the same goal of about a social revolution and the establishment of a welfare State, also envisaged in the Preamble. Furthermore, in *Unni Krishnan, J.P. v. State of Andhra Pradesh*,<sup>26</sup>, Justice Jeevan Reddy declared:

*“The provisions of Parts III and IV are supplementary and complementary to each other and not exclusionary of each other and that the fundamental rights are but a means to achieve the goal indicated in Part IV”.*

This approach of harmonizing the fundamental rights and directive principles has been successful to a considerable extent. For example, the Supreme Court has pointed to the objectives of socio-economic entitlements in order to interpret the right to ‘life and personal liberty’ as one which contemplates the ‘right to livelihood and housing’,<sup>27</sup> the ‘right to health’<sup>28</sup> and the ‘right to a clean environment’ among others. The Courts have also pointed to Directive principles in interpreting the prohibitions against forced labour and child labour.

*Public Interest Litigation:* The second limb of the ‘activist’ turn of the higher judiciary has been the device of Public Interest Litigation (PIL). Public Interest Litigation is a signature achievement of Indian constitutional interpretation, and is the principal vehicle by which the poor are granted access to the courts. In evolving this device, the Indian judiciary has significantly improvised on the characteristics of public law litigation. The Constitutional Courts have expanded their writ jurisdiction to hear matters brought by parties that otherwise do not have the knowledge about their legal rights or the material resources to approach them. Likewise, the Courts can also take cognizance of matters on their own without the requirements of procedural formalities. In the earliest instances,

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<sup>25</sup> (1973) 4 SCC 225

<sup>26</sup> (1993) 1 SCC 645

<sup>27</sup> *Olga Tellis v. Bombay Municipal Corporation*, AIR 1985 SC 180 (a journalist had filed a petition on behalf of hundreds of pavement-dwellers who were being displaced due to construction activity by the respondent corporation. The Court recognised the ‘right to livelihood and housing’ of the pavement-dwellers and issued an injunction to halt their eviction.)

<sup>28</sup> *Parmanand Katara v. Union of India*, AIR 1989 SC 2039 (The Court held that no medical authority could refuse to provide immediate medical attention to a patient in need.)

individual judges took cognizance of matters on receiving letters from aggrieved parties. However, in time this device of Public Interest Litigation (PIL) has evolved into an important remedy.

One of the earliest cases of public interest litigation considered by the Indian Supreme Court was the case of *Hussainara Khatoon (I) v. State of Bihar*.<sup>29</sup> This case was concerned with a series of articles published in a prominent newspaper (i.e. the *Indian Express*) exposing the plight of 'undertrial' prisoners languishing jails in the state of Bihar. A writ petition was filed by an advocate of the Supreme Court drawing attention of the Court to the deplorable plight of these prisoners. Many of them had served jail terms longer than the maximum sentence that court be granted by law. The Supreme Court accepted the *locus standi* of the advocate to maintain the writ petition. Thereafter, a series of cases ensued (*Hussainara Khatoon (I) v. State of Bihar- Hussainara Khatoon (IV) v. State of Bihar*) through which the Court gave a series of directions through which the right to speedy trial was deemed to be an integral and an essential part of right to "life and liberty" contained in Article 21 of the Constitution. In *Municipal Council, Ratlam v. Vardichand*<sup>30</sup>, the Court recognized the *locus standi* of a group of citizens who sought directions against the Municipal Council of the area for removal of open drains that caused stench as well as diseases. The Court, recognizing the right of the group of citizens, asserted that if the:

*"...centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men."*

However, it is important to note that Public Interest Litigation (PIL) involves three significant departures from the traditional notion of public law adjudication.

- Firstly, there is a dilution of the common law requirement of 'locus standi' i.e. it is only a party which is adversely affected by a particular act who can institute a legal

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<sup>29</sup> (1980) 1 SCC 81

<sup>30</sup> (1980) 4 SCC 162

proceeding in respect of the same. In Public Interest Litigation (PIL) a legal proceeding (in the form of a writ under Article 32) can be filed by any person on behalf of an aggrieved group of persons and the judges are also free to take cognizance of a matter on their own which involves public interest. This is different from the concept of a 'representative suit' in ordinary civil litigation or a 'Class Action suit' in the USA, since it is also possible for a person who is not personally aggrieved to approach the Courts. Critics have pointed to the misuse of this device of PILs which adds to the caseload of the courts. This aspect is significant since many voluntary sector organisations have repeatedly approached the Indian Supreme Court to safeguard the interests of the underprivileged and oppressed sections of society, to draw the Courts' attention to social evils and governmental apathy as well as to seek remedies against environmental damage.

- Secondly, under Public Interest Litigation (PIL) the nature of proceedings are not strictly adversarial as per the common-law norm. In an adversarial system, the respective parties engage in argumentation, presentation of evidence and cross-examination whereas the judges take on a passive role in deciding disputes. However, the trend in PILs has been that of judges taking on a more active role by way of seeking more information about the subject-matter and giving directions to public authorities regarding the same. In many ways, PILs have become a means of continuing judicial oversight over governmental functions.

- Thirdly, the Courts have extended the traditional remedies available under writ jurisdiction (such as habeas corpus, mandamus, quo warranto, prohibition and certiorari) to PILs and have also interpreted Article 32 to enable the Courts to grant discretionary remedies. As a consequence, private law remedies such as injunctions and orders of 'stay' have been liberally grafted into cases characterized as Public Interest Litigation. Coupled with the Court's power to give directions to public authorities as well as private actors, the exercise of judicial powers has often been described as 'judicial legislation'. For instance in *Vishaka v. State of Rajasthan*,<sup>31</sup> the Supreme Court issued guidelines for the creation of redressal mechanisms against sexual harassment of women at workplaces, since there was no legislation dealing with the issue.

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<sup>31</sup> (1997) 6 SCC 247

At present, there is a continuing debate on the desirable parameters of Public Interest Litigation (PIL). There have been some concerns that 'judicial activism' can often be described as 'judicial overreach', with respect to the tendency of judges to intrude into the domain of the executive and the legislature.<sup>32</sup> Some commentators have used phrases like 'judicial populism' to refer to perceptions that judges tend to intervene in matters with the objective of public visibility for themselves. However, there is considerable approval of the philosophy behind this device of public law litigation. In many instances, the Supreme Court has risen to the changing needs of society and taken proactive steps to address these needs, especially where both executive and legislative action has lagged behind.<sup>33</sup> This unique model has enabled the higher judiciary to rule on issues like consumer protection, gender justice, the prevention of environmental pollution and ecological destruction. It is also directed towards finding social and political space for the disadvantaged and other vulnerable groups in society and bring them at par with others, thus infusing in the society, the spirit of equality embraced by the Constitution of India.

With these comments I would like to conclude this address. Thank You!

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<sup>32</sup> For a critique of 'judicial activism' by way of Public Interest Litigation (PIL) see: T.R. Andhyarujina, *Judicial Activism and Constitutional Democracy in India* (Bombay: N.M. Tripathi, 1992)

<sup>33</sup> *Shriram Food & Fertilizer case*, (1986) 2 SCC 176 [on lethal chemical and gases posing danger to life and health of workmen]; *M.C Mehta v. Union of India* (1988) 1 SCC 471 [Ganga Pollution case]; and *Council for Environment Legal Action v. Union of India* (1996) 5 SCC 281 [Public Interest Litigation filed by registered voluntary organization regarding environmental degradation in coastal area].